NEGOTIORUM GESTIO IN SOUTH AFRICAN LAW

An Historical and Comparative Analysis

by

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TABLE OF CONTENTS

Preface .... (iv)

1 INTRODUCTION 1

1.1 Nature and Scope of Negotiorum Gestio 3

1.2 Forms of Negotiorum Gestio 8

2 PREREQUISITES FOR NEGOTIORUM GESTIO 17

2.1 Management of the Affairs of Another 18

2.2 Dominus Unaware of Management of Affairs ... 21

2.3 Animus Negotia Aliena Gerandi 24

2.4 Utiliter Coeptum 33

2.5 The Actiones Negotiorum Gestorum 41

3 DUTIES OF NEGOTIORUM GESTOR 43

3.1 Completion of Negotiorum Gestio 43

3.2 Rendering of an Account 46

3.3 Delivery of that which has Accrued 51

3.4 Liability for Loss and Damage 54

4 RIGHTS OF NEGOTIORUM GESTOR 65

4.1 Reimbursement of Necessary and Useful Expenses 66

4.2 Claim for Lost Interest and Income 71

4.3 Release from Obligations 78

4.4 Lien on Property of Dominus 80

4.5 Termination of Negotiorum Gestio 85

5 NEGOTIORUM GESTIO AND UNJUSTIFIED ENRICHMENT ... 89

5.1 The Actio Negotiorum Gestorum as an Enrichment Action 92

5.2 Administration of the Affairs of a Minor .. 93

5.3 Mala Fide Administration of the Affairs of Another for the Benefit of the Gestor 97

5.4 Administration of the Affairs of Another in the Bona Fide Belief that they are the Gestor's Own 110

5.5 Administration of the Affairs of Another Contrary to the Express Wishes of the Dominus .. 117

5.6 The Actio Negotiorum Gestorum as a Possessory Remedy 124

5.7 Negotiorum Gestio and Indirect Enrichment ... 128

6 COMPARATIVE SURVEY OF NEGOTIORUM GESTIO IN VARIOUS FOREIGN LEGAL SYSTEMS 136

6.1 France 137

6.2 Netherlands 148

6.3 Germany 158

6.4 Italy 174

6.5 Switzerland 183

6.6 Austria 198

6.7 Scotland 210

6.8 England 219

6.9 United States of America 235

7 CONCLUSION 246

Notes 257

Abbreviations 540

Table of Cases 551

Bibliography 561

PREFACE

The present treatise deals with the subject of *negotiorum gestio*, or unauthorised administration of the affairs of another, as it has developed and been applied in South African law. As appears from the title hereof, it is not merely a description of the relevant aspects of *negotiorum gestio* as applied in modern South African practice, but an historical and comparative analysis of an institution which has its origin in classical Roman law and has experienced fruitful development over a period of approximately two thousand years. In this regard the historical method of research has been applied, commencing with the Roman origins, continuing with the medieval and later development and concluding with the relevant law as applied in South Africa up to the present day.

Insofar as South African law is but one of the legal systems emanating from Roman law, a comparison with related legal systems is essential. For this purpose the comparative method of research has likewise been applied, reference being made firstly to the closely related, and codified, Romano-Germanic legal systems of France, the Netherlands, Germany, Italy, Switzerland and Austria, whereafter the related, but uncodified, legal system of Scotland is examined. Despite the fact that the law of England and the United States of America does not recognise *negotiorum gestio*, these legal systems have

developed their own solutions to problems based on facts closely resembling <u>negotiorum gestio</u>, so that a comparison of these systems has also been considered advisable.

After a general discussion of the nature and scope of <u>negotiorum gestio</u> on the one hand and the various forms in which <u>negotiorum gestio</u> may occur on the other, an analysis is made of the various prerequisites for the ordinary form of <u>negotiorum gestio</u>, followed by a discussion of the duties and rights of the <u>gestor</u>. Thereafter reference is made to "extraordinary" or "abnormal" <u>negotiorum gestio</u> and its relationship with the principles of unjustified enrichment, before the comparative survey of various other legal systems is presented.

The most significant general conclusion arising from the said survey, is that the South African law relating to <u>negotiorum gestio</u> is, for the most part, better developed than that occurring in any of the legal systems with which it is compared. Rather than South African law improving or amplifying the relevant principles relating to this institution by gleaning from foreign legal systems, it is suggested that the said legal systems, being the subject of the legal comparison, may be able to gain much by making reference to the relevant South African law. This does not, however, mean that the comparative analysis has been useless. The common origin and characteristics of South African law and the various Romano-Germanic legal systems referred to above, assist greatly in establishing a logical and systematic

approach to the subject as a whole. Furthermore, certain aspects of foreign law, such as that relating to so-called "indirect enrichment", may likewise be of considerable importance in clarifying uncertainties and ambiguities occurring in South African law. In this regard suggestions are not made de lege ferenda, inasmuch as any envisaged difficulties which may arise, should be clarified by means of judicial interpretation.

A large portion of the present treatise is based on research of sources which have not yet been considered in South African legal practice or in academic contributions to the subject. The general system and approach employed in respect of the said subject are also without precedent. It is respectfully submitted that the treatise constitutes a contribution to knowledge in the field of negotiorum gestio in particular and quasi-contract in general.

I wish to convey my heartfelt gratitude to Professor Wouter de Vos who, despite ailing health, willingly agreed to act as my Supervisor in preparing and presenting this treatise. His assistance, encouragement and unfailing enthusiasm were indispensable.

I wish also to thank Suzette van Heerden who, under difficult circumstances, typed and prepared the manuscript.

D H van Zyl

PRETORIA

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1 INTRODUCTION

The principles relating to the "quasi-contract," *negotiorum gestio*, also known as unauthorised administration,[1] in South African law have developed over a long period of time, commencing in the classical period of Roman law, consolidating during the legislative period of the Roman-Byzantine emperor, Justinian,[2] and maturing during the medieval and Roman-Dutch legal period, before being introduced into South Africa as part of its common law.[3] It is for this reason that, in the present contribution, the legal historical method has been applied as far as possible with a view to pointing out the actual development and application of *negotiorum gestio* in the course of various historical phases of development.[4]

The obvious starting point for a study of the present subject is to sketch the nature and scope of *negotiorum gestio*, whereafter the various forms in which this institution may be encountered, are discussed (chapter 1). Attention is then directed to the prerequisites laid down for a valid recourse to the principles of *negotiorum gestio*, albeit by the person who has managed the affairs in question (the *negotiorum gestor*) or by the person whose affairs have been managed (the *dominus negotii*) (chapter 2). The rights and duties of the *gestor* (as opposed to those of the *dominus*) clearly warrant careful discussion (chapters 3 and 4) and thereafter the relationship between *negotiorum gestio* and unjustified enrichment is dealt with (chapter 5).

2/...

In view of the fact that comparative law has, of late, been receiving considerable attention, both in South African legal practice and in the contributions of legal academics,[5] it should be particularly useful to present a comparative survey of <u>negotiorum gestio</u> (or its equivalent) in a number of foreign legal systems (chapter 6). In this regard it is advisable first to peruse the relevant principles in legal systems which have a similar background to that of South Africa, in the sense that they are related by virtue of the European <u>ius commune</u>, based on Roman law, which forms a necessary step in the development of the particular legal system. The legal systems (also known as "civil law systems") selected for this purpose are those of France, the Netherlands, Germany, Italy, Switzerland, Austria and Scotland. Thereafter, and bearing in mind that South African law has been strongly influenced by English law,[6] it may be convenient to look at the so-called Anglo-American law, that is to say the relevant legal principles pertaining to what may be termed the equivalent of <u>negotiorum gestio</u>, as applied in England and the United States of America (the so-called "common law systems"). As in the case of the historical survey, the comparative survey should be dealt with methodically and not simply by virtue of a description of the particular principles in question. Such description is usually interesting but rarely has practical importance, since it does not normally indicate how the said principles in various foreign legal systems can be used

with a view to supplementing or improving the relevant South African law.[7] In the conclusion (chapter 7) an attempt is made to evaluate the present state of *negotiorum gestio* in South African law, with reference to the historical and comparative aspects which may be significant or useful for purposes of the future development of this so-called "quasi-contract."

1.1 Nature and Scope of Negotiorum Gestio

The concept of *negotiorum gestio*, literally translated as "the management of affairs" has fascinated lawyers throughout the ages and to the present day has enjoyed more attention than its deceptively uncomplicated nature may appear to warrant.[8] It may briefly be defined as the voluntary management by one person (the *negotiorum gestor*) of the affairs of another (the *dominus negotii*) without the consent or even the knowledge of the other. There is hence no consensual basis to *negotiorum gestio* but, because reciprocal rights and obligations arise in respect of both parties to the administration or management of affairs under these circumstances, *negotiorum gestio* is sometimes classified as a "quasi-contract" and variously termed "unauthorised administration" or "unauthorised management."[9]

In the opening text of the Digest title *De negotiis gestis*, Ul-

pian states that the praetorian edict[10] relating to _nego-tiorum gestio_ was introduced because of the necessity of looking after the interests of absent persons and hence to prevent their suffering loss or damage.[11] This stand is, in later law, variously motivated by considerations such as equity,[12] natural law,[13] public interest,[14] humanitarianism,[15] or simply friendship.[16] The essential element, however, which distinguishes _negotiorum gestio_ from the consensual contract of mandate, is that it should be unauthorised (_sine mandato_).[17] As will be seen later,[18] should the _dominus_ be aware of the management of his affairs and do nothing to prevent it, he may be considered to have ratified or accepted such management of affairs and hence to have given a tacit mandate to the _gestor_ to continue with his activity. This may then be analogous to the case where the act of an unauthorised agent is ratified by the principal.[19] Otherwise than in the case of mandate, the unauthorised management of affairs should be spontaneous and voluntary, as one would expect from a friend.[20]

In Roman-Dutch law _negotiorum gestio_ is also referred to as _onderwind_ (or _onderwint_) and the _negotiorum gestor_ as the _onderwinder_ or _onderwindhebber_.[21] The nature and scope of the Roman _negotiorum gestio_, however, underwent little or no change in the Netherlands during the seventeenth and eighteenth centuries, as appears from the va-

rious definitions of this institute by some of the leading exponents of the Roman-Dutch tradition. Thus Grotius defines *negotiorum gestio* as the trouble that someone takes to manage the affairs of an absentee without authority thereto.[22] Voet's definition relates to the *negotiorum gestor* as being a person who manages the affairs of an absent person, or of one who is ignorant of the management of affairs, without being authorised to do so. He points out, however, that, although on the face of it the concept of *negotiorum gestio* is in conflict with the established principle that it is wrongful to interfere with affairs not pertaining to oneself,[23] the management of affairs is not considered wrongful if it is directed at the interests of the *dominus* and not at those of the *gestor*. In this regard Voet refers to the example of the person who is compelled to leave his property or interests in great haste, without having the opportunity of arranging that his affairs be managed in his absence. Should no reimbursement of expenses be allowed a *gestor* in such circumstances, his affairs would simply be abandoned and uncared for.[24]

Provided, therefore, that the *negotiorum gestio* complies with certain prerequisites (to which attention will be directed in the next chapter), it is not considered to be a form of wrongful interference in the affairs of another and reciprocal obligations arise as between *dominus* and

6/...

gestor. As will be pointed out later (in chapter 5), circumstances may well arise where all the prerequisites for the management of another's affairs have not been complied with, yet such management of affairs will not be considered wrongful, subject thereto, however, that the liability of the *dominus* will be reduced in accordance with the principles relating to unjustified enrichment.[25]

As in the case of Roman-Dutch law, the concept of *negotiorum gestio* has undergone little change in South African law and Rubin is correct in stating that, except to a very limited extent, the South African law of *negotiorum gestio* is the same as that recognised by the law of Justinian.[26] The reference to the law of Justinian should, of course, include a reference to the European *ius commune* as it arose and developed from the Justinianic law,[27] but the basic nature and scope of this useful institute has indeed undergone little change in the South African legal context. Hence Sir Johannes Wessels takes note of the "general principle of our law that it is wrongful for one person to interfere, uninvited, with the affairs of another," but continues by stating:

> "To this general rule, however, there is an exception. A person who, from a sense of duty or out of friendship, undertakes to administer the affairs of one who is absent in a way beneficial to the latter, does a meritorious and not a wrongful act. The person who interferes with the affairs of another must, however, justify his interference and show both that he acted

> in the interests of the person whom he intended to benefit and that in fact his interference proved to be, or might have been anticipated to be, useful to the absent person."[28]

Hahlo and Kahn, again, describe the <u>ratio</u> for the recognition of <u>negotiorum gestio</u> as follows:

> "The recognition of <u>negotiorum gestio</u> as a legal relationship has been variously justified on the grounds of social utility and equity, and the need to encourage a certain altruism in social life and on other similar grounds."[29]

In South African decisions, there has been little or no deviation from the definition of <u>negotiorum gestio</u> as developed in the Roman and Roman-Dutch law. As early as 1901, the following definition of the <u>negotiorum gestor</u> was given in the matter of <u>Colonial Government v Smith and Company</u>:[30]

> "Now the usual conception of a <u>negotiorum gestor</u> is one who, without express mandate, carries on the business, or who protects the property of another who is absent or who is incapable of acting for himself. As a rule, if the owner is present, or is unwilling or forbids the business being done, the unauthorised agent cannot force his services upon such owner."[31]

As will be seen later[32] English law and the law of the United States of America do not recognise the institut

of *negotiorum gestio* yet, to some extent, the equivalent of this institution may be found in the concept of the "agent of necessity." This concept is foreign to South African law, despite the fact that necessity may indeed be one of the circumstances present in a *negotiorum gestio*-situation.[33]

1.2 Forms of Negotiorum Gestio

The affair or interest which is managed in terms of *negotiorum gestio* is known as the *negotium* (plural: *negotia*) and the management thereof as such is described as *gerere*, from which terms such as *negotium gestum* and *negotia gesta* are derived.[34] The affair must in fact be managed before reciprocal rights and duties arise. This is what distinguishes *negotiorum gestio* as a quasi-contract from obligations based on *consensus*, for which actual conduct is not a prerequisite for the establishment of rights and duties.

Virtually any act or activity which may be construed as the conduct, administration or management of another's affair or affairs is sufficient to constitute *negotiorum gestio*, irrespective of whether it is of a legal, non-legal or purely factual nature.[35] There is hence a large variety of forms in which *negotiorum gestio* may be encountered.[36] Among the affairs of a legal nature which a *gestor* may undertake, may be mentioned payment of the

debts of the dominus[37] or entering into legal relationships for the benefit of the dominus, not as an agent but in personal capacity, such as occurs when the gestor becomes a party to an obligation and binds himself to perform certain duties and exercise certain rights.[38] Examples of such obligations include entering into an agreement of suretyship for the benefit of the dominus,[39] making purchases[40] or effecting sales[41] for the dominus, borrowing money for the use of the dominus,[42] accepting donations on behalf of the dominus[43] or collecting debts on his behalf.[44]

On the other hand the affairs to be managed may be of a totally non-legal nature, such as the maintenance of children,[45] tending a sick slave,[46] repairing a leased building[47] or effecting improvements to the property of the dominus.[48]

Further examples of negotiorum gestio have evolved from South African practice, such as the cases relating to the preservation of goods or protection of property on behalf of a dominus who is absent or incapable of acting for himself. Thus in the matter of Colonial Government v Smith and Company[49] the Government of the Cape Colony, at the request of the Port Elizabeth Town Council, removed explosives from certain magazines near the town and stored them in a floating magazine. Despite protests by the

owners of the magazines, the Government was held to be entitled to recover from such owners the expenses of the removal and storage of the explosives.[50]

A similar case is that of Amod Salie v Ragoon,[51] in which the Defendant stored the goods of the plaintiff, whose shop had been broken into in his absence, and thereby preserved such goods from damage or perishing. The Court held that the defendant was in the position of a negotiorum gestor.[52]

Cases likewise directed at the protection and preservation of property are the so-called "salvage cases", in which no express mention is made of negotiorum gestio, but the principles relating thereto may nevertheless be applicable, as pointed out by eminent Roman-Dutch lawyers such as Grotius and Schorer, who deal with it in connection with the concept of bergloon, the fee or honorarium payable in respect of property salvaged at sea.[53] It is important to note, however, that there is a significant distinction between negotiorum gestio and salvage: in the case of negotiorum gestio no reward or renumeration may be claimed by the gestor, whereas the very nature of salvage is that a reward or remuneration (bergloon) is claimable by the salvor.[54]

11/...

Somewhat similar to but not on all fours with the cases relating to the preservation of property is the interesting case of the seller who insures the goods he has sold against war risk, such insurance being for the benefit of the purchaser.[55]

Another form of negotiorum gestio which occurs frequently in South African practice is that relating to the sale of perishable goods belonging to an absent person. This usually occurs when a buyer of perishable goods refuses to accept them, because of inferior quality, and then sells them for the benefit of the seller, in order to prevent an outright loss of such goods.[56]

In generally tending the affairs of an absent dominus, the gestor is sometimes likened to a curator bonis or even a curator ad litem.[57] This does not, however, mean that he is permitted to institute or pursue legal proceedings or represent another in legal proceedings without a mandate or, at least, the consent of the other party.[58] The only exception to this rule is, apparently, where the gestor is closely related to the person whose interests he is managing, in which event he has the power to act without a mandate and, indeed, not only has he the right to do so but also a duty to institute and proceed with the necessary legal action.[59]

In this regard it must be noted that the court does not

have the power to appoint anyone as a _negotiorum gestor_ but, if the interested party cannot otherwise be represented, a curator may be appointed for him.[60]

Negotiorum gestio can relate to one or more affairs.[61] On the other hand one and the same act may be a _gestio_ as regards more than one individual: hence if A employs B to perform something for him and C performs for B but with the purpose of assisting A, C is _negotiorum gestor_ of both A and B.[62] If the _gestor_ manages an affair pertaining to several persons but has the intention of managing the affair of only one of them, he is considered to be the _gestor_ of each person who has benefited by his conduct.[63]

A _gestor_ who chooses to act for a _dominus_ in one matter is not obliged to attend to his other affairs: he must, of course, do that which is inextricably linked with or dependent on the _gestio_ he has undertaken, even after the death of the _dominus_.[64]

More than one _gestor_ may administer the affair or affairs of a single _dominus_, in which event each will be reimbursed for his share in the _gestio_.[65]

It is not required that the _gestio_ should concern the personal affairs of an absent _dominus_. It is sufficient if

the dominus has an interest therein that the act be performed, as would be the case where he is obliged to do something for a minor or dependant, and the gestor proceeds to do it.[66] An example of such affairs relates to the husband's duty to provide household necessaries to his wife as part of his maintenance obligations. Should he fail to do so and a third party should supply the wife with necessaries, such third party may, under certain circumstances, be considered a negotiorum gestor who is entitled to claim compensation from the husband. Thus in Excell v Douglas[67] the Court held that, where the common household of spouses married in or out of community of property had broken up, a third party who supplied household necessaries to the wife had no quasi-contractual claim against her husband unless the husband had failed to fulfil his maintenance obligations. In the case of Gammon v McClure[68] the claim of a third party under such circumstances was based on unjustified enrichment.[69]

As has been pointed out before, there is, under certain circumstances, a close relationship between negotiorum gestio and the consensual contract of mandate.[70] If, for instance, a mandatary exceeds the bounds of his mandate and in so doing benefits the dominus, he can, if his conduct was reasonable, be considered a negotiorum gestor in respect of the conduct which thus exceeded the bounds of the mandate.[71] Similarly, when someone manages

the affairs of another under the mistaken belief that he has a proper mandate to do so, his conduct is nevertheless considered to be a form a *negotiorum gestio*.[72]

Where the *dominus* ratifies the actions of the *gestor*, the question arises whether the *negotiorum gestio* is converted into *mandatum* or whether the *negotiorum gestio* continues to exist.[73]

In classical Roman law an important consequence of ratification (*ratihabitio*) by the *dominus* was that, by this means, an act of *gestio*, which had been performed contrary to the prerequisite of *utiliter coeptum*[74] and as such might be referred to as a *negotium male gestum*, would become binding and lead to the usual reciprocal rights and duties arising from *negotiorum gestio*.[75] Likewise, if a *gestor* exacted a debt owing to the *dominus* and the latter ratified such act, the *actio negotiorum gestorum* would be available.[76]

Post-classical Roman law appears to have approached the problem somewhat differently, by stating that ratification, including that relating to *negotiorum gestio*, leads to the establishment of a mandate as such and is not simply a continuation of the *negotiorum gestio*.[77]

Roman-Dutch law (in the sense of the European *ius commune*

of the Middle Ages and thereafter)[78] adopted a far more casuistic approach. Hence Brunnemann and Perezius tell us that the _actiones negotiorum gestorum_ and _mandati_ were concurrent[79] whereas Pothier follows the classical Roman law.[80] Voet suggests that the nature of the action depends on the intention of the _dominus_: if he intended that the _negotiorum gestio_ be converted into a mandate, the _actio mandati_ would be applicable; if not, the _actio negotiorum gestorum_ would remain in force.[81] Van Bynkershoek and Van der Keessel, however, express the view that, where there is ratification, albeit by way of a special mandate or consent, there is no longer a _negotiorum gestio_,[82] an opinion which runs directly counter to that of Van der Linden, who insists that the _actio negotiorum gestorum_ remains applicable, although he does qualify and distinguish various cases.[83] Huber appears to have taken a sensible and practical stand: his view is that, since the two actions have similar effect, while it is not necessary to name the particular action in a claim, very little turns upon the difference between the actions.[84]

In South African law the question has not, as yet, come up for decision but, it is suggested, it will probably not be necessary for a court to decide the issue since the remedy of a _gestor_ whose acts have been ratified by a _dominus_ will probably have virtually the same effect as the action of a _mandatarius_ who has performed similar acts in terms of his mandate. Similarly, there should

be very little difference between the rights of redress of the *dominus* or principal as against the respective *gestor* and *mandatarius*.[85] On the other hand, as Van Jaarsveld has pointed out, it may well be that our courts adopt the approach that the ratification of a *gestor's* actions will lead simply to an ordinary relationship as between principal and agent.[86] Yet there should be no objection to a *gestor's* wishing to proceed with the remedies arising from *negotiorum gestio*, irrespective of the ratification of his actions.

In contrast to the case where the acts of a *gestor* are ratified, *negotiorum gestio* may come into existence as a result of the mandate of a third party. This form of *negotiorum gestio* was recognised by Roman law and developed on a casuistic basis.[87] Thus Ulpian refers to a question raised by Marcellus in regard to the *gestor* who has acted on the instructions of a third person: the *gestor* would be entitled to the *actio mandati* against the third party and the *actio negotiorum gestorum* against the *dominus*.[88] This duality of actions was likewise recognised by the European *ius commune* and Roman-Dutch law,[89] before being accepted and applied, in an extended form, in the important decision of *Williams' Estate v Molenschoot and Schep (Pty) Ltd*.[90] The relevant part of the headnote to this case reads:

> "Where a person executes repairs to the property of another upon the instructions of a third person

who had no authority to give such instructions, the person executing such repairs is a *negotiorum gestor* in relation to the *dominus*, and as such has an action against the *dominus* based on the *negotiorum gestio*, provided the *negotiorum gestor* has acted in good faith and irrespective of the fact that there may also be a concurrent right of action against the third person who gave the unauthorised instructions."

2 PREREQUISITES FOR NEGOTIORUM GESTIO

In order to give rise to reciprocal rights and obligations, the *negotiorum gestio* must comply with certain basic requirements, which may be summed up as follows: the affairs which are managed should be those of another; the *dominus* should be unaware of the management of his affairs; the *gestor* should have the intention of managing the affairs of another (*animus negotia aliena gerendi*); the management of affairs should be executed in a reasonable or useful manner, at least at the inception thereof (*utiliter coeptum*). If these requirements are present and complied with, liability in terms of *negotiorum gestio* can arise and the reciprocal actions arising therefrom (the *actiones negotiorum gestorum*) will become available to the respective parties. In the case of the *dominus*, who wishes to hold the *gestor* to performance of his duties relating to the *negotiorum gestio*, such action is known as the *actio negotiorum gestorum directa*, whereas the action which is available to the *gestor* to enforce his rights flowing from the *negotiorum gestio* is termed the *actio negotiorum ges-*

torum contraria.

In certain cases, despite the absence of one or more of the said prerequisites, or where special circumstances are present, the gestor's actio negotiorum gestorum contraria takes the form of an enrichment action, which may variously be described as the "extended actio negotiorum gestorum" or the action arising from "abnormal" or "quasi-negotiorum gestio." This action will be dealt with in more detail in chapter 5 below.

2.1 Management of the Affairs of Another

It is the very essence of negotiorum gestio that one person (the negotiorum gestor) should manage the affair or affairs of another person (the dominus negotii or negotiorum) without being authorised to do so.[91] There must hence be at least two parties involved[92] and the affair or affairs in question should pertain to someone other than the gestor himself. Such affair or affairs must hence be that of another (negotium or negotia alterius, also referred to as negotium alienum or negotia aliena).[93]

There is no question of negotiorum gestio where a person administers his own affairs, even if he believes that they are the affairs of another.[94] Similarly there is no negotiorum gestio where a husband refuses to ratify what his wife, with whom he is married in community of property,

19/...

has done in regard to his assets during his absence. The *ratio* for this principle appears from *Wolmaransstad Ko-operatiewe Vereeniging v Leask & Co:*[95]

> "The only question then is whether a woman has the same privilege that a third person has of, in case of necessity, acting as a *negotiorum gestor*. Obviously the same necessity which may arise in the case of strangers, for interfering in the affairs of someone else, may arise in the case of a married woman. It would be very strange if there were no procedure by which a married woman could, in case of necessity, interfere in the affairs of her husband. But where community of property prevails, the doctrine of *negotiorum gestor* (sic) as understood in our law, is in my opinion strictly speaking not applicable. For it only refers to property which is being administered by one person on behalf of another, which does not obtain in the case where a woman is married in community of property. Moreover, the obligations and actions which arise between a *negotiorum gestor* and the principal can hardly be said to have any application in the case of a wife and her husband."

The affairs may, however, be partly those of the *gestor* and partly those of the *dominus*, in which case the *gestor* has a claim in respect of the part pertaining to the *dominus*.[96]

It is of no consequence whether the *gestor* was, at the time of the *negotiorum gestio*, mistaken as to the identity of the *dominus*: the person whose affairs are indeed managed, incurs liability.[97]

It is not a requirement that the dominus, whose affairs are managed, should have contractual capacity. As will be seen later, the administration of the affairs of a minor plays an important part in the relationship between negotiorum gestio and unjustified enrichment.[98] Similarly the gestio may be in respect of the affairs of a furiosus[99] an unborn child,[100] a deceased dominus or a vacant inheritance (hereditas jacens).[101] As from Roman times no distinction was made between the sexes in this regard: the gestor could be male or female and the gestio could relate to affairs of a man or a woman, as long as such affairs were those of another.[102]

In regard to the example of the hereditas jacens, Pothier adopts the approach that the vacant inheritance is, in fact, a fictitious or juristic person, which can also be the subject of negotiorum gestio.[103] The question whether there can be a negotiorum gestio in respect of an undetermined beneficiary in terms of a trust, led to conflicting opinions in the case of Crookes NO and Another v Watson and Others:[104] Van den Heever J A expressed the view that there could be no negotiorum gestio in such circumstances,[105] whereas Fagan J A, felt that this doctrine could indeed be applied.[106] Honoré supports the view of Fagan J A, and suggests that negotiorum gestio may be applicable even in the case of a person who professes to act for an unformed company in terms of section 35 of the Companies Act, No 61 of 1973:[107]

"It seems reasonable to argue that a non-existent

> *dominus* may be bound by *negotiorum gestio*, conditionally upon its coming into existence. There can be no doubt that, in common sense, an unformed company may need the assistance of intermediaries and promotors, if only because, in the absence of adequate prospects, it may never be formed. If this is correct, a person who professes to act as agent for an unformed company under s 35 may be liable as *negotiorum gestor* if he agrees to release the seller from his obligations and if the company is subsequently formed and could have ratified the contract."

However logical this approach may seem, it is suggested that there is a substantial difference between a fictitious or juristic person as *dominus* and a person who or which is not yet *in esse*: the uncertainty attaching to the latter would certainly make the application of the principles of *negotiorum gestio* difficult, if not impracticable. The situation is, of course, totally different in the case of an existing trustee, who may, in certain circumstances, be considered a *negotiorum gestor*.[108]

2.2 Dominus Unaware of Management of Affairs

In the opening text of the Digest title *de negotiis gestis* (D 3.5.1) Ulpian creates the impression the the *dominus* should be absent from the scene of the *gestio* before there can be mention of *negotiorum gestio*.[109] This accent on the absence of the *dominus* as an apparent prerequisite for liability in terms of *negotiorum gestio* likewise appears from a number of other Roman sources[110] and is repeated

by Grotius.[111]

In the early South African case of Kehrman v Stewart[112] it was similarly suggested that the dominus should be absent. The facts in that case were, briefly, that the respondent was the sole heir and executor of his brother who died during July 1902. Prior to the respondent's obtaining letters of administration, he took charge of two stores which belonged to the deceased and carried on the business in his own name. At a later stage, still prior to the issue of the letters of administration, the appellant obtained judgement against the respondent personally and attached certain goods purchased after the death of the deceased. The respondent's plea was that he was carrying on the business as executor and that the said goods, though purchased by him, in fact belonged to the estate. The Court rejected this plea, finding that the respondent had carried on the business as heir, so that the dominium of the goods vested in him. In this regard, however, the Court expressed the following dictum:

> "(T)he question is whether he was carrying on that business on his own behalf or on behalf of the estate. Now he must have been carrying it on in one of three capacities - either, as Mr de Villiers has argued, as negotiorum gestor, or as executor of the estate or as the heir, the person in whom the dominium of the estate was vested. Now I think it is impossible to suppose for one moment that he

> was carrying on the business as _negotiorum gestor_. How could he be that when the heir and executor were both present? If the heir and executor were absent, I could understand a third person taking the business over and carrying it on as _negotiorum gestor_. Here, however, B B Stewart (the respondent) was both heir and executor. There was no reason therefore, for a _negotiorum gestor_, and under the circumstances I fail to understand how it can be said that he was carrying on the business as _negotiorum gestor_. It seems to me perfectly clear that he was not."[113]

Despite the fact that the _dominus_ generally is physically absent at the time the _negotiorum gestio_ takes place, it is not a prerequisite that he should in fact be thus absent. The requirement is merely that he should be unaware of the fact that his affairs are being managed, which can be the case even when he is present, or in the close vicinity, when this occurs. This is the reason why, in a number of authorities, the absence of the _dominus_ (which is usually the case) is linked with his ignorance of the _negotiorum gestio_,[114] whereas in others the emphasis is placed on the ignorance or unawareness of the _dominus_ without mention of his absence from the scene of the _negotiorum gestio_.[115]

The requirement that the _dominus_ should be ignorant of the management of his affairs, and not necessarily absent from the scene thereof, has been accepted unconditionally in South African case law. Thus it is said in the case

of William's Estate v Molenschoot and Schep (Pty) Ltd:[116]

> "It is quite evident, therefore, that by 'absent' is meant absent from the transaction, that is to say, in ignorance of it and not necessarily absent from the place where it occurs."[117]

It is clear that if the *dominus* should indeed be aware of the management of his affairs or if he should consent thereto, it is no longer *negotiorum gestio*, but mandate. As Davis J said in Mohamed v Kamaludien:[118] "the whole essence of *negotiorum gestio* is the absence of authority." This means simply that there should be no authority of any nature granted to the conduct or management of the affairs of the *dominus*, albeit by way of express or by way of implied or tacit consent. Hence failure to prohibit or object to the management of affairs once the *dominus* has become aware of it, amounts to tacit or implied consent to or authorisation of such management of affairs, which in turn must be construed as a mandate.[119]

Should the *dominus* become aware of the *gestio* and ratify it, it would appear that either the actions arising from *negotiorum gestio* or those arising from mandate are available to the parties.[120]

2.3 Animus Negotia Aliena Gerendi

One of the main prerequisites and characteristics of

negotiorum gestio, in its ordinary sense, is the *animus negotia aliena gerendi*, the intention to manage or administer the affairs of another. This subjective element of *negotiorum gestio* is essential in order to found and justify a claim for disbursements incurred or damages suffered by the *gestor*.[121]

As will be pointed out later, the *animus*-requirement is of great importance in regard to that form of *negotiorum gestio* which may be termed "abnormal" or "extraordinary". This relates more particularly to the case where the *gestor* manages the affairs of another, not with the *animus negotia aliena gerendi*, but with the intention of serving his own interests (*sui lucri causa*). A similar case comes to the fore when the *gestor* manages the affairs of another under the *bona fide* impression that he is managing his own affairs. In neither of these cases is there a *negotiorum gestio* in the strict or ordinary or normal sense, and the *gestor* is at most entitled to recover his expenses and disbursements to the extent of the unjustified enrichment of the *dominus*. The action available to the *gestor* in such circumstances may be referred to as the "abnormal" or "extended" *actio negotiorum gestorum*.[122]

The requirement of *animus negotia aliena gerendi* is expressed in a variety of ways in Roman and later legal terminology, such as the *animus gerendi negotia*,[123] the *intentio negotium gerendi*,[124] the *contemplatio alterius* or *contemplatio domini*,[125] the *affectio gerendi negotii*[126]

or simply the *animus obligandi alienum* or *alterum*.[127] The effect of this intention should then be that the *dominus* is to be benefited by the management of his affairs.[128]

Apart from the intention to manage the affairs of another, it is additionally required that the *gestor* should have the intention of recovering from the *dominus* any disbursements or expenses incurred by him during the course of the management of the affairs of the *dominus*. This additional intention is usually referred to as the *animus repetendi*,[129] but the term, *animus recipiendi*, also occurs.[130]

In legal historical perspective it should be pointed out that the authorities are not *ad idem* in regard to the question whether classical Roman law required the *animus negotia aliena gerendi* for liability in terms of *negotiorum gestio*, although it is generally accepted that the post-classical Roman law, which culminated in the codification of the emperor Justinian, regarded this *animus* as an essential prerequisite.[131] In the later development of Roman law and in the European *ius commune* there was, however, little doubt as to the essential nature of the *animus*-requirement. The glossators of the twelfth and thirteenth centuries already required some form of *animus obligandi alterius*,[132] an approach which is likewise encountered in the works of the French *ultramontani*[133] and the commentators.[134] Later French[135] and German law[136] followed suit, so that it was not strange that the Roman Dutch writers required some form of intention, on the part of the *gestor*, to manage the

affairs of the <u>dominus</u>.[137]

In modern South African law the intention to manage the affairs of the <u>dominus</u> has without question been applied as a prerequisite for <u>negotiorum gestio</u> in its ordinary sense, which intention includes the intention to claim reimbursement for expenses necessarily or usefully incurred in the process of the administration of the affairs of the <u>dominus</u>. Sir Johannes Wessels describes this requirement in the following terms:

> "It is essential for the <u>actio negotiorum gestorum</u> that the person who without authority manages the affairs of another should have intended to act as a <u>negotiorum gestor</u> and should have intended to claim the costs of his voluntary administration."[138]

In the case of <u>Odendaal v Van Oudtshoorn</u>[139] De Kock J states the requirement thus:

> "As A opgetree het sonder C se opdrag of kennis maar met die bedoeling om C te bevoordeel, sal A in gepaste omstandighede as <u>negotiorum gestor</u> sy uitgawes van C kan verhaal."

Likewise, in the matter of <u>Standard Bank Financial Services Ltd v Taylam (Pty) Ltd</u> [140] the law in point is expressed as follows by Van Zijl J P:

> "This *quasi*-contractual relationship was brought about where the *gestor*, acting without a mandate rendered a service to the *dominus* - in this instance the debtor - and in so doing acted reasonably and in the interest of the *dominus* with the intention not only of administering the affairs of the *dominus* but also of being compensated for such administration."[141]

In cases where the *gestor* has no intention of recovering his expenses or disbursements, despite his aim to manage the affairs of another, or where he has the intention of donating (*animus donandi*) his efforts to the person who benefits therefrom, it is clear that the *gestor* will no longer have any claim or claims in this regard. This will normally be the case where he acts out of a sense of liberality, friendship or piety, or where he is otherwise prompted by moral obligations or similar considerations.[142]

The general principles relating to *negotiorum gestio* of this nature were well established in Roman law, as appears from numerous examples emanating from the family and friendship circle.[143] In most cases where the administration of affairs was inspired or motivated by family bonds based on piety, pity, generosity or affection, such as maintaining children, tending the sick or burying the dead, it was accepted that the expenses incurred would not be claimed at a later stage, unless it could be shown that the *gestor* intended recovering his expenses, and

disbursements.[144]

The great glossator Azo, in his commentary on the Code of Justinian, expresses a similar view: if the *gestor* believed and intended **that** he would recover his expenses, even should he have been prompted by considerations of piety, he has an action to recover such expenses.[145] The *ultramontanus*, Révigny, a contemporary of Azo, agrees that an *animus recipiendi* can be proved, and points out that the amount expended may be indicative of the intention of the *gestor*: if a large amount has been expended, no *animus donandi* is presumed; if the amount is small, such assumption may be made.[146]

The French humanist, Donellus, accepts that the *animus donandi* excludes an action based on *negotiorum gestio*;[147] he relates this to the exclusion of the action on the grounds of affection or piety, as being closely linked with the personal relationship between the parties, examples of which he enumerates.[148] The *gestor* is, however, free to prove that he acted with the *animo repetendi*.[149]

Domat says the intention of the *gestor*, in the case of affairs of a personal "charitable" nature, should be deduced from the circumstances relating to the status of the persons, the value of their estates and the precautions normally taken by persons making disbursements of this

nature. The mere fact that the persons are closely related is not sufficient for founding the presumption that the expenses have been incurred by virtue of liberality or generosity.[150]

Pothier points out that a donation should not easily be presumed and, like Domat, emphasises the circumstances which should be considered when deciding whether the _gestor_ has a right of recovery or not. Among these circumstances he mentions the following: the relationship between the parties, for example whether it is a father or a mother who has managed the affairs of children or grandchildren, or a father-in-law or mother-in-law managing the affairs of a son-in-law or daughter-in-law, an elder brother who acts for his younger brother or a master for a servant or any person towards whom he has great obligations; whether the person who administers the affair is wealthy and the other party poor; whether the expenses are small or not; whether the _gestor_ has had a long time within which to recover but has not done so; whether, subsequent to the _gestio_, the parties have settled several accounts between them without reference to the _gestio_ and whether a register of expenses has been kept by the _gestor_ or not.[151]

In his work on presumptions, Menochius states that the person who pays another's debt is not presumed to have

made a donation.[152] Groenewegen applies this presumption to *negotiorum gestio* in general: the *gestor* is presumed to have the *animus repetendi* rather than the *animus donandi*, the reason for this approach being that "the great shortage of all things" at the time excluded such a presumption.[153] Voet accepts Groenewegen's point of view on the basis that the *animus repetendi* is presumed in doubtful cases.[154]

It would appear that the correct approach is to determine the intention of the *gestor* with reference to all the surrounding circumstances, in which event it should not be necessary to resort to presumptions in regard to the *gestor's* intention.[155] It is suggested that a South African court will probably be somewhat reluctant to make a finding of *animus donandi*, unless such finding is prompted by strong evidence in support of the intention to donate.

The requirement of *animus negotia aliena gerendi* also comes to the fore in certain cases which have already been dealt with, but in a different context. In the discussion of the various forms of *negotiorum gestio*, it was pointed out that the same act may be a *gestio* in regard to more than one individual, for example, if A employs B to perform something for him, but C performs for B with the intention of assisting A, C is *negotiorum gestor* in respect of both A and B, even though

he did not have the animus negotia aliena gerendi in respect of B.[156] Similarly, when a gestor manages an affair or affairs pertaining to several persons, while he has the intention of managing the affair of only one of them, he is considered to be a negotiorum gestor in respect of each person who has benefited by his conduct.[157]

When someone manages the affairs of another under the mistaken belief that he has a proper mandate to do so, his conduct is nevertheless considered to be a form of negotiorum gestio, since he still has the animus negotia aliena gerendi.[158] Similarly, where the gestio is performed by A with the intention of doing it on behalf of B and B ratifies A's action, A may recover from B.[159] On the other hand, if the gestio is performed by B on the instructions of A, A is considered to have the animus negotia aliena gerendi and is liable as gestor towards the person whose affairs have been managed, whereas the relationship between A and B is one of mandatum.[160] In South African case law this principle has been extended to the case where A instructs B to do something for C, but A in fact has no authority to give such instructions: in such event B is considered to be a negotiorum gestor in respect of C, provided he acts in good faith and has the intention of managing C's affairs, regardless of whether or not he has a concurrent right of action against the person who gave the unauthorised instructions.[161]

If A has simply persuaded B to manage the affairs of the *dominus*, B is the *gestor* in relation to the *dominus*.[162]

The *animus negotia aliena gerendi* and the prerequisite of *negotium alterius* are likewise closely allied.[163] Thus, where the *gestor* manages his own affairs under the mistaken belief that they are those of another, his intention of managing such person's affairs is irrelevant, insofar as no *negotiorum gestio* arises.[164] If, however, the affairs are partly those of the *gestor* and partly those of the *dominus*, the *gestor* has a claim in respect of the part pertaining to the *dominus*.[165]

Should the *gestor* have intended to manage the affairs of one person, but he in fact managed those of another, *negotiorum gestio* arises in respect of the latter: his mistaken belief as to the identity of the *dominus* is thus of no consequence.[166]

2.4 *Utiliter Coeptum*

It is a strict requirement governing the right to sue as a *negotiorum gestor* that the management of the affairs should have been conducted in a useful or reasonable way (*utiliter*).[167] In his commentary on the provincial edict, Gaius appears to base this requirement on considerations of equity.[168] In other Roman sources, however, the *utiliter-*

requirement is related to the necessity (necessitas) of the gestio, but it seems clear that utilitas and necessitas in this context were not considered synonymous: that which was done utiliter did not have to be done in circumstances of urgency or necessity, even though such circumstances might frequently have been present.[169]

Rubin correctly states that the gestio should "be justified on equitable grounds"[170] but goes on to say:[171]

> "The criterian to be applied may, therefore, be stated as follows: Is the act one which the dominus would himself have performed, under the circumstances which obtained when the gestor intervened? If so - whether it turned out to his advantage or not - he is liable to the gestor."

It is true that the authority Rubin refers to in support of this proposition prima facie appears to justify his viewpoint,[172] but the greater weight of authority does not bear it out: regardless of whether the dominus would himself have managed the particular affair or affairs, if the gestor's conduct was reasonable in all the circumstances of the case, he will have acted utiliter. This will be seen from the examples mentioned below.

An important qualification in regard to the utiliter-requirement, particularly from the point of view of the gestor, is that the gestio does not have to be utiliter at all relevant times. As long as it was utiliter at

the commencement of the management of affairs, the <u>gestor</u> will be entitled to the usual remedies, even if the outcome of the <u>gestio</u> was unsuccessful or ineffective. This is why the <u>utiliter</u>-requirement is usually described as <u>utiliter coeptum</u>.[173]

In South African case law the <u>utiliter</u>-requirement appears to have been expressed in divergent ways. Thus in <u>Wolmaransstad Ko-operatiewe Vereeniging v Leask and Co</u>,[174] <u>utiliter</u> is defined as "that is necessarily, what was indispensable to be done." Such definition, with respect, over-emphasizes the circumstance of necessity or urgency, which may or may not be present but which is no prerequisite for liability in terms of <u>negotiorum gestio</u>.[175] A similar approach appears from <u>Colonial Government v Smith & Co</u>,[176] where reference is made to "the desirability, if not the actual necessity" of the <u>gestio</u>. In <u>Lewis Brothers v East London Municipality</u>,[177] it was held that the use of fire engines to assist in extinguishing a fire was not a form of <u>negotiorum gestio</u>, the argument being, amongst others, that "it would be wholly unreasonable" that the defendant should pay for the use of fire engines. The requirement of <u>utiliter</u> conduct was seemingly based on the standard of good faith (<u>bona fides</u>) in the case of <u>Amod Salie v Ragoon</u>,[178] where it is suggested that the <u>gestor</u>'s conduct should be "<u>bonâ fide</u> and not with a view to benefit himself in any way." Similarly in <u>William's Estate v Molenschoot and Schep (Pty) Ltd</u>,[179] the

following *dictum* appears:

> "But it seems to me that if once this relationship exists, then as between *dominus* and *gestor* the actions both *directa* and *contraria* necessarily also come into being - at least if the *negotiorum gestor* has acted in good faith, irrespective of the fact that there may also be concurrent rights of action against a third person who gave the unauthorised instructions."

The criterion for *utiliter* conduct would appear to be founded on equitable considerations (if not also necessity) in the matter of *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd*,[180] where it is stated:

> "The law does not allow rights to be acquired by meddling indiscriminately in the affairs of another, but meddling is allowed in circumstances where such meddling is necessary in order to do justice between man and man."

An approach which is encountered in respect of the *utiliter*-requirement relates to the so-called "benefit" of the *dominus*. In *Klug and Klug v Penkin*,[181] it was said:

> "It seems to be clear law that a person who manages the affairs of another without a mandate from him, has as a general rule a right of action to recover from him, *inter alia*, necessary and useful expenses incurred, if the person whose affairs have been managed has accepted the benefit of such unauthorised management."

This "benefit-theory", which has been supported or hinted at in a number of further decisions, albeit indirectly,[182] has been rightly critised by Rubin,[183] inasmuch as the effect of the *utiliter coeptum* rule is that no benefit at all need accrue to the dominus, provided the *gestio* was *utiliter* at its inception. The suggestion that the *dominus* should "accept the benefit" of the conduct of his affairs may, indeed, be construed as an *ex post facto* ratification of the *gestio* by the *dominus*, which rectification, in turn, has led to the evolution of a number of principles relating thereto.[184]

In determining whether the management of affairs complies with the requirement of *utiliter coeptum*, an objective approach is followed: if the act was indeed one which the *dominus* himself would have performed, having regard to all the surrounding circumstances, there is little doubt that such act will be considered *utiliter*, regardless of the final outcome thereof. As already mentioned, however, it is not a general proposition, inextricably linked to the *utiliter*-requirement, that the *gestio* should have been such that the *dominus* himself would have performed it. If it were so, the objective criterion would be placed in jeopardy, inasmuch as a heavy burden of proof would be placed on the *gestor*, who would have to show that the subjective attitude of the *dominus* would have been such as to prompt him to conduct the affair or affairs himself. In rebuttal the *dominus* would merely have to show that he would not have done the thing himself, at that

particular point in time, and the gestor's claim would fail.

Pothier suggests that, if the gestor had the opportunity to consult the dominus in respect of the management of his affairs but did not do so, the dominus might plead that the gestio was not utiliter on the ground that, if the gestor had approached him, he would certainly not have engaged the gestor to act for him. On the other hand, if the dominus could not be consulted because of his absence or for some other reason, this plea would not be effective should the gestio turn out to be unsuccessful.[185] It is suggested that the question whether the dominus be consulted or not is merely one of the factors and circumstances to be taken into consideration in determining whether an act of negotiorum gestio took place utiliter or not. Indeed, provided the gestio was utiliter coeptum, the good faith or subjective intention of the gestor at the time of managing the affairs of the dominus may not be taken into consideration in establishing whether the conduct of the gestor was utiliter or not.[186]

Examples of the management of affairs where the utiliter requirement is present, are legion. Ulpian mentions the case where the gestor repairs a house which is in danger of collapsing or tends a sick slave, whereafter the house is burnt out or the slave dies. In both cases the requirements for negotiorum gestio are complied with, even if the final outcome was disastrous, and the gestor

is entitled to institute the actio negotiorum gestorum.[187] Of course the unsuccessful outcome of the gestio should not have been caused by the fault of the gestor: if it has, the gestor will obviously not be permitted to claim reimbursement of his expenses and he may even have to face a delictual action by the dominus.[188]

Utiliter management of affairs is frequently illustrated with reference to what may be considered inutiliter conduct. Thus where a gestor spends more than he should reasonably have done, he is entitled to recover only what would, under the circumstances, be a reasonable disbursement.[189] If his costs of repairing something belonging to the dominus hence exceed what may be considered a reasonable amount, he will clearly not be justified in claiming more than the increased value of the thing. This means that, just as in the case where the requirement of animus negotia aliena gerendi is not complied with, non-compliance with the utiliter-requirement will entitle the gestor to a claim restricted to the measure of the dominus' unjustified enrichment.[190] This principle is neatly illustrated in the matter of Williams' Estate v Molenschoot and Schep (Pty) Ltd:[191]

> "However, it is possible that ... the estate might only be liable in so far as it can be shown to have been enriched by the expenditure. There is another and perhaps stronger ground upon which this basis might be held to be the correct one to be adopted, viz. that more seems to have been expended than the estate

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> itself would in the ordinary way have spent, even if had the power to do so. I am inclined to think that if a person, who mistakenly believes that he is acting under a mandate, seeks to recover from the owner by the _actio negotiorum gestorum contraria_, the usual limitations imposed upon any ordinary _negotiorum gestor_ would apply to him also - for instance, that he must not have spent more than is appropriate to the occasion, nor more than the owner himself would have spent ... If he does so, then he can recover no more than the amount by which the owner has actually and in fact been enriched."[192]

A further example of _inutiliter_ conduct comes to the fore where a _gestor_ pays a debt of the _dominus_: if it should not be in the interest of the _dominus_ that the debt be paid, because, for instance, he may have a right of retention or some similar remedy, the payment of the debt may be considered _inutiliter_.[193] Likewise the _gestor_ will not, for the same reason, have a claim for an overpayment he has made to a creditor of the _dominus_.[194] When expenses are incurred by a _gestor_ for the sake of pleasure or on some other ground not related to necessity or usefulness, the conduct of the _gestor_ will similarly be considered _inutiliter_.[195]

The _gestor_ is not entitled to claim on the grounds of _negotiorum gestio_ if he prevented someone else from making the expenditure out of his own pocket and not as a _negotiorum gestor_, as in the case of a relative of the _dominus_, who would have undertaken the affair out of a sense of piety and affection.[196] In this regard Wessels says:[197]

> "It is doubtful whether this rule ought to apply where the <u>negotiorum gestor</u> can show that the person, who offered to manage gratis the affairs of the absent <u>dominus</u>, was not competent to undertake the burden."

This would appear to be a correct approach, provided it is borne in mind that it will place a heavy burden of proof on the <u>gestor</u> as to the competence of the particular person.

Finally it should be pointed out that, if the <u>dominus</u> should ratify the <u>inutiliter</u> management of his affairs, he will be liable on the basis of <u>negotiorum gestio</u> or mandate.[198]

2.5 The Actiones Negotiorum Gestorum

Once the requirements of <u>negotiorum gestio</u> have been complied with and all the prerequisites for liability are present, reciprocal obligations arise as between <u>dominus</u> and <u>gestor</u> and reciprocal remedies become available to which the parties may have recourse with a view to exercising their respective rights. These remedies are the <u>actio negotiorum gestorum directa</u>, by means of which the <u>dominus</u> may exercise his rights arising from the <u>negotiorum gestio</u>, and the <u>actio negotiorum gestorum contraria</u>, which is the action of the <u>gestor</u> for the recovery of the expenses or disbursements made or the damages suffered by him during the course of the <u>gestio</u>.[199]

The actions arising from *negotiorum gestio* are based on the principles of equity and *bona fides*.[200] In this regard reference is sometimes made to an *actio negotiorum gestorum utilis*, which in Roman law would appear to have been developed as an extension of the ordinary *actio negotiorum gestorum*.[201] As Paul says, however, the difference between the ordinary action (*actio directa*)[202] and the *actio utilis*, is a subtle one and it does not really matter which is used, since the effect of both is similar.[203]

For present purposes, the *actio negotiorum gestorum utilis*, insofar as its existence is justified, is of importance because it is sometimes used in regard to the extension of *negotiorum gestio* beyond its normal bounds and application. As pointed out in the discussion of the *animus negotia aliena gerendi* and *utiliter coeptum* prerequisites,[204] when these prerequisites are not complied with, an abnormal, extraordinary, extended or quasi-*negotiorum gestio* may still be construed, in which event the *actio negotiorum gestorum contraria* of the *gestor* fulfils the function of an enrichment action. As will be seen later, this enrichment action has been variously termed the *actio utilis* or the extended ("uitgebreide"), abnormal or extraordinary *actio negotiorum gestorum*.[205]

Liability in terms of the *actiones negotiorum gestorum* does not terminate on the death of the *gestor* or *dominus*. The *gestor* is obliged to complete the *gestio*[206] and his

heirs remain liable for any non-compliance with this obligation or other obligations of the gestor. Similarly the dominus and his heirs remain liable towards the gestor and his heirs in respect of the obligations of the dominus.[207]

3 DUTIES OF NEGOTIORUM GESTOR

Before the various rights of the negotiorum gestor are dealt with, it may be convenient to look at the gestor's duties and obligations which accrue when he manages the affairs of another. Among such duties, the fulfilment of which the dominus may enforce with his actio negotiorum gestorum directa, the most important are: the completion of the negotiorum gestio, the rendering of an account by the gestor of his administration, the delivery of all that has accrued from the gestio and the proper, diligent and reasonable performance of the gestio, failing which the gestor may become liable for loss and damage resulting from the gestio.[208]

3.1 Completion of Negotiorum Gestio

The gestor is obliged to carry out and complete all that he has undertaken to do in respect of the unauthorised administration of the affairs of the dominus.[209] This includes doing all things necessarily related to the affair or affairs he has opted to manage. Hence, if the negotiorum gestio is not restricted to a particular matter but relates to a management of the business or affairs of

the *dominus* as a whole, the *gestor* must do all that is necessary for and incidental to the management of such business or affairs. The *ratio* for this principle is that, if the *gestor* undertakes the general administration of another's affairs, he must act as if he holds the latter's general power of attorney to act on his behalf. The *gestor* will thus be liable for all relevant acts of commission and omission in respect of the said business or affairs.[210] On the other hand, if the *gestor* has undertaken the management of only one affair of the *dominus*, he is not obliged to manage any of his other affairs, except insofar as such other affairs may be dependent on or necessarily related to the affair he has undertaken to manage.[211]

In this regard the principle has evolved that the *gestor* is not permitted to abandon the affairs he has undertaken if the *dominus* should suffer damages as a result thereof or if the *dominus* is not in a position to resume the affairs himself.[212] This does not, however, mean that the *gestor* may require the *dominus* to continue or assist with the affairs once they have been undertaken even if the *dominus* should be able to do so. In the case of *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd*,[213] this qualification was lucidly expressed in respect of a purchaser who had repudiated a shipment of flint clay as not being in accordance with specifications, and then purported to sell it to a third party at a reduced price as *negotiorum gestor* for the seller. The purchaser tendered the reduced price and demanded that the seller deliver to it the relevant

bills of lading, in order to enable the third party to obtain shipment and so to mitigate damages. The Court dealt with this question in the following manner:[214]

> "The applicant's counsel, however, made it clear that the heart of his client's case was its efforts to mitigate damages which the respondent would ultimately be liable for, and submitted that the applicant acted as _negotiorum gestor_ for the respondent in reselling the clay to Andre, but said that without the bills of lading it could not give possession to the latter. Assuming this submission to be well founded, then it is by no means clear that, on applicant's own version, this was a case of the foundling having been left on the doorstep which necessitated an altruistic intervention. If in the circumstances of this case the respondent was unco-operative and refused to assist when it could have assisted the applicant in the task it took upon itself _qua gestor_ to mitigate damages, would the applicant as _gestor_ have been entitled to invoke the aid of the Court to compel the respondent to assist in mitigating its own loss by ordering it to surrender its security for payment of the purchase price? It would be anomalous in the extreme if this were to be the legal position. It seems to be inconsistent with the concept of _negotiorum gestio_ that a _gestor_ should have a right of action against his _dominus_ to compel the latter to assist him in completing the administration which he took upon himself, as in the present case, by exercising the right to sell the goods that were allegedly deteriorating."

If the _dominus_ should die before the _gestio_ is completed, the _gestor_ must nevertheless complete the _gestio_ and fulfil all his obligations arising therefrom. Should he

fail to do so, the executor of the estate of the dominus will be able to claim fulfilment by the gestor of all his obligations, inasmuch as the reciprocal actions of the dominus and gestor are transferred to their respective heirs.[215]

In the event of the gestor's death prior to the completion of the gestio or pending fulfilment by the gestor of his obligations in terms of the negotiorum gestio, the dominus may insist on completion of the gestio or fulfilment of the deceased gestor's obligations by instituting the actio negotiorum gestorum directa against the estate of the gestor.[216]

Where there are several gestores who conduct the affairs of a dominus, they are not liable in solidum: each gestor is liable only to the extent of his own share in the administration of the affairs of the dominus.[217]

3.2 Rendering of an Account

One of the primary duties of the gestor is to render to the dominus an account of the administration and management of the affairs of the dominus.[218]

The gestor need account only for what he has in fact done and intended to do, and not also for those affairs which have not been managed, provided, of course, he has

managed only one affair and not several affairs or the affairs of the *dominus* in general, in which case other considerations arise.[219]

Likewise, when several *gestores* have managed the affairs of a *dominus*, each *gestor* need account only for the portion which he has himself managed. In this regard, Pothier tells us, the *gestor* differs from the mandatary: where several mandataries have been appointed to perform something, they all have to account for the whole of the performance, and not merely for that part managed by the particular mandatary.[220]

The account itself must be complete and fully justified by means of the relevant documentary or other evidence, in the form of receipts, vouchers or the like.[221] It may even be required that such proof be presented under oath.[222]

As regards the presentation of the account by the *gestor* to the *dominus*, Pothier considers it to be a prerequisite that the *gestor* should tender his account prior to, or at least simultaneously with, his claim for reimbursement of expenses or disbursements incurred by him during the course of the *negotiorum gestio*. The *ratio* for this requirement, according to Pothier, is that, because of the synallagmatic (bilateral) nature of *negotiorum gestio*, the *gestor* may not make demand of the *dominus* without his

being prepared to fulfil his own obligations. Apart from this consideration, the dominus must have the opportunity to query the gestor's account. If he does so the gestor must reply thereto and, in such a case, the account must be debated. If the account is not attacked, however, after the dominus has been given opportunity to do so, the gestor is free to claim what is owing to him in terms of his account.[223] This approach was accepted without comment by Wessels,[224] where he says:

> "It is a condition precedent to his recovering his expenses that the negotiorum gestor should render a full account of his management together with all documents, receipts and vouchers connected therewith...."

In the matter of McEwen N O v Khader,[225] the view expressed by Pothier and accepted by Wessels was held to be the correct legal position, as appears from the following dictum:[226]

> "Negotiorum gestio is peculiar to the Roman Law and has its origin in circumstances which prevailed in ancient times, circumstances which need not be canvassed in this judgment. One possible consequence of the unauthorised management of another's affairs may be to saddle him with the obligation to recompense the gestor who, unsolicited and without the knowledge of the dominus, took it upon himself to take charge of the affairs of the dominus. Ex hypothesi the dominus never was in a position to regulate his contractual relationship with the gestor and to prescribe the latter's obligations. The practical result of

> *negotiorum gestio* is that a man discovers that another, during his absence, and certainly unbeknown to him, undertook the management of his affairs. The *dominus* may be faced with an *actio contraria* for reimbursement by the unauthorised "agent". It is true that he is entitled to avail himself of the *actio directa* and claim an account of the *gestor*'s administration. But how is he to know what was done without his knowledge and to satisfy himself that he is liable to pay the *gestor*'s claim unless proof thereof is produced by the latter to substantiate it? It should be borne in mind that the *gestor* would, in any event, have to satisfy the court by the requisite degree of proof that he is entitled to relief. What, then, would be fairer than that one who has *meru motu* undertaken the management of the affairs of another should first render an account of his administration before he is entitled to sue for his expenses? This sort of consideration obviously influenced Pothier in expressing the views he did. I am persuaded that fairness and justice accord with those views, and that the law as stated by Pothier should be applied. This means that a *negotiorum gestor* is precluded from suing a *dominus* for expenses incurred in the unauthorised administration of the latter's affairs until the *gestor* has rendered a proper account of such administration."

The above judgement has been severely criticised by professor J E Scholtens in an article in the South African Law Journal.[227] The learned author refers to section VI of Pothier's *Traité de la procédure civile*, where the action of the person who has managed the affairs of another is discussed. According to Scholtens, Pothier is discussing

50/...

French law of procedure in both the said section of the *Traité de la procédure civile* and in § 226 of the *Appendice*, so that the latter passage "is of doubtful authority for our law."[228] Scholtens suggests further that the question regarding the time when the *gestor*'s account should be presented did not arise in Dutch practice, the reason being that the rendering of an account was not a prerequisite for the action of the *gestor*. In addition, it should be borne in mind, according to the learned author, that the institution of *negotiorum gestio* was introduced to protect the interests of the *dominus*, and that the *dominus* is sufficiently protected by the requirement of *utiliter gerere* on the part of the *gestor*. He concludes:[229]

> "Obviously, in a lawsuit the *gestor* will have to substantiate and prove his claim. This may be a balance due to the *gestor* on account of his receipts and expenses in the course of his administration of another's affairs. It would appear, however, that nowadays the claim of a *gestor* will more often only consist, as it did in the present case, of a few expenses incurred or an amount paid on behalf of the *dominus*. The rendering of an account by the *gestor*, it is respectfully submitted, should not be made a condition precedent for the *gestor*'s action. Otherwise, in cases like the present, a *dominus* might easily be provided with means to delay, if not to frustrate, the well-founded claim of his *gestor*."

It is submitted that there is considerable merit in Scholten's criticism, yet the authority of Pothier, as accepted

and confirmed in McEwen's case, is beyond question, particularly where Dutch practice has afforded no precedent in this regard. The fact that Pothier might have been writing about French practice does not detract from his authority as an exponent of the European *ius commune*, which had no regard for national boundaries. On a proper reading of the said passage of Pothier, it is hence clear that the *gestor* should render an account of his administration prior to, or at least *pari passu* with, his claim for reimbursement of expenses or disbursements or, for that matter, a claim by him for damages suffered during the course of his administration.

3.3 Delivery of that which has Accrued

The *gestor* is obliged to restore everything which he has received from or which has otherwise accrued as a result of his management of the affairs of the *dominus*. This includes everything which has come into the *gestor's* hands and which is incidental to the *gestio*, whether it be in the form of property, capital, interest on capital, fruits or profits which could, or should, have been collected.[230] Thus in the matter of *Grant's Farming Co Ltd v Attwell*[231] certain oxen belonging to an English company farming in the Orange Free State, were seized, during the Anglo-Boer War, by a British military force which handed them for safe-keeping to a farmer in Griqualand West. The latter in turn let them to a military contractor

52/...

for transport purposes. Thereafter the owners claimed, _inter alia_, an account of the profits earned under this contract. The Court held that the farmer was in the position of a _negotiorum gestor_ and should account for the profits earned by the oxen and received by him.

It is furthermore required that the _gestor_ collect all moneys owing by third parties to the _dominus_ insofar as such moneys are payable as a result of his administration.[232] If he should be tardy in making payments of money due to the _dominus_, he may make himself liable for loss of interest on such money, unless he can show that any loss of interest or, for that matter, capital was lost through no fault of his own.[233] Interest in such cases is calculated as at the time of _litis contestatio_.[234]

Money collected by the _gestor_ and of which the _dominus_ only later became aware, cannot be retained by the _gestor_ even if the _dominus_ did not claim it within the prescription period.[235]

Although the _gestor_ must pay what he himself owes to the _dominus_, he is not obliged to demand what is due to the _dominus_ by others unless such obligation is incidental to his management of the affairs of the _dominus_, the _ratio_ being that he does not, in his capacity as _gestor_ have a general authority to exact payment of debts on behalf of the _dominus_.[236]

If the *gestor*, who is also a creditor of the *dominus*, should receive payments due to the *dominus*, he must use such payments to the best advantage of the *dominus*. He is hence not permitted simply to pay to himself the debt owing by the *dominus* to him if it is clearly more advantageous to the *dominus* that another creditor be paid, such as would be the case where a debt bearing interest is to be extinguished rather than one bearing no interest.[237]

Even if money not legally due to the *dominus* has been received on his account by the *gestor*, the latter cannot retain it for his own benefit but must pay it over to the *dominus*. If, before paying over such money to the *dominus* or rendering an account in respect thereof, or before the *dominus* has approved the payment received by the *gestor*, the *gestor* should discover that it is not due, he may pay it back to the person from whom it was received and he will no longer be liable to render an account in regard to it. It is for the *gestor* to prove, however, that the said account was not due, since a payment made to him is presumed to be due unless the contrary be proved.[238]

The delivery of that which has accrued includes the cession to the *dominus* of any action acquired by the *gestor* in the course of the administration of affairs.[239]

54/...

3.4 Liability for Loss and Damage

The liability of the gestor for loss or damage caused to the dominus as a result of negotiorum gestio, has been the subject of much debate.[240] In general the principle is that the gestor is liable for all loss or damage incurred by the dominus, if such loss or damage has been caused by the fault of the gestor.[241] The same considerations apply where the dominus has lost interest as a result of the gestor's conduct.[242] In this regard it is sometimes stated that the gestor is liable for all acts or omissions arising from his management of the affairs of the dominus.[243]

Where more than one affair is involved and the dominus has suffered a loss on the one hand as a result of the negligence of the gestor but gained a profit on the other through the good offices of the gestor, the loss may be set off against the gain.[244]

A somewhat difficult question arising from the gestor's liability for loss or damage, relates to the standard of liability which should attach to the conduct of the gestor in his management of the affairs of the dominus.

In Roman law, the general standard of liability of the gestor, as expressed by the post-classical lawyer, Pomponius, was that the gestor should bear responsibility for his culpa (negligence in the widest sense) and dolus

(fraud). He continues to say, however, that his famous classical predecessor, Proculus, considered that the *gestor* should, under certain circumstances, also be liable for *casus* (better known as *casus fortuitus*), that is, fortuitous loss or damage not resulting from any fault on the part of the *gestor*. This would be the case where the *gestor* managed a novel affair which the *dominus* himself would not have been in the habit of managing, such as, for instance, the purchase of young and inexperienced slaves or the engagement in some or other novel enterprise.[245] In a text relating to the remedies of co-heirs, Paulus suggests that the *gestor* should exhibit the same diligence in conducting the affairs of the *dominus* as he would in respect of his own affairs.[246] Should he not do so, he would be guilty of so-called *culpa levis in concreto*, a form of negligence which did not require the utmost diligence to avoid.[247] On the other hand, a *Codex* text of 294 AD links the *gestor's* standard of liability merely to *dolus*, *culpa lata* and *culpa levis*.[248] In the Institutes Justinian, however, requires a stricter form of negligence, namely *culpa levissima* as it arises from the *gestor's* failure to apply *exactissima diligentia*. He submits that the diligence which a person is accustomed to apply in this own affairs is not sufficient, especially where someone else was in a position to administer the affairs with more diligence and care.[249] If the *gestio* were inspired by affection (*affectione coactus*) or by urgent necessity (*necessitate urguente*), the *gestor* was liable

only for fraud (*dolus*) or gross negligence (*culpa lata*).[250] Under certain circumstances his liability might even have been restricted to *casus fortuitus*,[251] but in post-classical Roman law liability on this ground was excluded, unless the parties had opted, by a specific agreement, to visit the *gestor* with such form of liability.[252] This qualification is, of course, totally repugnant to the nature of *negotiorum gestio*, the very essence of which is its independence of any form of agreement or *consensus*. During later legal development this anomaly was noticed and various explanations thereof were suggested, the general *consensus* being that the said qualification must have been an erroneous insertion.[253]

Roman legal precepts in regard to the *gestor*'s liability remained the basis of the European *ius commune* and Roman-Dutch law on the subject. A number of the early medieval writers, such as Odofredus, Cinus, Révigny and the Florentine lawbook (*liber iuris florentinus*), create the impression that the *gestor*'s liability is limited to *dolus* (or *culpa lata*) and *culpa levis* (in *concreto*), while he may even, under certain circumstances, be liable for *casus fortuitus*.[254] In general, however, the standard of liability required of the *gestor* was that based on *dolus* (or *culpa lata*) and *culpa levissima* (or *culpa levis in abstracto*), with reference, from time to time, of the *bona fides* required of the *gestor* and the equity of applying a strict standard of liability to him. Under certain

circumstances <u>casus fortuitus</u> was likewise regarded as a form of liability but this did not meet with general acceptance.[255]

As is to be expected, a number of the lawyers representing the European and Roman Dutch tradition, though accepting the Roman legal basis of the standard of liability applying to the <u>gestor</u>, extended the application of the relevant Roman principles and introduced certain variations and innovations into the law relating to such liability. Hence Domat suggests that the <u>gestor</u> should take the same care in managing the affairs of another as he would if he had been appointed as the agent of such person. That would make him liable for his negligence or any other fault including fraud, bad faith or lack of the greatest diligence.[256] He qualifies this statement, however, by saying that the <u>gestor</u>'s liability depends on all the surrounding circumstances: if the circumstances are such that it would be a hardship on the <u>gestor</u> to be held liable for the utmost diligence, his liability may be reduced to fault attributable to bad faith. This in turn will depend on the status of the persons involved, their relationship on the basis of friendship or close ties, the nature of the affair, the necessity of its management (for instance where it was done to prevent an attachment or sale in execution of the goods of an absent <u>dominus</u>), the difficulties accompanying such management, the conduct of the <u>gestor</u> and similar circumstances.257

Domat's famous compatriot, Pothier, follows the relevant Roman legal principles carefully in his discussion of the *gestor*'s liability but nevertheless provides a novel presentation of the theme. He starts off by saying that the *gestor* must apply the same diligence as the mandatary in conducting the affairs of the *dominus*, his liability being for *dolus* and *culpa levis* or *culpa levissima*, according to the nature of the affair managed.[258] At times, Pothier says, the *gestor* is also liable for *casus fortuitus*, for instance where he engages in an undertaking which the *dominus* himself is not in the custom of doing: in such a case the *gestor* has himself to bear the losses resulting from the failure of the undertaking.[259] He concludes by referring to the case where the *gestor*'s only obligation is to act in good faith when he conducts the affairs of another and is not liable for loss or damage caused by imprudence or incompetence. This occurs when the affairs of an absent *dominus* are abandoned and nobody has come forward to take charge of them: in this case no blame attaches to the *gestor* who is incapable and inexperienced in business yet undertakes the affairs to prevent their being deserted. The kind of negligence that such a *gestor* is liable for is that which is contrary to good faith and may be equated with *dolus*. Yet Pothier in this regard creates the impression that the standard of liability in such a case is in fact *culpa levis in concreto*, inasmuch as he suggests that it is a form of *dolus* not to act

with the same care in respect of the affairs of another as in respect of his own. He relates this to the precept that we should love our neighbours as ourselves.[260]

With reference to the French lawyer, Automne,[261] Groenewegen points out that, according to French law, the _gestor_ was not liable for _culpa levis_. This seems a rather strange proposition, particularly when the views of Domat and Pothier are considered, and its correctness would appear to be doubtful. Groenewegen continues, however, to say that Dutch law leaves this question to the discretion of the judge, which discretion is apparently exercised with reference to all the surrounding circumstances.[262]

In his _Censura forensis_ Van Leeuwen adheres to the relevant Roman legal principles in dealing with the liability of the _gestor_ who, according to him, is bound by his _dolus_, _culpa levis_, _culpa levissima_ and even _casus fortuitus_, should such have been caused by his fault. He too, however, advocates that the liability of the _gestor_ should be left to the discretion of the judge with reference to the state and nature of the affairs in question.[263] This approach is shared by authorities like Voet[264] and Schorer,[265] both of whom make direct reference to Van Leeuwen.

The standard of liability required by South African decisions to date would appear to be that of the ordinarily

prudent man, although a greater or lesser degree of care may be exacted if the circumstances should warrant it.

In the matter of Jacobs v Maree,[266] the gestor's liability was related to his good faith under the circumstances. In that case the gestor (defendant) sold certain onions to the dominus (plaintiff), who did not take delivery before it appeared that the onions were rotting. Not knowing the whereabouts of the dominus, the gestor sold the onions (on behalf of the dominus but without his authority) at less than the price for which the dominus had bought. In a claim for damages by the dominus, the Court held, on appeal, in the following terms:[267]

> "The onions were rotting, and as the defendant did not know the whereabouts of the plaintiff, he was justified, at all events, as negotiorum gestor, to do his best in the interest of the purchaser to whom the risk of loss attached ... As the defendant acted in good faith he was not in my opinion liable for damages. If he had sold the onions for more than the price at which they had been sold to the plaintiff, he would have been liable for the difference, but he would have been entitled to receive the price at which the plaintiff had bought."

The concept of bona fides and a finding of liability in accordance with the circumstances likewise came to the fore in the case of Amod Salie v Ragoon.[268] The gestor (defendant) had removed and stored the goods of the dominus (plaintiff) after the latter's shop had been broken into,

61/...

but only after he had obtained a permit from the Landdrost's office to do so. His intention was to prevent damage to the goods which could be considered abandoned and likely to perish. Thereafter the goods were commandeered by the Government. In a claim for the value of the goods, the action of the dominus was dismissed. The Court referred to Voet, Commentarius ad pandectas 3.5.4 and held that the gestor was, in the circumstances, liable for gross negligence only:[269]

> "As a general rule the Court looks with suspicion upon all cases where one person interferes with and takes possession of the goods of another person, and in every such instance the Court must be satisfied upon two points, first, that such person took the goods bona fide and not with a view to benefit himself in any way, and , secondly, that, having undertaken the care of the goods, he was not guilty of such degree of negligence as the law holds to be sufficient to involve liability under the circumstances, in other words that he discharged his duty with due diligence ... The defendant was in the position of a negotiorum gestor, and the passage cited from Voet 3,5,4 is directly applicable. The defendant having taken possession of plaintiff's goods after the store had been broken into and when the remaining stock was in danger of perishing, would be liable for gross negligence only ..."

In the matter of Lawrie v Union Government (Minister of Justice),[270] the decision in Amod Salie's case was distinguished and the standard of liability of a nego-

tiorum gestor expressed as "ordinary diligence." The facts were, briefly, that the owner of a motor car was arrested for drunken driving and his car detained by the police for safe custody. While so detained, the car was lost and later recovered by the owner in a damaged condition. A claim for damages against the police succeeded and, on appeal, counsel for the police argued that the detention of the vehicle was a form of depositum, alternatively that it was a case of negotiorum gestio where the Crown's liability was limited to gross negligence. The Court dealt with these arguments in the following manner:[271]

> "In my opinion this is not a case of depositum; for all practical purposes it may be regarded as negotiorum gestio. In support of the argument that the negotiorum gestor is only responsible for gross negligence reliance was placed on the decision in Amod Salie v. Ragoon (1903, T.S. 100). The circumstances in that case were special and the Court applied the statement of Voet (3.5.4) that there may be cases in which nothing beyond fraud and gross negligence are to be made good by the gestor, for instance, where he undertook the already neglected affairs of a friend which were otherwise about to perish. But, generally speaking, the negotiorum gestor must show ordinary diligence. "It is left to the discretion of the judge, taking into consideration the different conditions and quality of the business to see that the agent shows the degree of diligence required by the nature of the business". See van Leeuwen Cens. For. (1.4.26-3). In a case like the present, where the police take charge of a motor car in the possession of a person arrested,

> I see no reason why the police should not be required to exercise ordinary care in the custody of it. It is, of course, a perfectly proper course for the police to adopt to take charge of a car driven by a drunken man. But that consideration seems to me no ground for not requiring ordinary diligence from the custodian."

In a further appeal, the judgement against the police was upheld and the Court emphasised that the diligence required of a gestor was that of "a reasonably prudent person under the circumstances."[272]

A matter in which the gestor's liability was carefully considered, is that of Mohamed v Kamaludien.[273] The plaintiff (dominus) had deposited certain gramophone records with the defendant (gestor) to be kept in the latter's store and sold on a commission basis. Later the defendant requested that the plaintiff remove the records, failing which they would be stored with a third party at the plaintiff's risk and expense. When the plaintiff did not react to this request, the records were indeed handed over to the third party on the basis that some of the records were for storage and others for storage or sale on account, subject to commission. The third party hereafter went insolvent and, as no storage was paid or offered, his trustee sold all the records. The plaintiff now sued the defendant for return of the records or payment of their value. The magistrate gave judgement for the plaintiff, but on appeal this decision

was upset. The Court referred, inter alia, to Voet, Commentarius ad pandectas 3.5.4, and held that, in the circumstances of the case, the applicable standard of liability attaching to the defendant, in his capacity of negotiorum gestor, was that of fraud (dolus) or gross negligence (culpa lata). The general rule, however, as it appears from the judgement, is that the degree of negligence which a gestor should observe, is that of a prudent and reasonable man in the particular circumstances of the case. The relevant dictum of the Court reads:[274]

> "In my opinion, when a principal wrongfully and in breach of his contract leaves goods in the possession of a person against that person's will and to his manifest inconvenience and it thus becomes necessary for the latter to act in relation thereto, his acts must be judged by the more lenient standard set out by Voet in the second passage that I have cited and not by the harsher general rule. Judged by that more lenient standard, there can be no doubt of the correctness of the conduct of the defendant in storing the records with Ismail, and giving the latter the right to sell such of them as were not unsaleable. Indeed, even judged by the more exacting standard, I can see no culpa whatever in his having done so: it seems to me just what a prudent and reasonable man would have done in the circumstances."[275]

The principles relating to the liability of the negotiorum gestor, as they had evolved from the above mentioned

authorities, are neatly put by Rubin:[276]

> "In modern law, therefore, it would appear that these degrees of culpa are no longer of importance. The care which every person of ordinary prudence takes in his own affairs is, it is submitted, a proper measure of the care required of a gestor in dealing with the affairs of another, provided that it is acknowledged that reasons may exist for exacting, in some cases, a greater, and permitting in others a lesser, degree of care ... Once this general principle is accepted there is room for the special cases cited by the jurists, not as cases calling for the observance of defined standards of care, but as examples of circumstances which should be taken into account in determining whether the gestor's conduct corresponds to that of an ordinarily prudent man."

As has already been pointed out, where several gestores manage the affairs of a particular dominus, each gestor is pro parte liable for his share of the gestio and the standard of liability reviewed above is applicable to each individual gestor.[277]

4 RIGHTS OF NEGOTIORUM GESTOR

The rights of the negotiorum gestor, arising from his management of the affairs of the dominus, are, briefly, the right to be reimbursed for necessary and useful expenses he has incurred during the course of the gestio,

a claim for lost interest and income suffered as a result of the *gestio*, the right to be released from obligations arising from the *gestio* and the right to a lien on the property of the *dominus* in his possession, pending payment of his expenses or losses resulting from his management of the affairs of the *dominus*. Each of these rights will be dealt with in turn, whereafter it may be convenient to comment briefly on the termination of *negotiorum gestio*.[278]

4.1 Reimbursement of Necessary and Useful Expenses

Undoubtedly the most important right of the *negotiorum gestor* is that which entitles him, by virtue of the *actio negotiorum gestorum contraria*, to claim reimbursement of all necessary and useful expenses (*impensae necessariae* and *utiles*) incurred by him during the course of the management of the affairs of the *dominus*, provided, of course, that his conduct was reasonable (*utiliter*) under the circumstances and that he has complied with the further prerequisites for *negotiorum gestio*.[279] In this regard Pothier compares the position of the *gestor* with that of the *mandatarius*.[280]

Necessary expenses (*impensae necessariae*) are always recoverable where such expenses were necessary for the preservation of the thing or things to which the *gestio* was directed or otherwise necessary for the proper management

of the affair or affairs in question.[281]

Useful expenses (impensae utiles) are likewise recoverable insofar as they have been applied to improve the thing or things belonging to or circumstances relating to the dominus in respect of the management of his affairs.[282] Under the heading, dépenses non necessaires ("unnecessary expenses"), Domat describes impensae utiles with reference to those expenses which are not utiles: hence those expenses incurred imprudently for a dominus who did not wish them to be incurred or who was not in a position (financially, presumably) to incur them himself, fall to the account of the gestor. This would be the case, for instance, where a gestor effects useless repairs within a house, or makes changes not envisaged nor desired by the dominus since burdening the dominus in this way would be "indiscreet."[283]

It seems clear from these definitions of necessary and useful expenses that the gestor's right to be reimbursed therefor is closely related to the requirement that the gestio should be utiliter coeptum.[284] If the gestor's conduct was indeed utiliter at the commencement of the gestio, he will be entitled to reimbursement of his necessary and useful expenses even if the gestio was not, in the final event, successful. It is thus not necessary for the gestor to show that the outcome of the gestio was to the benefit of the dominus, as long as he can show that the expenses were reasonably incurred (sumptus utiliter

factos).[285]

In the case of McEuen and Co v Weinberg Bros,[286] a seller of certain goods, purchased c.i.f. prior to the outbreak of war, insured such goods against war risk. In an action to recover the premium from the purchaser the Court held that insurance against the risk did not fall upon the seller, and allowed the claim on the following ground:[287]

> "It seems to me, therefore, that this was a disbursement which the plaintiffs were reasonably entitled to make, and I am disposed to think that they are entitled to recover this amount from the defendant."

An inaccuracy in this regard is expressed in the matter of Klug and Klug v Penkin:[288]

> "It seems to be clear law that a person who manages the affairs of another without a mandate from him, has as a general rule a right of action to recover from him, inter alia, necessary and useful expenses incurred, if the person whose affairs have been managed has accepted the benefit of such unauthorised management."

Wessels[289] likewise states that the gestor's expenditure should have benefited the dominus and that the gestor must prove "the actual advantage" to the dominus. This approach is clearly in conflict with the requirement of utiliter coeptum, which demands no more of the gestor

than initially reasonable conduct, regardless of the outcome of the *gestio* and regardless of whether the *dominus* has received any benefit or advantage from such *gestio*.[290]

There is, of course, no objection to the view expressed in *Williams' Estate v Molenschoot and Schep (Pty) Ltd*[291] that, where the conduct of the *gestor* was not *utiliter*, a *gestor*'s claim for disbursements may be restricted to the actual unjustified enrichment of the *dominus*.[292] It is not correct, however, as Wessels suggests,[293] that the recovery of necessary expenses incurred by the *gestor* should necessarily be related to the unjustified enrichment of the *dominus*. Wessels relies on Voet, *Commentarius ad pandectas* 3.5.9, to support this proposition, but it is submitted that this approach does not seem to be justified by the authorities and certainly not by Voet in the said passage, which deals primarily with the enrichment action arising from the *negotiorum gestio* of the *gestor* who has managed the affairs of the *dominus* for his own benefit (*sui lucri causa*) and not for that of the *dominus*.[294]

An example of *inutiliter* expenses incurred by a *gestor* is the case where a *gestor* has, in the management of the affairs of the *dominus*, spent more than he should reasonably have done. In such a case he is entitled to recover only what would, under the circumstances, be a reasonable

disbursement.[295]

When a *gestor* has incurred expenses for the sake of pleasure or luxury (*impensae voluptuariae*) or on some other ground not related to necessity or usefulness, the conduct of the *gestor* will similarly be considered *inutiliter* and he will not be entitled to recover such expenses.[296]

The *gestor* may claim reimbursement of both present and future expenses, provided such expenses are necessary or useful as described above.[297] Van Leeuwen refers to the *gestor*'s action under these circumstances as an *actio utilis*.[298] Why he does so, is not clear, since it seems that the principles that he is setting forth relate to the ordinary form of *negotiorum gestio* which complies with all the prerequisites for the ordinary *actio negotiorum gestorum contraria*. It is submitted that such ordinary action will indeed be available to the *gestor*.

If the *gestor* has received payments on behalf of the *dominus* during the course of the *gestio*, he is entitled to deduct his expenses from such payments and to pay the balance to the *dominus*.[299]

Where the affair being managed is partly that of the *gestor* and partly that of the *dominus*, the *gestor* will have a claim for reimbursement of necessary and useful expenses

only in respect of the part pertaining to the *dominus*.[300]

As has been pointed out above, the *gestor* should render an account of his administration prior to, or at least *pari passu* with, his claim for reimbursement of expenses or disbursements.[301]

4.2 Claim for Lost Interest and Income

The *negotiorum gestor* is entitled to claim interest on money expended by him out of his own pocket or by way of a loan during the course of a *gestio*, on the basis that such interest was lost to him as a result of his management of the affairs of the *dominus*.[302] In a *Codex*-text the *ratio* for this principle is described as *bona fides*, even if the *gestor* should have been swayed by necessity to manage the affair in question.[303]

The right to claim interest is, in any event, in accordance with the principle that a *gestor* is entitled to be recompensed for all his expenses, past or future (*quidquid eo nomine vel abest ei vel afuturum est*).[304] This right is, as may be expected, tempered by the requirement that the *gestor* should have acted *utiliter* in running up the interest.[305] If, therefore, he has contracted a heavier burden of interest than the particular affair justifies, the *dominus* will not be liable for such interest,[306] except, perhaps, on the basis of unjustified enrichment,

as in the case where the *gestor* has incurred heavier expenses than he should reasonably have done.[307]

A warm debate in the Roman-Dutch law revolved about the question whether interest was payable as from date of expenditure or only from the date of *litis contestatio*. An early decision of the *Hof van Holland* stipulates clearly that interest is claimable as from the date of expenditure, being the date as from which the *gestor*'s loss of interest commences.[308] Groenewegen, however, expresses the view that this rule, originating in Roman law, has become abrogated in both France and Holland, insofar as interest may be claimed only from the time of *litis contestatio*.[309] Groenewegen's view is accepted without demur by Voet[310] and Schorer,[311] but rejected by Van der Keessel and Van der Linden, who prefer the Roman principle and follow the said decision of the *Hof van Holland*.[312]

Wessels criticises the approach adopted by Groenewegen and Voet in the following terms:[313]

> "It is difficult to see why the principle of the Civil Law should not be followed, for the *negotiorum gestor* is deprived of the use of his money and the *dominus* is benefited. If the *negotiorum gestor* borrowed the money at interest, the *dominus* would be liable for capital and interest. It is not as though the loan is necessarily for a short period for, the *dominus* being absent, a long time may elapse before a claim can be made upon him."

Rubin expresses a similar sentiment:[314]

> "Notwithstanding the weighty authority in its favour, it is difficult to justify this departure from the clear terms of the Roman law. It can hardly be justified on equitable grounds for there seems to be no reason why a gestor should not be compensated when he has been deprived of the use of his money because he has spent it in the interests of the dominus."

It is respectfully suggested that this criticism is completely justified, inasmuch as the basic principle remains that the gestor should be recompensed for all his necessary and useful expenses, both present and future and for all loss or damage suffered by him. Loss of interest as from the date when such interest commences to run must surely be included, in its entirety, in the loss which should be recompensed in accordance with the said principle.

It is not only loss of interest which the gestor may claim, but also loss of income or any similar loss arising from his management of the affairs of the dominus. This is implicit in the gestor's right to be compensated for whatever loss or damage he has suffered as a result of the negotiorum gestio (quidquid eo nomine vel abest ei vel afuturum est), provided, of course, that he has complied with all the prerequisites for a claim by means of the actio negotiorum gestorum contraria.[315]

The gestor is not entitled to any reward, remuneration or salary for his services. This principle was firmly entrenched in the European ius commune and Roman-Dutch law, a comparison sometimes being drawn between negotiorum gestio and mandatum in this regard.[316]

A contrary Roman-Dutch opinion, however, is that of Van Leeuwen, who expresses the view that, if a gestor has been accustomed to receiving a salary for the management of affairs, and the dominus is in the habit of paying a salary for the administration of his affairs, a salary should then indeed be paid. The situation is different, according to Van Leeuwen, where such custom in regard to salary has not prevailed.[317] It is submitted that this view cannot be correct, when the weight of common law authority is considered, except, perhaps, in the special case of bergloon - the remuneration paid in the case of the salvage of property at sea.[318] In this regard Van Bynkershoek refers to the great effort required to recover a vessel captured by the enemy and asks the rhetorical question why the recuperator should not be rewarded in such circumstances. He concludes that, where the recuperatio has been utiliter, the recuperator will have the ordinary actio negotiorum gestorum (contraria) to claim reimbursement of his expenses. He will also, however, on the grounds of equity, have an action to claim remuneration for his salvage of the stricken vessel.[319]

Van der Keessel critises Van Bynkershoek in his commentary on the *Inleidinge* of Grotius and confirms the majority view that no salary or remuneration may be claimed by a *negotiorum gestor*. Van Bynkershoek's opinion relating to a salary for the *gestor* is of so general a nature, says Van der Keessel, that it may be considered to be applicable to all forms of *negotiorum gestio*. But it is clear that it should apply only to the case where a ship has been captured by the enemy and recovered: in such a case the *gestor* (*recuperator*) should be rewarded for the danger and effort to which he has been exposed and he should receive no less than the salvage remuneration (*servaticium*) granted to persons who salvage wrecks. Van der Keessel expresses grave doubt, however, as to whether the *gestor* may, in any other case, claim a salary, since such claim would be in conflict with the nature of *negotiorum gestio*, which arises from benevolence and friendship. The reason why the *gestor* is granted an action is that his services should not cause him prejudice: it is not directed at the making of profit. The Roman principle in this regard has been received unchanged into Roman-Dutch law and contrary opinions should be rejected.[320]

Although this criticism by Van der Keessel of Van Bynkershoek appears to be somewhat unjustified, inasmuch as the latter clearly refers to the case where a ship is salvaged or recovered from enemy hands, the opinion expressed by Van der Keessel with regard to the basic nature of

and principles applicable to negotiorum gestio cannot be faulted. There seems to be little doubt that, in Roman-Dutch law, except in the exceptional case of salvage of a ship in distress, there was no question of any remuneration, reward or salary forthcoming to a gestor who had managed the affairs of another.[321]

In South African case law the legal position relating to remuneration of a gestor has likewise been clearly defined. In the matter of Williams' Estate v Molenschoot and Schep (Pty) Ltd,[322] the Court dealt at length with the common law authorities and concluded definitively that the gestor was not entitled to any remuneration. In this regard the Court made the following interesting comment:[323]

> "I may add that I am not sorry to see this limitation on the right of action of the negotiorum gestor. With it, the dominus is in less danger of having onerous services thrust upon him: nobody usually can object to paying for things at absolute cost price. But without it, even though there are other safeguards into which it is unnecessary at the moment to enter, he might not be by any means so safe: the out-of-work carpenter or builder (or even the mason) looking for a job might well be a menace in such circumstances."[324]

The suggestion in Grant's Farming Co Ltd v Attwell[325] and Lewis Brothers v East London Municipality[326] that reasonable compensation may be paid for services rendered

by a gestor are not, it is respectfully submitted, in accordance with the weight of authority.[327] Nor is the view expressed by Wessels in regard to the payment of "a fair wage" consistent with such authority, however reasonable it may seem:[328]

> "On principle, the negotiorum gestio of the Civil law is a gratuitous act and therefore as a rule the unauthorised manager cannot claim a salary. It is doubtful whether our courts would regard this rule as rigid. A mason finds that the house of an absent friend requires urgent repairs. He does the work himself. Why should he not recover, over and above any money he has expended, a fair wage for his work?"

As in Roman Dutch law, the only apparent exception to the rule relating to the non-remuneration of the gestor arises from the "salvage cases", which may be considered an exceptional form of negotiorum gestio. A reasonable reward for salvage services has long been accepted as part of South African law. In Table Bay Harbour Board v New Zealand Steamship Company. The "Papanui",[329] the following principles in respect of the amount of remuneration payable in salvage cases were accepted by the Court:

> "(I)n estimating the amount to be paid the Court will take into consideration a number of things, viz, the value of the property saved, the actual peril from which it had been saved, the possibility of assistance from elsewhere, the state of

> the weather at the time the services were rendered, the degrees of risk and peril incurred by the salvors, the degree of labour and skill exerted by them, the value of the ships, boats, etc. employed in the salvage, the time occupied, the injury or loss of any kind to the salvors, and the fact of human life being saved."

It is submitted that the said principles would still be applicable in modern law.[330]

4.3 Release from Obligations

A well-established right of the _gestor_ is that he may insist on being released from obligations entered into by him during the course of the administration of the affairs of the _dominus_.

That this was the position in Roman law appears clearly from a text of Gaius incorporated in the Digest of Justinian, namely, that the _gestor_ has an action whensoever "he has obligated himself to another in respect of the affair of the absent (_dominus_).[331]

Domat accepts the Roman principle by stating that the person whose affair has been properly managed, is obliged to the _gestor_, who has taken the trouble to manage such affairs, to release him from the consequences of his administration: this includes to perform what he has undertaken, to indemnify him in respect of obligations he has incurred and to ratify that which he has done well.[332]

Pothier expresses the view that the actio negotiorum gestorum contraria has two objects, namely to reimburse the gestor for the expenses incurred by him in managing the affairs of the dominus, and to discharge him from the obligations he has contracted during the course of the gestio. As an example of the latter, Pothier refers to the case where a gestor has contracted with workmen to effect repairs to the house of the dominus. Insofar as he has contracted in his own name the obligation to pay the workmen for their work, the dominus should provide the gestor either with a receipt indicating that he (the dominus) has paid the creditors towards whom the gestor was obligated, or a discharge in terms of which the creditors accept the dominus as debtor in place of the gestor and hence release the latter from further liability. Should the dominus fail to furnish such receipt or discharge, the gestor may claim from him payments of the amounts he (the gestor) is obliged to pay, subject to the qualification that the gestor is not entitled, by his own inadvertence, to incur greater obligations than are strictly necessary for the management of affairs in question, since the dominus is obliged to release the gestor only from obligations which were necessarily incurred.[333] This qualification is clearly an application of the utiliter-requirement: obligations unnecessarily incurred by the gestor will probably be considered inutiliter and bar him from the ordinary remedies available to him.[334]

In his discussion of the gestor's rights, Van Leeuwen

describes the *gestor*'s right to be released from obligations as an example of compensation for loss or damage he may suffer in the future, as compared with loss suffered by him in respect of expenses already incurred or loss resulting from his inability to obtain what he would otherwise have obtained.[335]

The weight of Roman-Dutch authority accepts the right of the *gestor* to be released from obligations incurred by him during the course of the *gestio* without qualification, other than the *gestor*'s obligation to comply with the ordinary prerequisites for *negotiorum gestio*.[336] There is no doubt that this is also the position in modern South African law.[337]

4.4 Lien on Property of Dominus

One of the advantages accruing to a *gestor* who has made disbursements for the *dominus* during the course of the *gestio*, is that he has a lien on any property of the *dominus*, insofar as such property is in his possession or under his control, pending payment to him of his necessary and useful expenses.[338]

This appears to have been the position in Roman law and later legal development,[339] as strikingly illustrated by Christinaeus with the following example from one of his *decisiones*:

"When someone buys an article, which was captured by the enemy, with a view to returning it to the (rightful) owner, the question arises whether he has an action against such owner for reimbursement of the price and interest? It was held in the affirmative, with reference to the case where the enemy occupy the castle of another during wartime and the owner is unable to expel them: if the neighbour of the *dominus* should recapture the castle, suffering damage in the process, the *dominus* will be obliged to reimburse the *gestor* for the expenses he (the *gestor*) has incurred in recapturing the castle; the *gestor* is not obliged to restore the castle to the *dominus* before he has indeed been reimbursed."[340]

The common law principles in regard to the *gestor*'s lien pending reimbursement of his necessary and useful expenses, appear to have been accepted in the matter of *New Club Garage v Milborrow and Son*.[341] In that case a garage owner expended money on the repair and maintenance of a motor car which had apparently been hired and never returned to the lessor. At the time the said expenses were incurred, the garage owner did not know who the real owner of the vehicle was. After he had discovered the true position, he retained the car, with the tacit consent of the owner, it would seem, and he now claimed an additional amount for storage. On appeal against a magistrate's decision allowing the claim on the ground that the garage owner had a lien on the car, the Court found that the garage owner was in the position of a *negotiorum gestor* and that he indeed had a lien, based on the principles relating to unjustified enrichment,

as appears from the following _dictum_:[342]

> "And for all the expenses, both useful and necessary, the respondent, as _bona fide_ and innocent possessor of the car, had a lien on the car, resting on the equitable principle that no one shall be enriched at the expense of another."[343]

It is important to note from this _dictum_ that the _gestor_'s lien is not merely related to, but directly based on the principle of unjustified enrichment. This may be explained by the fact that the _actio negotiorum gestorum_, in its extended form, has the function of an enrichment action and plays an important part as a special kind of possessory remedy, as will be seen later.[344] On the other hand the lien or right of retention (_ius retentionis_) has, in South African law, for many years been made to depend on the principles relating to unjustified enrichment, regardless of whether the institution of _negotiorum gestio_ is present or not.[345]

In the case of _Wessels v Morice_,[346] the defendant imported certain cattle from England at the request of the plaintiff. When the cattle arrived on the plaintiff's Free State farm, they were rejected by plaintiff on the grounds that they were not up to standard while the price was too high. The defendant thereupon requested that the plaintiff rail the cattle back to him, but, owing to certain veterinary restrictions, the return of

the cattle was delayed. In view of the expenditure which the plaintiff had incurred in respect of railage, feeding, safe custody and other expenses, he exercised a lien and refused to part with the cattle until his said expenditure had been paid. While exercising and maintaining his lien, it would appear that the plaintiff incurred further costs, which costs he likewise claimed. The Court regarded the plaintiff a "necessary agent" - an English legal term which is roughly equivalent to *negotiorum gestio*[347]- for the defendant and as such he was entitled to reimbursement of his expenses, but only until he (the plaintiff) could in fact have returned the cattle to the defendant. After such time the plaintiff was entitled to a lien but not to the reimbursement of further costs resulting from enforcement of the lien. In this regard the Court said:[348]

> "This being the position, in view of defendant's request that the cattle should be sent back to him, we must regard the plaintiff as holding the cattle as a necessary agent for the defendant until they could be returned to his principal, whom he rightly regarded as the owner. Up to the 3rd August, therefore, it was inevitable that the expense for keeping the animals must be incurred by or on behalf of the plaintiff, and the question of lien does not arise. There can be no question that so far the plaintiff is entitled to succeed (Theron v. Africa, 10, S.C., 216). But, after the permit had been obtained, and the cattle could have been returned it appears to us that, though quite within his rights in refusing to part with them until his expenses were paid, holding as he still did on account

> of the owner who had asked for their return, the plaintiff, in these circumstances, was debarred from making any further charge for keeping the cattle merely to enforce his lien (see Somes v British Empire Shipping Co., 8 11.L.C., 338). In the case cited the question was whether a person, who having a lien upon a chattel, chose to keep it for the purpose of enforcing his lien, could make any claim against the proprietor for so keeping it. The House of Lords was decidedly of opinion that he could not, and on principle we take the same view."

Apart from the objection which may be taken to the use of the term "necessary agent", the *ratio* of this judgement raises certain questions. It may be said that a *gestor* who chooses to exercise a lien in order to exact payment of his necessary and useful expenses incurred to date, is no longer a *gestor* in respect of the costs involved in enforcing the lien. On the other hand, it may be argued that the exercise of the lien is simply a continuation of the *gestio*, so that the costs incurred in enforcing the lien may be claimed, provided the *gestor*'s conduct was *utiliter*. Alternatively, the exercise of the lien may be considered a new and independent act of *negotiorum gestio*, albeit not the ordinary form thereof. In such a case the *gestor* would be entitled to claim at least the amount by which the *dominus* has been unjustifiably enriched as a result of the enforcement of the lien.

The expense involved in feeding the cattle and maintaining them in good condition would be expense that the *dominus* himself would have had to bear, so that, if he were not to reimburse the *gestor* for such expense, he would indeed be unjustifiably enriched, to the obvious detriment of the *gestor*.

4.5 Termination of Negotiorum Gestio

Although the question of termination of *negotiorum gestio* is not, strictly speaking, a right of the *gestor*, it is convenient to deal with this subject at the conclusion of the discussion of the *gestor*'s rights, inasmuch as the termination of the *gestio* has the effect of terminating the rights and, for that matter, the duties of the *gestor*.

The usual forms of termination of obligations are, it is submitted, also applicable to *negotiorum gestio*. Hence, if the *gestio* has been performed, in the sense that it has been completed, the reciprocal rights and obligations arising therefrom are extinguished.[349] On the other hand liability in terms of the *actiones negotiorum gestorum* does not terminate on the death of the *gestor* or *dominus*. Inasmuch as the *gestor* is obliged to complete the *gestio*, his heirs remain liable for any non-compliance with this or, for that matter, any other obligation of the *gestor*. Similarly the *dominus* and

his heirs remain liable towards the *gestor* and his heirs in respect of the obligations of the *dominus*.[350]

Negotiorum gestio may also be terminated by agreement between the parties. This may be an agreement simply to release the *gestor* from his obligations, with the effect that the reciprocal rights and duties of the parties are ended, or it may take the form of a novation, in terms of which the *negotiorum gestio* is transformed into, say, a contract of letting and hiring of services (*locatio conductio operarum*) or letting and hiring of work (*locatio conductio operis*).

Where the *dominus* has ratified the *gestor*'s management of his affairs, the *negotiorum gestio* may be transformed into the contract of mandate (*mandatum*) and the relationship between *dominus* and *gestor* becomes similar to that between principal and agent.[351]

Subject to what has been said above in regard to the *gestor*'s liability for *casus fortuitus* under certain circumstances,[352] the *gestor*'s liability ceases and the *gestio* is terminated when performance or completion thereof is made impossible as a result of *vis maior* or *casus fortuitus*.

Negotiorum gestio may also be terminated by prescription.

87/...

In a text from the Codex it is said that prescription in the form of longi temporis praescriptio,[353] is not applicable to the actio negotiorum gestorum directa of the dominus, so that tardiness by the dominus in pursuing his action on account of, for instance, military activities, will not create any obstruction to his right to institute the said action.[354] In his commentary on the said text and with reference to another Codex text, Brunnemann, however, suggests that the prescriptive period for this action is thirty years.[355]

Pothier refers to the interesting case of a gestor who is himself a debtor of the dominus and fails to exact payment from himself before the prescription period lapses: if he should raise the defence of prescription against a claim by the dominus, the latter may replicate that he is not entitled to rely on prescription on the ground that he was obliged to exact the said payment prior to the lapse of the period of prescription.[356]

The old Prescription Act, No 18 of 1943, refers, in section 3(2)(c), to a prescriptive period of three years in respect of contracts, actions for damages, the actio doli and the "condictiones indebiti, condictiones sine causa and proceedings at common law for restitutio in integrum," while no reference is made to negotiorum gestio or the actions arising therefrom. In the matter of Vryburg School Board v Cloete,[357] however, it was

held that sections 3(2)(c)(ii) and (iii) of the said Act were not confined to claims arising from contract, so that it would appear that the <u>actiones negotiorum gestorum directa and contraria</u> prescribe after three years and not, in terms of section 3(2)(e)(iii) of the said Act, only after the lapse of thirty years, as Rubin suggests.[358] De Vos states the legal position in this regard correctly where he says, with reference to the <u>Vryburg School Board</u>-case:[359]

> "Die uitwerking van hierdie beslissing skyn te wees dat enige vorderingsreg om die prys of waarde van goedere of dienste, of vergoeding daarvoor, te eis hoedat daardie reg ook al ontstaan het, na drie jaar verjaar. Dit sluit m.i ook die eis van die <u>gestor</u> in. Al kan hy nie vergoeding eis vir wat hy self gedoen het nie (behalwe vir sover hy deur sy optrede inkomste wat hy andersins sou gehad het, verbeur het), eis hy tog vergoeding vir hierdie bewese dienste en verrigte werk wanneer hy vergoeding eis vir wat hy uitbetaal het of nog moet uitbetaal aan mense wat hy gehuur het om die werk te doen. Regtens is dit tog hy wat die dienste bewys het."

Section 5(1)(d), read with section 5(2), of Act 18 of 1943 states that the period of extinctive prescription begins to run "from the date on which the right of action first accrued against the debtor." In the case of both the <u>actio negotiorum gestorum directa</u> and <u>contraria</u> it is submitted that the right of action accrues once the <u>gestio</u> is completed, subject, however, to the

provisions of section 7 of the Act in regard to the suspension of prescription.[360]

The present Prescription Act, No 68 of 1969, likewise stipulates a period of three years for the prescription of the actiones negotiorum gestorum,[361] as appears from section 11(d) of the said Act. Subject to the provisions of section 12 of such Act (as regards suspension of prescription), it is suggested that, as in the case of the old Act, prescription begins to run when the gestio is completed.[362]

5 NEGOTIORUM GESTIO AND UNJUSTIFIED ENRICHMENT

Negotiorum gestio and unjustified enrichment have in common that they are both frequently classified as "quasi-contracts", inasmuch as they give rise to liability (reciprocal rights and obligations) in a manner somewhat similar to contractual liability), but without the essential element of a contract, namely consensus between the parties, being present.

The various aspects of negotiorum gestio have been dealt with in chapters 1 to 4 above, with reference from time to time to the fact that the liability of the dominus is sometimes limited to his actual unjustified enrichment, as in the case where the gestor's management of the affairs of the dominus has been inutiliter.[363] This

relates to the interesting phenomenon that the action of the _negotiorum gestor_, that is the _actio negotiorum gestorum contraria_ is, under certain circumstances, an enrichment action in that the _gestor_'s claim is limited to the extent of the actual (unjustified) enrichment of the _dominus_ as a result of the management of his affairs by the _gestor_.

Before these circumstances are enumerated, it must be pointed out that Roman law did not recognise independent "enrichment actions" in the usual sense, but it was well acquainted with certain general rules or principles of equity which gradually became associated with particular actions. Such a general equitable principle is the well known _dictum_ of the Roman jurist Pomponius: "For it is by nature equitable that no one should be enriched (literally "made richer") to the prejudice of another."[364] In this regard "enrichment" or, more accurately, "unjustified enrichment" is usually defined as the situation which arises when the estate of one person is unjustifiably increased at the expense of another, without any recognised or acceptable legal ground or justification for such increase being present.[365]

In order to remedy the inequitable situation which arose when unjustified or unjustifiable enrichment occurred, Roman law and, by way of the reception process, Roman-Dutch law, developed a number of actions, the most im-

91/...

portant of which were termed *condictiones*. Among such *condictiones* were the *condictio indebiti*, *condictio ob turpem (vel iniustam) causam*, *condictio ob causam datorum* (or *causa data causa non secuta*) and the *condictio sine causa*.[366] The function of the *condictio* was simply to recover that which had been unjustifiably transposed from one estate to another.

The Roman enrichment actions, as received into Roman-Dutch law and developed by Roman-Dutch lawyers and courts, have become part and parcel of South African law, subject to the proviso, however, that, despite the fact that Roman-Dutch law apparently recognised a general enrichment action,[367] the Appeal Court has decided, in the matter of *Nortje en 'n Ander v Pool N O*,[368] that no such general enrichment action exists in South African law.[369] South African courts are hence required to apply the existing enrichment actions, insofar as they may have developed in accordance with the considerations of practice.[370]

Among such enrichment actions is the *actio negotiorum gestorum* in its extended form which, from Roman times, developed as an action entirely independent of the various *condictiones* or allied enrichment actions. It is this action which demands closer consideration and, for that matter, greater recognition, as will be pointed out in the ensuing discussion.

5.1 The Actio Negotiorum Gestorum as an Enrichment Action

The actio negotiorum gestorum in an "abnormal","extraordinary" or "extended" form came to the fore and developed significantly from as far back as Roman times. In such form it in fact fulfilled the function of an enrichment action, although there was a certain amount of confusion as to the true nature of the "ordinary" or "normal" form of the action and certain authors created the impression that all actions arising from negotiorum gestio were enrichment actions.[371]

There are four main instances in which the gestor's claim is limited to the extent of the actual enrichment of the dominus, namely: (a) where the gestor has administered the affairs of a minor; (b) where he has mala fide administered the affairs of another for his own benefit; (c) where he has administered the affairs of another in the bona fide belief that they were his own; (d) where he has administered the affairs of another contrary to the express wishes of the dominus (domino prohibente).

Under certain circumstances the actio negotiorum gestorum fulfils the function of a possessory remedy and in this way has paved the way for a far more extended application of such action as an enrichment action than

has hitherto been accepted or even realised. Each of the aforesaid instances will be dealt with in turn.[372]

5.2 Administration of the Affairs of a Minor

When the *dominus* or *gestor* in a *negotiorum gestio* relationship is a minor, his interests, as may be expected, are protected to the extent that any claim against him is limited to the extent of his actual unjustified enrichment.

This principle secured a firm foothold in Roman law, where the enrichment liability of the minor, or rather of the *pupillus*,[373] was primarily related to the *rescriptum* of the emperor Antoninus Pius, which provided that, where a *pupillus* was party to an obligation, an action was available against him only insofar as he had been enriched. In this regard it was also said that the *pupillus* was subject to a "natural obligation."[374]

In medieval legal development and in the later European law, the said principle relating to the liability of the *pupillus*, and hence of the minor in general, was accepted and applied without question. Thus the *Summa trecensis*, dating from the period of the glossators, indicates that the liability of the *pupillus* is limited to his actual enrichment, regardless of whether he acted as *gestor* or

dominus.[375] Elsewhere the glossators link the _ratio_ for this form of liability to the _utiliter_-prerequisite[376] or to the necessity or utility of the _gestio_,[377] an approach which is rejected by the _ultramontanus_ from Orléans, Jacques de Révigny, who prefers the simple principle as expressed in the _rescriptum divi Pii_ aforesaid.[378]

Later generations of lawyers, dating from the period of the commentators to the pre-codification period in France, have little to add to the general principle as set forth in the _rescriptum divi Pii_.[379] Pothier is the exception in this regard: although he accepts certain general principles relating to the liability of _pupilli_ and minors,[380] he does not accept that, where a minor's affairs have been managed, his liability should be limited to his actual enrichment. The _ratio_ for this approach is that, otherwise than in the case of consensual contracts, the quasi-contract of _negotiorum gestio_ is not based on the _consensus_ of the parties, but gives rise to reciprocal obligations without consent of the parties thereto. It is hence immaterial whether the minor _dominus_ was capable of giving valid consent, since his obligations are incurred without reference to any consent or _consensus_ on his part.[381]

A similar attitude is adopted by the German natural law exponent, Thomasius, who says that, for purposes of

liability in terms of _negotiorum gestio_, there is no difference between a minor and an adult. To diminish the minor's liability, as opposed to that of the adult, would be repugnant to natural equity, Roman legal principles and the rules of proper interpretation and should be rejected in practice. Hence, if the _actio contraria_ should indeed be limited to a claim for the enrichment of the _dominus_, where the _gestor_ is a minor and the _dominus_ a major, the _gestor_ is fully liable towards the _dominus_, whose liability towards the _gestor_ is limited to his (the _dominus_') enrichment.[382]

Support for the views of Pothier and Thomasius appears from the comment of Kohler, a member of the German historical school. He says that the limitation of the liability of the _pupillus_ to enrichment is in fact in conflict with the _pupillus_' own interests.[383] Other members of the German _usus modernus pandectarum_, historical and pandectist schools, however, follow the Roman principle and limit the minor's liability to his actual enrichment, without further ado.[384]

Despite slight variations in approach, more particularly with regard to interpolations in Roman texts and similar technical matters, the Roman-Dutch writers of the sixteenth to eighteenth centuries accept the principle that the minor or _pupillus_ in a _negotiorum gestio_ relationship is liable only insofar as he has been actually and unjustifiably enriched.[385]

The said principle was likewise substantially received into modern South African law, where it is accepted that a minor can be liable to the extent to which he has been enriched,[386] despite objections by Rubin[387] and De Vos.[388]

Initially liability of minors in Roman-Dutch law followed the so-called "benefit-theory" as advocated in Nel v Divine Hall and Co,[389] namely that if the particular act was not "for the benefit" of the minor, a claim against such minor would fail. This approach was considered and rejected in the matter of Edelstein v Edelstein.[390] It is, in any event, clearly in conflict with the early decision of Price qq Dieleman v Berrange, alias Anderson,[391] where the "benefit" in question is correctly regarded as enrichment, as appears from the following portion of the summary of the case:

> "The Court held that, as the defendant had instituted that action causa sui proprii commodi, and, as owing to its unsuccessful termination, the minors, the plaintiffs, have derived no benefit whatever from it, those costs have not been in rem versum of the plaintiffs, nor have they been locupletiores facti thereby, the defendant cannot, as a negotiorum gestor, claim any part of those expenses, actione contraria negotiorum gestorum (vide Voet 3:5,8 and 9), the plaintiffs are under no equitable obligation to repay any part of those costs. The Court therefore rejected the defendant's claim."

As will be seen later,[392] the cited text of Voet, Commentarius ad pandectas 3.5.9, refers to the enrichment action of the gestor who acted mala fide and in his own interest (sui lucri causa), so that it seems clear that the action available against the minor in the present circumstances is the actio negotiorum gestorum in its guise as an enrichment action.[393]

5.3 Mala Fide Administration of the Affairs of Another for the Benefit of the Gestor

The most striking example of the actio negotiorum gestorum as an enrichment action is that of the gestor who knowingly (and hence mala fide) undertakes the management of another's affairs, not with the animus negotia aliena gerendi,[394] but with the intention of benefiting himself (sui lucri causa).

The starting point of sui lucri causa management of another's affairs and the remedies if any, flowing therefrom, is a Digest-text of which the jurist Ulpian was the author, namely D 3.5.5.5. According to this text it was Labeo's opinion that the person who managed the affairs of another for his own profit, managed his own affair rather than that of the dominus. Such person would remain liable to the dominus by virtue of the ordinary actio negotiorum gestorum (directa), but any claim that

he might have for expenses incurred during the course of the *gestio*, would be limited to the enrichment of the *dominus*. If his actual expenses were more than the enrichment of the dominus, it would be the *gestor*'s loss, the *ratio* being that he should pay the penalty for his "dishonourable" conduct.[395]

In the medieval legal development this principle was readily accepted, as appears from the early contributions of the glossators.[396] The glossators were also the first to further extend the application of the *actio negotiorum gestorum* as an enrichment action. Hence *Lo codi*[397] made this action available in all cases where the *gestor* had not acted *utiliter*.[398]

Of more importance was the extension of the application of the enrichment action arising from the *negotiorum gestio* to the realm of possession, insofar as the *mala fide gestor* was equated with the *mala fide possessor* who had incurred expenses in his improvement of property belonging to another. A very real and valuable contribution in this regard came from the pen of the glossator Martinus, who expressed the view that the *mala fide possessor* under such circumstances had not only a right of retention, with a view to claiming compensation for his expenses, but an action based on unjustified enrichment. It is pointed out that the glossators Johannes Bassianus

and Bulgarus disagreed with Martinus on this score, but a giant step forward had been taken on the initiative of Martinus, and his influence in the later legal development was to be phenomenal.[399] Révigny, the most illustrious member of the school of Orléans, which was contemporaneous with but independent of the glossators,[400] is not happy with Martinus' action for the *mala fide gestor* in the guise of a *mala fide possessor*, on the ground that such *gestor* or *possessor* does not have the *animus negotia aliena gerendi*,[401] so that he is prepared to grant only a *ius retentionis*, even in the case of a *bona fide possessor*.[402] On the other hand the majority of commentators who turn their attention to this question are prepared, for various reasons, to give an action to the *mala fide possessor* on the same basis as the action accorded the *mala fide gestor* of D 3.5.5.5.[403]

An important contribution to the acceptance of the extended *actio negotiorum gestorum* as an enrichment action was made by a number of French lawyers during the period from approximately 1500 to 1800. Molinaeus refers to the action of D 3.5.5.5 as an *actio utilis* or *actio in factum ex aequitate*,[404] whereas Cujacius calls it the *condictio incerti ex causa debiti*,[405] leaving no doubt as to the nature of the action.[406] Pothier sees the basis of the action as "the natural equity which does not permit one person to be enriched and to profit at the expense of another."[407] It is apparently for this reason that a

large number of French writers have no difficulty in equating the *mala fide gestor* with the *mala fide possessor* and hence in granting the latter an action for reimbursement of his necessary and useful expenses, and not simply a right of retention.[408] In this regard Cujacius mentions that there is no difference between a *bona fide* and *mala fide possessor*, since both have access to an *actio specialis in rem*, whereas the *mala fide possessor* may also make use of a *condictio incerti* or *condictio possessionis*.[409] According to Molinaeus the *mala fide possessor* is assisted in this way on the ground of "the natural equity that no one should be enriched at the expense of another."[410] It would appear that this equitable principle in fact lies at the root of the French approach to the reimbursement of the *mala fide gestor* or *possessor* for necessary and useful expenses incurred during the course of the *gestio* or *possessio*.[411]

The German legal development in respect of *mala fide gestio* during the period from approximately 1600 to 1900 took a somewhat different course to that in France. Although the majority of German lawyers belonging to the *usus modernus pandectarum*, historical and pandectist schools accepted the principle of D3.5.5.5 in awarding an action to the *mala fide gestor* who had acted *sui lucri causa*,[412] there appears to have been a measure of reluctance in extending this action to the *mala fide possessor*

who had effected necessary or useful improvements to the property of another.[413] Yet jurists like Goeddaeus[414] and Glück[415] suggest that an actio negotiorum gestorum utilis was in fact, in practice, available to the possessor under such circumstances.[416]

The enrichment action arising from D 3.5.5.5 was generally accepted in the Roman-Dutch law of the seventeenth and eighteenth centuries.[417] Of great interest, however, is that virtually all the authorities relate this action to the possessory remedies. This does not, of course, mean that they were all in agreement as to the applicability of the said action in the field of possession. A number of writers are prepared to concede only a right of retention in the case of possessors, whether they were bona fide or mala fide.[418] Others incline to a more equitable approach, by suggesting the feasibility of some or other action.[419] Van der Keessel is prepared to give the bona fide possessor an action but he refuses the mala fide possessor such action.[420] This is in conflict with the clear opinion of Grotius, who has no hesitation in giving an action to both bona fide and mala fide possessor.[421] Voet does the same and, with apparent reference to the principle of D 3.5.5.5, he points out that "natural equity" demands, in his time as opposed to Roman times, that an action, and not only a right of retention, should be made available to both bona fide and mala fide possessors for the recovery of necessary

and useful expenses, lest the owner of the property be enriched thereby.[422] In this manner Roman-Dutch law set the stage for the further development of the extended actio negotiorum gestorum in its South African context.[423]

Despite the very clear authority of D 3.5.5.5, as logically extended from medieval times to the end of the Roman-Dutch period of development, a number of South African decisions totally disregarded such authority and denied an action, on the basis of unjustified enrichment or otherwise, to a mala fide gestor who had acted in his own interests. Thus in the matter of Bernstein v Tayler,[424] 5HCG 1888 where the defendant pleaded, inter alia that he had acted as a negotiorum gestor in the interests of the plaintiff, the Court remarked:

> "As to the allegation that the defendant's proceedings were justified as a negotiorum gestio, very little need be said, and it was not seriously argued, for it is perfectly clear that the defendant's conduct in the matter was not dictated by a desire to protect the interests of the plaintiff but to protect himself."

No consideration was given to the right of a mala fide gestor to claim reimbursement of his necessary and useful expenses on the basis of the extended actio negotiorum

gestorum.

The mala fide gestor was similarly ignored in Amod Salie v Ragoon,[425] 1903 TS where the Court emphasised the standard of liability of a gestor in the following terms:

> "As a general rule the Court looks with suspicion upon all cases where one person interferes with and takes possession of the goods of another person, and in every such instance the Court must be satisfied upon two points, first, that such person took the goods bona fide and not with a view to benefit himself in any way and, secondly, that having undertaken the care of the goods he was not guilty of such degree of negligence as the law holds to be sufficient to involve liability under the circumstances, in other words that he discharged his duty with due diligence."[426]

A very good example of mala fide gestio is illustrated by the facts in Shaw v Kirby,[427] 1924 GWLD in which the plaintiff, without any request or authority and with the sole purpose of benefiting himself, paid a debt of the defendant. In deciding whether the defendant was liable or not, the Court held:

> "It seems clear from the evidence, as above set forth, that the plaintiff did not, as claimed in the summons, pay these sums by way of an advance 'at the instance and for the benefit of the defendant,' but he paid them without any mandate

from her, and in consideration of benefits which, by these payments, he expected would accrue to himself when the partnership agreement should take effect. It is true that the defendant did in fact benefit by these payments: but that in itself, without any request, express or implied, by her to the plaintiff, to make the payments, or without any undertaking, express or implied, on her part to make repayment, is not sufficient to render her liable."

This decision was given on the authority of English law only, without a single reference to South African common law or case law and it is, with respect, clearly wrong.

An analogous, and fairly recent, case is that reported as Van Staden v Pretorius,[428] in which the plaintiff had likewise paid the defendant's debts and on the strength of such payment had instituted a claim against the defendant for repayment of the amounts paid. The Court referred to Voet, Beginselen des regts 3.30.4, and held that such authority was inapplicable, whereafter it found support for its dismissal of the plaintiff's claim in the very matter of Shaw v Kirby. In this regard the following dictum arises:[429]

"Counsel was asked to consider on the present declaration and the evidence given in respect thereof whether it was not possible to find some other legal basis for the claim made. Accordingly further

argument in writing was placed before me wherein two submissions were made. The first has no merit whatsoever. It is contended that this is a case of condictio indebiti. This is an untenable proposition. The money was due to the creditors concerned. The other submission was that this is a case of unjust enrichment. Assuming that in a general way there has been an enrichment because the defendant was relieved of certain obligations, this by itself does not create a cause of action ... Voet in Beginselen des Regts, 3.30.4, after stating that one's debts can be discharged by means of payment by another, goes on to say: "wat de wedereisching van 'tgeene een ander voor den schuldenaer heeft betaelt aangaat, zoo hy 'tzelve uit last des schuldenaers heeft gedaen, kan hy 'tzelve door de actie van lastgeving wedereischen; zoo hy het zelve buiten zyn weeten heeft gedaen, kan hy 'n zelve door de tegenstrydige actie van onderwint wedereischen ..."

In this passage Voet takes the view that recovery of such moneys from the original debtor depends on whether a mandate to pay exists or, otherwise, if the existence of a negotiorum gestio can be proved. On the facts of the present case there was no mandate and no negotiorum gestio. The payment was in any event not made for the benefit of the defendant but of the plaintiff himself."

This judgement has, with obvious justification, been severely criticised.[430]

There are, fortunately, a number of South African decisions which serve to remedy the inaccuracies emanating from the

aforesaid cases. The first is the very early matter of Prince qq Dieleman v Berrange, alias Anderson,[431] 1830 in which the Court referred with approval to the claim of the gestor, who acted causa sui proprii commodi, as authority for the nature of the actio negotiorum gestorum which may be instituted against minors. Similarly in Stoll's Trustee v Kriege and Bosman,[432] 1835 the Court held that payment of another's debt, in the interest of the payer, gave rise to a claim against the person whose debt had been paid.

In Harman's Estate v Bartholomew,[433] 1955 (N) the trustee in the insolvent estate of one Harman had sued the defendant for £200, being the balance of the purchase price of a business sold by Harman to the defendant. The latter denied liability, pleading that he had paid the said amount to a certain company at the request of an attorney acting on behalf of Harman. It appeared from the evidence that Harman had not given specific instructions to the attorney to request the defendant to pay off his (Harman's) indebtedness to the said company. In its judgement, the Court apparently accepted the principle of D 3.5.5.5, as is shown by the following dictum:[434]

> "Assuming that the authorities relied upon represent the law and that they cover a case where the person claiming to be gestor is not acting in someone else's interests but in his own, Mr. Shaw concedes

> that the defendant must fail unless he can show that Harman benefited to the extent of £200 as a result of the defendant's payment to Rosenbach and Co. I am very doubtful whether Harman was enriched by the payment made to Rosenbach and Co ... I think that what was contemplated by the authorities referred to is the expenditure of money or labour on the part of the *gestor* which has had the effect of altering another's position so as to make the latter actually richer or better off than he would have been but for the intervention."

Full recognition is accorded the action of the *mala fide gestor* in the important matter of *Odendaal v Van Oudtshoorn*,[435] in which the Court rejects earlier decisions which failed to recognise the action arising from "abnormal" or "quasi" *negotiorum gestio* in instances where the *gestio* had been performed in the *gestor*'s own interests. In this matter the plaintiff had likewise paid a certain debt of the defendant, which payment the defendant had refused to reimburse to the plaintiff. After consideration of numerous authorities, the Court remarks:[436]

> "Vir my kom dit voor, as die werke van die ou sowel as die moderne skrywers nagegaan word, dat daar eintlik weinig twyfel kan bestaan dat die aksie wat aan die"gestor" toegestaan word in omstandighede soortgelyk as die wat hier onder bespreking is op die beginsel van ongeregverdigde verryking gegrond is. Weliswaar is daar nie eenstemmigheid oor die naam van die aksie nie. Sommige sien dit as 'n uit-

breiding of uitbouing van die *actio negotiorum gestorum contraria*. Ander noem dit 'n *quasi actio negotiorum gestorum contraria*. Daar word ook na verwys as 'n *actio utilis* of selfs onder ander benaminge ... Na my mening is dit voldoende om te weet dat ons gemene reg die bestaan van 'n grond van aksie in sulke omstandighede erken het en dat ongegronde verryking die beginsel is wat ten grondslag van daardie aksie gelê het."

Thereafter the Court proceeds to point out that the recognition of the extended *actio negotiorum gestorum* was not affected by the decision in *Nortje en 'n Ander v Pool N O*,[437] namely that South African law does not recognise a general enrichment action, insofar as the action of the *mala fide gestor* is indeed one of the existing and recognised enrichment actions known to our law. In this regard the Court explains:[438]

"Die oorsig van ons regsbronne en van die menings van moderne gesaghebbendes op die gebied laat weinig twyfel dat die Romeins-Hollandse Reg die grond van aksie erken het. Die vraag is nou of daar voldoende rede bestaan om te bevind dat die verhaalsreg ingevolge daardie aksie nie meer deel uitmaak van ons reg vandag nie. Die posisie word nie geraak deur die beslissing in *Nortje en 'n Ander v Pool, N.O.*, 1966(3) SA 96 (A.A.), nie omdat die onderhawige grond van aksie wel binne die aanwendingsgebied van 'n erkende verrykingsaksie van ons reg tuisgebring kan word. Die beslissings in die sake van *Shaw v Kirby* en *Van Staden v Pretorius*

is wel gesag teen die erkenning van sodanige grond van aksie in ons reg. Maar in albei gevalle is daar nie voldoende ondersoek ingestel na ons regsbronne nie en gevolglik kan die beslissings nie as gesaghebbend beskou word nie. Die gevolgtrekking waartoe 'n mens dus gedryf word, is dat die grond van aksie nog steeds deel van ons reg uitmaak en dat dit hierdie Hof nie vry staan om, in weerwil van die oorwig van die gesag wat die bestaan van die aksie erken, te bevind dat dit nie meer deur ons reg erken word nie. Met alle respek aan die geleerde Regters wat die teenoorgestelde standpunt ingeneem het, is dit dus ons mening dat hulle die regsposisie nie juis vertolk het nie en dat daardie beslissings nie gevolg behoort te word nie."

It is somewhat unfortunate that, directly after this very lucid exposé of the legal position of the <u>mala fide gestor</u>, the Court apparently voices certain reservations as to the application of the extended <u>actio negotiorum gestorum</u> in practice, in view of the embarrassment which an officious intermeddler could cause. The Court says, in this regard, that it must be shown that the <u>gestor</u> acted reasonably ("redelik") under all the circumstances and that there was "in die omstandighede van die geval 'n onbehoorlike of ongeregverdigde verryking."[439] If by this is meant that the <u>gestio</u> is to be <u>utiliter coeptum</u>,[440] there can be no quarrel with it. The primary issue to be decided remains, however, whether there was an unjustified enrichment or not.[441]

In the recent decision of Standard Bank Financial Services Ltd v Taylam (Pty) Ltd,[442] the action of the gestor who has paid another's debt in his own interest was likewise given full recognition as an enrichment action. The Court accepted the judgement in Odendaal v Van Oudtshoorn as reflecting the correct legal position, namely that "the gestor can recover expenses on the grounds of unjust enrichment when he has paid another's debt sui lucri causa."[443] In this way the principle of D3.5.5.5, in accordance with which an enrichment action in the form of the extended actio negotiorum gestorum is made available to the mala fide gestor who has managed the affairs of another in his own interests (sui lucri causa), has been clearly confirmed.[444]

5.4 Administration of the Affairs of Another in the Bona Fide Belief that they are the Gestor's Own

Where a gestor manages the affairs of another in the bona fide belief that they are his own, he is entitled, as in the case of the mala fide gestor, to claim compensation for his necessary and useful expenses to the extent of the unjustified enrichment of the dominus.

The origin of this action is a text of the Roman jurist, Africanus, as reflected in D 3.5.48. The example appearing from this text is the following: A sells to B a slave who comes into B's possession with a certain thing. The thing,

however, had been stolen by the slave while he was still in A's possession. Under the mistaken impression that he has the right to sell whatever is in the newly acquired slave's possession, B _bona fide_ sells the thing to a third party, after which the thing is destroyed, or otherwise ceases to exist. Africanus points out that, in such a case (where the owner, A, can no longer make use of his _rei vindicatio_), A has an _actio negotiorum gestorum_ to recover from B the price received for the thing. He continues by saying that this same action should likewise be granted when someone manages the affairs of another under the _bona fide_ impression that they are his own. Similarly an action should be granted to the person who believe that he is the beneficiary in respect of an inheritance and (_bona fide_) pays out the legacies prescribed by the Will: the _ratio_ of the action is that the true heir is relieved of the burden of paying out the legacies.[445] It is clear that the real heir, in this example, will be enriched at the expense of the putative heir who has _bona fide_ discharged certain of the real heir's obligations.

The principles recorded in D 3.5.48 in fact indicate that in all cases where someone has _bona fide_ managed the affairs of another in the mistaken belief that the affairs are his own, the action granted the _gestor_ under

such circumstances is the extended *actio negotiorum gestorum*, functioning as an enrichment action. This appears the more clearly when the said text is read with D 12.1.23, likewise from the pen of Africanus. In the latter text we are told that, where a person has taken possession of and sold a slave under the *bona fide* but mistaken impression that the slave has been bequeathed to him, whereas it in fact had been bequeathed to someone else, it was the opinion of jurist, Salvius Julianus, that, should the slave have died subsequently to the said sale thereof, the true legatee has a *condictio* which he may institute against the supposed legatee for the price realised as a result of the sale. The *ratio* for this *condictio* is the enrichment-principle, namely that the supposed legatee should not be unjustifiably enriched at the expense of the true legatee.[446]

In the early medieval legal development the extended *actio negotiorum gestorum* of the *bona fide gestor* was generally accepted as a valid remedy, the interesting aspect being that most writers dealt with this action in their discussion of the action of a *bona fide possessor* who had effected improvements on the property of another. Among the glossators it was once again Martinus who boldly asserted that the action to be accorded a *bona fide possessor* under such circumstances should be the *utilis actio negotiorum gestorum*.[447] The famous lawyer from the School of

Orléans, Jacques de Révigny, appears to equate the action of D3.5.48 with a condictio certi generalis or condictio sine causa[448] and is also prepared to give the action to the bona fide possessor.[449] The commentator, Castrensis, leaves little doubt as to the nature of the action arising from D 3.5.48: he refers to it as an utilis actio negotiorum gestorum which is analogous to the actio in factum ex aequitate of D 12.1.32.[450]

An aspect of particular interest brought to the fore by certain of the commentators in regard to the bona fide gestor, is that which may be termed "indirect enrichment" or "third party enrichment."[451] This relates to the situation which arises when A, at the instance of B performs services for C, without agency, stipulatio alteri or a similar legal institution being present. Should A, for some reason or another, not be able to recover his expenses or damages from B, while it is clear that A has been impoverished and C unjustifiably enriched, will A be able to claim from C on the basis of unjustified enrichment? The answer to this question as replied to by Baldus and Salycetus is "yes".[452]

The development of the European ius commune in France during the period subsequent to the commentators and prior to codification confirmed the action arising from D 3.5.48 as an enrichment action accorded the gestor who bona fide managed the affairs of another under the mistaken impression

that they were his own. Pothier sees the action as an *actio utilis ex aequitate* with the function of an enrichment action.[453] Molinaeus suggests that this action should be applied in cases where a *bona fide possessor* has effected improvements to the property of another, provided no other remedy is available to the *gestor*.[454] This opinion is shared by Pothier who declares that French jurisprudence does not permit the "subtleties" of Roman law, as would apparently arise from texts like D 12.6.33 and by virtue of equity alone, an enrichment action will be available to the *bona fide possessor* for recovery of his useful and necessary expenses, on the same basis as the enrichment action granted the *mala fide gestor* in terms of D 3.5.5.5.[455]

In Germany during approximately the same period prior to codification, the legal development was similar to that in France. The *bona fide gestor* had an enrichment action at his disposal,[456] which action was also accorded to the *bona fide possessor* for the recovery of necessary and useful expenses.[457] The case of "indirect enrichment" in regard to *bona fide gestio* (as propounded by the commentator's Baldus and Salycetus - see above) finds considerable support among the German lawyers. A number of members of the *usus modernus pandectarum* and natural law school, on the one hand, and of the historical school and pandectists,on the other, are prepared to allow A to claim directly from C on the basis of *negotiorum gestio*.[458]

Very few Roman-Dutch authorities deal with the case of the *gestor* who manages the affairs of another in the *bona fide* but mistaken belief that they are his own. Nevertheless there are strong indications that Roman-Dutch law likewise granted an enrichment action under such circumstances.[459]

Of some significance in Roman-Dutch law is the question of "indirect enrichment" which, as in the case of the discussion of this aspect by the commentators and German lawyers, appears to be dealt with in relation to *bona fide gestio*. Despite the fact that one of the rights of the *gestor* is to be released from obligations he had incurred while managing the affairs of the *dominus*,[460] there is clear authority that, in the example mentioned above, A will be entitled to claim directly from C by means of an enrichment action. The obvious action in these circumstances would appear to be the extended *actio negotiorum gestorum* of D 3.5.48, although it is not stated by the authorities in as many words. Hence Westenberg and Schrassert suggest that A's action should be an *utilis actio de in rem verso* whereas Huber and Van Bynkershoek simply refer to an action *ex aequitate* without giving it a name.[461]

Authorities in South African law in regard to the *bona fide gestor* who managed the affairs of another in the mistaken belief that they were his own, are scanty but

clear. Thus in Klug and Klug v Penkin,[462] the agent of the plaintiffs effected certain repairs to a house belonging to the defendant, under the bona fide but mistaken belief that the house in question belonged to the plaintiffs. The plaintiffs thereupon claimed reimbursement of the costs incurred in regard to the said repairs on the basis of the defendant's enrichment. In the magistrate's court an exception, that the claim disclosed no cause of action, was upheld. On appeal it was held, inter alia, that, assuming the repairs to have been necessary and beneficial, the circumstances disclosed a good cause of action by the agent against the defendant in spite of the fact that, at the time, the agent had carried out repairs to property which he thought belonged to the plaintiffs and not to the defendant. The Court referred to Voet, Commentarius ad pandectas 3.5.12 and Digest 3.5 and held that, "under the general principle" the plaintiffs had a right of action against the defendant. The Court held further "that their mistaken belief at the time they made the repairs does not affect their right."[463] It is clear that the "general principle" referred to here is none other than the general principle that no one should be unjustifiably enriched at the expense of another. Although it was not expressly stated by the Court, it is submitted that the action granted the plaintiffs is none other than the extended actio negotiorum gestorum of D 3.5.48, which was accepted without question by the Court in Standard Bank

Financial Services Ltd v Taylam (Pty) Ltd.[464] In any event, in view of the recognition of the mala fide gestor's action,[465] there can be little doubt that the gestor who administers the affairs of another in the bona fide belief that they are his own, will be accorded an action for the recovery of his necessary and useful expenses, particularly in view of the principle of unjustified enrichment in respect of the remedies pertaining to bona fide and mala fide possession.[466]

5.5 Administration of the Affairs of Another Contrary to the Express Wishes of the Dominus

At first sight the administration of the affairs of another contrary to such person's express wishes should not entitle the gestor to an action. That was indeed the situation in Roman law: the gestor who acted domino prohibente was not entitled to an action for the recovery of his disbursements, even though the gestio had been properly (and utiliter) rendered.[467]

The fact that the mala fide gestor, who had acted sui lucri causa,[468] was, according to Roman law, granted an enrichment action while the gestor, who had acted domino prohibente, was not, may have been the inducement for later generations of lawyers to assist the latter also by means of an enrichment action.

Among the glossators it was again Martinus who suggested an *utilis actio negotiorum gestorum* on the grounds of equity and by way of analogy with the action of the *mala fide gestor* who had acted *animo depraedandi* and *sui luori causa*.[469] Révigny of the School of Orléans expressed doubt as to whether the action should be rejected, in view of the fact that the *dominus* might not have been of sound mind (*sani capitis*), or that the prohibition might have been expressed orally but not as a reflection of the real wish of the *dominus* (*prohiberet ore et non prohiberet corde*).[470] The commentators were, on the whole, reluctant to deviate from the Roman rejection of an action *domino prohibente*,[471] but the French exponents of the European *ius commune* generally had little difficulty in motivating the granting of an action to the *gestor* under such circumstances. Hence Molinaeus suggests that the *gestor* should have an *actio in factum*,[472] while Pothier's name for the action is the *action générale in factum*, based on the general principle of "natural equity" that no one should be enriched at the expense of another.[473]

Among the German authorities of the pre-codification period there seems to be a surprising reluctance to grant an action, based on unjustified enrichment or otherwise, to the *gestor* who has acted *domino prohibente*.[474] This reluctance is also encountered among the Roman-Dutch writers insofar as certain of them adhere to the princi-

ple of C 2.18.24 and refuse an action,[475] whereas others, including the highly authoritative Voet and Groenewegen, are prepared to grant an action for recovery of necessary and useful expenses on the basis of unjustified enrichment, as in the case of the mala fide gestor or mala fide possessor.[476]

In South African case law there were, initially, divergent views as regards the legal position of the gestor who had acted domino prohibente. The report of an early Cape decision, Ryneveld v The Wine Depot,[477] appears under the laconic heading, "A 'negotiorum gestor' suffered to appear in court,"whereafter the heading is explained in the following way:

> "The Court allowed him to appear in that capacity solely in consequence of the consent of the other party and by no means admitted that he had any right to appear in that capacity if any objection had been made to his so doing."

From this portion of the report the inference may be made that the Court would not have allowed an action had the gestor acted contrary to the prohibition of the dominus.

A similar approach appears from the case of Union Bank

v Beyers; Union Bank v Du Toit,[478] in which the following dictum occurs:

> "The doctrine that a person can act as a trustee or mandatary, or occupy some similar relation towards another person who is sui juris against his will and without his consent, has no place, as far as I am aware, in our law."

In the matter of Colonial Government v Smith and Company,[479] however, the Court referred to the authority of Voet and Groenewegen in coming to the conclusion that the gestor indeed has an action for the recovery of his necessary and useful expenditure to the extent of the unjustified enrichment of the dominus:

> "Now the usual conception of a negotiorum gestor is one who, without express mandate, carries on the business, or who protects the property of another who is absent or who is incapable of acting for himself. As a rule, if the owner is present, or is unwilling or forbids the business being done, the unauthorised agent cannot force his services upon such owner. In this case the defendants, though protesting against being disturbed at their own magazines, seem to have recognised the desirability, if not the actual necessity, for a removal of their goods to a place of safety, and actually assisted the Government and took the benefit of their work. Voet, in his title De Negotiis Gestis, admits the general rule founded on the civil law to be that a person is not liable for expenses incurred against his consent, but he points out the injustice of allowing one person

to be enriched to the injury of another, and adds that nowadays it was admitted rather that moneys so expended could be recovered (3, 5, 11), and he adds that this view of the law was also held by Groenewegen and other Roman-Dutch jurists. Voet places such expenditure on a footing similar to that incurred by a <u>mala fide</u> possessor ... Here the Government could not justly be called <u>mala fide</u> possessors, but at all events they ought not to be considered in a worse position than such a possessor would be in. The Government preserved the property of the defendants at a time when they were unable to deal with it, and under the circumstances I do not think the Government is barred from recovering the amount necessarily and usefully expended on defendants' behalf by the protest which was made by them more as a matter of form. The work had to be done, and it was done by plaintiffs at the least possible cost, and without any profit to the Government. The defendants are the richer for the expenditure, in that they have been saved incurring the expenses themselves, and their property has been preserved to them thereby. The claim is certainly an equitable one, and in my opinion our law, possibly differing from English common law, allows the outlay to be recovered."

There seems to be little doubt that the action awarded to the <u>gestor</u> in this instance is, in fact, the extended <u>actio negotiorum gestorum</u> functioning as an enrichment action. The parallel drawn between the <u>gestor</u> and the <u>possessor</u> requires little elucidation.[480]

In <u>Odendaal v Van Oudtshoorn</u>,[481] the Court <u>obiter</u> voiced

some doubt as to whether modern South African law would be amenable to granting an action to the gestor who has acted domino prohibente. After referring to the different opinions obtaining in Roman-Dutch law, the Court suggested:[482]

> "Dit is te betwyfel of 'n Hof vandag nog bereid sal wees om sover te gaan as Groenewegen en andere wat 'n aksie tot beskikking van 'n gestor gestel het wat teen die uitdruklike verbod van die dominus gehandel het."[483]

Any doubts which may have arisen as a result of the said obiter dictum have been totally dispelled by the recent decision in Standard Bank Financial Services Ltd v Taylam (Pty) Ltd,[484] a case in which a gestor had paid another's debt for his own benefit (sui lucri causa) and contrary to his express wishes (domino prohibente). After a thorough review of all the authorities, the Court had no hesitation in finding that the gestor had an action against the dominus, on the basis of the latter's enrichment, but it added the proviso that indiscriminate involvement in the affairs of another is not acceptable unless it is necessary for the purpose of doing "justice between man and man" and there is "just cause" for disregarding the wishes of the dominus. The Court expressed its view in this regard in the following manner:[485]

> "It has been contended that the granting of an ac-

tion on the grounds of unjust enrichment where the *gestor* has *sui lucri causa* meddled in the *domini*'s affairs against his expressed wishes is a very wild and unbridled horse to saddle. This, in fact, is not so. The horse may be a bit wild but it is certainly not unbridled. The circumstances in which the payment was made contrary to the wishes of the *dominus* are always an important factor in determining whether the payment was or was not justly done. The law does not allow rights to be acquired by meddling indiscriminately in the affairs of another, but meddling is allowed in circumstances where such meddling is necessary in order to do justice between man and man ... There was not a gratuitous interference in the affairs of the *dominus*. The interference took place to give proper effect to a contract which the *dominus* had entered into with the *gestor*. Had the *gestor* not acted *sui lucri causa*, but to give effect to the contract which the *dominus* had entered into with a third party, the *negotiorum gestorum* relationship could well have been created. It is this link that allows the equitable action to arise in the shadow of the *actio negotiorum gestorum contraria*. This link is also a portion of the bridle that prevents indiscriminate or gratuitous meddling in the affairs of another in own interest against the expressed wishes of the other, it is even more important that the meddling should not be gratuitous, but that both parties should have a real interest in the matter that is meddled with. It is not only the meddling that must not be gratuitous, but there must not be a gratuitous disregard of the wishes of the *dominus*. In fact, there must be some just cause for disregarding his wishes. The public spiritedness and the good neighbourliness that occasions the concern for the affairs of another must be present to bring the matter

within the ambit of the actio negotiorum gestorum contraria."

It is respectfully submitted that the aforesaid proviso is not supported by common law or other authority, unless, of course, it is intended to qualify the gestio domino prohibente with reference to the utiliter coeptum requirement.[486] But then again, even if the gestor's conduct were inutiliter, the extended actio negotiorum should still be available, provided that the dominus has been unjustifiably enriched and the gestor impoverished by the negotiorum gestio. It is hence suggested that our courts should be wary to apply any qualifications to the nature of the gestio domino prohibente other than to require unjustified enrichment of the dominus at the expense of the gestor, in which event the gestor should be entitled to recover his necessary and useful expenditure to the extent of such unjustified enrichment.[487]

5.6 The Actio Negotiorum Gestorum as a Possessory Remedy

In the discussion of the mala fide administration of the affairs of another for the benefit of the gestor and the administration of the affairs of another in the bona fide belief that they are the gestor's own (referred to respectively as mala fide and bona fide gestio),[488] it

was pointed out that a considerable number of the old authorities applied the extended actio negotiorum gestorum, arising from these cases of "extraordinary" or "abnormal" negotiorum gestio, as a remedy for recovery of necessary and useful expenses incurred by the possessor, albeit bona fide or mala fide.[489] This development is also prevalent in modern South African law, although it has not been characterised by clarity of exposition.

It is generally accepted that the bona fide or mala fide possessor or occupier has an action for compensation where he has expended money on material in preserving or improving the movable or immovable property of another. Where the expenses were necessary, the possessor or occupier is usually entitled to reimbursement of all such expenses, and where they were useful, he is entitled to either such expenses, or the extent to which the value of the property has been enhanced, whichever is the lesser.[490] In general, if such possessor or occupier is in possession of the property in question, he has a lien (ius retentionis) as against the owner of the property until his claim for compensation has been satisfied, irrespective of whether the improvements effected in respect of the property or the preservation thereof emanated from an agreement between the possessor or occupier thereof and a third party.[491]

The principles relating to compensation due to the possessor

or occupier are based on the general principle that no one should be unjustifiably enriched at the expense of another. These principles have also found their way into the sphere of locatio conductio operis and operarum: the person who has rendered incomplete or defective performance in terms of such a contract is usually granted an enrichment action for the recovery of compensation for the work in fact done or services in fact rendered.[492]

The link between possession and negotiorum gestio has come to the fore in a number of South African decisions insofar as the principle has evolved that the gestor, just as a possessor, who has effected improvements to the property of another, has an action for compensation for such improvements.[493] In Nortjé en 'n Ander v Pool N O[494] the Court referred to the common law development in this regard and held that the bona fide gestor should be granted an utilis actio negotiorum gestorum contraria (the extended actio negotiorum gestorum) with a view to claiming compensation for improvements effected by him to the property of another.[495] This is confirmed in Gouws v Jester Pools,[496] in which matter it is suggested that the extended actio negotiorum gestorum may be made available to a bona fide occupier also.

A further link between possession and negotiorum gestio appears from the case of New Club Garage v Milborrow and Son,[497] in which the Court held that a garage owner

who had repaired the motorcar belonging to another person, was a *gestor* in relation to such person and that he "as *bona fide* and innocent possessor of the car, had a lien on the car resting on the equitable principle that no one shall be enriched at the expense of another."[498]

When the relationship between possession and *negotiorum gestio* is observed more closely, it would appear that in all cases where a possessor has effected improvements to the property of another, he may be considered a *gestor* in respect of such person, subject to the proviso, however, that his action is not the ordinary *actio negotiorum gestorum*, but the extended form of this action in its guise as an enrichment action. It is furthermore immaterial whether the *gestor* is a *bona fide* or *mala fide* possessor or occupier and whether the property improved is movable or immovable. All cases where improvements are thus effected give rise to "abnormal" or "extraordinary" *negotiorum gestio* for which the extended *actio negotiorum gestorum* is available with a view to claiming reimbursement or compensation for necessary and useful expenses.

There are indications that the field of application of the extended *actio negotiorum gestorum* as an enrichment action may be even further extended by serving as a remedy, not only for the possessor or occupier who has

128/...

effected improvements to the property of another, but also for the contractor or sub-contractor in analogous cases arising from locatio conductio operis or operarum.[499] In this way the action may eventually aspire to an almost general application and hence diminish the necessity of introducing a general enrichment action, whether it be by statute or by judicial interpretation.

5.7 Negotiorum Gestio and Indirect Enrichment

During the course of the discussion of the administration of the affairs of another in the bona fide belief that they are the gestor's own,[500] attention was drawn to an interesting phenomenon referred to as "indirect enrichment" or "third party enrichment." As pointed out, this relates to the situation which arises when A, at the instance of B performs services for C (the "third party") without agency, stipulatio alteri or a similar legal institution being present. Should A, for some reason or another, not be able to recover his expenses or damages from B, while it is clear that A has been impoverished and C unjustifiably enriched, will A be entitled to claim from C on the basis of unjustified enrichment? This question has led to a lively debate among legal academics. Thus Honoré declares that South African law indeed "recognises some cases of third party enrichment," although the present legal situation is "somewhat anamolous,"[501] while

De Vos strenously denies the existence of or justification for such an action on the grounds, inter alia, that it is in conflict with the "at-the-expense-of" requirement for an enrichment action and is likewise in conflict with the principles relating to paritas creditorum.[502]

As pointed out in the said discussion of the bona fide gestor, Salycetus and Baldus among the commentators and certain representatives of the German legal development were prepared to grant an action under the circumstances subsisting in the so-called "indirect enrichment" cases.[503] Similarly certain Roman-Dutch authorities, such as Huber, Van Bynkershoek, Westenberg and Schrassert, appear to be amenable to granting an action on equitable grounds under such circumstances.[504] Although the authorities do not say so in so many words, it is clear that C should be regarded as the dominus and A as the gestor in an "abnormal" or "extraordinary" negotiorum gestio relationship, and that the enrichment action available to A against C is the extended actio negotiorum gestorum.

In modern South African law there has not, to date, been a case directly in point on the question of whether the extended actio negotiorum gestorum should be granted in an "indirect enrichment" situation. Yet there have been a number of decisions in which the same result has been achieved or in which it should have been achieved.

Hence in <u>New Club Garage v Milborrow and Son,</u>[505] B hired a motor car from C. While the car was still in B's possession, it broke down, and B instructed A to repair it. A did so under the impression that B was the owner. Thereafter B disappeared from the scene and A established that C was in fact the owner of the car. The Court held that A was a <u>negotiorum gestor</u> in regard to C and that he had both an action for recovery of all his necessary and useful expenses and a lien on the car until such time as he had been paid therefor, as appears from the following portion of the judgement:[506]

> "I am clearly of opinion, however, that up to the time of respondent's discovery that appellant was the owner of the car, his (respondent's) position was that of a <u>negotiorum gestor</u>. He took charge of the car <u>bona fide</u> in the absence of the owner, without any mandate express or implied from the owner, and for the owner's benefit, and with the intention of holding the owner liable for all legitimate expenses connected with his care and custody. It was not essential that he should know who the owner was, provided that he undertook the business for the owner, whosoever he might ultimately turn out to be ...And the owner is bound to reimburse the <u>negotiorum gestor</u> for all useful and necessary expenses incurred by him in connection with his administration of the owner's business, and to indemnify him against all obligations incurred by him on account of the same, as well as against all losses sustained by him in connection therewith.... And for all the expenses, both useful and necessary, the respondent, as <u>bona fide</u> and innocent possessor of the car, had a lien on

the car resting on the equitable principle that no one shall be enriched at the expense of another."

Although the Court appears to suggest, in the quoted passage, that A may have been an ordinary gestor, it is clear that he was in fact involved in the extraordinary form of negotiorum gestio so that the action, which is based on the general enrichment principle can be no other than the extended actio negotiorum gestorum.[507]

In the matter of Knoll v S A Flooring Industries Ltd[508] C contracted with B, a contractor, to complete the building of a house. B subsequently entered into a sub-contract with A to do a portion of the work. When B refused to pay A in terms of the sub-contract, A claimed from C on the basis of negotiorum gestio. The Court dismissed the claim because it had not been proved that C had been unjustifiably enriched at the expense of A. The inference which may be made from this decision is that, if unjustified enrichment had been proved, the extended actio negotiorum gestorum may have been available to A.[509]

The development of the extended actio negotiorum gestorum in cases of indirect enrichment was dealt a blow in the matter of Gouws v Jester Pools (Pty) Ltd.[510] In that case A, a contractor, entered into an agreement with B, in terms of which he undertook to construct a swimming pool on what he believed was B's property. After the work had been completed, it appeared that C was in fact

the owner of the property in question and not B. B had, however, left the country so that A's contractual claim against him was useless. In an action by A against C, a magistrate's court found for A on the ground that C had been unjustifiably enriched at the expense of A. On appeal explicit recognition was given to the "*negotiorum gestio* giving rise to an action based on enrichment,"[511] but the appeal was upheld on the basis that C's enrichment had not been "at the expense of" A. It is respectfully submitted that this decision is incorrect, inasmuch as *negotiorum gestio* and unjustified enrichment are not dependent on any contractual relationship between the enriched and impoverished parties or the *dominus* and the *gestor*. The very essence of these "quasi-contracts" is that no *consensus* or similar relationship between the parties is required for the establishment of reciprocal rights and duties. The simple question to be asked is whether C has been unjustifiably enriched at the expense of A, regardless of any contractual relationship which either of these parties may have had with an intermediary (B in our example). Obviously, if A is able to recover from B in terms of a contractual relationship and C, in turn, is obliged to perform in respect of B, there will be no room for a claim based on unjustified enrichment. In a case such as the present, however, where B has disappeared from the scene so that C will no longer have to make performance to him, while A is unable to claim from him, the unjustifiable enrichment of C and the unjustifiable impoverishment of A, arising from the same *factum*,

namely the constructing of a swimming pool, are painfully clear. There can be no doubt that A should have been allowed to recover from C, by means of the extended *actio negotiorum gestorum*, to the extent of the latter's unjustified enrichment.[512]

A step in the right direction, it is respectfully suggested, was taken in the matter of *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons*.[513] The facts were, briefly, that C sold B certain goods on hire-purchase subject to the provision that B was not, without C's permission, to store the goods with any third party on terms which might entail the payment of storage fees. In conflict with this provision, B concluded an agreement with A in terms of which the goods would be stored in A's warehouse at a certain fee for removal and storage of the goods. At all relevant times A *bona fide* believed that B was the true owner of the goods. When C subsequently laid claim to the goods, A refused to hand them over before being reimbursed for his removal and storage expenses. C made payment under protest and later unsuccessfully sued A for repayment of the amount thus paid. On appeal, the Court considered the debate regarding the so-called "at the expense of" requirement for an enrichment action and suggested that this requirement was not indisputable, but that it was not necessary to decide the question since the issue before the Court was not the enrichment action but a lien

raised as a defence against C's <u>rei vindicatio</u>. In regard to the lien the Court held that an essential requirement for such lien was that the owner should be unjustifiably enriched at the expense of the possessor who had incurred necessary and useful expenses in respect of the goods in question. The Court had no doubt whatever that C, in the present case, had been unjustifiably enriched at the expense of A, despite the fact that the expenditure had been incurred in terms of a valid contract between A and B.[514]

The logical inference to be drawn from the <u>Brooklyn House</u>-decision is that, insofar as there is no "at the expense of "requirement in the case of an enrichment lien, it can certainly not be argued that such requirement should be exacted in the case of an enrichment action, since the basic principles applicable to the lien and the action are scarcely distinguishable. The said decision confirms irrefutably that enrichment actions, and hence the extended <u>actio negotiorum gestorum</u>, are not dependent on any contractual relationship between the enriched and the impoverished parties and are likewise not affected by any contractual relationship which might have existed between the enriched party and a third party. The question whether there has been unjustified enrichment is thus a question of fact, to be determined without reference to any preceding contractual relationship between the parties, subject, however, to the proviso mentioned above that,

if A is able to recover from B in terms of a contractual relationship and C, in turn, is contractually obliged towards B, an enrichment action will not be available to A against C. It will hence be a subsidiary action which will come to the fore where B has disappeared from the scene and the enforcement of rights and obligations in respect of B has become impossible or totally academic.

De Vos suggests that the granting of relief to the impoverished party (A in our example) against the unjustifiably enriched party (C in our example) is in conflict with the paritas creditorum rule.[515] It is pointed out in this regard that the question of parity of creditors usually comes to the fore only when the debtor is in insolvent circumstances. If the enriched party in an unjustified enrichment situation should indeed be insolvent, the impoverished party would, it is submitted, be in the same position as any other non-preferent creditor. The mere fact that he is granted an enrichment action does not imply that he should be given preference as against any other creditor. It is hence submitted that there are no grounds for suggestion that the granting of the extended actio negotiorum gestorum to A against C, where the intermediary, B, has disappeared from the scene and can no longer claim or be sued, is in conflict with the rule of paritas creditorum.[516]

In view of the aforesaid considerations it is suggested

that, in all cases of "indirect" or "third party" enrichment, where the intermediary party, B, has fallen away and can no longer sue or be sued, A, as gestor, will be able to claim directly from C, as dominus, reimbursement of all his necessary and useful expenses incurred with regard to the improvement or preservation of C's property. The action in such a case is the extended actio negotiorum gestorum and the amount which can be claimed is limited to the extent of C's actual enrichment.

6 COMPARATIVE SURVEY OF NEGOTIORUM GESTIO IN VARIOUS FOREIGN LEGAL SYSTEMS

It is not the purpose of this chapter to present a detailed discussion of negotiorum gestio in foreign law. As mentioned in the introduction to this work, it is of considerable interest to compare the development of this institution in a number of "Romano-Germanic" or "civil law" legal systems with that of the comparable institution or institutions in the so-called "Anglo-American" or "common law" legal systems. The three most popular "civil law" systems, dealt within most South African comparative studies, are those of France, the Netherlands and Germany. Italian law, being closely related to that of France, and Swiss and Austrian law, being more closely related to German than to French law, are always of interest to the comparative lawyer. The law of Scotland

is again of particular interest to South African lawyers because of its basically "civil law" background which has undergone some change as a result of the influence on it of the English common law.

English law, as will be pointed out in more detail below, has no institution termed negotiorum gestio but, in its characteristically casuistic way, the law of England has developed equivalent institutions which are strongly reminiscent of the Roman institution. Of some interest in this regard is how these equivalent institutions have been dealt with in the law of the United States of America which, though of English common law origin, has tended, in certain circumstances, to adopt a different approach to legal development in general.

The legal systems which are thus surveyed in this chapter are those of France, the Netherlands, Germany, Italy, Switzerland, Austria, Scotland, England and the United States of America. The intention of the survey is not so much to describe the relevant principles obtaining in the various legal systems, as to attempt to extract from these systems practical suggestions with a view to improving or supplementing the South African law relating to negotiorum gestio.[517]

6.1 France

In the French *Code civil* (CC) of 1804, *negotiorum gestio* (*la gestion d'affaires*) is dealt with in sections 1372-1375 as one of two quasi-contracts, the other being payment of that which is not due (*le paiement de l'indû*) or *solutio indebiti*, as it is better known in Roman-Dutch law.[518]

The said sections of the *Code civil* read as follows:

> "Art. 1372. Lorsque volontairement on gère l'affaire d'autrui, soit que le propriétaire connaisse la gestion, soit qu'il l'ignore, celui qui gère contracte l'engagement tacite de continuer la gestion qu'il a commencéé, et de l'achever jusqu'à ce que le propriétaire soit en état d'y pourvoir lui-même; il doit se charger également de toutes les dépendances de cette même affaire.
>
> Il se soumet à toutes les obligations qui résulteraient d'un mandat exprès que lui aurait donné le propriétaire.
>
> Art. 1373. Il est obligé de continuer sa gestion, encore que le maitre vienne à mourir avant que l'affaire soit consommée, jusqu'á ce que l'héritier ait pu en prendre la direction.
>
> Art. 1374. Il est tenu d'apporter à la gestion de l'affaire tous les soins d'un bon père de famille.
>
> Néanmoins les circonstances qui l'ont conduit à se charger de l'affaire, peuvent autoriser le juge à modérer les dommages et intérêts qui résulteraient des fautes ou de la négligence du gérant.

Art. 1375. Le maitre dont l'affaire a été bien administrée, doit remplir les engagements que le gérant a contractés en son nom, l'indemniser de tous les engagements personnels qu'il a pris, et lui rembourser toutes les dépenses utiles ou nécessaires qu'il a faites."

In translation, the said sections can be expressed thus:

"Art 1372. When someone voluntarily manages the affair of another, regardless of whether the owner knows of the gestio or not, the gestor tacitly binds himself to continue with the gestio that he has initiated and to completeit, at least to the point where the owner is in the position to do so himself. The gestor is likewise required to take charge of all ancillary matters arising from the particular affair he is managing.

In acting as he does, the gestor submits himself to all the obligations which would have resulted from an express mandate that the owner might have given him.

Art 1373. He is obliged to continue with his management, even if the dominus should have died prior to the completion thereof, until such time as the heir is in a position to take over.

Art 1374. In managing the affair he is required to

exercise all the care of a good father of a family (*bonus paterfamilias*).

Nevertheless the circumstances which prompted him to take charge of the affair can be taken into account by the judge with a view to moderating the damages, or loss of interest which may result from the fault or negligence of the *gestor*.

Art 1375. The *dominus* whose affair has been well managed must fulfil the obligations which the *gestor* has contracted in his name, indemnify him against all personal obligations he has undertaken, and reimburse him for all the useful or necessary expenses he has incurred."[519]

By virtue of judicial and legal academic interpretation in accordance with the requirements of practice, the French law relating to *negotiorum gestio* has developed beyond the fairly narrow ambit of the said sections of the *Code civil*. To a large extent the same principles apply as in South African law, while certain innovations occur which may conceivably be of great interest to the South African lawyer.[520]

From section 1372 CC the requirement that the *gestio* should be voluntary is a reminder of the *gestor volun-*

tarius or spontaneus which is frequently encountered in the European ius commune.[521] This is one of the distinctive features of negotiorum gestio as opposed to mandate. In the definition of negotiorum gestio in French law the emphasis is placed on voluntary management of the affairs of another without express or tacit mandate.[522] It is clear that the affairs should be those of another[523] but, otherwise than in South African law, it is not required that the dominus should have been unaware of the management of his affairs, as appears from section 1372 CC (soit que le propriétaire connaisse la gestion soit qu'il l'ignore). In general, however, French commentators are agreed that, where the dominus is aware of the gestio, such gestio is transformed, by express or tacit mandate (depending on the circumstances) into a contract of mandate, as is the case where the dominus ratifies the gestio.[524]

As in South African law, the affair may be of virtually any nature and appear in a variety of forms. In this regard it is said that the affairs may be not only administrative (actes d'administration) but also dispositive (actes de disposition), such as the sale of movables or construction of a building.[525]

There is no objection to the parties (dominus and

gestor) having been previously involved in a contractual or similar legal relationship (*rapports juridiques antérieurs*). Provided the *gestio* does not emanate directly from the contractual or other obligations and can be judged independently of the former relationship, it will be a valid *gestio*. An example of such *gestio* would be where a *mandatarius* has exceeded the limits of his mandate: if his further (unauthorised) acts comply with the requirements of *negotiorum gestio*, he will have the remedies of the *gestor* against the *mandator* (in his capacity of *dominus*).[526]

There is similarly no objection where a *gestor* manages partly his own affair and partly that of another (as in the case of co-owners), or where he manages the affairs of one person in the mistaken belief that they are those of another.[527]

It is significant that no *animus negotia aliena gerendi* is specifically required in terms of the *Code civil*. This led Toullier to believe that there was no such requirement.[528] In general, however, French commentators suggest that the *animus* is indeed a prerequisite for the *actio negotiorum gestorum* in its ordinary sense.[529] Where the *gestor* had an intention to donate or not to claim reimbursement in respect of the expenses incurred by

him (*intention libérale*), he would, of course, not make use of the said action.[530]

The requirement of *utiliter coeptum* appears to relate to section 1375 CC (*bien administrée*), "well managed," and French law has followed the Roman precept that the administration should be "properly", "reasonably" or "well" undertaken at the time of the *gestio*, regardless of whether or not any advantage has accrued to the *dominus* from such *gestio*. The authorities do not appear to emphasise the commencement of the *gestio*, so that it would seem that the *coeptum*-qualification of the *utiliter*-requirement does not, in fact, apply in French law.[531]

Among the duties of the *gestor*, his obligation to complete the *gestio* is given great emphasis, insofar as it is dealt with in sections 1372 and 1373 CC. In these sections it is stated that the *gestor* tacitly undertakes to continue the *gestio* he has commenced until such time as the *dominus* himself, or, if the *dominus* has died, his heir, is able to take over. The *gestio* includes managing all the affairs or doing all the acts which are dependent on the *gestio* as a whole.[532]

The *Code civil* does not stipulate, as South African law does, that the *gestor* should deliver that which

has accrued or that he should render an account of his *gestio*. With reference to the concluding portion of section 1372 CC, however, namely that the *gestor* has the same obligations (*mutatis mutandis*) as the *mandatarius*, French law has apparently included these obligations in the general obligation that the *gestor* should render an account (*rendre compte*) of the *gestio*.[533] The relevant section 1993 CC requires that the *mandatarius* should account for his administration and for all that he has received as a result of his mandate, even if that which he has received was not due to the *mandator*.[534]

Section 1374 CC deals with the liability of the *gestor*. In managing the affair of another he is required to exercise the care and diligence of the "good father of a family," that is the *diligentia* of the *bonus et diligens paterfamilias*, as known to Roman law. He is hence liable for *culpa levissima* or *culpa levis in abstracto*, to once more use the Roman terminology. The qualification to section 1374 CC brings the liability of the *gestor* close to that applicable in South African law: the general circumstances prevailing at the time of the *gestio* and which prompted the *gestor* to act as he did, may be taken into account in deciding to what extent the *gestor* should be held liable for loss or damage. This may be translated into the simple liability

of the reasonable man under all the circumstances.[535]

In section 1375 CC the obligations of the *dominus* (*maître*) are dealt with. If the *gestio* has been *utiliter* (*bien administrée*) the *dominus* must fulfil the obligations arising from contracts concluded by the *gestor* in the name of the *dominus*, and must likewise indemnify the *gestor* against the obligations that the *gestor* has personally contracted during the course of the *gestio*. Contracts concluded in the name of the *dominus* presuppose a form of agency or representation, which is in fact in conflict with the nature of *negotiorum gestio* as a form of unauthorised representation.[536]

For the rest the *dominus* is bound to reimburse the *gestor*, as in South African law, for all the necessary and useful expenses incurred by him in the course of the *gestio*. By virtue of the extension of the application of the mandator's obligations, the *dominus* is obliged, in terms of section 2000 and 2001 CC, to make good damage suffered by the *gestor* and to pay interest on the amounts advanced to the *gestor*, for the purposes of the *gestio*, as from the date that the advances were confirmed.[537]

As in South Africa, the *gestor* is not entitled to

remuneration, although there has been a movement away from this strict rule insofar as, where a professional *dominus* renders professional services by way of *negotiorum gestio*, the fee which he would otherwise have been able to charge, is reckoned as an expense or damage which should be made good.[538]

Finally, likewise as in South Africa, the *gestor* is entitled to a lien (*droit de rétention*) in respect of the thing to which the *gestio* has been directed, until such time as he has been recompensed for his expenses, damages or interest.[539] It hence appears that, in French law, the rights of the *gestor*, as the counterpart of the obligations of the *dominus*, largely coincide with those pertaining in South African law.[540]

In certain cases where the prerequisites for the ordinary *actio negotiorum gestorum* are not complied with, French law, as is the case in South Africa, makes provision for an *actio de in rem verso* based on unjustified enrichment. In this regard the concept *gestion d'affaires anormale* is sometimes encountered and it would appear that the *actio de in rem verso* made available to the *gestor* in such circumstances is on all fours with the extended *actio negotiorum gestorum* of Roman-Dutch and South African law. Hence, where the *dominus* or *gestor* is

147/...

still a minor, his liability is limited to the extent of his unjustified enrichment. Similarly, where a gestor acts sui lucri causa in his own interests, or where he manages the affairs of another in the bona fide belief that they are his own, the actio de in rem verso, just like the extended actio negotiorum gestorum, is available to him to claim the unjustified enrichment of the dominus.[541]

Where the dominus has prohibited the intervention in his affairs, French law permits no action: indeed, the gestor who acts domino prohibente may very well be held delictually liable for any damage or injury arising from his gestio. Yet, in certain cases, as Colin-Capitant point out, the opposition of the dominus may be considered to be of no effect, for instance where the dominus has prohibited an act which he himself is legally liable to perform, as in the case where a hotelier provides accommodation to a married woman in the face of her husband's opposition where it is clear that the husband is not complying with his obligation to provide maintenance to his wife.[542] In other cases the indication is that, also where the dominus is prohibens, an enrichment action in the form of the actio de in rem verso is available to the gestor.[543]

Section 1375 CC is important not only because it sets out the obligations of the *dominus* in a *negotiorum gestio* relationship, but also because it introduces a form of "indirect enrichment" such as that which has developed in South African law.[544] This comes to the fore where the *gestor* concludes an agreement with a third party in his own name but is unable to perform the obligations arising from it. The French commentators are not *ad idem* as to whether the third party may, as *gestor* in his own right, act directly against the *dominus*, yet weighty authorities such as Aubry-Rau and Planiol-Ripert suggest that the third party should be able to sue the *dominus* by way of the *actio de in rem verso*, the enrichment action which, as we have seen, may be equated with the extended *actio negotiorum gestorum* granted in similar unjustified enrichment situations.[545]

6.2 Netherlands

The Burgerlijk Wetboek (BW) of 1838 deals with *negotiorum gestio (zaakwaarneming)* in sections 1390 to 1394:

> *"Art. 1390. 1. Wanneer iemand vrijwillig, zonder daartoe last te hebben bekomen, eens ander zaak met of zonder deszelfs weten waarneemt, verbindt hij zich daardoor stilzwijgend om de waarneming voort te zetten en te voltooijen, tot dat degene wiens belangen hij waarneemt in staat zij om in die*

zaak zelf te voorzien.

2. Hij moet zich insgelijks belasten met al hetgeen tot die zaak behoort.

3. Hij onderwerpt zich aan alle de verpligtingen welke hij zoude hebben moeten nakomen, ingeval hij bij eene uitdrukkelijke lasgeving was gemagtigd geworden.

Art. 1391. Hij is verpligt met zijn beheer voort te gaan, al ware het ook dat degene wiens belangen hij waarneemt mogt komen te overlijden voor dat de zaak is ten einde gebragt, tot tijd en wijle de erfgenaam dit beheer op zich kan nemen.

Art. 1392. Hij is gehouden opzigtelijk dat beheer de pligten van een goed huisvader te vervullen.

2. Niettemin is de regter bevoegd om de vergoeding der kosten, schaden en interessen, welke door schuld of nalatigheid des waarnemers mogten veroorzaakt zijn, te matigen, naar gelang der omstandigheden die hem tot de waarneming der zaak bewogen hebben.

Art. 1393. Degene wiens belangen door een ander behoorlijk zijn waargenomen, is gehouden de verbindtenissen, door den waarnemer in zijnen naam aangegaan, na te komen, denzelven schadeloos te stellen wegens alle persoonlijke door hem aangegane verbindtenissen, en aan hem alle nuttige of noodzakelijke gedane uitgaven te vergoeden.

Art. 1394. Hij die eens anders zaak zonder lastgeving heeft waargenomen, is tot geen loon geregtigd."

The said sections may be translated as follows:

"1390. 1. When a person voluntarily, without being authorised thereto, manages the affair of another with or without such person's knowledge, he tacitly obliges himself thereby to continue with and to complete the management, until the person whose interests he is managing is able himself to make arrangements in regard to the affair.

2. He is likewise required to take over the management of all aspects relating to the affair.

3. He subjects himself to all the obligations with which he would have had to comply if he should have been authorised by express mandate.

1391. He is obliged to continue with his management, even should the person whose interests he is managing die before the completion of the affair, until the heir is able to take over the management himself.

1392. 1. In regard to the management he is bound to fulfil the duties of the good father of a family.

2. The judge is nevertheless empowered to reduce the amount of compensation of costs, damages and interests, which may have been caused by the fault or negligence of the gestor, in accordance with the circumstances which may have induced him to undertake the management.

1393. The person whose interests have been properly managed by another, is obliged to perform the obligations incurred in his name by the gestor, to

indemnify him against all obligations incurred by him in his own name, and to compensate him for all useful or necessary expenses incurred.

1394. The person who has managed the affairs of another without being authorised thereto, is not entitled to any renumeration."

Otherwise than in the earlier draft codes of the Netherlands, the quoted sections of the BW are virtually a Dutch translation of the French _Code civil_, with the exception of section 1394 BW which does not appear in the French code.[546] In the draft civil code which is envisaged for the Netherlands (_Ontwerp voor een Nieuw Burgerlijk Wetboek_) (NBW), _negotiorum gestio_ is dealt with in sections 6.4.1.1 to 6.4.1.5. To a large extent the compilers of the draft have broken away from the French tradition and attempted to establish a typically Dutch codification of the principles relating to _negotiorum gestio_. The proposed sections improve vastly on the present law, although they can clearly not cover all the problem areas on the subject.[547] On the other hand, the decisions of the _Hoge Raad_ and other tribunals in the Netherlands have done much to amplify the present BW and will doubtless continue to do so when the NBW comes into operation.[548] Asser-Rutten define _negotiorum gestio_ as follows:[549]

"_Zaakwaarneming is de handeling welke iemand op redelijke grond stelt, met de bedoeling daardoor de belangen van een ander voor diens rekening_

en risico te behartigen, zonder de bevoegdheid daartoe aan een rechtshandeling of aan de wet te ontlenen."

This definition introduces the animus negotia aliena gerendi although the BW does not make specific provision for this requirement.[550] It was in fact introduced by virtue of a decision of the Hoge Raad in 1891,[551] whereafter it was generally accepted as a prerequisite for liability in terms of the actiones negotiorum gestorum. It is not, however, necessary that the gestor should know who the dominus is.[552] In this regard Asser-Rutten point out that the management of the affairs of another means that it should be done in the interest, for the account and at the risk of the dominus.[553]

For the rest, the requirements of negotiorum gestio as set forth in the relevant sections of the French Code civil appear to be reflected, to a greater or lesser extent, in the BW. Thus it is required that the gestio, albeit of a legal or purely factual nature, should relate to the affairs of another. This includes the case where the affairs are partly those of the gestor and partly those of another.[554] It is not required that the dominus should be unaware of the gestio, but, if he should be aware of it and do nothing to prevent it, he may be considered to have given the gestor a tacit mandate to continue with the gestio. This is then the explanation of the word vrijwillig ("voluntarily") as it

appears in section 1390 BW. It is stated, in this regard, that the *gestio* should not arise from a legal act (such as a contract or mandate) or statutory provision.[555]

The *utiliter coeptum* requirement of the *ius commune* in South African law does not occur in so many words in the *Burgerlijk Wetboek*, but the *utiliter* portion thereof may be inferred from the word *behoorlijk* ("properly") which appears in section 1393 BW.[556] In the above quoted definition of Asser-Rutten the *utiliter* concept is reflected in the words *op redelijke grond*, which simply implies that the *gestio* should be reasonably undertaken. In their commentary on this requirement Asser-Rutten suggest that a certain degree of necessity (*een zekere noodzaak*) should be present in order to obstruct the officious intermeddler.[557] Yet they voice the opinion that the improper intervention (*onbehoorlijke indringen*) in the affairs of another without good cause is wrongful and hence no *negotiorum gestio*.[558] It is clear that the court should decide, in accordance with the circumstances, whether the *gestio* has been reasonable or not.[559] It is not necessary that the *dominus* should himself have been able to manage the affair or affairs in question.[560] Nor is it required that the outcome of the *gestio* should be successful: inasmuch as the risk of the *gestio* passes to the *dominus*, all that is required is that the *gestio*

should have been reasonable at the time of execution thereof. As in French law, however, it is not stated that the <u>gestio</u> should be <u>utiliter coeptum</u>, that is reasonable at the time of commencement of the <u>gestio</u>.[561]

In regard to the duties of the <u>gestor</u>, sections 1390 and 1391 BW oblige the <u>gestor</u>, as is the case with the corresponding sections of the French code, that he should continue and complete the <u>gestio</u> until the <u>dominus</u> or his heir is in a position to take over the management of the affair himself. All ancillary matters which arise from the <u>gestio</u> and are directly dependent thereon must likewise be managed. The <u>gestor</u> is, indeed, subject to all the obligations with which he would have had to comply had he been expressly authorised to manage the affair or affairs in question. The standard of liability applicable to the <u>gestor</u> is, as in French law, that of the <u>bonus paterfamilias</u>, as appears from section 1392 BW. The court has the power, however, to reduce the amount of compensation payable by the <u>gestor</u> for costs, damages or loss of interest suffered by the <u>dominus</u> as a result of the fault or negligence of the <u>gestor</u>, should the circumstances which prompted him to undertake the <u>gestio</u> warrant such reduction.[562]

Although the cited sections of the <u>Burgerlijk Wetboek</u> do not expressly stipulate the <u>gestor</u>'s duty to render an account of his administration or deliver up to the

dominus that which has accrued from the gestio, the third leg of section 1390 BW subjects the gestor to the obligations of the mandatary, in respect of whom such duty is indeed expressly stipulated.[563]

The rights of the gestor appear from section 1393 BW. If the gestio has been utiliter or properly (behoorlijk) undertaken, the dominus must fulfil the obligations arising from contracts concluded by the gestor in the name of the dominus and must indemnify the gestor in respect of obligations that the gestor has personally contracted in the course of the gestio. This section corresponds with section 1375 CC in that the reference to contracts concluded by the gestor in the name of the dominus suggests that the gestor has acted as an agent or representative of the dominus, a suggestion which runs counter to the nature of negotiorum gestio as the voluntary and unauthorised management of the affairs of another. For the rest, as in South African law, the gestor is entitled to be reimbursed for all the necessary and useful expenses incurred by him in managing the affairs of the dominus, subject thereto, as specified in section 1394 BW, that he is not entitled to any fee, salary or like form of renumeration for his services.[564] On the other hand, the gestor does have a right of retention (retentierecht) until he has been recompensed for his expenses and damages.[565]

The relationship between *negotiorum gestio* and unjustified enrichment in the law of the Netherlands has not developed or even come to the fore as in French or South African law. To a large extent the question has been academic, despite the fact that the *Hoge Raad* in 1959 decided, in the *Quint-Te Poel* case, that there is no general enrichment action in the Netherlands.[566] In the *Ontwerp voor een Nieuw Burgerlijk Wetboek* provision is made for the introduction of a general enrichment action,[567] but until such time as the *Ontwerp* comes into operation, solutions have to be found for cases of *negotiorum gestio* which do not comply with the prerequisites for an ordinary action, yet which require an action, at least on the basis of unjustified enrichment, in accordance with the equities of the particular case.[568]

In the most recent study of the relationship between *negotiorum gestio* and enrichment in Dutch law (with comparative references to French and German law), Mrs Biegman-Hartogh adopts the approach that no extended *actio negotiorum gestorum* or general enrichment action should be available to the *gestor* who has not complied with the prerequisites for *negotiorum gestio*, except in the case where he *bona fide* fulfilled the maintenance obligations of another under the impression and in the mistaken belief that they were his own. In this regard she points out that the "pseudo-gestor" who manages the affairs of

another *domino prohibente* is liable to the *dominus* on the ground of wrongful, delictual activity. If the *gestor* himself suffers loss or damage under such circumstances, he has only himself to blame.[569] This is, with respect, an over-simplification of the problem which may arise in the cases of *gestio domino prohibente* or *mala fide* and *bona fide gestio*, which occupied the minds of weighty Roman-Dutch authorities prior to the codification of Dutch law[570] and were not considered by the said author. Asser-Rutten, indeed, point out that in certain circumstances, the veto of the *dominus* may be ignored.[571] Pitlo is similarly of the opinion that the self-willed *dominus* should be protected against himself where it is clear that his good judgement has been impaired, subject thereto, however, that the self-righteous *gestor* should not be permitted to meddle at will in the affairs of another.[572] A number of authorities are, in fact, in favour of the granting of a general enrichment action to the *gestor domino prohibente*.[573] It is submitted that this is the correct approach and, until such time as the general enrichment action of the NBW comes into operation, the extended *actio negotiorum gestorum* of Roman-Dutch law should be applied, as advocated by Van Goudoever.[574] Similarly, in a case of *bona fide gestio*, where the *gestor* mistakenly believes he is managing his own affairs, and in the case of *mala fide gestio*, where the *gestor* acts in his own interests, certain authors are prepared to assist with an enrichment

action, albeit not the extended *actio negotiorum gestorum* of Roman-Dutch law.[575]

No reference is made in the Dutch authorities to an enrichment action in the case where a minor is *dominus* or *gestor* in a *negotiorum gestio* relationship, although no objection is raised to a minor's involvement, subject thereto that, where he concludes an agreement in his own name, as *gestor*, such agreement is voidable.[576]

Finally, reference should be made to the case of "indirect enrichment," which comes to the fore where a *gestor* in terms of section 1393 BW, concludes an agreement with a third party in his own name, but is unable to make performance. In a 1926 decision of the *Hoge Raad* it was held that the third party could not sue the *dominus* directly, but the same tribunal in 1931 allowed an action.[577] Although it was not said in so many words, the *ratio* for the granting of the action was clearly unjustified enrichment.[578] Until the general enrichment action of the NBW becomes operative law, the Netherlands may well take note of the possibilities of the extended *actio negotiorum gestorum* as developed in their pre-codification legal history.

6.3 Germany

In German law *negotiorum gestio* (*Geschäftsführung ohne*

Auftrag) is dealt with in sections 677-687 of the *Bürgerliches Gesetzbuch* (BGB) of 1900.[579] Of the various codified legal systems, the German treatment of the subject is possibly the most careful and precise. It may be convenient to quote the German text of the said sections of the BGB, whereafter the various aspects relating to *negotiorum gestio* will be discussed with reference to the specific sections:

> "677. Wer ein Geschäft für einen anderen besorgt, ohne von ihm beauftragt oder ihm gegenüber sonst dazu berechtigt zu sein, hat das Geschäft so zu führen, wie das Interesse des Geschäftsherrn mit Rücksicht auf dessen wirklichen oder mutmasslichen Willen es erfordert.
>
> 678. Steht die Übernahme der Geschäftsführung mit dem wirklichen oder dem mutmasslichen Willen des Geschäftsherrn in Widerspruch und musste der Geschäftsführer dies erkennen, so ist er dem Geschäftsherrn zum Ersatze des aus der Geschäftsführung entstehenden Schadens auch dann verpflichtet, wenn ihm ein sonstiges Verschulden nicht zur Last fällt.
>
> 679. Ein der Geschäftsführung entgegenstehender Wille des Geschäftsherrn kommt nicht in Betracht, wenn ohne die Geschäftsführung eine Pflicht des Geschäftsherrn, deren Erfüllung im offentlichen Interesse liegt, oder eine gesetzliche Unterhaltspflicht des Geschaftsherrn nicht rechtzeitig erfüllt werden würde.
>
> 680. Bezweckt die Geschäftsführung die Abwendung einer dem Geschäftsherrn drohenden dringenden Gefahr,

so hat der Geschäftsführer nur Vorsatz und grobe Fahrlässigkeit zu vertreten.

681. Der Geschäftsführer hat die Übernahme der Geschäftsführung, sobald es tunlich ist, dem Geschäftsherrn anzuzeigen und, wenn nicht mit dem Aufschube Gefahr verbunden ist, dessen Entschliessung abzuwarten. Im übrigen finden auf die Verpflichtungen des Geschäftsführers die für einen Beauftragten geltenden Vorschriften der 666 bis 668 entsprechende Anwendung.

682. Ist der Geschäftsführer geschäftsunfähig oder in der Geschäftsfähigkeit beschränkt, so ist er nur nach den Vorschriften über den Schadenersatz wegen unerlaubter Handlungen und über die Herausgabe einer ungerechtfertigten Bereicherung verantwortlich.

683. Entspricht die Übernahme der Geschäftsführung dem Interesse und dem wirklichen oder dem mutmasslichen Willen des Geschäftsherrn, so kann der Geschäftsführer wie ein Beauftragter Ersatz seiner Aufwendungen verlangen. In den Fällen des 679 steht dieser Anspruch dem Geschäftsführer zu, auch wenn die Übernahme der Geschäftsführung mit dem Willen des Geschäftsherrn in Widerspruch steht.

684. Liegen die Voraussetzungen des 683 nicht vor, so ist der Geschäftsherr verpflichtet, dem Geschäftsführer alles, was er durch die Geschäftsführung erlangt, nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung herauszugeben. Genehmigt der Geschäftsherr die Geschäftsführung, so steht dem Geschäftsführer der im 683 bestimmte Anspruch zu.

685. 1. Dem Geschäftsführer steht ein Anspruch nicht zu, wenn er nicht die Absicht hatte, von dem Geschäftsherrn Ersatz zu verlangen.

<u>2. Gewähren Eltern oder Voreltern ihren Abkömmlingen oder diese jenen Unterhalt, so ist im Zweifel anzunehmen, dass die Absicht fehlt, von dem Empfänger Ersatz zu verlangen.</u>

<u>686. Ist der Geschäftsführer über die Person des Geschäftsherrn im Irrtume, so wird der wirkliche Geschäftsherr aus der Geschäftsführung berechtigt und verpflichtet.</u>

<u>687. 1. Die Vorschriften der 677 bis 686 finden keine Anwendung, wenn jemand ein fremdes Geschäft in der Meinung besorgt, dass es sein eigenes sei.</u>

<u>2. Behandelt jemand ein fremdes Geschäft als sein eigenes, obwohl er weiss, dass er nicht dazu berechtigt is, so kann der Geschäftsherr die sich aus den 677, 678, 681, 682 ergebenden Ansprüche geltend machen. Macht er sie geltend, so ist er dem Geschäftsführer nach 684 Satz 1 verpflichtet."</u>

It is particularly interesting to note that the BGB distinguishes between "ordinary" and "extraordinary" forms of <u>negotiorum gestio</u> and that it has little hesitation in applying the principles relating to unjustified enrichment whenever the prerequisites for ordinary <u>gestio</u> are not complied with.[580] In translation the quoted sections of the BGB may be reflected as follows:

"677. The person who manages an affair of another without being authorised by the latter or otherwise

entitled to do so, must manage the affair in accordance with the interest of the *dominus*, while taking into account his actual or presumed wishes.

678. If the undertaking of the *gestio* should be in conflict with the actual or presumed wishes of the *dominus* and the *gestor* ought to have been aware of this, the *gestor* is bound to compensate the *dominus* for any damages arising from the *gestio*, even when such obligation does not otherwise fall on him.

679. The opposition by the *dominus* to the *gestio* is irrelevant if, without such *gestio*, a duty of the *dominus* which requires to be complied with in the public interest, or a statutory duty of the *dominus* in regard to the furnishing of maintenance, should not be properly fulfilled.

680. If the *gestio* should be directed at averting an imminent danger threatening the *dominus*, the liability of the *gestor* is limited to wilful intent and gross negligence.

681. As soon as practicable the *gestor* must inform the *dominus* of his undertaking of the *gestio* and await the decision of the latter, unless the delay

should entail danger. For the rest the provisions of sections 666 to 668 (of the BGB), in regard to the obligations of the mandatary, are correspondingly applicable to the gestor.

682. Should the gestor not have the capacity to act or have limited capacity to act, his liability is limited, in accordance with the provisions relating to compensation or wrongful acts and reimbursement of unjustified enrichment.

683. If the gestio is in accordance with the interest and actual or presumed will of the dominus, the gestor can claim reimbursement of his expenses as if he were a mandatary. In the cases set forth in section 679, the gestor has a claim on this basis even when the gestio is contrary to the wishes of the dominus.

684. If the conditions stipulated in section 683 are not present, the dominus is obliged to return to the gestor all that he has acquired during the course of the gestio, in accordance with the provisions relating to the reimbursement of unjustified enrichment. Should the dominus ratify the gestio, the gestor has the claim provided for in section 683.

685. 1. The *gestor* does not have a claim if he did not have the intention of claiming compensation from the *dominus*.

2. If parents or grandparents provide maintenance to their descendants or *vice versa*, it is presumed, in cases of doubt, that there is no intention to claim compensation from the recipient.

686. If the *gestor* is mistaken as to the identity of the *dominus*, the true *dominus* acquires the rights and duties arising from the *gestio*.

687. 1. The provisions of sections 677 to 686 are not applicable when a *gestor* manages the affairs of another in the mistaken belief that they are his own.

2. If a *gestor* treats the affair of another as his own, although he knows that he is not entitled to do so, the *dominus* may enforce the claims provided in sections 677, 678, 681 and 682. If he should enforce them, he is liable to the *gestor* in terms of section 684.1."

From the above it appears that "ordinary" *negotiorum*

gestio is distinguished from "extraordinary" *negotiorum gestio* in the sense that the former complies with the normal prerequisites for *negotiorum gestio* whereas the latter does not thus comply. In this regard reference is sometimes made to *berechtigte Geschäftsführung ohne Auftrag* as opposed to *unberechtigte* and *unechte Geschäftsführung ohne Auftrag*.[581]

Section 677 BGB requires that, in the case of the "ordinary" *negotiorum gestio* (*berechtigte Geschäftsführung*), the *gestor* should act in the interests of the *dominus* and in accordance with his wishes or what may be presumed to be his wishes. This smacks of the *utiliter* requirement of the Roman-Dutch law. The said section does not limit the nature or form of the *gestio*, which may hence include any activity (*jede Tätigkeit*), albeit of legal or purely factual nature.[582] The affairs must clearly be those of another and the *gestio* should not be undertaken by virtue of a mandate by the *dominus* or a legal duty to do so.[583] It is not specifically required that the *dominus* should be unaware of the *gestio*, but section 681 BGB makes it clear that, if the *dominus* is unaware of the *gestio*, he should be informed as soon as possible after the commencement thereof[584] so that he can decide whether he wants the *gestio* to continue or cease, or whether he wishes to take it over himself. In the case where he decides that the *gestio* may continue, it would appear that the *gestio* is ratified,

166/...

hence becoming a mandate, alternatively that the _gestor_ is given a tacit mandate to carry on with the _gestio_. Acting in accordance with the interest and wishes or presumed wishes of the _dominus_, coupled with the duty of the _gestor_ to inform the _dominus_ of the commencement of the _gestio_, ensures that the management of affairs will be eminently reasonable, thus bringing the German law into line with the Roman-Dutch law in respect of the _utiliter coeptum_ requirement. German law likewise does not require that the _gestio_ have a successful outcome, provided it was _nützlich begonnen_ (_utiliter coeptum_).[585]

When the _dominus_ has expressed his will, the _gestor_ must give effect to it, except in certain prescribed cases, to which attention will be turned below. Where no will has been expressed, because the _dominus_ is absent or otherwise in no position to do so, the presumed will (_mutmassliche Wille_) of the _dominus_ must be established. In doing so an objective test is applied with reference to all the circumstances, the position (more particularly the financial position) of the _dominus_ and what may reasonably have been expected of a person in the position of the _dominus_. Ordinarily the presumed will of the _dominus_ will reflect his interests, which are likewise to be established by the application of objective principles.[586] If there is a conflict between the will of the

dominus and his objectively established interests, the will takes precedence.[587]

It is clear from section 677 BGB that the *gestor* who must act in accordance with the wishes and interests of the *dominus* must, if he desires to be classified as a *berechtigter Geschäftsführer*, have the intention of managing the affairs of another, in the sense of the *animus negotia aliena gerendi*. This appears to be confirmed by section 685.1 BGB, which refers to the *gestor*'s intention to claim compensation from the *dominus* (*Absicht Ersatz zu verlangen*), a phrase which is reminiscent of the *animus obligandi, recipiendi* or *repetendi* of the *ius commune*.[588] The said section indicates that a *gestor* may act with the *animus donandi* and thus not have the intention of claiming reimbursement of his expenses. Section 685.2 BGB provides for a presumption, in cases of doubt, that there is an *animus donandi* when parents or grandparents furnish maintenance to their descendants or vice versa. The *onus* of proving the intention not to sue (*Verzichtswille*) rests upon the *dominus*.[589]

Apart from the duty of acting reasonably at the commencement of the *gestio* as discussed above, section 677 BGB requires that the *gestio* should be reasonably managed, in accordance with the will (or presumed will), and interests of the *dominus*, for as long as the *gestor* is busy with it. Otherwise than in French, Dutch or South African

law, the *gestor* is not obliged to complete the *gestio* as may be inferred from the fact that section 681 BGB stipulates that he should, as soon as practicable, inform the *dominus* of the commencement of the *gestio* and then wait for the decision of the *dominus* as to continuation thereof. Only when a delay in continuing with the *gestio* may result in the creation of a dangerous situation, is the *gestor* not obliged to wait for the decision of the *dominus*, but may continue with the *gestio*. This does not, however, exempt him from informing the *dominus* of the *gestio* as soon as possible or practicable. The decision as to whether a dangerous situation is imminent or not rests with the *gestor*, who is expected to make his decision as objectively as possible, but without the necessity of researching the interests of the *dominus* in any depth.[590] Under certain circumstances the nature of the *gestio* may be such that the *gestor* is under a duty to continue with or even complete , failing which he may become liable for damages or even become criminally or delictually liable.[591] The death of the *dominus* has no affect on the duties of the *gestor* other than that the *gestor* may be required to continue with the *gestio* on the ground of an emergency situation, as't were.[592] Similarly, when the *gestor* dies, his duties are transferred to his heirs.[593]

Section 681 BGB stipulates further that the *gestor* has the same duties as the mandatary in terms of sections

666 to 668 BGB.[594] This means that he must, on request, give the *dominus* the required reports in regard to the progress of the *gestio* and, on completion of the *gestio*, render account thereof. He is likewise required to deliver to the *dominus* all that has accrued or that he has acquired from the *gestio*. This includes interest on money, forthcoming to the *dominus*, as from the date of the investment thereof by the *gestor*.

The *gestor*'s liability for loss or damage appears from section 678 read with section 680 BGB. He is liable for all intentional or negligent conduct in accordance with the provisions of section 276 BGB.[595] He may even be liable for *casus fortuitus* (*Zufall*) in cases where the risk has passed to him or where he is in default of an obligation resting upon him.[596] Such liability hence comes to the fore when the undertaking of the *gestio* is contrary to the express or presumed will of the *dominus* under certain circumstances where the *gestor* ought to have realised it. Even if he should execute the *gestio* with the utmost care, he would still be liable for any damage or loss arising from the *gestio*. Section 680 BGB, however, limits the *gestor*'s liability to intentional conduct (*Vorsatz* or *dolus*) and gross negligence (*grobe Fahrlässigkeit* or *culpa lata*) if the *gestio* is intended to avert an imminent danger threatening the *dominus*. The danger may be of any kind, but will normally relate to the person or property of the *dominus* in accordance with the well considered judgement of the *gestor*,

whose liability remains diminished even if he has bona fide erred in considering that an imminent danger exists.[597]

If the gestio has complied with the requirements of section 677 BGB, that is, if the undertaking of the gestio is in accordance with the interest and actual or presumed will of the dominus, the gestor has the same right as the mandatarius to claim reimbursement of his expenses. This includes all expenses incurred by the gestor in executing the gestio, insofar as the gestor considered them necessary under the circumstances,[598] such as travelling or storage expenses or other necessary outlay.[599] Likewise included is a claim for loss of interest or income and a release from or indemnity against obligations incurred by the gestor as against third parties. As in French law, the gestor may conclude agreements in the name of the dominus, hence as an unauthorised representative (vollmachtloser Vertreter), or in his own name. In the former case, if the dominus should fail to ratify the agreement, he must release the gestor from the obligations arising therefrom. In the latter case the dominus is required to fulfil the obligations arising from the agreement.[600] Compensation for damages suffered by the gestor in the course of the gestio includes compensation for damage caused by casus fortuitus (Zufall).[601] The gestor is not entitled to any remuneration, fee or salary for his labour, except where professional or similar services, for which a fee is normally payable, have been

rendered. The rendering of such services is considered an indirect loss of income for which reimbursement according to the normal tariff or fee is allowed.[602] Finally, in regard to the rights of the _gestor_, he is entitled to a lien (_Zurückbehaltungsrecht_) in respect of the property, or portion thereof, relating to the _gestio_.[603]

An exception in regard to the prerequisites for a valid claim in terms of section 683 BGB appears from section 679 BGB. If the failure to execute the _gestio_ has the effect that an obligation of the _dominus_, which the public interest requires, should be complied with, is not performed, alternatively that a statutory duty to furnish maintenance is not fulfilled, the prohibition of the _dominus_ may be ignored by the _gestor_ and he will still have all the rights of the ordinary (_berechtigter_) _gestor_.[604] On the other hand, if this exception is not present, and the _gestio_ does not comply with the interest and the actual or presumed will of the _dominus_, the _dominus_ is obliged, in terms of section 684 BGB, to return to the _gestor_ all that he has acquired as a result of the _gestio_ in accordance with the precepts relating to unjustified enrichment, unless the _dominus_ has ratified the _gestio_, in which event the _gestor_ will have the rights of the ordinary _gestor_ in terms of section 684 BGB. In other words, if the _gestor_ has not complied with the prerequisites for the ordinary _actio negotiorum gestorum_, which includes the management of affairs _domino prohibente_ where the

provisions of section 679 BGB are not applicable, the gestor's action is limited to the actual, unjustified enrichment of the dominus. This would appear to be in accordance with the European ius commune and Roman-Dutch law which granted the gestor an enrichment action when he acted domino prohibente or inutiliter.[605]

The gestor who has managed the affairs of the dominus for his own advantage, as if they were his own, while he is aware of the fact that they are not, is in virtually the same position as the gestor who has acted domino prohibente. He also has an enrichment action available to him provided (and in this respect his position differs from the common law gestor who has acted sui lucri causa and animo depraedandi) the dominus avails himself of the rights accruing to him in terms of sections 677, 678, 681 or 682 BGB, as provided for in section 687.2 BGB. If the dominus should decide not to make use of any of these rights, the gestor in turn has no claim against him on the ground of unjustified enrichment or otherwise. For the rest, his liability is the same as that of the gestor who has acted domino prohibente.[606]

A somewhat strange provision appears from section 687.1 BGB, which stipulates that, where a gestor manages the affairs of another in the mistaken belief that they are his own (hence the bona fide gestor of the Roman-Dutch law and European ius commune), there is no gestio at

all and the relevant provisions of the BGB (sections 677-686) are not applicable. This is in conflict with the legal development of the action arising from D 3.5.48 which action was received and applied throughout the greater part of Europe prior to codification of the European civil law.[607] It may be that this laconic denial of the existence of negotiorum gestio under these circumstances relates to section 686 BGB, which provides that, where the gestor is mistaken as to the identity of the dominus, such error may be ignored inasmuch as the real dominus acquires the rights and bears the obligations arising from the gestio.[608] Yet the authorities are agreed that the principles relating to unjustified enrichment, and the actions arising therefrom, are available to both dominus and gestor.[609] This differs from the position in the legal historical development and, for that matter, in French law (with its general actio de in rem verso) and South African law (with its extended actio negotiorum gestorum), insofar as the gestor only has an enrichment action at his disposal, whereas the dominus has the use of the usual remedies arising from negotiorum gestio in its ordinary sense.

Where the gestor is a minor or a person with no capacity or only a limited capacity to act, section 682 BGB restricts his liability in accordance with the principles relating

to delictual damages and unjustified enrichment. Where the *dominus* lacks the capacity to act, there is no need to reduce his liability, since such lack of capacity does not affect the *gestor*'s rights.[610]

The question of "indirect enrichment" in German law has been the subject of much fruitful research and discussion. There is much uncertainty as to the legal position in this regard but there are definite tendencies in the direction of accepting that the third party, as *gestor*, may sue the *dominus* directly.[611]

6.4 Italy

Negotiorum gestio (*gestione di affari*) is dealt with in sections 2028 to 2032 of the Italian *Codice civile* of 1942.[612] The said sections read as follows:

> "2028. (*Obbligo di continuare la gestione*).- *Chi, senza esservi obbligato, assume scientemente la gestione di un affare altrui, è tenuto a continuarla e condurla a termine finchè l'interessato non sia in grado di provvedervi da se stesso.*
>
> *L'obbligo di continuare la gestione sussiste anche se l'interessato muore prima che l'affare sia terminato, finchè l'erede possa provvedere direttamente.*
>
> 2029. (*Capacità del gestore*). - *Il gestore deve avere la capacità di contrattare.*

2030. (Obbligazioni del gestore). - Il gestore è soggetto alle stesse obligazioni che deriverebbero da un mandato.

Tuttavia il giudice, in considerazione delle circostanze che hanno indotto il gestore ad assumere la gestione, può moderare il risarcimento dei danni ai quali questi sarebbe tenuto per effetto della sua colpa.

2031. (Obblighi dell'interessato). - Qualora la gestione sia state utilmente iniziata, l'interessato deve adempiere le obbligazioni che il gestore ha assunte in nome di lui, deve tenere indenne il gestore di quelle assunte dal medesimo in nome proprio e rimborsagli tutte le spese necessarie o utili con gli interessi dal giorno in cui le spese stesse sono state fatte.

Questa disposizione non si applica agli atti di gestione eseguiti contro il divieto dell, interessato eccetto che tale divieto sia contrario alla legge, all' ordine pubblico o al buon costume.

2032. (Ratifica dell'interessato). - La ratifica dell'interessato produce, relativamente alla gestione, gli effetti che sarebbero derivati da un mandato, anche se la gestione è stata compiuta da persona che credeva di gerire un affare proprio."

In translation this portion of the Codice civile may be expressed in the following way:

"2028. (Duty to continue the gestio): The person who, without being obliged to do so, knowingly undertakes the management of an affair of another,

is bound to continue and complete it for as long as the *dominus* (literally "interested party") is not in a position to see to it himself.

The obligation to continue the *gestio* remains even where the *dominus* dies before its completion, until the heir (of the *dominus*) is able to see to it directly.

2029. (Capacity of the *gestor*): The *gestor* must have the capacity to contract.

2030. (Obligations of the *gestor*): The *gestor* is subject to the same obligations which accrue to a mandatary.

Nevertheless the judge, after considering the circumstances which have induced the *gestor* to undertake the *gestio*, may limit the amount of compensation for damages for which the *gestor* would have been liable as a result of his fault.

2031. (Duties of the *dominus*): If the *gestio* has been reasonably commenced, the *dominus* must fulfil the obligations that the *gestor* has assumed in his (the *dominus*') name, indemnify the *gestor* against those obligations assumed by him in his own name,

and reimburse him for all his necessary and useful expenses, together with interest as from the day on which the expenses were incurred.

This provision does not apply to the acts of administration carried out contrary to the prohibition of the *dominus*, unless such prohibition is contrary to the law, the public interest (literally "order") or good morals (*boni mores*).

2032. Ratification by the *dominus* has the same effect, in respect of the *gestio*, as would arise from a mandate, also where the *gestio* has been performed by a person who believed that he was managing his own affair."[613]

Negotiorum gestio (*la gestione degli affari altrui*) is categorised as an obligation arising from law (*la legge*) as opposed to obligations arising from illegality (*l'illecito*) and contract (*il contratto*).[614] The management or administration of another's affairs without authority is, strictly speaking, in conflict with the general principle that no one should interfere with or become involved in the affairs of another. Yet, as in Roman times and following the example of all legal systems descended from Roman law, Italian law (perhaps the most direct descendant,

geographically and otherwise) grants full recognition to the institution of negotiorum gestio.[615]

Rotondi[616] defines negotiorum gestio thus:

> "La gestione d'affari si ha quando un subbietto avente capacità di agire, volontariamente, e senza esservi obbligato per legge né invitato dall'interessato (tradizionalmente: 'dominus negotii') assume scientemente la gestione di un affare altrui."

He thus sees it as an institution which comes to the fore when a person, having the capacity to act, volontarily and without being obliged by law or requested by the dominus to do so, knowingly (and hence willingly) undertakes the management of an affair of another.

It would appear that the gestio can take any form, legal or purely factual, insofar as the gestor's right to enter into binding agreements during the course of the gestio is recognised (section 2031). It is thus a prerequisite that there must be a gestio,[617] provided it is a legal activity.[618] As in the other legal systems dealt with hitherto, it is required that the gestio should be unauthorised, and hence not prompted by the will (or mandate) of the dominus or by any legal duty to do so.[619] There is no doubt that the affair should be that of another (affare altrui), as appears from section 2028, but it is

not specifically required that the *dominus* should be unaware of the *gestio*. As in French and Dutch law, the *dominus* or his heirs are given an opportunity to take over the management of the affair (section 2028), while a full section (2032) is devoted to ratification by the *dominus*, in which event the *gestio* effectively becomes a mandate, even where it was undertaken by a person who *bona fide* believed that he was managing his own affair.

The intention to manage the affair of another (*animus negotia aliena gerendi*) is an express prerequisite for a valid and binding *gestio*, as may be readily inferred from the use of the word *scientemente* in section 2028.[620] This implies not only knowledge or awareness of the fact that the affairs of another are being managed but the will or intention to manage them.[621]

Italian law emphasises, even more strongly than the French, Dutch or German law on the subject, that the *gestio* should be *utiliter coeptum*. This appears with the utmost clarity from the words *utilmente iniziata* used in section 2031. The *gestio* does not, therefore, have to be successful, since the risk passes to the *dominus* once the *gestio* has commenced reasonably.[622] The reasonableness is determined objectively and not in accordance with the *gestor*'s subjective view thereof. Trabucchi says that, if it can be foreseen, from an objective point of view, that the *dominus* will suffer damage should the *gestio* not be undertaken

or even if it should be delayed, there can be no doubt as to the reasonableness of the gestio.[623] This approach seems to lose sight of the fact that the gestio is not limited to that which is necessary, but certainly includes activity which may be described as advantageous or useful.

A final requirement for a valid gestio is that the gestor must have the capacity to act (section 2029). This aspect will be dealt with below in a discussion of the relationship between negotiorum gestio and unjustified enrichment.

Among the duties of the gestor the most prominence is given to his obligation to continue with and complete the gestio, at least until such time as the dominus himself or, if he has died, his heir, is able to take over the gestio or make arrangements regarding it (section 2028).[624] For the rest, the gestor has the same obligations as the mandatary (section 2030) which includes, it would seem, the duty to inform the dominus of the circumstances and progress of the gestio so that the dominus can decide whether to veto it or allow it to continue, with or without modification (sections 1710 to 1712), the duty to render an account and the duty to deliver all that he has received or acquired during the course of the gestio

181/...

including interest on money accruing to the *dominus* but invested by the *gestor*, such interest to run from the date of the investment (sections 1713-1714).[625] The liability of the *gestor* for loss or damage is that of the *bonus paterfamilias*.[626] Section 2030, however, gives the judge the power to diminish the amount of damages payable by the *gestor*, in accordance with the nature of his negligence while taking into account the circumstances which prompted the *gestor* to undertake the *gestio*.[627]

Once it is established that the *gestio* was reasonable at the outset (*utiliter coeptum* or *utilmente iniziata*) the *dominus* is required, as in French and Dutch law, to perform the obligations which the *gestor* has incurred in the name of the *dominus* (hence as an intermediary or representative), to indemnify the *gestor* in respect of obligations incurred by him in his own name, and to reimburse him for all his necessary and useful expenses. This includes interest on the expenses as from the date on which they were incurred (section 2031).[628]

The second sentence of section 2031 smacks strongly of German influence, insofar as the duties resting on the *dominus* in terms of the first portion of this section are not applicable where the *gestio* has been executed contra-

182/...

ry to the prohibition of the dominus (domino prohibente). The only exception to this rule is where the prohibition is contrary to law, public interest or the boni mores, in which event the gestor's rights and the corresponding duties of the dominus in terms of the said section remain valid and enforceable.

Although nothing is said in the Codice civile in regard to the relationship between negotiorum gestio and unjustified enrichment, it seems clear, from a number of authorities, that, where the gestio does not comply with the normal requirements for validity, an enrichment action will still be available to the gestor in the sense that he may still claim reimbursement of his necessary and useful expenses to the extent that the dominus has been actually and unjustifiably enriched by the gestio.[629] This principle applies where the gestor has acted in his own interest (sui lucri causa) and not with the animus negotia aliena gerendi. In this case the gestio is termed gestione impropria which excludes the gestor from the usual remedies arising from negotiorum gestio, but nevertheless grants him an enrichment action.[630] The gestor is assisted in the same way where, for instance, the gestio was not utiliter coeptum, or where the gestor bona fide acted in the mistaken belief that he was managing his own affairs.[631] Similarly, if the gestor has acted domino prohibente he still has an enrichment action

at his disposal.[632] Where the gestor is a minor or a person with no (or limited) capacity to act, his liability is likewise limited to the extent of his actual unjustified enrichment.[633] In all these cases the enrichment action in question is the general enrichment action of section 2041 of the Codice civile.[634]

6.5 Switzerland

The Swiss law relating to negotiorum gestio (Geschäftsführung ohne Auftrag) does not appear in its civil code (Zivilgesetzbuch - ZGB), as in the case of the other European legal systems dealt with hitherto, but in a separate code of obligations known as the Obligationenrecht (OR).[635] The relevant sections, 419-424, read as follows:

> "419. Wer für einen anderen ein Geschäft besorgt, ohne von ihm beauftragt zu sein, ist verpflichtet, das unternommene Geschäft so zu führen, wie es dem Vorteile unter der mutmasslichen Absicht des anderen entspricht.
>
> 420. Der Geschäftsführer haftet für jede Fahrlässigkeit. Seine Haftpflicht ist jedoch milder zu beurteilen, wenn er gehandelt hat, um einen dem Geschäftsherrn drohenden Schaden abzuwenden.
>
> Hat er die Geschäftsführung entgegen dem ausgesprochenen oder sonst erkennbaren Willen des Geschäftsherrn unternommen und war dessen Verbot nicht unsittlich oder rechtswidrig, so haftet er auch für den Zufall, sofern

er nicht beweist, dass dieser auch ohne seine Einmischung eingetreten wäre.

421. War der Geschäftsführer unfähig, sich durch Verträge zu verpflichten, so haftet er aus der Geschäftsführung nur, soweit er bereichert ist oder auf böswillige Weise sich der Bereicherung entäussert hat.

Vorbehalten bleibt eine weitergehende Haftung aus unerlaubten Handlungen.

422. Wenn die Übernahme einer Geschäftsbesorgung durch das Interesse des Geschäftsherrn geboten war, so ist dieser verpflichtet, dem Geschäftsführer alle Verwendungen, die notwendig oder nützlich und den Verhältnissen angemessen waren, samt Zinsen zu ersetzen und ihm in demselben Masse von den übernommenen Verbindlichkeiten zu befreien, sowie für andern Schaden ihm nach Ermessen des Richters Ersatz zu leisten.

Diesen Anspruch hat der Geschäftsführer, wenn er mit der gehörigen Sorgfalt handelte, auch in dem Falle, wo der beabsichtigte Erfolg nicht eintritt.

Sind die Verwendungen dem Geschäftsführer nicht zu ersetzen, so hat er das Recht der Wegnahme nach den Vorschriften über die ungerechtfertigte Bereicherung.

423. Wenn die Geschäftsführung nicht mit Rücksicht auf das Interesse des Geschäftsherrn unternommen wurde, so ist dieser gleichwohl berechtigt, die aus der Führung seiner Geschäfte entspringenden Vorteile sich anzueignen.

Zur Ersatzleistung an den Geschäftsführer und zu dessen Entlastung ist der Geschäftsherr nur so weit verpflichtet, als er bereichert is.

424. Wenn die Geschäftsbesorgung nachträglich vom Geschäftsherrn gebilligt wird, so kommen die Vorschriften über den Auftrag zur Anwendung."

In translation the said sections may be rendered thus:

"419. The person who manages the affairs of another without his authority is obliged to manage the affair he has undertaken in accordance with the interest and the presumed intention of the other.

420. The gestor (Geschäftsführer) is liable for all forms of negligence. His liability will, however, be judged less harshly if he acted to avert an imminent danger threatening the dominus (Geschäftsherr).

If he has undertaken the gestio against the expressed or otherwise recognisable will of the dominus, and such prohibition was not contra bonos mores or illegal, he is also liable for casus fortuitus (Zufall), unless he can prove that it would have occurred even without his intervention.

421. If the gestor lacked legal capacity to obligate

himself contractually, his liability arising from the *gestio* is limited to the extent of his unjustified enrichment or to the extent that he has *mala fide* disposed of the enrichment.

This is still subject to a further liability arising from wrongful acts.

422. If the undertaking of the *gestio* is required by the interest of the *dominus*, he is obliged to reimburse the *gestor* for all his necessary or useful, and suitably proportionate, expenses incurred, together with interest, and to release him, to the same extent, from the obligations he has incurred, as also to compensate him for other damages in accordance with the discretion of the judge.

The *gestor* has this claim, if he acts with the necessary diligence, even in those cases where the intended result does not follow.

Should the *gestor* not be entitled to reimbursement of his expenses, he has the right of removal (*ius tollendi* - *Recht der Wegnahme*) in accordance with the provisions relating to unjustified enrichment.

423. If the *gestio* is not undertaken with the intention of serving the interests of the *dominus*, the latter still has the right to appropriate for

himself the advantages arising from the management of his affairs.

The liability of the dominus to compensate and indemnify the gestor is limited to the enrichment of the gestor.

424. If the gestio is subsequently ratified by the dominus, the provisions relating to mandate become applicable."

These carefully considered provisions have led, in Swiss law, to the development of a very clear distinction between "true" and "false" negotiorum gestio (echte und unechte Geschäftsführung ohne Auftrag), which distinction, for the most part, bears strongly on the relationship between unjustified enrichment and negotiorum gestio.[636] In this regard Swiss law has remained extremely true to the Roman legal tradition, as pointed out by Moser, who compares the institution of negotiorum gestio with a ship lost at sea, whereafter it was taken over by modern codifications in a virtually unchanged condition, with the result that modern problems relating to this institution have, for the most part, already been debated in the Roman legal sources.[637]

As in Roman law, negotiorum gestio is considered to be of a quasi-contractual nature despite the fact that it

188/...

is dealt with as a particular contractual relationship (one of die einzelnen Vertragsverhältnisse) directly after mandate (der Auftrag).[638] Any activity, factual or legal, directed at satisfying human needs, may form the object of a gestio. It does not have to relate to financial matters as appears from the fact that, under certain circumstances, the preservation of life and bodily integrity may be its object.[639]

It is clear from the general trend of the quoted portion of the OR that the affair or affairs to be managed must be those of another. Section 419 OR refers, in this regard, specifically to gestio für einen anderen. There may be several domini whose affairs are managed by the same gestor and it is not necessary for the gestor to know who the dominus is. His mistaken belief as to the identity of the dominus is irrelevant.[640]

The said section 419 OR likewise requires that the dominus should not have authorised the gestio, but it is not stipulated that the dominus should be unaware of the management of his affairs. Insofar as section 424 OR, however, provides for the ratification of the gestio, in which event the principles relating to mandate become applicable, it seems that the awareness of the dominus that his affairs are being managed may be considered at least a tacit authorisation or ratification thereof. Swiss law does not consider the ratification to have

the effect of changing the <u>negotiorum gestio</u> into a contract of mandate, since the latter requires the <u>consensus</u> of both parties, which cannot be said to be present where the <u>dominus</u> has simply approved or ratified the <u>gestio</u> subsequently. Apart from this objection, the alteration of the legal relationship between the <u>dominus</u> and <u>gestor</u> into one of mandate will have the effect of subjecting the <u>gestor</u> to stricter duties than he would have as a <u>gestor</u>.[641]

The intention to manage the affairs of another (<u>animus negotia aliena gerendi</u>) is an essential prerequisite for the true <u>negotiorum gestio</u>, as is implicit in section 419 OR (<u>für einen anderen ein Geschäft besorgt</u>), section 420 OR (<u>um ... Schaden abzuwenden</u>), section 422 OR (<u>beabsichtigte Erfolg</u>) and 423 OR (<u>mit Rucksicht auf das Interesse des Geschäftsherrn</u>). Even though this <u>animus</u> is not specifically mentioned in the OR, the <u>Bundesgerichtshof</u> of Switzerland has insisted that it be present in the "true" or "ordinary" (<u>echte</u>) <u>negotiorum gestio</u>.[642] The very essence of the "false" (<u>unechte</u>) forms of <u>negotiorum gestio</u> is the absence of the intention to manage the affairs of another.[643] It is true that in most cases of emergency <u>negotiorum gestio</u> is performed spontaneously or instinctively, but in such cases there is little difficulty in presuming the intention to serve the interests of another.[644] An <u>animus donandi</u> or <u>Liberalitätsabsicht</u> is frequently

encountered in the relationship between close friends or relatives, but such intention is not presumed.[645] It is obvious, however, that the person who manages his own affairs in the mistaken belief that they are those of another can never be a negotiorum gestor. On the other hand, the person who mistakenly believes that he has a duty to perform the gestio remains a gestor, subject thereto that the gestio must still comply with the further prerequisites for validity.[646]

The requirement of utiliter coeptum, though not expressed in so many words in the relevant sections of the OR, may be inferred from a number of sections. Hence in section 419 OR the gestor is required to execute the gestio in accordance with the interests and presumed wishes of the dominus. Where such wishes are known or recognisable, the gestor has a clear indication of the direction he must follow. Should the will of the dominus be in conflict with his interests, the will takes precedence, as is the case in German law.[647] Section 422 OR provides that, where the circumstances are such that an undertaking of the gestio is called for in the interest of the dominus (durch das Interesse des Geschäftsherrn geboten war), the gestor is entitled to claim his expenses or losses. The interest of the dominus in this section

is a further indication of the necessity that the gestio should be reasonably performed under all the circumstances. The said section continues, however, by granting the gestor these rights even where the gestio was not successful. This can be no other than the utiliter coeptum requirement - as long as the gestio was reasonably undertaken at the commencement thereof, the outcome of such gestio is irrelevant.[648] Section 423 OR confirms the utiliter requirement by providing that, where the gestio has been undertaken without taking the interest of the dominus into account, the dominus still has all the usual rights arising from the ordinary case of negotiorum gestio, but the gestor is entitled to compensation and indemnification only to the extent of the unjustified enrichment of the dominus.

Vischer points out, in regard to the utiliter coeptum requirement, that Swiss practice is inclined to insist on a certain urgency (Dringlichkeit) in the situation before it can be said that there has been compliance with this requirement.[649] The Bundesgerichtshof has, in fact, held that the payment of disputed debts is contrary to the interest of the dominus and hence not in compliance with the utiliter requirement.[650] This decision, however, does not appear to relate to any urgency but is simply an application of the principle regarding what is reasonable under the circumstances. It is respectfully suggested that the urgency of the situation

can be only one of the factors to be taken into account when determining whether a particular gestio was reasonable or not. If urgency were indeed the determining factor, there would be no room for an claim in respect of useful expenses (section 422 OR).

The duties of the gestor are much the same as in the other systems hitherto discussed. He is expected to continue and complete the gestio,[651] in accordance with the interest and presumed wishes of the dominus and with the appropriate care (gehörigen Sorgfalt) (sections 419 and 422 OR). Although nothing is said in the OR about any further specific duties, it would appear that he has the same duties as the mandatary in respect of rendering an account and delivering that which has accrued from the gestio, including interest or money he has delayed in paying over to the dominus.[652]

Section 420 OR stipulates that the gestor is liable for all forms of negligence (jede Fahrlässigkeit), except when he has acted to avert an imminent danger threatening the dominus, in which event his liability may be somewhat diminished in accordance with the circumstances as the judge, in his discretion, sees fit. On the other hand, the section continues, his liability will be increased, to include liability for casus fortuitus (Zufall) if he has acted contrary to the expressed or otherwise recognisable will of the dominus, unless the veto of the dominus

was, as in German law, contra bonos mores (unsittlich) or illegal (rechtswidrig). In section 422 the care and diligence expected of the gestor is referred to as gehörige Sorgfalt.[653]

The rights of the gestor, and the corresponding duties of the dominus, are set forth in section 422 OR. If the gestio was undertaken as required by the interest of the dominus (and hence utiliter), the dominus is to reimburse the gestor for all his necessary and useful expenses incurred in the course of the gestio, provided they were "suitably proportionate" (den Verhältnissen angemessen). It is doubtful whether the latter qualification is necessary since, if it is established that the expenses were indeed necessary or useful and, in addition, the gestio was utiliter coeptum, it would follow that such expenses should be "suitably proportionate." If they are not, the gestio would be inutiliter, alternatively the expenses would be considered neither necessary nor useful.

The necessary and useful expenses include interest thereon as from the date when they were incurred. In addition the gestor is entitled to be released from obligations he has incurred during the course of the gestio and to be compensated for damages he has suffered. The extent to which he should be released and compensated in this way is left to the discretion of the judge.[654]

A strange provision, which does not appear in any of the other codes dealt with in the present comparative survey, comes to the fore in the last sentence of section 422 OR, namely that, if the gestor has not complied with the necessary prerequisites in order to justify his claims, he has the right to remove whatsoever he has acquired as a result of the gestio, in accordance with the principles relating to unjustified enrichment. This Recht der Wegnahme is clearly the ius tollendi of the Roman and later law of property. It is a right which, in fact, has nothing to do with unjustified enrichment as such unless it should be considered an alternative remedy to an enrichment action or the only remedy (available to the persons who have erected improvements on the property of another) where no enrichment action is available. Insofar as the Swiss law has a general enrichment action, which is the obvious remedy to employ when the requirements of a valid negotiorum gestio have not been met, it seems somewhat illogical to grant the gestor a ius tollendi under these circumstances.

The OR does not make provision for a lien in favour of the gestor until such time as he has been paid for his necessary and useful expenses claimable in accordance with the code. The mandatary on the other hand is specifically granted a lien.[655] It would appear that, should the need arise, the gestor may likewise have access to

such lien.

The relationship between _negotiorum gestio_ and unjustified enrichment in Swiss law is linked with three sections of the OR, namely 421, 422 and 423.

Section 421 OR provides that, where a _gestor_ lacks legal capacity so that he cannot incur contractual obligations, his liability is limited to the extent of his unjustified enrichment, including such enrichment as has been _mala fide_ disposed of or destroyed by him. His delictual and criminal liability, however, remains unimpaired. This is clearly an application of the Roman principle relating to the _pupillus_.[656]

Section 422 OR has already been dealt with in the preceding comments. The important inference to be drawn from this section is that, where a _gestor_ has not complied with the _utiliter coeptum_ requirement for the ordinary _negotiorum gestio_, he may sue the _dominus_ on the basis of unjustified enrichment.

The source of the distinction between _echte_ and _unechte negotiorum gestio_ is section 423 OR. This section provides that, where a _gestor_ has not acted with the intention to manage the affairs of another (_animus negotia aliena gerendi_), the _dominus_ retains all the rights

arising from the ordinary negotiorum gestio, while the gestor's right to claim compensation or indemnification is limited to the amount of the actual, unjustified enrichment of the dominus. No distinction is made between the mala fide gestor who has acted solely in his own interests (sui lucri causa or animo depraedandi) and the bona fide gestor who has managed the affairs of another in the mistaken belief that they are his own, so that the enrichment principle should clearly apply to both.[657]

Section 423 OR has led to an immense extension of the application of negotiorum gestio, as related to unjustified enrichment, in everyday practice. The enrichment action arising from unechte Geschäftsführung ohne Auftrag has, in fact, developed as an independent enrichment action on the same basis as the extended actio negotiorum gestorum of Roman Dutch and South African law, despite the fact that there is a general enrichment action in Swiss law.[658]

As mentioned above, where the gestor acts contrary to the prohibition of the dominus, the gestor's liability is increased (in terms of section 420 OR) to include liability for casus fortuitus, unless the prohibition was illegal or contra bonos mores. If these exceptions are not applicable, the gestor's action is no gestio and, in fact, he is in the same position as the gestor who

has acted without the animus negotia aliena gerendi or the gestor whose conduct has not been utiliter coeptum. It can hence be justifiably inferred that the gestor who has performed the gestio domino prohibente will likewise have the enrichment action, arising from unechte Geschäftsführung ohne Auftrag, at his disposal.[659]

As in South African law, possessors, both bona fide and mala fide, have been likened to negotiorum gestores in Swiss law, with the exception that actions available to and against them are dealt with by means of a lex specialis arising from sections 938-940 ZGB. Certain authorities are of the opinion that the enrichment action arising from negotiorum gestio in its unechte form should be granted as a subsidiary remedy to possessors who have effected improvements to the property of others.[660] This would be a logical extension of such action.

Finally, the question of "indirect enrichment" has also received attention in Switzerland. Section 422 OR stipulates that the dominus has a duty (in the case of an ordinary gestio which complies with all the necessary requirements) to release the gestor from obligations he has incurred during the course of the gestio. It does not specify, however, whether the obligations may be incurred in the name of the dominus or in the name of

the *gestor* himself.[661] If the *gestor* should have acted in his own name, the question arises whether the third party may sue the *dominus* directly should the *gestor* disappear from the scene. A number of prominent authorities declare that he may,[662] and this would also appear to be the attitude of the *Bundesgerichtshof*.[663] There seems to be no reason why the action of section 423 OR should not be applied in these circumstances. The possibilities regarding the extension of the application of this action are quite as numerous as those relating to the extended *actio negotiorum gestorum* of South African law.

6.6 Austria

Sections 1035 to 1040 of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) of 1811 set out the general principles relating to *negotiorum gestio* (*Geschäftsführung ohne Auftrag*) as follows:[664]

> "1035. *Wer weder durch ausdrücklichen oder stillschweigenden Vertrag, noch vom Gerichte, noch aus dem Gesetze das Befugnis erhalten hat, darf der Regel nach sich in das Geschäft eines andern nicht mengen. Hätte er sich dessen angemasst, so ist er für alle Folgen verantwortlich.*
>
> 1036. *Wer, obgleich unberufen, ein fremdes Geschäft zur Abwendung eines bevorstehenden Schadens besorgt, dem ist derjenige, dessen Geschäft er besorgt hat, den*

notwendigen und zweckmässig gemachten Aufwand zu ersetzen schuldig: wenngleich die Bemühung ohne Verschulden fruchtlos geblieben ist.

1037. Wer fremde Geschäfte bloss, um den Nutzen des andern zu befördern, übernehmen will, soll sich um dessen Einwilligung bewerben. Hat der Geschäftsführer zwar diese Vorschrift unterlassen, aber das Geschäft auf seine Kosten zu des andern klarem, überwiegenden Vorteile geführt; so müssen ihm von diesem die darauf verwendeten Kosten ersetzt werden.

1038. Ist aber der überwiegende Vorteil nicht klar; oder hat der Geschäftsführer eigenmächtig so wichtige Veränderungen in einer fremden Sache vorgenommen, dass die Sache dem andern zu dem Zwecke, wozu er sie bisher benützte,unbrauchbar wird, so ist dieser zu keinem Ersatze verbunden: er kann vielmehr verlangen, dass der Geschäftsführer auf eigene Kosten die Sache in den vorigen Stand zurücksetze, oder, wenn das nicht möglich ist, ihm volle Genugtuung leiste.

1039. Wer ein fremdes Geschäft ohne Auftrag auf sich genommen hat, muss es bis zur Vollendung fortsetzen, und gleich einem Bevollmächtigten genaue Rechnung darüber ablegen.

1040. Wenn jemand gegen den gültig erklärten Willen des Eigentümers sich eines fremden Geschäftes anmasst, oder den rechtmässigen Bevollmächtigten durch eine solche Einmengung an der Besorgung des Geschäftes verhindert; so verantwortet er nicht nur den hieraus erwachsenen Schaden und entgangenen Gewinn, sondern er verliert auch den gemachten Aufwand, insofern er nicht in Natur zurückgenommen werden kann."

In translation these sections may be rendered thus:

"1035. In general a person, who is not authorised by an express or tacit agreement, or who does not have the authority arising from a court order or from law, may not involve himself in the affairs of another. If he should have done so, he is liable for all the consequences.

1036. When a person, although not requested to do so, manages the affair of another with the intention of averting imminent damage, the person whose affair he has managed, is obliged to reimburse him for his necessary and useful (expedient) expenses, even though his trouble, without any fault of his own, should remain fruitless.

1037. A person who wishes to undertake the affairs of another with a view only to furthering the latter's interests, must seek the consent thereto of such other person. Should the gestor (Geschäftsführer) have failed to comply with this provision, yet have managed the affair at his expense, to the obvious and preponderant advantage of the other, the latter must reimburse him for the costs incurred in respect of such affair.

1038. If the preponderant advantage should not be obvious, or if the gestor, of his own accord, has effected such substantial changes to a thing be-

longing to another, that the thing becomes useless, to such other person, for the purpose for which he has hitherto used it, the latter is not obliged to render any compensation; on the contrary he can require that the _gestor_, at his own expense, restore the thing to its previous state or, if that is not possible, to compensate him fully.

1039. A person who has undertaken the affair of another without authority, must continue with it until its completion and, like a mandatary, render a full account in regard thereto.

1040. If someone presumes to involve himself in the affairs of another against the validly expressed will of the owner (ie the latter), or if, by such interference, he prevents the duly authorised agent from managing the affair, he is not only liable for the damages and lost profit resulting therefrom, but he also loses that which he has expended, insofar as it can not be removed _in natura_."

Of all the legal systems dealt with hitherto, the Austrian law adopts by far the most negative approach to _negotiorum gestio_ and clearly regards it, primarily, as the unwarranted, unwelcome and even culpable interference in the affairs of another - an approach strongly reminiscent of the famous _adagium_ of Pomponius in D50.17.36: _Culpa_

est immiscere se rei ad se non pertinenti.[665]

The subject of negotiorum gestio is dealt with in the second part of the ABGB, under the general title Von den Sachenrechte (regarding real rights), in the second division thereof, which bears the title Von den persönlichen Sachenrechten (regarding "personal real rights"). This division deals with the general principles of contract and also with specific contracts (chapters 17-30). Chapter 22 thereof, consisting of sections 1002-1044, is titled Von der Bevollmächtigung und andern Arten der Geschäftsführung. Sections 1002 to 1034 of this chapter deal with mandate (Bevollmächtigung) in general, immediately whereafter negotiorum gestio (Geschäftsführung ohne Auftrag) is treated of (in sections 1035 to 1040). Directly after the discussion of negotiorum gestio, and still part of chapter 22, four sections (1041 to 1044) are devoted to the "application of a thing to the advantage of another" (Verwendung einer Sache zum Nutzen des andern). To a large extent this accords with the actio de in rem verso of the Roman and Roman-Dutch law and of the European ius commune. The close proximity of the in rem versio and negotiorum gestio in chapter 22 has led to their frequently being related, and hence to a strong relationship between negotiorum gestio and unjustified enrichment as in Swiss law, with the notable difference, however, that nowhere in sections 1035 to 1040 of the ABGB is any direct reference made to unjustified enrichment.[666]

Koziol-Welser define negotiorum gestio in the following way:

> "Geschäftsführung ohne Auftrag ist die eigenmächtige Besorgung der Angelegenheiten eines anderen in der Absicht, dessen Interessen zu fördern."[667]

They hence see it as the management of the affairs of another on the own initiative of the gestor, with the intention of promoting the interests of the dominus. Their definition of negotiorum gestio is somewhat more positive than the ABGB's general approach to this institution and covers virtually all the prerequisites for negotiorum gestio as set forth in the other legal systems already dealt with.

The affair or affairs to be managed must be those of another (Geschäft eines anderen or fremdes Geschäft), as appears from each of the quoted sections. It is clear from section 1035 ABGB that the gestio should be unauthorised: if the gestio was performed by virtue of an agreement (tacit or express), or as a result of a court order or legal duty, there is no gestio. The affair may take any form, whether it be purely factual (eg the painting of another's house or saving a drowning person) or a legal act (eg paying the debts of another).[668] It is not necessary that the gestor should be aware of the identity of the dominus and hence his mistaken belief

as to the identity of the dominus is immaterial. There is no prerequisite that the dominus should be absent or unaware of the gestio, although this would probably normally be the case, as may be inferred from section 1037 ABGB, which requires that, in cases where the negotiorum gestio is simply advantageous (zum Nutzen) of the dominus and not executed in circumstances of emergency, the co-operation and consent (Einwilligung) of the dominus should be sought.In this regard the ABGB distinguishes three kinds of gestio, namely the gestio prompted by urgency or imminent danger (Geschäftsführung im Notfall - provided for in section 1036 ABGB), the useful gestio (nützliche Geschäftsführung - provided for in section 1037 BGB) and the"useless" or "disadvantageous" negotiorum gestio (unnütze Geschäftsführung - provided for in section 1038 ABGB).[669]

Although no animus negotia aliena gerendi is specifically required, it may be inferred from sections 1036 (zur Abwendung ... besorgt) and 1037 ABGB (um den Nutzen des andern zu befordern). It likewise appears from the above quoted definition, which seems to reflect the basic approach of all the authoritative writers.[670]

The prerequisite of utiliter coeptum, likewise, is not specifically defined in the ABGB, but may be inferred from the use of the words überwiegender Vorteil ("preponderant advantage") occurring in sections 1037 and 1038 ABGB.

It also relates to the concept Nutzen ("usefulness") appearing in section 1037 ABGB. A preponderant advantage or usefulness, it would seem, relates to an objectively determined increase in value of the property forming the object of the gestio, but as seen from the (subjective) wishes of the dominus. Hence, if the renovation of the house of another certainly increases the value thereof but the dominus is impecunious or had intended to pull the house down, the gestio cannot be considered to be to his "preponderant advantage" and is thus not utiliter.[671] The question of utiliter coeptum, reasonableness at the commencement of the gestio, applies only in the case of urgency, as appears from section 1036 ABGB: the gestor is entitled to the reimbursement of his expenses, even when the gestio was fruitless (fruchtlos), provided he was not, by his own fault, responsible for the failure of the gestio.[672]

The duties of the gestor are the usual, namely to continue with and complete the gestio, as specifically stipulated in section 1039 ABGB (bis zur Vollendung fortsetzen),[673] and to render an account of and deliver up that which has accrued from the gestio. The latter duty likewise appears from the said section (genaue Rechnung daruber ablegen), which compares the gestor with the mandatary in this regard.[674]

The liability of the _gestor_ for loss or damage is a heavy one, as appears at the outset from section 1035 ABGB: if anyone should interfere in the affairs of another without being contractually or legally entitled to do so, he must bear all the consequences of his actions. Where he has acted contrary to the "preponderant advantage" of the _dominus_, and more particularly where he has altered the property of the _dominus_ to such an extent that such property has become useless to the _dominus_, the _gestor_ may be ordered to effect a _restitutio in integrum_, alternatively to compensate the _dominus_ fully for the loss he has suffered. This is the harsh effect of section 1038 ABGB, a harshness which appears also from section 1040, in accordance with which the _gestor_, who has acted contrary to the validly expressed wishes of the _dominus_ or who has prevented the properly authorised agent of the _dominus_ from managing the affair in question, is liable not only for the damages and lost profit arising from his conduct, but also loses whatever he has expended on the affairs of the _dominus_, unless it is of such a nature that he can remove it by way of a _ius tollendi_. He is likewise liable for _casus fortuitus_ (_Zufall_) in terms of section 1311 ABGB, unless the _gestio_ was performed in an emergency situation (_im Notfall_), as provided for in section 1312 ABGB. According to the latter section, his liability may be limited even where he has

207/...

prevented another person, who would have achieved more than he did, from managing the affair in question, insofar as the utility or advantage he has indeed effected may be brought into consideration when determining the damage he has caused.[675]

The _gestor_'s right to be reimbursed for expenses he has incurred during the course of the _gestio_ is limited. Section 1036 ABGB entitles him to reimbursement of his necessary and "expedient" (_zweckmässig_) expenses where the _gestio_ has been undertaken to avert an imminent danger of damage to the _dominus_. Where he can prove utility (_Nutzen_) and a clear "preponderant advantage" as a result of his _gestio_, he is likewise, in terms of section 1037 ABGB, entitled to his expenses. In the circumstances as set forth in section 1038 ABGB, namely where there is no "preponderant advantage" or his alteration of the property of the _dominus_ has rendered it useless for the purpose for which the _dominus_ had previously used it, he has no claim whatever for the reimbursement of expenses. Section 1040 likewise deprives him of his expenses, subject to a _ius tollendi_, if he has acted _domino prohibente_ or prevented a properly authorised representative of the _dominus_ from managing the affair.

As in the other legal systems discussed above, the _gestor_ is not entitled to any form of remuneration for his

services, except in special cases such as the Finderlohn of section 391 ABGB, which accrues to the finder of lost goods, and the salvation honorarium of section 403 ABGB.[676]

The ABGB makes no provision for any claim for loss interest, lost income or damages suffered by the gestor,[677] and likewise does not provide for his release from obligations incurred by him in the course of the gestio or for a lien pending payment of his validly claimable expenses.

The apparently inequitable situation which arises from the severe limitations placed on the rights of a gestor, has inevitably led to the consideration of unjustified enrichment and, more particularly, the Versionsklage of section 1041, as a remedy to assist the hapless and luckless gestor. Austrian law does not, as is the case with German and Swiss law, recognise unechte Geschäftsführung, yet, as Gschnitzer puts it, section 1041 schlägt ... die Brücke zwischen der Geschäftsführung ohne Auftrag und den Bereicherungsklagen.[678] The said section reads thus:

> "1041. Wenn ohne Geschäftsführung eine Sache zum Nutzen eines Andern verwendet worden ist; kann der Eigentümer sie in Natur, oder, wenn dies nicht mehr geschehen kann, den Wert verlangen, den sie zur Zeit der Verwendung gehabt hat, obgleich der Nutzen in der Folge vereitelt worden ist."

The gist of the section is that, if a person, without managing affairs (ohne Geschäftsführung), does something (literally: "applies a thing") to the advantage of another, he can reclaim that which he has done in natura or, where that is no longer possible, he can claim the value of that which he has done as at the date thereof, even though the advantage should, as a result, fall away.[679]

Kupisch interprets the words, ohne Geschäftsführung, as ohne die typische, für die Geschäftsführung ohne Auftrag vorausgesetzte Sachlage.[680] If this is so, and it seems perfectly logical, it should mean that all cases of negotiorum gestio not falling under sections 1035 to 1040 ABGB, should be subject to the Versionsklage or Verwendungsklage of section 1041 ABGB, which follows directly on the sections dealing with negotiorum gestio in general and forms part of the same chapter. It is suggested that, in all the various cases in which the extended actio negotiorum gestorum of the Roman-Dutch and South African law is applicable,[681] the action arising from section 1041 AGBG should be equally applicable. Hence where the gestor is a minor, he should be liable to the extent of his unjustified enrichment in terms of the said action. Similarly, where the gestor has mala fide acted to serve his own selfish interests, or where the bona fide gestor has managed the affairs of another in the mistaken belief that they are his own, or where the

gestor has *acted domino prohibente*, such *gestor* should have the said action at his disposal in the same way as his predecessor of the *ius commune* was able to fall back on the extended *actio negotiorum gestorum*, albeit only as a subsidiary remedy. There is strong support for this approach among the Austrian authorities, a number of whom have done the logical by linking the *bona fide* and *mala fide* possessor to the *gestor* of similar disposition. It would appear that, until there is a general acceptance of this approach, either by judicial interpretation or by the amendment of the relevant portion of the ABGB, Austria is bound to remain a number of steps behind its neighbours in Western Europe in regard to the proper and equitable legal position of the *negotiorum gestor*.[682]

6.7 Scotland

The institution of *negotiorum gestio* is well-known in Scots law, despite the fact that it is geographically isolated from Europe, where the Romano-Germanic tradition ensured the continued existence of Roman law, albeit in its later form as the European *ius commune*. As a result of its relatively unhappy relationship with England during the thirteenth and fourteenth centuries, Scotland formed its famous "Auld Alliance" (*La Vieille Alliance*) with France early in the fourteenth century. In this way Scotland came into close contact with the law of France and other European countries; thereby paving

the way to a reception of Roman law in Scotland. The great institutional writers, such as Lord Stair, George Bell and John Erskine, ensured the effectiveness of the reception process by drawing liberally from Roman legal sources in their works on Scots law. The law relating to negotiorum gestio was no exception to this rule, the Scottish doctrine being firmly based on the Roman law of Justinian.[683]

As in Roman law, negotiorum gestio in the law of Scotland is frequently referred to as a "quasi-contract", although it is also described as an obligation arising from "unjust enrichment."[684] Gloag and Henderson define it as follows:

> "A negotiorum gestor is a person who, without any regular authority, intervenes to manage the affairs of another who, temporarily or permanently, is unable to manage them himself, and in circumstances where it is reasonable to assume that authority would have been given had the circumstances rendered it possible to apply for it."[685]

Walker suggests that the circumstances referred to in this regard involve "some kind of emergency" or "some necessity."[686] This does not seem to be borne out by institutional authority[687] and no other authority is cited in support of this approach. On the contrary,

the relevant requirement appears to be simply that the _gestio_ should, under all the circumstances, be reasonably undertaken or "necessarily or profitably done" as Lord Stair has put it, "otherwise he (ie the _gestor_) hath his labour for his pains."[688] In explaining the reason for the necessity of the institution of _negotiorum gestio_, Stair expresses his view in charming fashion:[689]

> "The ground of these obligations is, because it is frequent for men to go abroad upon their affairs, supposing quickly to return, and leave no mandate for managing of them ... and yet being detained from them beyond expectaction, they may be easily lost; for instance, some redemptions must be peremptor, and the failure therein hath a great inconvenience; or the perfecting of some great bargain, a great part whereof is already done, and the not perfecting the rest loseth the whole; or the management of any work of great profit, that for want of some pains or expenses might be lost. These who interpose themselves in such cases, do necessarily and profitably for the good of the absent, and so are under no delinquence; neither are they presumed to gift their pains and expenses; nor have they any conventional obligation upon their part: and yet, though there were no positive law for it, the very light of nature would teach us it ought to be recompensed. And therefore can be no other than an obediential or natural obligation, by the authority of God and our obedience to him."

From this _ratio_ it does not appear that any situation of emergency, urgency or necessity is required, nor, indeed,

does the latter portion of Gloag and Henderson's definition quoted above, appear to be substantiated. It may well be that the reasonableness of the gestio may be determined by reference, inter alia, to the question whether the dominus would have given his authority to the gestio had it been applied for, but this would merely be one of the factors or circumstances which would have to be considered. It seems clear, indeed, that the real prerequisite which comes to the fore in this regard, is simply the utiliter coeptum requirement of Roman law. This is confirmed by the fact that, if the gestor has acted reasonably, he is entitled to be reimbursed for his expenditure necessarily or usefully ("profitably", as Stair puts it) incurred, even if the gestio is unsuccessful and the expenditure hence not "beneficial" to the dominus.[690] It is clear that, if the gestor is an officious intermeddler whose conduct is not, in the circumstances, reasonable, he would not comply with this requirement. On the other hand Scots law apparently allows the gestor, whose conduct has not been reasonable, an action to recover the unjustified enrichment accruing to the dominus as a result of the gestio and this same action is available to him when he has acted in his own interests or contrary to the will of the dominus.[691]

As in the other legal systems already dealt with, the affairs managed by the gestor must be authorised and must be those of another. The latter (the dominus),

though not necessarily physically absent, must be unaware of the gestio or otherwise unable to manage the affairs himself. Should he be aware of the gestio, he may be held to have tacitly consented thereto and hence to have given a tacit mandate to the gestor to continue with the gestio.[692] Both Stair and Erskine state that the dominus should be absent.[693] This does not seem to be in accordance with modern Scots law, however, insofar as a gestor may be physically present but lacking in legal capacity or otherwise unable to manage the affairs in question himself. In this regard Scottish practice has held that there is proper negotiorum gestio when a gestor has managed the property of a dominus who was absent,[694] or of a person who became mentally incapax,[695] or where he took over the duties of an executor who had gone abroad,[696] or managed the business of an imprisoned owner.[697] There was similarly a valid gestio where a gestor shipped goods belonging to another to prevent their being seized.[698] It is likewise not unusual for a gestor to have managed the affairs of pupils or minors.[699]

The animus negotia aliena gerendi is not given much attention in Scots law, but it would appear to be a prerequisite for a valid gestio, as appears from Stair's discussion of the animus donandi at the commencement of the title on "Recompense or Remuneration", where he says:[700]

> "But the matter is more clear when the good deed is done, not *animo donandi*, but of purpose to oblige the receiver of the benefit to recompense. Such are the obligations *negotiorum gestorum*; and generally the obligations of recompense of what we are profited by the damage of others without their purpose to gift, or as the law expresseth it *in quantum locupletiores facti sumus ex damno alterius* ... It is a rule in law, *donatio non praesumitur*; and therefore, whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly. Whence ariseth that other rule of law, *debitor non praesumitur donare ...*"

Once again the reference to unjustified enrichment in regard to *negotiorum gestio* is of particular interest, although it does tend to create the impression that all actions for reimbursement arising from *negotiorum gestio* are enrichment actions.

The duties of the *gestor* in Scotland are much the same as elsewhere. He is required to complete the *gestio*, to render an account of what he has done and to deliver whatever has accrued from the *gestio*. This includes the fruits (including interest on monies payable to the *dominus*) and profits arising from the *gestio*.[701] According to Bell, the *gestor* is not permitted to discontinue with his management of the affairs in question until they have been completed, unless the *dominus* relieves him of his duty to continue therewith or he is replaced by a duly authorised representative.[702] If he should interrupt or fail to con-

tinue with the *gestio*, he may be liable for any damages resulting therefrom.[703]

The liability of the *gestor* for loss or damage resulting from the *gestio* varies in accordance with the circumstances. Erskine reviews the Roman authorities in this regard and states:

> "By some texts of the Roman law, the *negotiorum gestor* ought to use the most exact diligence ... By others, he is liable only in the middle kind of diligence ... But in truth the degree of diligence ever rises or falls according to the views of the *gestor*, in undertaking the management, and the nature of the *gestio*. Where the *gestor*, from friendship and the necessity of the case, takes upon him the direction of an affair which requires immediate execution, he is accountable only for gross omissions ... If, on the other hand, his motives appear selfish and interested, or if he act contrary to the express will of the owner, or if he has involved him in a new negotiation, in which he never dealt formerly, he is answerable even for casual misfortunes; and he is not entitled to the recovery of his disbursements, except in so far as the owner has been a gainer by them ... The texts requiring a middle kind of diligence may be equitably applied to the cases where no special circumstances occur on either side; for though the *gestor*'s office be gratuitous, he ought to be the more strictly accountable, that he assumed it to himself, without the owner's authority."[704]

This is a very flexible approach to the liability of the

gestor: the full spectrum of liability, from *dolus* and *culpa lata* to *culpa levis*, *culpa levissima* and even *casus fortuitus* depending on the circumstances, may be applicable.[705]

In the matter of *Kolbin and Sons v Kinnear and United Shipping Co*,[706] the question of varying degrees of liability was considered in a case where the *gestor* had removed certain goods belonging to the *dominus* to prevent their being seized and confiscated. In the Court of Session it was held that the conduct of a *gestor* "must be considered in the light of what a business man might be expected to do in similar circumstances in order to give reasonable protection to the owner's interests."[707] On appeal before the House of Lords, Lord Atkin enunciated the relevant principles in the following terms:

> "What measure of care is required from a *negotiorum gestor* in respect of goods over which he assumes control has been the subject of much discussion. *Culpa lata, levis, levissima* have been assigned their own boundaries, though to define them in particular cases has proved no easy task. In my humble opinion the most scientific treatment of the problem is not to predicate different degrees of negligence, but to concentrate on the duty, breach of which constitutes negligence. The duty is to take reasonable care in the circumstances and will vary in each case, but, having been discharged, negatives any negligence, *lata*, *levis* or *levissima*."[708]

In view of the above, the standard of liability applicable to the *gestor* may be described as the exercise of reasonable care and diligence by a reasonably prudent man in all the circumstances of the particular case.

If the *gestor* has acted reasonably under all the circumstances, he is entitled to be reimbursed for all his expenses necessarily or usefully incurred, regardless of the outcome of the *gestio*. This includes lost interest, but subject thereto that he is not entitled to any reward or remuneration for his services.[709]

The *gestor* is also entitled to be released from obligations or liabilities reasonably incurred during the course of the *gestio*.[710] In this regard Scots law has developed an important principle which has resulted in unqualified recognition of the principle of "indirect enrichment," to which reference has frequently been made in the discussion of other legal systems.[711] In cases where a person has been reasonably and properly employed by the *gestor* to render certain services for the benefit of the *dominus*, such person (the third party) has a direct right of action against the *dominus* for his expenses, disbursements or fees.[712]

It would appear from the above discussion that Scots law has discovered a number of the very real and practical uses to which the institution of *negotiorum gestio* can

be put, but a goodly number of the further applications thereof have remained unexploited. However important the recognition of the principle of "indirect enrichment" in Scots law may be, the numerous further possibilities arising from the relationship between negotiorum gestio and unjustified enrichment have scarcely been touched upon. The development of the extended actio negotiorum gestorum, with its primary function as an enrichment action, should prove to be of great use in Scottish practice, with a view to solving the problems accompanying mala fide and bona fide gestio, where the animus negotia aliena gerendi is lacking, or gestio domino prohibente, where the gestor has acted contrary to the express wishes of the dominus. The further extension of the action to cases of bona fide and mala fide possessio, where improvements have been effected to the property of another, and to numerous other fields of law, likewise warrant investigation. Professor T B Smith cannot be faulted where he states:

"The full scope of negotiorum gestio in Scots law has not been fully explored ..."[713]

6.8 England

It is a well-known fact that English law does not recog-

nise the institution of *negotiorum gestio* in the form which originated in the Roman law and was received into all the legal systems discussed above. On the other hand, in its characteristically casuistic manner, English law has indeed given assistance and provided remedies in a number of cases which would, in South African, Scots or continental law, be considered to be typical cases of *negotiorum gestio*. Unfortunately, despite valiant attempts at systematising these cases, there has been little success in establishing any settled principles in this regard, so that the non-English lawyer will probably have great difficulty in finding his way through the English sources for purposes of effecting comparative research. The reason for this may be that, although certain authorities have attempted to isolate the cases which are comparable with *negotiorum gestio* in general,[714] most authorities are inclined to associate *negotiorum gestio* with the limited field of "agency of necessity."[715] The quasi-contractual nature of *negotiorum gestio* in Roman law and in most "civil law" systems may likewise be the reason why "agency of necessity." and hence "*negotiorum gestio*" cases, are frequently discussed in connection with the English concept of "quasi-contract" and "unjust enrichment" or restitution. In this regard it is interesting to note that "quasi-contract" includes the treatment of subjects like *quantum meruit* (or *quantum valebat*) and restitution (sometimes referred to as "unjust enrichment")

with the inclusion of cases for which South African law would grant enrichment actions such as the condictio indebiti, condictio sine causa, condictio causa data causa non secuta, or condictio ob turpem vel iniustam causam. In some cases the courts have allowed relief to an impoverished party, mainly, it would seem, on the grounds of equity, and in other cases remedies are granted by statute. Yet English law recognises no general principle relating to unjustified enrichment, let alone a general enrichment action. Hence, in the important matter of Sinclair v Brougham,[716] quasi-contractual actions in general were related to implied or constructive contracts based on legal fiction.[717] In view of this somewhat confusing and unsettled situation, it is, therefore, unwise to attempt a classification of "negotiorum gestio" cases as quasi-contracts or the like.[718]

The locus classicus in regard to the rejection of negotiorum gestio in English law is usually considered to be the decision in Falcke v Scottish Imperial Insurance Co,[719] in which the following dictum appears:

> "The general principle is, beyond all question, 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 any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a

benefit upon a man against his will ... With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can ... according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or give a lien."[720]

It would appear that the English antipathy to the concept of altruistic intervention in and management of the affairs of another is rooted in its immersion in the notion of contract. Furthermore, unless the gestio can be founded on an implied contract, an equitable constructive trust arising from a fiduciary relationship between gestor and dominus, or subrogation, there is no relief forthcoming to the gestor.[721]

Despite this apparently inequitable approach, English law has, indeed, provided a remedy ina number of cases which could quite easily be regarded as examples of negotiorum gestio. The most obvious are the so-called "funeral cases", in which an outsider (as "gestor") paid for the funeral costs of a deceased person and thereafter successfully sued for his expenses from the estate of the deceased or other responsible person (as "dominus"). In the early decision of Jenkins v Tucker,[722] the ratio for allowing the claim was substantiated in the following terms:

"(T)here was a sufficient consideration to sup-

> port 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."

In this case there was clearly no contractual, quasi-contractual, fiduciary or subrogation-relationship between the parties, yet "common decency" warranted the granting of the relief sought.

A similar ratio appears from Rogers v Price:[723]

> "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?"

In the matter of Tugwell v Heyman,[724] the court allowed the action on the basis of an "implied contract" arising from an "implied promise" that the party responsible for the funeral costs would reimburse a third party who took it upon himself to pay for such funeral. The relevant part of the judgement reads:

> "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."

The case of Shallcross v Wright,[725] went a step further, by allowing the plaintiff, a stranger with whom the deceased had been lodging, a claim for both funeral expenses and the expenses incurred in fumigating the premises. The court held:[726]

> "Considering all the circumstances, I think that this was a case of necessity; for reasons of 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."

As in the <u>Tugwell</u> case there was clearly no contract, express or implied, but equitable considerations prompted the court, with respect, to make use of the fiction of an implied contract in order to justify a claim which simply could not be denied.

The <u>ratio</u> of an "implied contract" was dispensed with in the case of <u>Ambrose v Kerrison</u>,[727] in which the court found for the plaintiff by virtue of "a proper regard to decency." The relevant <u>dictum</u> reads:

> "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 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."

In similar vein, and with particularly philosophical

bent, the court justified the granting of the claim, in the matter of Bradshaw v Beard,[728] in the following words:

> "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."

As Marasinghe quite correctly points out, the right to reimbursement in all these "funeral cases" was dependent on no contractual, quasi-contractual, fiduciary or subrogation-relationship between the parties: "The fact of the payment itself appears to have given rise to the right to a recompense from the person benefiting from it."[729]

Apart from the "funeral cases", there are a number of cases relating to the rendering of services by one person for the benefit of another person's property, in which, although there was likewise no contractual or similar relationship between the parties, the courts were nevertheless disposed to grant a claim for reimbursement of expenses. In the cases in question, there was no question of authorisation by the owner of the property, so that

the facts accord with those in an ordinary negotiorum gestio situation.

An example of such a case is afforded by the facts in Robinson v Walter[730] in which the plaintiff had taken care of the defendant's horse, which had been abandoned by third parties. In this case the plaintiff was granted a lien pending payment of his expenses in respect of keeping the horse. The court held:[731]

> "(H)e only detains the horse till he be satisfied for his meat, and so 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."

In later cases, the granting of a lien under similar circumstances was denied, as in the case of Binstead v Buck,[732] which was followed in Nicholson v Chapman,[733] but the right to compensation of the person who had rendered the services in question was never rejected, nor even attacked, as far as can be established. In the latter case it was clearly indicated that the plaintiff had a claim, which he had to prove:

> "(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."[734]

More recently, in the case of Sorell v Paget,[735] the plaintiff, who had rescued a heifer belonging to the defendant, was granted his claim for compensation for the reasonable expenses incurred by him in so doing, and likewise granted a lien in respect of the heifer until his claim had been satisfied. The granting of a lien, in conflict with the Binstead and Nicholson decisions, was justified on the basis that it was not a true lien, but the common law right of "distress damage feasant." The important aspect of the Sorell decision, however, was that it confirmed a right to compensation in such circumstances, which right had been recognised over a period of three and a half centuries.[736]

In the matter of The Great Northern Railway v Swaffield,[737] the right of the plaintiff in cases of this nature was compared with the right of a shipowner to incur expenses, without authority, in order to protect the cargo:[738]

> "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 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."

Reference should also be made to Munro v Wilmott,[739] in which the defendant, as bailee, had sold plaintiff's car for £105 after spending £85 on it to make it saleable, such expenditure having been incurred without the plaintiff's knowledge, consent or request. The plaintiff's action in conversion succeeded, but the expenditure of £85 was set off against his claim. The decision was justified as follows:[740]

> "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."

The same principle was applied in the case of Nelson v Duncombe.[741] The defendant, in his capacity as trustee of a fund of which the plaintiff was a beneficiary, incurred personal expense in maintaining the plaintiff

in a lunatic asylum and in subsequent proceedings to have the plaintiff declared sane. In a claim by the plaintiff for an accounting by the defendant, the latter pleaded set-off of the said personal expenditure incurred for the benefit of the plaintiff. Despite his lack of authority, the defendant's plea was upheld in the following terms:

> "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?"[742]

Finally, attention must be drawn to the cases arising from so-called "agency of necessity", to which reference was made at the commencement of this discussion of <u>negotiorum gestio</u> in English law.[743] As Marasinghe points out: "Semantics apart, the term <u>negotiorum gestio</u> has its closest affinities with that body of law labelled in the textbooks as agency of necessity."[744] The important aspect relating to agency of necessity is that it has

always been a prerequisite for the existence of this institution,that the parties should have been linked by a contractual or other relationship prior to the advent of the necessitous circumstances leading to the agency of necessity. It hence differs from the cases referred to above, insofar as remedies were granted in them regardless of the non-existence of any prior relationship between the parties.[745] It would appear, however, that this prior relationship cannot substantially, if at all, affect the nature of the agency of necessity as such, since, at the time when the relevant act is committed, no authority exists for it. To all intents and purposes it is no different from the cases encountered in Roman, Roman-Dutch and South African law, namely where a mandatary exceeds the bounds of his mandate and in so doing benefits the principal, he may, if his conduct was reasonable, be considered a negotiorum gestor in respect of the conduct which thus exceeded the bounds of the mandate.[746]

The concept of "necessity" refers to that which is "reasonably necessary,and in considering what is reasonably necessary any material circumstance must be taken into account, eg danger, distance, accommodation, expense, time, and so forth".[747]

Agency of necessity appears to have originated in the power of the master of a ship to deal with the ship or

her cargo beyond the scope of his ordinary authority should the circumstances warrant it. This includes the power to dispose of or otherwise deal with the cargo of the ship, or even to deal with the ship itself, provided there was indeed necessity for his actions, that he had acted wisely and prudently in the circumstances and that it had been impracticable for him to communicate with the owner of the ship or her cargo in order to obtain instructions.[748]

A special case of agency of necessity is the acceptance of a bill of exchange for the honour of the drawer. It was initially attempted to restrict agency of necessity to this special case and the case of the ship's master,[749] but further applications of the doctrine were inevitably introduced.[750] In Prager v Blatspiel, Stamp and Heacock Ltd,[751] it was accepted that the doctrine could no longer be limited in scope, and that it should also apply in cases where any agent, who is unable to communicate with his principal, intervenes in a state of emergency, provided his actions are *bona fide* and in the interests of the persons concerned.[752]

The prerequisites for a claim on agency of necessity are fourfold: firstly, the agent should not be able to communicate with his principal to obtain instructions;

secondly, there must be an emergency or similar necessity requiring him to act in the way he does; thirdly, his conduct must be bona fide and in the interests of the parties concerned; fourthly, the steps taken by him must be reasonable and prudent in the circumstances.[753]

The above instances of and requirements developed for agency of necessity are peculiarly reminiscent of negotiorum gestio and its requirements. In view of the said antipathy of English law to this Roman institution, the English doctrine and the various cases of agency of necessity have been considered anomalous,[754] but there are strong feelings that the courts should extend the application of the doctrine and simultaneously establish a rational approach thereto.[755]

When the aforesaid cases and principles are considered, the conclusion is inescapable that, despite English law's rejection of the negotiorum gestio doctrine, it has developed remedies, over a long period of time, which have virtually the same effect as those arising from negotiorum gestio. There can surely be no quarrel with Stoljar when he says:[756]

> "And indeed, it is not too much to say that, as regards normal cases, there is more concordance than divergence between Roman and English results,

though tradition and doctrine seem so different."

Nor can Marasinghe be faulted in stating that "English law does not in fact deny a remedy in circumstances where the civilian doctrine of negotiorum gestio would apply," a statement which leads him to the following conclusion:

> "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."[757]

Despite the ingenuity and resourcefulness of English law, with its casuistic approach to law and high regard for equity, it would seem that its avoidance, if not outright rejection, of the concept of negotiorum gestio is hardly justifiable. A bold consideration and application of existing principles and remedies in a systematic way, may be able to fill this obvious lacuna in English private law even if it should have to be under another name than the Romanistic sounding negotiorum gestio. One could hardly do better than to refer, in this regard, to Powell, who with characteristic perspicuity, identifies the problem area in the following manner:[758]

235/...

"Our examination of the miscellaneous cases which we have grouped under the heading of negotiorum gestio reveals the existence of gaps in our law which could perhaps be filled by the acceptance of a rubric of this kind. If Latin terms are disliked, perhaps the somewhat cumbrous and pompous phrase "uncommissioned intervention" may be used. But, whatever the term, the development of a body of doctrine under its aegis would help to rid the law of many unjust results. Possibly the same effect could be produced by the modern trends in the development of the principles of restitution."

6.9 United States of America

The law of the United States of America (hereinafter referred to as "American law"), in respect of the unauthorised administration of the affairs of another, corresponds to a large extent with that of the English common law, which in fact forms the basis of the relevant legal principles, hence justifying the description of the American law as "Anglo-American"law - at least for purposes of the present discussion. It must, of course, be borne in mind that the various states have developed their own "state law" as opposed to "federal law" which is somewhat restricted in its application. There is hence no uniform or general common law which is applicable to all the American States, although the general approach to law, with its roots in English common law, does not necessarily differ

greatly from state to state. An exception in this regard is the state of Louisiana, which has its own civil code, based, for the most part, on the French Code civil.[759]

As in English law, there is no institution of negotiorum gestio in American law. Indeed, the person who voluntarily and without authority intervenes in the affairs of another is somewhat contemptuously referred to, in many instances, as a "mere volunteer" or "officious intermeddler," if not a "tortfeasor."[760] Despite this apparently negative approach, however, American law has, as in the case of English law, granted remedies in a number of different cases in which the facts have corresponded strongly with those in many European cases of negotiorum gestio. In this regard a virtually general principle has developed that a person who supplies goods, services or money to another person who is suffering some kind of emergency or necessity, is entitled to reimbursement for the value of the benefits he has bestowed, provided he did not intend such benefits to be simply gratuitous. This principle is referred to by McCamus as the principle of "necessitous intervention,"[761] and has been associated with the principle of "unjust enrichment."[762]

The general approach to the granting of relief in the form of restitution is dependent, it would appear, on two basic prerequisites, namely, in the first place, that the "intermeddler" should not have acted "officiously," in the sense

of "interference in the affairs of others not justified by the circumstances under which the interference takes place,"[763] and, secondly, that the defendant should have received a genuine benefit. In this regard the doctrine of "agency of necessity" has played an important role in American law. The same prerequisites are applicable as in the case of the English agency of necessity,[764] the _ratio_ being that the parties have tacitly agreed that, where the said prerequisites are complied with, the agent will be entitled to act prudently in the best interests of the principal. The relevant principle is enunciated thus in the _Restatement_:[765]

> "Unless otherwise agreed, if after the authorisation is given, an unforeseen situation arises for which the terms of the authorisation make no provision and it is impracticable for the agent to communicate with the pricipal, he is authorised to do what he reasonably believes to be necessary in order to prevent substantial loss to the principal with respect to the interests committed to his charge."

The said prerequisites are paraphrased in a comment of the _Restatement_ as follows:[766]

> "The rule ... is applicable only if the agent reasonably believes:
>
> 1. that the principal did not contemplate or forgot to provide for the situation in his directions to the agent;

2. that ... it is not feasible to communicate with the principal or to ascertain his wishes before action is necessary;

3. that it is necessary for him to run counter to or exceed the letter of his instructions or what, under ordinary circumstances, would be his inferred authority if the interests in his charge are to be adequately protected;

4. that if the principal knew the facts he would desire the agent to act; and

5. that the action taken is the best method of protecting the interests and carrying out the purposes of the principal, or the method which, from his knowledge of the principal, he should realise that the principal would desire him to use."

In general, however, there has not been a clear distinction between cases of genuinely inferred powers of an agent to act in an emergency situation, and cases of "necessitous intervention."[767] There are, for instance, a number of cases of "necessitous intervention" in which relief has been granted without making use of the doctrine of agency of necessity. It would hence appear that the said doctrine is restricted to cases of implied authority, whereas the "necessitous intervention" cases are based on the "general principle of enrichment." In this regard the Restatement states:[768]

"A person who has a power created by law to subject

another to liability for the protection of the other's person or property or for the performance of the other's obligations is not an agent but is the holder of a power to create restitutional rights."

The cases of necessitous intervention may be divided into two main categories, namely, intervention to protect the life, health, property or credit of another, on the one hand, and intervention with a view to fulfilling the duty of another, on the other hand.

In respect of the first category, the matter of <u>Matheson v Smiley</u>[769] is frequently cited as an example of "unofficious" intervention to preserve life and health. The Manitoba Court of Appeal granted the claim for reimbursement of expenditure incurred by a surgeon who had attended a man after a suicide attempt. The decision of the Court was justified as follows:[770]

"There was no allegation by the plaintiff of any status to sue, or as I read the claim, of any 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."

Of some interest is the fact that the services rendered to Smiley were, eventually, unsuccessful, whence it is difficult to avoid a parallel with the <u>utiliter coeptum</u> requirement of the <u>ius commune</u>.[771]

Another form of preservation of life and health is the supply of necessaries to mental incompetents, minors and drunkards, a service which, in general, can scarcely be otherwise rendered than altruistically, without officiousness and to the obvious benefit of the person or persons in question.[772]

A somewhat less obvious case of necessitous intervention, however, involves the preservation of the property of another. The <u>Restatement</u> presents a general rule granting relief

in cases of necessitous intervention to preserve property,[773] yet the courts have, in general, restricted claims for reimbursement to cases in which there has been a prior legal relationship between the parties, and the claimant has hence come into lawful possession of the property of another. Examples of such claimants are lessors who protect property left by the lessee on the leased premises,[774] or finders who protect the goods of another until they may be returned to their rightful owners.[775]

There is little uniformity in the various courts in respect of the person who has not had a prior legal relationship with the beneficiary: some courts grant relief and others deny it.[776]

The second category of necessitous intervention referred to above, namely the fulfilment of another's duty, includes the fulfilment of duties relating to burial of deceased persons (one of the most important cases in English law, as pointed out above[777]), support of a spouse or children and acting in the public interest in accordance with a statutory duty.[778] An example of the last-mentioned form of intervention is the case of Sommers v Putnam County Board of Education,[779] in which the principle was enunciated thus:

> "The obligation must be of such a nature that actual and prompt performance thereof is of grave public

> concern; the person upon whom the obligation rests must have failed or refused with knowledge of the facts to perform the obligation; or it must reasonably appear that it is impossible to perform it; and the person who intervenes must, under the circumstances, be not a mere intermeddler but a proper person to perform the duty."

From the above, it would appear that the inference may justifiably be drawn that American law has developed a class of remedies which do not arise from contract or tort, but simply ex lege. Provided the conduct of the altruistic intermeddler is not officious or contrary to the interests and benefit of the party in respect of whom the intervention has taken place, he should be granted an action to claim reimbursement of his reasonably incurred expenses. There are many points of contact between the American altruistic or necessitous intervention and the South African negotiorum gestio, but a systematic and logical exposé of the relevant principles is still lacking. Yet the American reluctance to draw from the civilian tradition in this regard is not nearly as marked as in English law.[780] The existence of the concept of negotiorum gestio in the law of the American State of Louisiana may, indeed, be a contributing factor in establishing a solid foundation for the development of a uniform approach to the remedial treatment of the management of another's affairs without

authorisation thereto, whether it be on the basis of restitution (or "unjust enrichment"), quasi-contract, agency of necessity, necessitous intervention or constructive trust.[781]

Before concluding the present discussion of American law, reference should be made to the law relating to negotiorum gestio in Louisiana state law. Title 5 of the Civil Code deals with "quasi-contracts" and "offenses and quasi-offenses" and Section 2 thereof bears the title "Of the Quasi Contract resulting from the Management of Another's Affairs." Sections 2295-2300 of this title read as follows:

> "ART. 2295. When a man undertakes, of his own accord, to manage the affairs of another, whether the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it, until the owner shall be in a condition to attend to it himself; he assumes also the payment of the expenses attending the business.
>
> He incurs all the obligations which would result from an express agency with which he might have been invested by the proprietors.
>
> ART. 2296. He who has taken upon himself the management of some particular affair is not bound to manage others unconnected with that.

ART. 2297. The duties he has undertaken do not cease even if the person, for whom he acts, die previous to the business being terminated; they continue until the heir can take upon himself the direction of it.

ART. 2298. In managing the business, he is obliged to use all the care of a prudent administrator.

Yet, where circumstances of friendship or of necessity have induced a person to undertake the management, that consideration may authorize the judge to mitigate the damages which may arise from the faults or the negligence of the manager.

ART. 2299. Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses.

ART. 2300. All persons, such even as are incapable of consent, may, by the quasi contract, resulting from the act of a third person, become either the object or the subject of an obligation; because the use of reason, although necessary on the part of the person whose act forms the quasi contract, is not requisite in those by whom, or in whose favor, the obligations resulting from the act, are contracted."

The French origin of these sections is fairly obvious. Section 2295 is virtually a translation of section 1372 CC, except that the word "expenses" is clearly a mistranslation or misconception of the French <u>dépendances</u> (not

245/...

dépenses).[782] Section 2296 does not appear in the *Code civil*, but it is simply an elaboration of the provisions of section 1372 CC that the *gestor* is bound also to manage the ancillary matters arising from the affair he is managing (the *dépendances*). If the Louisiana Code had rendered the *dépendances* of section 1372 CC correctly, as "dependent" or "ancillary matters", section 2296 will probably not have been necessary.

Section 2298 is a repetition of section 1373 CC, the *bonus paterfamilias* (*bon père de famille*) being rendered as a "prudent administrator." The same applies to section 2299, which reflects the content of section 1374 CC, except that "equity" is introduced as the *ratio* for the obligations of the *dominus* towards the *gestor*.

Section 2300 is a somewhat puzzling innovation which does not appear in the *Code civil* nor in any of the other *codes* dealt with above. If the words "object" and "subject" refer to the person of no or limited legal capacity, as *dominus* and *gestor* respectively, the section would be in conformity with the general principles of the Roman law and *ius commune*, except that no reference is made to the enrichment liability which must needs be linked to such persons. The reason for this cannot be that the possibility of unjustified enrichment in certain cases of *negotiorum gestio* is unknown to Louisiana law, since in *Standard*

246/...

Motor Car Co v State Farm Mutual Automobile Insurance Co,[783] it was held that the gestor who managed the affairs of another for his own benefit was still entitled to reimbursement in accordance with the principles of negotiorum gestio. It is not clear whether the court regarded this as a case of extraordinary or abnormal negotiorum gestio, but the authorities to back the correctness of this decision are legion.[784]

Despite a certain lack of development and depth in the Louisiana law relating to negotiorum gestio, the "civil law" tradition lives on and the possibility (if not probability) of its influencing the development of American law in general should not be discarded.[785]

7 CONCLUSION

The historical and comparative analysis of negotiorum gestio in South African law leads to certain interesting and important observations in regard to this legal institution, which observations are significant not only from the point of view of the South African lawyer, but also, undoubtedly, from that of the foreign lawyer whose particular legal system has been discussed in the comparative survey.

At the outset it should be mentioned that, despite the many voices which may express a contrary opinion, the historical

method of legal research has tremendous advantages in an uncodified legal system such as that of South Africa and, to a somewhat lesser extent, that of Scotland. The historical analysis has isolated the various elements of _negotiorum gestio_ from its earliest origins in classical Roman law to its application in the Western World of today. It has assisted South African law in developing the most thorough and complete system of principles relating to the unauthorised administration of the affairs of another, and indicated that, despite the lapse of some two thousand years since classical Roman times, the modern institution of _negotiorum gestio_ is, albeit in a more streamlined and practical form, not so far removed from its Roman origins. In this regard, the other legal systems dealt with in this treatise have more to learn, it is respectfully submitted, from South African law than the reverse. This is certainly so in the case of the codified legal systems, which are confronted by the decided disadvantage that codification has, in general, resulted in the exclusion of the vast wealth of the _ius commune_ of Europe, thereby compelling lawyers frequently to seek solutions to problems not dealt with in the codes by excessive theorising and artificial interpretation. If recourse could be had, by these lawyers, to the brilliance of their pre-codification authorities, such as Pothier and Domat in France, Brunnemann and Heineccius in Germany,

or Grotius and Voet in Netherlands, the finding of solutions should be so much simpler. It is true that German BGB has attempted to capture as much as possible of the pre-codification _negotiorum gestio_ in its treatment of _Geschäftsführung ohne Auftrag_,[786] while the Swiss OR has granted full recognition to the "abnormal" or "extended" forms of _negotiorum gestio_,[787] yet it cannot be said, with any real conviction, that the codification of the law relating to _negotiorum gestio_ has been particularly successful.

The perusal of the variety of cases which have evolved in the Anglo-American legal systems in an attempt to find solutions to problems of a typically _negotiorum gestio_ nature, is interesting, but such cases are characterised by their lack of system and principle. American law may be slightly more progressive in this regard, concentrating on the remedial rather than the factual, but the consistent refusal, or at least reluctance, to recognise the institution of _negotiorum gestio_, has deprived the law of England and the United States of America (with the exception of the State of Louisiana) of the opportunity to develop a systematic approach, based on logic and principle, to the activities of the altruistic intermeddler.[788] The Anglo-American rejection of the officious busybody who unjustifiably interferes in the affairs of others and thrusts

unwanted services upon them, is unequivocally shared by the law of those countries which recognise _negotiorum gestio_. Adequate protection against such busybody is, however, afforded by the requirements in the law of such countries, that the conduct of the _gestor_ or intermeddler should be reasonable (_utiliter_) with regard to all the circumstances.[789] In cases where the conduct is unreasonable, or where any of the other prerequisites for _negotiorum gestio_ are not complied with, the liability of the person in whose affairs the intermeddler has involved himself, is restricted to the actual unjustified enrichment of the former, as appears with great clarity from South African law,[790] and, to a lesser extent, from Swiss and German law.[791] There should not, indeed, be any quarrel with the equitable aspect of this approach.

The law of Scotland in regard to _negotiorum gestio_ warrants a remark. Although Scots law shares, with South African law, the civil law tradition, as embodied in Roman-Dutch law and the _ius commune_ of Europe, it has not made nearly as much use thereof as it might. This may be ascribed to the gradual infiltration into Scots law of English legal concepts such as the "agency of necessity." By permitting, albeit inadvertently, such infiltration, Scots law may, in fact, be endangering and weakening the solid civil law

foundations of *negotiorum gestio* as prepared by institutional writers such as Stair, Erskine and Bell. Only a return to the traditional Scots law in this regard will prevent further inroads by English legal concepts which have no place in Scots law.

As mentioned in the introduction at the commencement of the present treatise, the practical importance of a comparative survey is to establish in how far the South African law may be supplemented or improved with reference to the development of the relevant principles in the foreign legal systems examined. In the present instance, however, it is respectfully suggested, the comparative analysis should be of more value to the foreign legal systems, which have been the object of the comparison, than to South African law, insofar as the latter has, in general, more to offer such foreign legal systems than *vice versa*. A significant exception to this general observation, however, is the treatment of "indirect enrichment" in a number of the said foreign legal systems. As mentioned above, the South African authorities are not *ad idem* as to whether a third person, with whom the *gestor* has contracted, may sue the *dominus* directly should the *gestor* disappear from the scene. It has been suggested that the third party should be regarded as an "abnormal" or "quasi-*gestor*" in

relation to the *dominus*, in which event the extended *actio negotiorum gestorum* should be available to the third party with a view to claiming from the *dominus* the amount by which the latter has been actually and unjustifiably enriched at the expense of the third party.[792] The South African decisions in the matters of *Gouws v Jester Pools (Pty) Ltd*[793] and *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons*[794] appear to be in conflict with each other in this regard and a final decision will, in time, probably rest with the Appellate Division of the Supreme Court. Apart from the common law (*ius commune*) authority supporting the granting of an action in such circumstances, further support, from the comparative point of view, may be found in French, Dutch, German, Swiss and Scots law.[795]

In his work on *negotiorum gestio* in South African law, Rubin has stated that South African law requires improvement or modification in that it gives inadequate protection to a *dominus* who has an unwanted benefit thrust upon him.[796] It is suggested that this is in fact not so, since abundant protection is afforded by the requirement of *utiliter coeptum*.[797] If the *gestio* is unwanted, and justifiably so (because, for instance, the *dominus* is a pauper, or intended to sell or had already sold a property improved

by the *gestor*), such *gestio* would be *inutiliter*. It is clear that, if the *gestor* had the opportunity of consulting the *dominus* but did not do so, or if he had reason to know or was able to establish what the presumed wishes of the *dominus* were, but ignored such wishes, his conduct would assist in establishing whether the *gestio* was *utiliter* or not. The *utiliter*-concept is, however, a wide one and should not be related to specific factors such as failure to consult with the *dominus* or to act in accordance with the presumed will of the *dominus*. The court should have an unfettered discretion to establish, with reference to all the relevant surrounding circumstances, whether the *gestio* was *utiliter* or not. Where the *gestio* is *inutiliter*, the extended *actio negotiorum gestorum*, based on the principles of unjustified enrichment, comes into play.

Rubin's suggestion for a further improvement or modification, namely that the principles of unjustified enrichment in regard to the case of *negotiorum gestio domino prohibente*, should be applied with the qualification that the *dominus* should in fact be enriched at the expense of the *gestor* while it should, in the circumstances, have been reasonable for the *gestor* to ignore the prohibition of the *dominus*,[798] is not justifiable. If there was unjustified enrichment, the consideration whether it was, in the cir-

253/...

cumstances, reasonable for the *gestor* to have ignored the prohibition of the *dominus*, is irrelevant. Reasonableness comes to the fore only in regard to the *utiliter coeptum* requirement relating to ordinary *negotiorum gestio*. Where the *dominus* is *prohibens* there is no ordinary *gestio* and reasonableness hence plays no rôle.[799]

Rubin is correct in stating that kinship should be only one of the factors to be considered when determining whether the *gestor* has an *animus repetendi* as opposed to the *animus donandi*.[800] It is not clear whether the learned author is suggesting a modification of South African law in this regard, since it would appear that the South African approach is to establish the intention of the *gestor* with reference to all the surrounding circumstances and without resorting to presumptions as to such intention.[801]

The recognition of the extended *actio negotiorum gestorum* as an enrichment action is a *fait accompli* in South African law.[802] Apart from its traditional applications, the possibility of further extension of its application should be explored, such as in respect of the *locatio conductio operarum* or *operis* and the so-called *quantum meruit* cases. In this way the extended *actio negotiorum gestorum* may develop a virtually general application, hence diminishing the need to recognise the established existence of a general enrichment action in South African law. In any event, the application of the extended *actio*

negotiorum gestorum is in fact support for the existence of a general enrichment action insofar as it is frequently referred to, in common law sources, as an action based on enrichment, without reference to it as an *actio negotiorum gestorum* in extended form or otherwise. It may thus be argued that the extended *actio negotiorum gestorum* is simply a form of the general enrichment action, particularly in view thereof that, in South African law, it is not necessary for a plaintiff to stipulate in the pleadings what the name of the action is on which he is relying. All that need be stated in the particulars of claim, in order to establish a valid *causa* based on unjustified enrichment, is that the defendant has been unjustifiably enriched at the expense of the plaintiff.

The liability of the *gestor* for loss or damage suffered by the *dominus* as a result of the *gestio*, has been variously dealt with in South African legal sources.[803] The approach suggested by Rubin in this regard cannot be faulted, namely that degrees of *culpa* are of no importance, inasmuch as the degree of liability of the *gestor* may differ in accordance with the circumstances, which circumstances should be taken into account when establishing whether the *gestor*'s conduct corresponds with that of the ordinarily prudent man.[804]

South African law is more flexible than most of the codified legal systems discussed above in regard to the *gestor*'s

right to be released from obligations incurred by him during the course of the *gestio*.[805] No distinction is made between his acting in the name of the *dominus* and his acting personally, as appears from some of the codes.[806] The *gestor* who thus incurs obligations always acts personally and there is no suggestion that he may act as an agent of the *dominus*. The very essence of *negotiorum gestio* is that it is unauthorised, so that the reference to agency in these circumstances is a *contradictio in terminis*.

The *gestor*'s right to exercise a lien in respect of the object of the *gestio* is an important weapon of defence which has gained recognition in South African law as also in a number of foreign legal systems referred to above.[807] It is submitted that this is an equitable remedy accruing to the *gestor* pending reimbursement of his necessary and useful expenses incurred during the course of the *gestio*. The question of a lien in this circumstances does not yet appear to have come to the fore in Scots law,[808] but in English law, in similar circumstances, it has been granted in some cases but denied in others.[809]

The question of termination of the *gestio* is not restricted to prescription of the *actiones negotiorum gestorum directa* and *contraria*, insofar as the usual forms of termination of obligations are likewise applicable to *negotiorum gestio*. This is an aspect which has not yet received

much attention in South African law, and it is suggested that the discussion hereof above should serve as a guideline in questions relating to the termination of *negotiorum gestio*.[810]

Finally, it should be observed, although South African law has experienced a useful development of the institution of *negotiorum gestio* as from Roman times, such development is not yet complete. It is not, however, suggested that *lacunae* should be amplified and uncertainties or ambiguities clarified *lege ferenda*. Recourse to the extensive available sources and judicial interpretation thereof should, it is submitted, resolve any difficulties which might not yet have come up for consideration in the courts.

NOTES

1 Thus referred to by L Rubin in his thesis entitled _Unauthorised Administration (Negotiorum Gestio) in South Africa_ (1958) (hereinafter quoted as "Rubin, _Unauthorised Administration_"). This was in fact the first specialist contribution in the field of _negotiorum gestio_ as applied in South African law.

2 On Justinian (482-565 AD) and his legislation, the body of which was later to be called the _Corpus Iuris Civilis_ see M de Villiers, "Aspects of Justinian and his Legislation" in SALJ 39(1922) 296-303; F Pringsheim, "The Character of Justinian's Legislation" in Pringsheim, _Gesammelte Abhandlungen_ 2 (1961) 73-85 (also in LQR (1940) 229-246); J E Spruit, "De Justiniaanse wetgeving" in _Coniectanea neerlandica_ (1974) 59-99; D H van Zyl, "Ons Regserfenis: Justinianus die Wetgewer" in De Rebus Procuratoriis 110 (1977) 84-87; idem, _Geskiedenis en Beginsels van die Romeinse Privaatreg_ (1977) 57-66; idem, _Geskiedenis van die Romeins-Hollandse Reg_ (1979) 27-37.

3 As has frequently been pointed out, "Roman-Dutch law" is in fact a misnomer for what should more readily be termed "Roman-European law" or simply "European _ius commune_", inasmuch as the Justinianic Roman law was,

258/...

for the most part, introduced, by way of a reception-process, into the greater part of medieval and later Europe and not only into the Netherlands. The so-called "Roman-Dutch law", which was to become the South African common law, largely comprised the works of Dutch jurists, who quoted liberally from the works of jurists from beyond the borders of the Netherlands and hence conferred on such "foreign" jurists an authoritativeness which was never to recede or diminish and still holds good, up to the present day, even in the South African context. See in this regard G Schwarzenberger, "European Common Law" in CLP 26 (1973) 114-130; R Feenstra, "Romeins recht en europese rechtswetenschap" in Coniectanea neerlandica (1974) 101-137; D H van Zyl, "Die Romeinse Reg in Europa en Suid-Afrika" in Scintilla iuris (1971) 10-14; idem, Geskiedenis van die Romeins-Hollandse Reg (1979) 4, 7-9, 41-42, 290-291, 329-330 and 498-550.

4 On the legal historical method see D H van Zyl, "Die Regshistoriese Metode" in THRHR 35 (1972) 19-37; idem, Geskiedenis van die Romeins-Hollandse Reg (1979) 3-4.

5 See in general W J Hosten, "Romeinse Reg, Regsgeskiedenis en Regsvergelyking" in THRHR 25 (1962) 16-35; D H van Zyl, Beginsels van Regsvergelyking (1981) 14-16.

6 See J W Wessels, History of Roman-Dutch law (1908)

399-401; H D J Bodenstein, "English Influences on the Common Law of South Africa" in SALJ 32 (1915) 337-358; C G Botha, "The Early Influences of the English Law upon the Roman-Dutch Law in South Africa" in SALJ 40 (1923) 396-406; R W Lee, "Roman Law and Common Law Elements in the Law of South Africa and Ceylon" in AJ (1959) 114-119; O D Schreiner, The Contribution of English Law to South African Law; and the Rule of Law in South Africa (1967); D H van Zyl, Geskiedenis van die Romeins-Hollandse Reg (1979) 448-458 and 478-494; B Beinart, "The English Legal Contribution in South Africa: The Interaction of Civil and Common Law" in AJ (1981) 7-63.

7 The comparative method in legal context has elicited much fruitful discussion: see H C Gutteridge, Comparative Law. An Introduction to the Comparative Method of Legal Study and Research (1949); I Zajtay, "The Aims and Methods of Comparative Law" in CILSA 7(1974) 321-330; K Zweigert; H Kötz, An Introduction to Comparative Law 1 (1977) 23-41; R David, J E C Brierley, Major Legal Systems in the World Today (1978) 11-16; D H van Zyl, Beginsels van Regsvergelyking (1981) 34-43; idem, "Die Regsvergelykende Metode" in THRHR 46 (1983)1-13 . It is clear from a perusal of the comparative method, that the historical perspective ("vertical comparison") should be borne in mind throughout, insofar as no comparison of legal principles can be effective if the comparatist loses sight of the historical development of the principle or institution he wishes to study.

See in general: W J Hosten, "Romeinse Reg, Regsgeskiedenis en Regsvergelyking" in THRHR 25 (1962) 16-35; A Watson, "Comparative Law and Legal History" in Watson, Legal Transplants (1974) 102-106; K Zweigert, H Kötz, An Introduction to Comparative Law 1 (1977) 7-9; D H van Zyl, Beginsels van Regsvergelyking (1981) 36-37.

8 See the important contributions of G Pacchioni, Della gestione degli affari altrui secondo il diritto romano civile e commerciale (1935); G Verburg, De vrijwillige zaakwaarneming (1949); H H Seiler, Der Tatbestand der negotiorum gestio im römischen Recht (1968) (a work of great depth, reviewed by, inter alia, K H Ziegler in Juristenzeitung 24 (1969) 676; P Gandolfi in Rivista italiana per le scienze giuridiche 12 (1969) 357-363; P van Warmelo in THRHR 32 (1969) 197-199; T Mayer-Maly in ZSS 86 (1969) 416-435; G I Luzatto in SDHI 35 (1969) 479 sqq; J Gaudemet in Index 1 (1970) 269-273; M Talamanca in Labeo 17 (1971) 217-244; A D'Ors in AHDE 42 (1972) 861 and D Larquet in RH 53 (1973) 282-287); L Rubin, Unauthorised Administration (Negotiorum Gestio) in South Africa (1958) (reviewed by J C de Wet in THRHR 22 (1959) 69-70; J E Scholtens in SALJ 75 (1958) 445-451; W G Burger in AJ (1959) 288-289). Reference may further be made to Wächter, "Beiträge zur Lehre von der Negotiorum Gestio" in Arch civ Prax 20 (1837) 337-361 (particularly 347-361: a discussion of Roman law in the spirit

of the <u>Pandekten recht</u>); E Chambon, <u>Die Negotiorum Gestio. Eine civilistische Abhandlung</u> (1848); E Rühstrat, "Beiträge zur Lehre von der negotiorum gestio" in Arch civ Prax 32 (1849) 173-199; 33 (1850) 25-42, 213-241; 34 (1851) 59-84; W de Gelder, <u>De zaakwaarnemer, wet en regt</u> (1853) (reviewed by A de Pinto in Themis 14 (1883) 555-582: this work takes the form of a somewhat unscientific novel about the intermeddling <u>negotiorum gestor</u>); H Dankwardt, <u>Die negotiorum gestio</u> (1855); F O Köllner, <u>Die Grundzüge der obligatio negotiorum gestio</u> (1856); Engelenberg, <u>De leer der negotiorum gestio in het romeinsch recht</u> (1859); E Zimmermann, <u>Aechte und unächte negotiorum gestio</u> (1872); E von Monroy, <u>Die vollmachtlose Ausübung fremder Vermögensrechte</u> (1878) (reviewed by P Krüger in Arch civ Prax 62 (1879) 203-206); A Sturm, <u>Das negotium utiliter gestum</u> (1878) (likewise reviewed by P Krüger in Arch civ Prax 62 (1879) 206-208); M Wlassak, <u>Zur Geschichte der negotiorum gestio</u> (1879) (reviewed by P Krüger in Arch civ Prax 62 (1879) 496-500); E Rühstrat, "Ueber die Klagen auf Erstattung von Impensen und über generelle negotiorum gestio" in Arch civ Prax 64 (1881) 110-150; Cogliolo, <u>Trattato teorico pratico dell'amministrazione degli affari altrui</u> (1890); T Dijkstra, <u>Iets over Zaakwaarneming</u> (1892); F Atzeri-Yacca, <u>I requisiti essenziali della negotiorum gestio</u> (1897); H van Goudoever, <u>Bijdragen tot de leer der zaakwaarneming</u> (1905) (reviewed by M Polak in RM 26 (1907) 324-330 and G van Slooten in Themis 67 (1906) 635-646); G Pacchioni,

"Nuovi studi sulla negotiorum gestio" in Rivista del diritto commerciale 12 (1914) 835sqq; S Riccobono, "La gestione degli affari altrui e l'azione di arricchimento nel diritto moderno" in Rivista del diritto commerciale 15 (1917) 369 sqq; idem, "Dal diritto romano classico al diritto moderno" in Annali Palermo 3/4 (1917) 244 sqq; 529 sqq; F von Bossowski, "Ancora sulla negotiorum gestio" in BIDR 37 (1929) 129 sqq; C Ferrini, "Appunti sulla dottrina romana della 'negotiorum gestio'" in _Opere Ferrini_ 3 (1929) 205-234; J Partsch, _Studien zur negotiorum gestio_, vol 1 (1913); vol 2 in _Aus nachgelassenen und kleineren verstreuten Schriften_ (1931); A Ehrhardt, "Zum objektiven Tatbestand der negotiorum gestio" in Freiburger rechtsgeschichtlicher Abhandlungen 5 (1935) 1 sqq; M Morelli, _Die Geschäftsführung im klassischen römischen Recht_ (1935) (reviewed by E-H Kaden in ZSS 56 (1936) 342-345); H Kreller, "Negotiorum Gestio" in _Paulys Real-Encyclopädie der classischen Altertumswissenschaft, Supplement-Band_ 7 (1940); S Solazzi, "Sulla gestione per conto d'altrui" in _Scritti Solazzi_ 2 (1957) 527 sqq; B Biondi, "Gestione di affari altrui" in Noviss dig Ital 7 (1961) 810-812; G Nicosia, "Gestione di affari altrui" in ED 18 (1969) 628 sqq; T Mayer-Maly, "Probleme der negotiorum gestio" in ZSS 86 (1969) 416-435; M Talamanca, "Le fattispecie dell'actio negotiorum gestorum" in Labeo 17 (1971) 217-244; P Q R Boberg, "The Good Samaritan" in BML 4 (1975) 169-170. More particularly in regard to _negotiorum gestio_ as related to unjustified enrichment

see D H van Zyl, Die Saakwaarnemingsaksie as Verrykingsaksie in die Suid-Afrikaanse Reg (1970)(reviewed by W de Vos in THRHR 34 (1971) 95-98 and C G van der Merwe in SALJ 88 (1971) 251-252); W de Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg (1971) 38-41, 78-81 and 190-195; A von Tuhr, Actio de in rem verso. Zugleich ein Beitrag zur Lehre von der Geschäftsführung (1970). Cf A Guarneri Citati, "Studi sulle obbligazioni indivisibili nel diritto romano" in Annali Palermo 9 (1921) 5 sqq; F Haymann, "Zuwendung aus fremden Vermögen" in Jher Jahrb 77 (1927) 188 sqq; B Frese, "Defensio, solutio, expromissio der unberufenen Dritten" in Studi Bonfante 4 (1930) 397 sqq. Undoubtedly the most important South African common law authority on the subject is the outstanding work of R J Pothier, Appendice du quasi-contrat negotiorum gestorum in his Oeuvres complètes: Traités des contrats de dépot, de mandat, de nantissement, d'assurance, de prêt et du jeu (1844) 198-238 (translated by B G Rogers and B X de Wet as "Pothier's Treatise on the Contract of Mandate" with "Appendix on the Quasi-Contract Negotiorum Gestorum (Of Business Discharged) (1979) 96-130). On Pothier's importance in South African legal practice see, inter alia, Kroon v Enschede 1909 TS 374 at 383; Gerber v Wolson 1955(1) SA 158 (A) at 170H-171A and 181H-184B.

9. Negotiorum gestio (or rather negotia gesta, as it was referred to in classical Roman law) had its origin in Roman times - see W W Buckland, A Text-Book of Roman Law from

Augustus to Justinian (1966) 537-538; M Kaser, Das römische Privatrecht 1 (1971) 586-590; 2 (1975) 415-419; J C van Oven, Leerboek van romeinsch privaatrecht (1948) 371-374 ; D H van Zyl, Geskiedenis en Beginsels van die Romeinse Privaatreg (1977) 314-317. In Inst 3.27 Justinian deals with negotiorum gestio as one of the obligationes quasi ex contractu, whereas in the Digest and Code it is dealt with under the title De negotiis gestis (D3.5 and C2.18 (19)). On negotiorum gestio in the classical period of Cicero, see E Costa, Cicerone giureconsulto (1927) 178-181 (with reference to, inter alia, Cicero's Topica 17.66. Except where otherwise indicated, the Mommsen-Krüger edition of the Corpus Iuris Civilis has been used in this contribution.

10 On the relevant edict see D3.5.1; 3.5.3 and O Lenel, Das Edictum Perpetuum (1927) 86, 101; H Kreller, "Das Edikt de negotiis gestis in der Geschichte der Geschäftsbesorgung" in Festschrift Koschaker 2 (1939) 193 sqq; idem, "Das Edikt de negotiis in der klassischen Praxis" in ZSS 59 (1939) 390-431; G Segré, "Sulle formule relative alla negotiorum gestio e sull'editto e il iudicium de operis libertorum" in Scritti Segré (1952) 1-60.

11 D 3.5.1 (Ulpianus): Hoc edictum necessarium est, quoniam magna utilitas absentium versatur, ne indefensi rerum possessionem aut venditionem patiantur vel pignoris distractionem, vel poenae committendae actionem, vel iniuria

rem suam amittant. Cf D 44.7.5 pr (Gaius). The *ratio* for this edict finds support in the school of *usus modernus pandectarum* and the pandectists. See Brunnemann, *Comm in pand* ad D 3.5 (*nam nisi hoc reciperetur et utrinque actio daretur, magnis damnis afficerentur absentes*); Mühlenbruch, *Doctrina pandectarum* (translated into German as *Lehrbuch des Pandecten-Rechts*) 434; Arndts, *Lehrbuch der Pandekten* 297; Von Wächter, *Pandekten* 203; Goudsmit, *Pandecten-systeem* 42. Domat, *Les loix civiles dans leur ordre naturel* 2.4.2.1 (Strahan's translation 1468) refers to D 3.5.1 as the *fondement des engagemens de celui dont l'affaire a été gerée* and comments on it thus: *Celui de qui un autre a fait quelque affaire à son insçu, est obligé envers lui à ce que demandent les suites de ce qui a été geré. Et cette obligation se contracte quoiqu'on l'ignore, par le devoir de reconnoissance de ce bon office* ..

12 Heineccius, *Elementa iuris civilis secundum ordinem institutionum* 3.28.966 (*ob aequitatem vel utilitatem*); Pothier, *Appendice* 167 (*l'équité naturelle*); Huber, *Positiones juris* ad Inst 3.28.2-3 (*propter aequitatem*; *Causa obligationis est aequitas*.)

13 Leyser, *Meditationes ad pandectas* sp 55 ad D 3.5 coroll 1: *Is qui negotia amici sui absentis gerenda non suscipit, sed perite patitur, peccat contra jus naturae* ...

14 Stryk, *Usus modernus pandectarum* 3.5.1: *Ergo nullum*

subest dubium, cum idem defensionis absentium favor adhuc hodie militet, idemque favor publicus sit.

15 Heineccius, *Elementa iuris naturae et gentium* 1.13.346: *Denique idem humanitatis amor merito impellere unumquemque deberet, ut alterum, non minus ac seipsum, ope iuvaret.*

16 Huber, *Praelectiones juris civilis* ad D 3.5.1: *negotiorum gestio* was introduced *amicitiae causa*, which is described as that which occurs when *quis absentis amici negotia sponte gerenda suscipit.*

17 Albericus de Rosate, *Dictionarium iuris* sv *negotiorum gestor*: *Negociorum gestor ille est verus seu merus, qui sine mandato vel cura, vel officio iniuncto, alterius negocium gerit*; Pacius, *Isagogicae in dig* 3.5: *Quare non inepte dicere possumus procuratorem esse negotiorum gestorem cum mandato et negotiorum gestorum esse procuratorem sine mandato*; Huber, *Positiones juris* ad Inst 3.28.5: *negotiorum gestio dicitur, cum quis aliena negotia sine mandato gratis administrat.* Cf Grotius, *Inleidinge* 3.26.4; Van der Keessel, *Dictata ad Inst* 3.28.3; Glück, *Pandecten* 419; Vangerow, *Lehrbuch der Pandekten* 664 n 1 (*ohne Auftrag*). See also M Conrat (Cohn), *Das florentinische Rechtsbuch* (*Liber iuris florentinus*) (1882) 50 (par 4.1): *Sed quia negotiorum gestores similes sunt procuratoribus, de hiis est dicendum. Qui negotium gerit accepto mandato, procurator dicitur. Ita qui negotium agit absque mandato gestor negotii dicitur.*

267/...

18 See chapter 2.2 below.

19 On the relationship between mandate and _negotiorum gestio_ in Roman and early law, see Seiler, _Negotiorum gestio_ (1968) 114-144; H W M van Helten, "Opmerkingen over de verhouding tusschen de actio mandati en de actio negotiorum gestorum in het romeinsche recht" in RM 23 (1904) 176-188; M Pampaloni, "L'eccesso di mandato" in BIDR 20 (1908) 210 sqq; B Frese, "Prokuratur und negotiorum gestio im römischen Recht" in _Mélanges Cornil_ 1 (1926) 325 sqq; idem, "Das Mandat in seiner Beziehung zur Prokuratur" in _Studi Riccobono_ 4 (1936) 397 sqq; F von Bossowski, _Die Abgrenzung des mandatum und der negotiorum gestio im klassischen und justinianischen Recht_ (1937); C Cosentini, "Ratihabitio mandato comparato" in _Annali Catania_ (1946-1947) 240 sqq; V Arangio-Ruiz, _Il mandato in diritto romano_ (1949) (reviewed by P Voci in SDHI 15 (1949) 241-245); S Solazzi, "Procuratori senza mandato" in _Scritti Solazzi_ 2 (1957) 569 sqq; idem, "La definizione del procuratore" in _Scritti Solazzi_ 2 (1957) 557 sqq; idem, "Ancora procuratori senza mandato" in _Scritti Solazzi_ 2 (1957) 609 sqq; A Watson, _Contract of Mandate in Roman Law_ (1961) (reviewed by F M de Robertis in SDHI 28 (1962) 414-424); idem, _The Law of Obligations in the Later Roman Republic_ (1965) 193-207; T Mayer-Maly, "Probleme der negotiorum gestio" in ZSS 86 (1969) 431-432 (at 432-435 he also discusses the distinction between _negotiorum gestio_ and _tutela_, on the one hand, and _negotiorum gestio_ and _cura_ on the other); P Angelini, _Il 'procurator'_ (1971)

(reviewed by A Burdese in SDHI 37 (1971) 307-328); O Behrends, "Die Prokuratur des klassischen römischen Zivilrechts" in ZSS 88 (1971) 215-299; J Nicosia, "L'azione relative alla 'male gesta procuratio'" in *Studi Volterra* 4 (1971) 787-797; H T Klami, *Teneor Mandati* (1976) 10-25. In the South African context, the work of SR van Jaarsveld, *Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg* (1974) 34 presents a useful exposition on the subject: "Die *mandatum omnium bonorum* is blykbaar die kiem van die latere saakwaarneming want die lashebber (*mandatarius*) kon allerlei handelinge verrig (*negotia gerere*) waarvoor hy geen spesifieke opdrag ontvang het nie. Om hierdie rede is die besondere korrelasie tussen die twee regsfigure dan ook vanselfsprekend. *Negotiorum gestio* het baie eienskappe besit en gevolge in werking laat tree wat groot ooreenstemming met die *mandatum*-figuur toon." See also his discussion (op cit) at 35-37, 54-55; 60-62; 192-193 and 242. See also Wessels, *Contract* (1951) 3584-3585; Rubin, *Unauthorised Administration* (1958) 2-9; D J Joubert, *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 128; J E de Villiers, J C Macintosh, *The Law of Agency in South Africa* (1981) 271-281. Cf M Nathan, *The Common Law of South Africa* 3 (1913) 1151-1154 (he refers, at 1151, to *negotiorum gestio* as "unauthorised agency"); L R Caney, *The Law of Suretyship* (1970) 35.

20 D 3.5.3.10 (*sponte et nulla necessitate cogente*); Accursius,

C J C Glossatum, gloss actionem ad C2.18 (19).16 (spontaneo gestore); idem, gloss utili and actione ad C2.18(19).17 (spontaneus gestor); idem, gloss nulla ad C2.18(19).1 (gestor ... voluntarius); Cinus, Comm in C2.19(18).20 (gestor spontaneus); Placentinus, Summa codicis 2.19 (sponte etiam sine mandato) (Cf Arena, Comm in univ ius civile ad C2.18(19)); Révigny, Lectura super cod 2.18(19).17 (spontaneus gestor) and 2.18(19).20 (voluntarius gestor); Cujacius, Recitationes in lib IV priores codicis Justiniani ad tit XVIII de neg gest (vol 8 col 59): Hic tit. est de procuratoribus voluntariis qui sine mandato dominorum, sive eorum ad quos res pertinet, sua sponte litibus se, vel alienis negotiis offerunt: iis sunt qui gestores dicuntur et procuratores voluntarii; idem, Paratitla in libros novem codicis Justiniani repetitae praelectionis in lib V cod, ad tit XLV de eo qui pro tutore negotium gessit (vol 7 col 955) (gestor amicus et voluntarius); Brissonius, De verborum significatione s.v. negotium (lib 12 p 897) (ultro et sponte); Pothier, Pandectae Justinianeae 3.5.41 (sponte); Brunnemann, Comm in cod 2.19.2. (loquitur lex haec de gestore voluntario ... spontaneus negotiorum gestor); Heineccius, Antiquitatum romanorum syntagma ad Inst 3.28.2 (negotiorum gestor quoque erat voluntarius procurator); idem, Elementa juris civilis secundum ordinem pandectarum 3.5.445 (sponte ... procurator voluntarius); idem, Elementa iur civ sec ord inst 3.28.969 (sponte et gratis); Lauterbach, Compendium juris ad D 3.5 (sponte et utiliter); Schneidewein, Comm in Inst

3.28.1.1 (*sponte et sine mandato utiliter gerit*); Molinaeus, *Comm* in C2.19(18) (*opera omnia* 3 col 113) (*sine mandato, id est sponte*); idem, *Extricatio labyrinthi dividui et individui* 1.2 (op om 2 col 214) (*pro voluntarie gestis*); Windscheid, *Pand* 430 (*freiwillige Bezorgung*); Baron, *Pand* 309 (*freiwillige Führung fremder Geschäfte*); Perezius, *Praelectionis cod* 2.19(18).2 (*sponte*); Voet, *Comm ad Pand* 3.5.1 (*voluntarius procuratur*); Vinnius, *Partitiones iur civ* 2.41 (*voluntaria tractatio*); Van Leeuwen, *Censura forensis* 1.4.25.1 (*rerum alienarum administratio alia est voluntaria*); idem, op cit 1.4.26.1 (*sponte*); Van der Linden, *Suppl ad Voet* 3.5.1 (*voluntarius procurator*); Sande, *Decisiones aurea* 3.7 def 1 (*amicus voluntarius*); Westenberg, *Principia juris* ad D 3.5.1 (*procuratores ... voluntarii*); Cf Gudelinus, *Comm de jure novissimo* 3.8; Noodt, *Prob iur civ* 3.9.1 (*op om* 1 p 51) (ut quasi amici).

21 Barels, *Advysen* 9 (*onderwinders of directeurs*); *Aanhangzel tot het Hollandsch rechtgeleerd woorden-boek* sv *negotiorum gestio*: describes the *gestor* with reference to Voet's definition (apparently as set forth in the *Commentarius ad pandectas* 3.5.1 and perhaps in the *Compendium juris* ad D 3.5.1): *Een onderwindhebber, zo spreekt Voet, is, die zig de zaaken van eenen afweezenden of die 'er geen bewustheid van heeft, zonder volmagt te hebben, onderwind ... somtyds ook wel, schoon oneigentlyk, een procurator genaamd*. Strangely enough Kersteman's *Hollandsch rechtsgeleert woorden-boek* contains no reference at all

to _negotiorum gestio_ or _onderwind_.

22 Grotius, _Inleidinge_ 3.27.1: _Onderwind is de moeite die iemand aanneemt ten opzichte van een afwezende zonder last, om zijne zaecken te verrichten_. See too Van Leeuwen, _Het Roomsch Hollandsch recht_ (abbreviated: RHR) 4.28.1-2: _Sodanige verbintenis geeft het onderwinden en uitvoeren van eens anders saken, het zy dat men ter min, en sonder last voor een afwesend vriend des selfs saken verrigt_; Huber, _Heedensdaegse rechts-geleertheyt_ (abbrev HR and translated by P Gane as "The Jurisprudence of my Time") 3.28.3: _Onderwint is bedieninge van een ander mans saken in sijn afweesen, sonder gevraagt of gelastigt te zijn ondernoomen ..._; Van der Linden, _Koopmans Handboek_ 1.15.15.1: _Het onderwinden van eens anders zaaken, buiten zijnen last en buiten zijn weten, mits niet in zijn weerwil en tegen zijn verbod_. On the proviso in respect of the _dominus prohibens_, see chapter 5.5 below.

23 A principle well-known in Roman law, as appears from D 50.17.36 (Pomponius): _Culpa est immiscere se rei ad se non pertinenti_.

24 Voet, _Comm ad pand_ 3.5.1: _Negotiorum gestor est, qui absentis vel ignorantis negotia sine mandato gerit ... quandoque, licet improprie, procurator appellatus ... ac voluntarius procurator ... Et licet vulgo culpae adnumeretur, immiscere se rei ad se non pertinenti ... culpa tamen non est, si quis aliena gerat negotia in gratiam_

et utilitatem non suam, sed domini; usque adeo, ut utilitatis causa dicatur receptum esse, eos, quorum negotia gesta sunt, etiam ignorantes obligari; ne alioquin absentium, qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia; quae sane nemo curaturus esset, si de eo, quod impendisset, nullam habiturus esset actionem. Cf idem, *Compendium juris* ad D 3.5.1: *Negotiorum gestor est, qui absentis vel ignorantis negotia sine mandato gerit. Et licet culpa sit immiscere se rei ad se non pertinenti ... tamen si quis aliena gesserit negotia in gratiam domini, actio negotiorum gestorum inde nascitur, directa et contraria.* Van Leeuwen, *Censura forensis* 1.4.25.1 refers to *negotiorum gestio* as *rerum alienarum administratio* in his discussion of the quasi-contract. In *Cens for* 1.4.26.1 he gives a definition of *negotiorum gestor* similar to that of Voet, but continues by distinguishing the *gestor* from the *mandatarius* (see n 19 supra) with reference to the will and consent of the *dominus*: *Negotiorum gestor est is, qui alterius negotia absque mandato sponte gerenda suscipit ... differt a mandatario in eo, quod is ex voluntate et consensu domini, hic, nec volente, nec nolente, sed ignorante domino, intercedat consensuro tamen, si sciret ... requiritur enim tale negotium, quod dominus solitus fuerit ipse gerere, aut aliis demandare.* As will be seen later (chapter 2.4 below) this latter remark is incorrect, inasmuch as the requirement in question is not that the *gestio* must be such that the *dominus* himself would

have undertaken it, but that it should be undertaken _utiliter_ - at least at the commencement thereof.

25 Van der Keessel, _Dictata ad Inst_ 3.28.1 describes a quasi-contractual obligation such as that arising from _negotiorum gestio_, thus: _Obligatio itaque in quasi contractu non ex aliquo consensu sed ex re oriri dicitur_ ... _id est ex ipso negotio quod gestum est, et vim obligandi habet_. In 3.28.5, however, he describes the _ratio_ for the _actio contraria_ accruing to the _gestor_ as the principle that no one should be unjustifiably enriched at the expense of another, which creates the impression that the _gestor_'s action is always based on enrichment. This is not correct as will be discussed in detail in chapter 5 below. The actions arising from _negotiorum gestio_, namely the _actio directa_ in favour of the _dominus_ and the _actio contraria_ in favour of the _gestor_ are dealt with in more detail later (chapter 2.5 below). On the quasi-contractual basis of _negotiorum gestio_ see also Pothier, _Appendice_ 167: _A défaut de contrat, cette gestion forme un quasi-contrat entre les parties, qui produit entre elles des obligations semblables à celles qui produit le contrat de mandat_.

26 Rubin, _Unauthorised Administration_ 11 and 15. At 10-15 he deals with the Roman-Dutch law of _negotiorum gestio_ in general. See too _Standard Bank Financial Services Ltd v Taylam (Pty) Ltd_ 1979(2) SA 383(C) at 387H (_per_ Van Zijl J P): "Our law in regard to _negotiorum gestio_

is based firmly, but with minor divergencies, upon the Roman law."

27 See n 3 supra in regard to the concepts of Roman-Dutch law and European ius commune.

28 Wessels, Contract 3551-3552

29 H R Hahlo, E Kahn, The Union of South Africa. The Development of its Laws and Constitution (1960) 562. The authors correctly raise a warning against "the classification of negotiorum gestio as a legal relationship based on unjust enrichment." See too R W Lee, An Introduction to Roman-Dutch Law (1953) 345-348; G Wille, Wille's Principles of South African Law (1977) 499-501; R W Lee, A M Honoré, The South African Law of Obligations (1978) 154-156 (par 433-435); A F S Maasdorp, Maasdorp's Institutes of South African Law 3: The Law of Contracts (1978) 350-354. At 350 "quasi-contract" is defined thus: "Quasi-contracts are obligations which are not based upon any agreement, either express or implied, between the parties to them, but which are by law regarded as subsisting between them because of the circumstances in which they are placed."

30 18 SC (1901) 380 at 392 (per Buchanan ACJ).

31 The question regarding negotiorum gestio contrary to the

express wishes of the *dominus* will be dealt with in chapter 5.5 below. See too *Ex parte Abbas* 1920 CPD 346 at 347 (*per* Benjamin J): "A *negotiorum gestor* is one who acts upon his own authority for an absent person." In *Klug and Klug v Penkin* 1932 CPD 401 at 404, Watermeyer J states as follows: "It seems to be clear law that a person who manages the affairs of another without a mandate from him, has as a general rule a right of action to recover from him, *inter alia*, necessary and useful expenses incurred, if the person whose affairs have been managed has accepted the benefit of such unauthorised management." The qualification expressed at the end of this *dictum* is, with respect, incorrect, insofar as the liability of the *dominus* is not dependent on his acceptance of any benefit arising from the *gestio* nor is any such prerequisite recognised in common law (see chapter 2 below). See in general the important decisions in: *Williams' Estate v Molenschoot and Schep (Pty) Ltd* 1939 CPD 360; *Knoll v S A Flooring Industries Ltd* 1951(1) SA 404(T); *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979(2) SA 383(C).

32 See chapters 6.8 and 6.9 below.

33 On the relationship between *negotiorum gestio* and necessity, see A J Kerr, *The Law of Agency* (1979) 65-68 and, further, J M Paley, "Compulsion, Fear and the Doctrine of Necessity" in A J (1971) 205-247, esp at 226-229 (re "the protective

action" and the rules pertaining thereto). F F W van Oosten, "Wederregtelikheid - 'n Skuldtoets?" in THRHR 40 (1977) 90-95, discusses the question, with reference to negotiorum gestio, whether delictual or criminal wrongfulness can be subjectively ascertained, despite decisions which insist on an objective test (see esp at p91). J V van der Westhuizen, Noodtoestand as Regverdigingsgrond in die Strafreg (1979) 419 n 68 criticises this approach. At p 7 he distinguishes between emergency and negotiorum gestio by reference to examples: "A breek in B se huis in om 'n lekkende kraan reg te maak. Indien hy betrap word voordat hy die kraan kan herstel en van saakbeskadiging aangekla word, het hy geen groter belang beskerm as wat hy opgeoffer het nie. Slegs sy bedoeling onderskei hom van die dieftige inbreker. Hy kan dus aanvoer dat hy as negotiorum gestor opgetree het. Indien hy wel die kraan herstel en groot waterskade voorkom, is dit noodtoestand omdat hy 'n veel groter euwel afgewend het as wat hy deur die breek van die venster teweeggebring het." In n 20 at p 7 he refers to the case of the medical doctor who performs an emergency operation on a seriously injured and unconscious patient, without being able to get the necessary leave to do so: "Of dit as noodtoestand of saakwaarneming beskou word, is nie noodwendig van groot belang nie. Die feit is dat die handeling regmatig is. Omdat saakwaarneming as regverdigingsgrond in ons reg nog veel minder as noodtoestand ter sprake gekom het, is dit verkieslik om dit as noodtoestand te behandel. Indien die pasiënt weier om toestemming te gee

en die operasie al wyse is om sy lewe te red, is daar beslis geen saakwaarneming voorhande nie maar wel noodtoestand." On the criminal aspects relating to negotiorum gestio see in general J C de Wet, H L Swanepoel, Die Suid-Afrikaanse Strafreg (1975) 94: "Dit spreek vanself dat ook in die strafreg saakwaarneming as regverdigingsgrond beskou moet word, want die barmhartige voer hier geen aanval nie, maar bring hulp en bystand." Of interest is their reference to section 74 of the Transkeian Penal Code: "Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit." Cf E M Burchell, P M A Hunt, South African Criminal Law and Procedure vol 1: General Principles of Criminal Law (1970) 322. According to both these sources, negotiorum gestio contrary to the will of the dominus or executed when his consent could easily have been obtained, would be unjustifiable. No authority is tendered for this proposition, however. For a similar approach in the law of delict see N J van der Merwe, P J J Olivier, Die Onregmatige Daad in die Suid-Afrikaanse Reg (1980) 111-112 and 562. Cf T W Price, "Defence, Necessity and Acts of Authority" in Butt SAL Rev (1954) 1-35 and W J Hosten, A B Edwards, C Nathan,

F Bosman, _Introduction to South African Law and Legal Theory_ (1980) 476, where the authors remark: "It will be appreciated that it is sometimes very difficult to distinguish between the acts of a _negotiorum gestor_ and those carried out in a state of necessity." In Wessels, _Contract_ 3634 reference is made to a _quasi-negotiorum gestor_ as an "agent of necessity". The examples he gives, however, are those simply relating to _negotiorum gestio_, albeit in a particular form (see cases in n 56 below). The terms _quasi negotiorum gestio_ and "agency of necessity" should be avoided, since the former may be confused with the extended form of _negotiorum gestio_ as a basis for an enrichment action, whereas the latter is a term derived from English, and not Roman-Dutch law. See also De Villiers and Macintosh, _The Law of Agency in South Africa_ (1981) 271-272, where the following opinion is expressed: "The term _negotiorum gestor_ was originally used to describe the person who acted on behalf of another and solely for the latter's benefit in circumstances of urgency, knowing that he had no such authority to act. There was, and could be, no question of any relationship arising between the two parties by consent (save _ex post facto_ by ratification); 'the whole essence of _negotiorum gestio_ is the absence of authority'. It was because of the impossibility of obtaining the consent of the _dominus_ that the _gestor_ took it upon himself to act in order to protect the property or interests of the _dominus_. Accordingly, the relationship created between the parties, although recognized

and labelled by the law on equitable grounds, was correctly classified as a quasi-contractual, and not a contractual one. The absence of consent, the ignorance of the dominus as to the acts done on his behalf (though not necessarily his absence from the place where done - Williams' Estate case - were the distinctive features of this relationship. In consequence, the negotiorum gestor (as thus defined) plays a constantly shrinking role in a world of ever-improving communications, because it is quite clear that an unauthorized person should not interfere in another's affairs if it is possible to get in touch with that other. Nevertheless in cases of extreme urgency, where the owner of property cannot be found, the doctrine still has its value. This last sentence (which appeared verbatim in the first and second edition) was criticized by Davis J in Williams' Estate v Molenschoot and Schep (Pty) Ltd as being too narrow. While it might be more accurate to say that a person is justified in acting as gestor whenever the circumstances demand immediate or wellnigh immediate action and communication with the principal is impracticable, it is suggested that the extension (by Davis J) of the concept of negotiorum gestio to the case where A acts on B's behalf not for reasons of urgency but merely because of his erroneous belief that he has B's authority so to act is unwarranted."
This view can clearly not be correct: negotiorum gestio is certainly not restricted to cases of "extreme urgency" or where it is impossible to obtain the consent of the

owner. See the discussion in chapter 2.2 below. A recent contribution to necessitous intervention related to <u>negotiorum gestio</u> is that of A K Blommaert, "Negotiorum gestio and the Life-rescuer" in TSAR 1981.2 123-135: the author deals for the most part with the delictual principles involved in life-rescuing in English and Canadian law (of the authorities in regard to salvage in n 54 below). On "agency of necessity" and similar cases in English and American law see chapters 6.8 and 6.9 below. This whole subject relates closely to the prerequisite of <u>utiliter coeptum</u>, which will be dealt with later (chapter 2.4 below).

34 On the meaning of <u>negotium</u> in Roman law see H Heumann, E Seckel, <u>Handlexicon zu den Quellen des römischen Rechts</u> (1958)sv <u>negotium</u>; M de Villiers, "Negotium in Roman Law" in SALJ 45 (1928) 223-224. The basic meaning of the concept did not change in Roman-Dutch or, for that matter, early South African law: see <u>Aanhangzel tot het Hollandsch rechtsgeleerd woordenboek</u> (1772-1773) sv <u>negotiorum gestio</u>; <u>Malan and Van der Merwe v Secretan Boon & Co</u> Foord (1880) 94, where at 96 (<u>per</u> De Villiers C J) the basic meaning of <u>nudum pactum</u> is discussed and the words, <u>habet in se negotium aliquod</u>, are translated as "it entails some degree of labour" (the reference being to D.19.5.15). It would not appear that the meaning of the word has altered in modern South African law: it continues to indicate any kind of action or activity which may give rise to an obligation. Lewis and Short, <u>A Latin Dictionary</u> (1966) sv

negotium (negocium) render it as "business", "employment" "occupation" or "affair." On the concept negotium gerere as opposed to donare (the making of a donation) see G G Archi, "Donare e negotium gerere" in Studi Volterra 1 (1971) 669-692.

35 M Kaser, Das römische Privatrecht 1 (1971) 588: Das Geschäft, das der gestor führt, kann (wie beim Auftrag) jedes erlaubte rechtliche oder faktische Tätigwerden sein. The qualification erlaubte ("permissible") indicates that the act should not be of a criminal or delictual (unlawful or wrongful) nature. Cf Seiler, Negotiorum Gestio (1968) 10 n 1: Als negotium wird verstanden jede nichtdeliktische Tätigkeit in privatrechtlichen Dingen.

36 See in general Seiler, Negotiorum Gestio 11-12; Rubin Unauthorised Administration 16-20; J E de Villiers, J C Macintosh, The Law of Agency in South Africa (1981) 279-281.

37 D 3.5.5.3 (Ulpianus): Item si procuratori tuo mutuam pecuniam dedero tui contemplatione, ut creditorem tuum vel pignus tuum liberet, adversus te negotiorum gestorum habebo actionem ...; D 3.5.42(43) (Labeo): Cum pecuniam eius nomine solveres, qui tibi nihil mandaverat, negotiorum gestorum actio tibi competit, cum ea solutione debitor a creditore liberatus sit: nisi si quid debitoris interfuit eam pecuniam non solvi. Cf C 2.18.12; D 17.1.12.6; D 47.2.81.7. The matter of Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979(2) SA 383(C) also deals with payment of another's

debt, but the emphasis falls on payment of a debt of the <u>dominus</u> in the interest of the <u>gestor</u>, which is a case of enrichment liability as dealt with in chapter 5.3 below. Cf <u>Union Bank v Beyers</u>; <u>Union Bank v Du Toit</u> 3 SC (1881) 89.

38 D 3.5.2 (Gaius): <u>Si quis ... ipse se in rem absentis alicui obligaverit, habet eo nomine actionem</u>. On the legal relationship (if any) between the third party, with whom the <u>gestor</u> has contracted in the course of the <u>gestio</u>, and the <u>dominus</u>, see Rubin, <u>Unauthorised Administration</u> 74-79; idem, "The Legal Consequences of Contracts Concluded by a Negotiorum Gestor" in Butt S A L Rev (1954) 124-133. See also n 85 infra.

39 D 3.5.45 pr (in fine)-1 (Africanus): <u>Idem est et si filio meo mandaveris ut pro te fideiuberet, et ego pro te fideiusserim. Si proponatur te Titio mandasse, ut pro te fideiuberet, meque, quod is aliqua de causa impediretur quo minus fideiberet, liberandae fidei eius causa fideiussisse, negotiorum gestorum mihi competit actio</u>. Cf D 3.5.4; D 3.5.5 pr; D 3.5.30 pr; D 3.5.31 pr; D 16.1.7; D 17.1.20.1 (Paulus): <u>Fideiussori negotiorum gestorum est actio, si pro absente fideiusserit</u>; D 46.1.4 pr; Pothier, <u>Traité des obligations</u> 428, 445; Voet, <u>Comm ad pand</u> 46.1.31, the relevant portion of which reads: <u>Regressus ei</u> (ie to the surety or <u>fideijussor</u> <u>contra debitorem principalem datur in id omne, quod fidejussorio nomine solvere coactus fuit, accommodata eum in finem actione mandati, si ex man-</u>

dato debitoris principalis fidejusserit, vel actione negotiorum gestorum, si sine mandato interveniens utiliter negotium debitoris gessisse probetur. See too Rossouw and Rossouw v Hodgson and Others 1925 AD 97 at 102 (per Innes C J): " Should the surety give his guarantee without the knowledge of the debtor, his claim to be reimbursed for loss incurred for the benefit of the latter would be that of a negotiorum gestor"; Turkstra v Massyn 1959(1) SA 40(T)(per Roper A J) at 45 D-F: "Under our law of suretyship in order that a person may bind himself as surety for the debt of another, it is not necessary that the principal debtor should have given his consent ... If there is no cession the surety is entitled to sue by the actio mandati if he becomes surety with the principal debtor's consent or by the actio negotiorum gestorum if he took this course without such consent" (see the discussion of this case by J E Scholtens, "Rights of Recourse of Sureties and Third persons who Paid Another's Debt" in SALJ 76 (1959) 266-271). On the actio negotiorum gestorum in regard to co-sureties see ASA Investments (Pty) Ltd v Smit 1980 (1) SA 897(C) in which Van Zijl J P criticises the decision of Wessels J in Kroon v Enschede and Others 1909 TS 374. Cf the early decision in Stoll's Trustee v Kriege and Bosman 3 Menzies (1835) 448. In Molife v Barker N O 27 SC (1910) 9 the applicant, a creditor of an insolvent estate, alleged that he was indebted to one of the other creditors of the insolvent estate as surety of the insolvent and that the trustee of the insolvent estate, who had paid to such other creditor

the amount owing to him by the applicant, should be regarded as a <u>negotiorum gestor</u> of the applicant. The Court held (<u>per</u> De Villiers C J) that the trustee had not intended to act as <u>gestor</u> so that he could not be legally regarded as such.

40 D 3.5.10; D 3.5.21; D 3.5.45 pr. Cf D 3.5.5.8; D 3.5.18.3; D 21.1.51.1; C 3.32.8.

41 D 3.5.48 (discussed in more detail in chapter 5.4 below); C 2.18.19. Cf D 3.5.8; D 3.5.12; D 17.1.22.10; D 44.4.5.4; C 3.32.3.1; C 3.36.20. On the letting of a usufruct on behalf of the <u>dominus</u> see D 7.1.12.2.

42 D 3.5.35 (Paulus): <u>Si liber homo bona fide mihi serviens mutuam pecuniam sumpserit eamque in rem meam verterit, qua actione id, quod in rem nostram vertit, reddere debeam, videndum est: non enim quasi amici, sed quasi domini negotium gessit. Sed negotiorum gestorum actio danda est: quae desinit competere, si creditori eius soluta sit.</u>

43 D 3.5.31.1 (Papinianus): <u>Ignorante virgine mater a sponso filiae res donatas suscepit: quia mandati vel depositi cessat actio, negotiorum gestorum agitur.</u>

44 D 3.5.5.4 (Ulpianus): <u>Si quis peacuniam vel aliam quandam rem ad me perferendam acceperit: quia meum negotium gessit, negotiorum gestorum mihi actio adversus eum competit.</u>

Cf D 3.5.8; D 3.5.22; D 3.5.23; D 26.7.37.1; D 46.3.62. In post-classical Roman law it is suggested that the payment as such should first have been ratified before the collection of debts is actionable in terms of _negotiorum gestio_. See C2.18.9: _Si pecuniam a debitore tuo Iulianus exegit eamque solutionem ratam habuisti, habes adversus eum negotiorum gestorum actionem_. Cf C 8.37.3.1. Pothier, _Appendice_ 206 is analogous inasmuch as it deals with a person who has undertaken to carry out another's affairs without authority: he may be responsible for failure to exact a debt owed by himself to such other person but not so for his failure to collect debts owing by other of his creditors.

45 C 2.18.11; C 2.18.15. See also Albertario, "Sul diritto agli alimenti" in _Studi Albertario 1_ (1933) 249 sqq.

46 D 3.5.9.1 (_servum aegrum curavit_); C 2.18.10: _Si servum alienum non inutilem domino constitutum aegrum curastis, et negotium utiliter gessistis, competenti vobis actione sumptus recuperare potestis_.

47 D 3.5.5.13; D 3.5.9.1. Cf D 7.1.48 pr.

48 D 3.5.2; D 3.5.5.5 (discussed in detail in chapter 5.3 below).

49 18 SC (1901) 380.

50 The Court referred, by way of analogy with the case where a *mala fide* possessor incurs expenses, to Voet, *Comm ad pand* 3.5.11 and *Bellingham and Another v Bloommetjie* 1874 Buch 36 at 39. The *Colonial Government*-case was, in fact, applied in *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979(2) SA 383(C) at 393E-395A. The *actio negotiorum gestorum* as a possessory remedy is dealt with in chapter 5.6 below.

51 1903 TS 100.

52 The Court (*per* Innes C J) relied directly on Voet, *Comm ad pand* 3.5.4 in regard to the liability of the *gestor* (see chapter 3.4 below). See too *Lawrie v Union Government (Minister of Justice)* 1930 TPD 402. The facts were that the car of an arrested person was detained by the police for safe custody. The Court held, *per* Tindall J at 407, that this was not a case of *depositum* since "for all practical purposes it may be regarded as *negotiorum gestio*." Cf *Grant's Farming Co Ltd v Attwell* 9 HCG (1901) 91: oxen were seized during the war by a British military force and handed over to a farmer for safe-keeping; the Court (*per* Laurence J P at 95) similarly held that the farmer "was in the position of a *negotiorum gestor* with the rights and obligations attaching to that position ..." Reference may further be made to *De Hart v De Jongh* 1903 TS 260, *Lewis Brothers v East London Municipality* 21 SC (1904) 156 and *Kehrman v Stewart*

1905 TS 677, in which cases the respective Courts found that *negotiorum gestio* was not applicable, despite the fact that the preservation of property was present in all three cases. In *Kehrman*'s case (also discussed in chapter 2.2 below) the sole heir and executor of a testator took charge of two stores, which had belonged to the testator and carried on the business in his own name. When the question arose at a later stage whether the heir had acted as *negotiorum gestor*, the Court (*per* Solomon J at 679) held that it was "impossible to suppose for one moment that he was carrying on the business as *negotiorum gestor*. How could he be that when the heir and executor were both present?" (ie present in his dual capacity). Rubin, *Unauthorised Administration* 21-22 criticises this decision: "While the evidence fully justified the conclusion that the defendant (ie respondent) had not in fact acted as a *negotiorum gestor*, it is submitted that the learned Judge's reasoning is unsatisfactory. There is no reason why the fact that a person is executor in a deceased estate should in itself prevent him from acting for the estate as a *negotiorum gestor*. The material question is whether the administration undertaken by him is within the scope of his powers as executor. If it is, his act has been authorized and there is, for that reason, no room for *negotiorum gestio*. But if, in administering the affairs of the estate, he does something which, although beyond the scope of his powers as executor, is calculated to benefit the estate, he will be entitled to claim as *negotiorum gestor* in respect of such administration."

Rubin finds support for this proposition in L Ferera (Private) Ltd v Vos N O & Others 1953(3) SA 450 (A) at 465 and continues: "In our law ... a claim by a sole heir is competent because the assets of the deceased rest, not in the heir, but in the executor of the estate. The claim of the sole heir is a debt due by the estate, and if the estate is insolvent, the heir, although not entitled *qua* heir to any part of the estate, would be entitled as a *negotiorum gestor* to a share in the distribution of the estate together with the other creditors." In Lodge v Modern Motors 1957(4) SA 103(SR) the possibility of *negotiorum gestio* was similarly ignored, even though it would have been a good cause of action. The Court held that "the enrichment principle" applied but did not venture beyond the ambit of such principle. See the criticism of this case by W de Vos, "Miskenning van Negotiorum Gestio" in THRHR 28 (1965) 229-231; J E Scholtens in Annual Survey (1965) 169-170; R C Beuthin, "Third Time Unlucky" in SALJ 82 (1965) 464-470.

53 Grotius, *Inleidinge* 3.27.6: *Onder deze naam van onderwind behoort mede de moeite die genomen werd om ander luiden goed in zee te berghen, 't welck alzoo ghemengt is met groot ghevaer, ende dat by gebreck van dien veele goederen zouden gaen verlooren, zoo is met groote reden in deze landen ingevoert berg-loon.* The amount of the *bergloon* is discussed by Grotius in *Inleidinge* 3.27.7. See further *Inleidinge* 2.4.37 and 3.29.4. Cf Schorer, *Aanteekeningen*

over de Inleidinge tot de Hollandsche rechts-geleerdheid van Hugo de Groot, 3.27.6, who deals at length with the Dutch decisions relating to bergloon, and Van Bynkershoek, Quaestiones juris publici 1.5 (op om 2 p 171-173).

54 See Associated Boating Companies v Baardsen. In Re The "Lief" 12 SC (1895) 330; Table Bay Harbour Board v New Zealand Steamship Company. The "Papanui" 18 SC (1901) 31; The "Mangoro". Union Government (Railways and Harbours) v New Transvaal Chemical Co Ltd; Charente Steamship Co Ltd v New Transvaal Chemical Co Ltd 1913 WLD 60; Maytom v The Master "Harry Escombe" and Others 1920 AD 187; S A Railways and Harbours v Wilcock NO 1935 CPD 489; Hermdal Steamship Company of 1912 Ltd v Union Government; Steamship Company Svendborg Ltd v Union Government; East Asiatic Company Ltd v Union Government; A/S Motor Tramp v Union Government 1951(3) SA 899(N). The question of the gestor's (and salvor's) rights to remuneration is discussed in chapter 4.2 below. Somewhat analogous to salvage, is negotiorum gestio in regard to life-saving: see A K Blommaert, "Negotiorum gestio and the Life-rescuer" in TSAR 1981.2 123-135.

55 McEuen & Co v Weinberg Bros 1915 CPD 789 at 791-792 (per Gardiner J): "It seems to me, as at present advised, that if there is to be any payment of war risk insurance, this would not fall upon the seller of the goods. In this case the seller has insured the goods against war risk. He claims that he did so in the interest of the

buyer and that he is entitled to recover the premium as a _negotiorum gestor_. I am disposed to think that his contention is correct."

56 See _Greenshields v Chisholm_ 3 SC (1884) 220; _Jacobs v Maree_ 19 SC (1902) 152; _Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd_ 1968 (1) SA 571(A). Cf _Koen v Maske & Co_ 24 SC (1907) 699; _Van Vollenhoven v Lawrence_ 1915 OPD 127; _Fine and Gluckman v Heyneke_ 1915 TPD 211; _Natal Shipping and Trading Co Ltd v Africa Madagascar Agencies Ltd_ 1921 TPD 530; _Philips & Co v Greyvenstein & Co_ 1922 EDL 29; _Outeniqua Produce Agency v Machanik_ 1924 CPD 315; _Chaimowitz v Balgowan Trading Co_ 1927 NPD 36. As mentioned in n 33 above, Wessels, _Contract_, 3634 refers to cases of this nature as _quasi negotiorum gestio_, inasmuch as the _gestor_ is compelled by force of circumstances to act as a _gestor_ and hence as an"agent of necessity."

57 _Ex parte Hattersley_ 1904 TH 258; _Abroms v Minister of Railways and Harbours_ 1917 WLD 51; _Ex parte Lennon Ltd_ 1929 WLD 195; _Ex parte Pearlman_ 1957(4) SA 666(N).Cf _In re Ebden_ 1 Roscoe (1864) 161. The case of _L Ferrera (Private) Ltd v Vos N O and Others_ 1953(3) SA 450(A) deals with the right of an executive dative, in "an extreme case of necessity" to buy goods on credit and borrow money for the benefit of the estate, in which event he may hold the estate liable on the basis of _negotiorum_

gestio. On protutela as a "species of negotiorum gestio" see Rubin, Unauthorised Administration 18. The relationship in Roman law between tutela and negotiorum gestio on the one hand and cura and negotiorum gestio on the other is dealt with in detail by Seiler, Negotiorum gestio 145-296. A trustee may also, in certain circumstances, exercise the functions of a negotiorum gestor. See Honoré, The South African Law of Trusts (1976) 81, 94,96, 147 and 150. At 147 he makes the following interesting comment: "The true position, it is thought, is that the meddler or person who mistakenly imagines himself to be a trustee, is liable to the actio negotiorum gestorum directa - an action which can be brought even when the contrary action would not lie. The principle of good faith requires that, if the direct action is brought, a set-off of necessary and useful expenses incurred in good faith should be allowed .. (A) person who acts as trustee without obtaining the necessary authority from the Master will not in law be validly appointed. His position will therefore be that of a negotiorum gestor." The mistake may, in fact, emanate from the Registrar, as he points out at 150: "It is thought that, if the Registrar by mistake registered an unqualified trustee, the latter's position would be that of negotiorum gestor." Cf Vernall v Naested 1924 SR 103. On the gestor who mistakenly believes he has a mandate, see n 72 infra.

58 D 3.5.5.14 (conveniendi eos iudicio facultatem non habuit);

C 2.18.20.2 (_nec agendi quidem ... facultatem habere potuit_); Voet, _Comm ad pand_ 3.5.7: _neque ullus, quem mandato carere constat, actionis pro alio in judicio movendae facultatem habeat_; idem, _Comm ad pand_ 3.3.10: _non ergo ad judicium quisquam tanquam procurator pro actore admittendus est, si constet, eum mandato carere, etiamsi de rato cautionem obtulerit; quod et hodie obtinere ..._; Groenewegen, _De legibus abrogatis_ ad D 3.5.8 pr: _Hodie negotiorum gestori imputari non potest cur oblata de rato cautione debitorem non convenerit: quia moribus nostris absque mandato in judicio non admititur_; Wessels, _Contract_ 3630; _Ryneveld v The Wine Depôt_ 2 Menzies (1833) 185; _Havenga v Steyn_ 3 Menzies (1844) 511; _Ex parte Hands_ 25 SC (1908) 417; _Lintott v Hill_ (1909) ORC 87; _Abroms v Minister of Railways and Harbours_ 1917 WLD 51 at 53 (_per_ Bristowe J): "It seems that although a voluntary agent cannot _prima facie_ bring or defend an action on behalf of his principal because a power of attorney is necessary for that purpose ... yet he may be allowed to do so by consent ... or if the objection is not taken ...; and if he does institute proceedings the principal may apparently ratify his act at all events before sentence ...; _Ex parte Abbas_ 1920 CPD 346; _Yu Kwam v President Insurance Co Ltd_ 1963 (1) SA 66(T). In _Lintott v Hill_ (1909) ORC 87 it was further held that a _gestor_ who institutes legal proceedings without the necessary consent or authority, may be ordered to pay the costs _de bonis propriis_.

59 D 3.3.35 pr; D 3.5.7 pr. Voet, _Comm ad pand_ 3.5.7 qualifies the general principle that the _negotiorum gestor_ is not permitted to litigate without authority or consent (see n 58 supra) as follows: ... _nisi gestor fuerit coniuncta persona ejus, cujus res curat, ac proinde sine mandato agendi potestatem habeat._ See also _Yu Kwam v President Insurance Co Ltd_ 1963(1) SA 66(T) at 69B-E. In general Roman law permitted a _gestor_ to act on behalf of the _dominus_ or his slave (or other dependant) in legal proceedings, eg as _defensor_ when the _dominus_, as accused, was absent. See D 3.3.35; D 3.5.30.2; D 3.5.30.7; D 3.5.40.

60 _Ex parte Abbas_ 1920 CPD 346 at 347 (_per_ Benjamin J): "Now the Court never appoints a _negotiorum gestor_. A _negotiorum gestor_ is one who acts upon his own authority for an absent person." But see _Ex parte Dold and Stone_ 1922 EDL 211 in which application was made by persons in their capacity as _negotiorum gestores_, for leave to sell landed property under their control. The Court granted a rule _nisi_ calling upon all interested parties to show cause why the order should not be made final (it does not appear from the report whether it was in fact made final). Cf _Ex parte Hattersley_ 1904 TH 258.

61 D 3.5.3.2 (Ulpianus): _'Negotia' sic accipe, sive unum sive plura_; Placentinus, _Summa codicis_ 2.19: _Sponte gerit quis absentis negotium, vel unicum vel pauca_; Pothier,

Appendice 168: Il est évident qu'il ne peut y avoir de quasi-contrat negotiorum gestorum sans une affaire dont la gestion soit la matière de ce quasi-contrat: au reste, il n'importe que ce soit la gestion d'une affaire unique, ou la gestion de plusiers affaires; Noodt, Comm ad dig 3.5 (op om 2 p 74): Negotia vero sic accipe: sive unum sive plura. Ita pluralis numerus etiam singularem complectitur: quia sive unum negotium geratur sive plura, utrimque est aequitas permittendae actionis.

62 D 3.5.45; C 2.18.14; Pothier, Appendice 178-179; Wessels, Contract 3556.

63 D 3.5.5.8; Pothier, Appendice 195: Dans ce cas, selon la subtilité du droit, je n'ai d'action que contre la personne dont j'avois intention de faire l'affaire; mais l'équité me donne une action contre les autres qui en profitent. See too Natal Bank Ltd v Parsons 1906 TH 102; Reid and Others v Warner 1907 TS 961; Trahair v Webb & Co 1924 WLD 227. Cf Forster v Becker 1914 EDL 193; Pollock v Creydt 1915 NPD 350; Spencer v Gostelow 1920 AD 617.

64 C 2.18.20.2 (but see D 3.5.5.14 and Seiler, Negotiorum gestio 14-16). Pothier, Appendice 201 deals with the subject lucidly: Quoique celui qui a fait une affaire d'une personne ne soit pas obligé de faire ses autres affaires; il est néanmoins obligé de faire tout ce qui est une dépendance de l'affaire qu'il a commencé de gérer, et tout ce qui est nécessaire pour la mettre à chef; et il doit

<u>le faire même après la mort de celui dont il avoit volonté de faire l'affaire</u>. Cf idem, op cit 206; Menochius, <u>De praesumptionibus</u> 1.14.6.2: <u>Nam qui negotia alterius semel gessit, non praesumitur etiam nunc gerere: cum ipsum agere non sit quid continuum</u>; idem, op cit 1.20.5: <u>Hinc facit quid ille, qui aliquot dies et menses negotia alterius gessit, non praesumitur se ex ea gestione voluisse obligare, perpetuo negotia illa tractare sed solum tamdiu obligatus dicitur quamdiu sibi placet;</u> Wessels, <u>Contract</u> 3591. On the question of <u>gestio</u> for a deceased estate see Voet, <u>Comm ad pand</u> 3.5.1 (in fine) and see n 101 below. See too the discussion in chapters 3.1 and 4.5 below.

65 D 3.5.25; Pothier, <u>Appendice</u> 215; Voet, <u>Comm ad pand</u> 3.5.2 (in fin): <u>Si plures gesserint, contra singulos datur pro sua tantum parte</u>; Wessels, <u>Contract</u> 3607. See also n 217 below. This may be compared with the case where a <u>gestio</u> is performed by a co-owner in respect of common property. See D 42.5.9.4 (Ulpianus): ... <u>nam negotiorum gestorum agere non magis potest, quam si socius commune aedificium fulsit, quia hic quoque creditor commune, non alicuius negotium gessisse videtur.</u> This text is followed by Brissonius, <u>De verborum significatione</u> sv <u>negotium</u> (lib 12 p 896): <u>Si socius commune aedificium fulsit, commune non alienum negotium gessisse videtur</u>. Cf D 10.3.6.2; D 3.5.5.6 and see n 96 below.

66 D 3.5.5.2; Grotius, _Inleidinge_ 3.27.2; Pothier, _Appendice_ 171: _Pour former entre vous et moi le quasi-contrat negotiorum gestorum, il n'est pas nécessaire que l'affaire que j'ai faite fût proprement et principalement votre affaire; il suffit qu'elle fût une affaire dont vous étiez chargé, et que vous eussiez intérêt qui fût faite_ ... _Quoique, dans cette espèce, l'affaire que j'ai faite pour vous ne fût pas proprement et principalement votre affaire, qu'elle fût celle de votre mineur plutôt que la vôtre, elle étoit néanmoins en quelque façon votre affaire, puisque vous en étiez chargé, et que si elle n'eut pas été faite, vous en eussiez été responsable envers votre mineur_.

67 1924 CPD 472.

68 1925 CPD 137.

69 See also _Oelofse v Grundling_ 1952(1) SA 338(C) and _Behr v Minister of Health_ 1961(1) SA 629(SR). This seems to be in accordance with the approach of South African legal authors, such as Rubin, _Unauthorised Administration_ 62-63, where he says: "A husband is under a legal obligation to support his wife by providing her with food, clothing, accommodation and even with the necessary funds for the purpose of instituting legal proceedings. His duty remains even after the joint household has ceased to exist, provided that its non-existence is due to his fault ... (A) third party who supplies a wife with necessaries,

which the husband, though under a legal duty to do so, has himself failed to supply, ...is entitled to recover from the husband, whether the marriage is in or out of community of property, and whether there is a joint household or not, on the ground that he has acted as a _negotiorum gestor_ by discharging an obligation imposed upon the husband by law ...In most cases the necessaries will have been supplied with the intention of making a profit rather than serving the interests of the husband, and the third party will therefore be entitled to recover only to the extent that the husband has been enriched. Provided, however, that a reasonable price is charged, it is submitted that such price will represent the amount due to the third party on the basis of enrichment". Cf H R Hahlo, _The South African Law of Husband and Wife_ (1975) 169-186; P Q R Boberg, _The Law of Persons and the Family_ (1977) 199-209; P J J Olivier, _Die Suid-Afrikaanse Persone-en Familiereg_ (1980) 114-120; J Neethling, "Negotiorum Gestio of Verryking?" in THRHR 33 (1970) 280-284. See in general on the question on household necessaries: Van Bynkershoek, _Observationes tumultuariae_ 1300; Rodenburg, _Tractatus de iure coniugum_ 1.2.1; Van Wesel, _Tractatus de connubiali bonorum societate et pactis dotalibus_ 1.1.29; _Janion v Watson & Co_ 6 NLR (1885) 234; _Rautenbach v Groenewald_ 1911 TPD 1148; _Coetzee v Higgins_ 5 EDC (1887) 352; _Rebier & Co v Algar_ 1914 NPD 420; _Karsten v Forster_ 1914 CPD 919; _Wolmaransstad Ko-operatiewe Vereniging v Leask & Co_ 1915 TPD 272; _Reloomel v Ramsay_ 1920 TPD 371; _Bing and Lauer v Van der Heever_ 1922 TPD 279; _Lyons v_

Lyons 1923 TPD 345; _Pretorius v Hack_ 1925 TPD 643; _Bonthuys v Preiss_ 1933 OPD 59; _Stern v Schattel_ 1935 CPD 78; _Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius_ 1951(1) SA 730(T). The enrichment action of the _gestor_ who acts in his own interests will be discussed in chapter 5.3 below.

70 See the discussion in chapter 1.1 above and the authorities cited in n 19. See also chapter 2.2 below where one of the prerequisites for _negotiorum gestio_, namely that the _dominus_ should be unaware of the _gestio_, is dealt with. The problem relating to the difference between the _negotiorum gestor_ and the _procurator_ also exercised the minds of the old authorities, such as Perezius, _Institutiones imperiales_ 3.28, where he discusses and debates the question: _differtne negotiorum gestor a procuratore_?

71 D 3.5.31; Pothier, _Appendice_ 177(after dealing with the case of the _gestor_ who believed he had authority to act for the _dominus_): _Par la même raison, lorsque mon mandataire a excédé les bornes de la procuration que je lui ai donnée, en faisant quelque chose outre ce qui y étoit porté, sa gestion pour ce qu'il a fait outre ce qui y étoit porté, étant faite sans mon ordre, forme entre nous le quasi-contrat negotiorum gestorum_; Voet, _Comm ad pand_ 17.1.11: _cum alioquin excedens mandati fines non mandatum executus esse, sed aliud quid fecisse, sibique potius, quam mandanti, negotium gessisse censeatur_; Van der

Keessel, Theses selectae 573: Qui in emptione excessit fines mandati, de excessu non habet actionem, ne quidem negotiorum gestorum; Wessels, Contract 3561; Klug and Klug v Penkin 1932 CPD 401 at 405. It would appear that an executor of a deceased estate has a claim as negotiorum gestor where he has exceeded the powers granted him as executor. See L Ferera (Private) Ltd v Vos N O & Others 1953 (3) SA 450 at 465 D; Kehrman v Stewart 1905 TS 677; Rubin, Unauthorised Administration 21-22.

72 D 3.5.5.pr (Ulpianus): Item si, cum putavi a te mihi mandatum, negotia gessi, et hic nascitur negotiorum gestorum actio cessante mandati actione. Idem est etiam, si pro te fideiussero, dum puto mihi a te mandatum esse; Pothier, Appendice 176: Mais quand même celui qui a fait d'affaire de quelqu'un auroit cru avoir un ordre de lui pour la faire, s'il n'y en a pas eu, il n'y a pas de contrat de mandat, et la gestion qu'il a faite forme entre eux un quasi-contrat negotiorum gestorum; idem, Pandectae Justinianeae 3.5.7: Modo autem nullum mandatum intervenerit, nil refert gestor crediderit necne mandatum esse; Heineccius, Edictum Perpetuum 24 (op om 7 p 396): Nec interest animum quis gerendi habuerit, an sibi mandatum esse per errorem crediderit; Treutler, Selectae disputationes ad ius civile Justinianeum 1.10.2: Expediuntur autem negotia ... necessario, cum quis coactus ea gerit ... vel necessitatis suspicione, ut si quis se mandatum curamve suscepisse falso existimet; Noodt, Comm ad dig 3.5: Quid igitur? Putavi mihi a te mandatum, cum non esset man-

datum; et tua gessi negotia. Quae nascetur actio? Certum est, cessare actionem mandati, deficiente mandato. Igitur detur actio negotiorum gestorum. At non veni ultro, sed quia putavi mandatum esse; Von Vangerow, Lehrbuch der Pandekten 664 n 1.2: Dass der Geschäftsführer irriger Weise glaubt, es sei ein Mandat da, hindert die actio negotiorum gestorum nicht; Zoesius, Comm ad dig 3.5.10; Wessels, Contract 3560. The case of Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360 is of considerable importance in this regard. After an exhaustive research of the relevant authorities (at 366-367), Davis J says (at 376): "I am inclined to think that if a person, who mistakenly believes that he is acting under a mandate, seeks to recover from the owner by the actio negotiorum gestorum contraria, the usual limitations imposed upon any ordinary negotiorum gestor would apply to him also - for instance that he must not have spent more than is appropriate to the occasion, nor more than the owner himself would have spent ... if he does so, then he can recover no more than the amount by which the owner has actually and in fact been enriched." See, however, Knoll v S A Flooring Industries Ltd 1951(1) SA 404(T), where De Villiers J criticises the Williams' Estate-case and says (p408 A-C): "I have some doubt whether it was necessary, in that case, to rely on the principles of negotiorum gestio at all. It seems to me if a person, thinking that he was authorised to do so, that he had been engaged by the owner, bona fide

does certain work to his house by which he has benefited-been enriched - in a certain amount, it would be unjust for the owner to be enriched at the expense of the builder, and the latter could in equity claim the amount by which the owner has been enriched. That seems to me to be a perfectly good cause of action and, although one may bring it under the principles of _negotiorum gestor_ (sic), it does not seem to me that it is essential, for success in an action, to bring in that principle. The equitable doctrine of unjust enrichment is wide enough to cover the facts in _Williams_' case to my mind." See the discussion of this case by J E Scholtens, "Negotiorum Gestio and Unjust Enrichment"in SALJ 68 (1951) 134-137 and also the comments in Annual Survey (1950) 130-131. Cf _Chaimowitz v Balgowan Trading Co_ 1927 NPD 36; _Vadas (Pty) Ltd v Philp_ 1940 CPD 267. The relationship between _negotiorum gestio_ and unjustified enrichment is dealt with in more detail in chapter 5 below.

73 See in general Seiler, _Negotiorum gestio_ 61-72; Rubin, _Unauthorised Administration_ 28-29; S R van Jaarsveld, _Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg_ (1974) 35-37, 54-55, 60-62, 192-193, 242.

74 This requirement is dealt with in chapter 2.4 below.

75 D 3.5.8 (Scaevola): _Pomponius scribit, si negotium a te_

quamvis male gestum probavero, negotiorum tamen gestorum te mihi mon teneri. Videndum ergo, ne in dubio hoc, an ratum habeam, actio negotiorum gestorum pendeat: nam quomodo, cum semel coeperit, nuda voluntate tolletur? Sed superius ita verum se putare, si dolus malus a te absit. Scaevola: immo puto, et si comprobem, adhuc negotiorum gestorum actionem esse, sed eo dictum te mihi non teneri, quod reprobare non possim semel probatum: et quemadmodum quod utiliter gestum est necesse est apud iudicem pro rato haberi, ita omne quod ob ipso probatum est. Ceterum si ubi probavi, non est negotiorum actio: quid fiet, si a debitore meo exegerit et probaverim? Quemadmodum recipiam? Item si vendiderit? Ipse denique, si quid impendit, quemadmodum recipiet? Nam utique mandatum non est. Erit igitur et post ratihabitionem negotiorum gestorum actio.

76 C 2.18.9: Si pecuniam a debitore tuo Iulianus exegit eamque solutionem ratam habuisti, habes adversus eum negotiorum gestorum actionem. Cf D 3.5.5.8; D 3.5.5.11-13; D 17.1.50; D 47.2.81.5 and 7.

77 D 50.17.60 (Ulpianus): Semper qui non prohibet pro se intervenire, mandare creditur, sed et si quis ratum habuerit quod gestum est, obstringitur mandati actione; C 4.28.7. But Cf C 3.32.3. See in general on the classical as opposed to the post-classical approach, Seiler, Negotiorum gestio 61-72.

According to W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (1966), ratification in Roman law had the effect that the *gestor* might treat the *gestio* as a mandate, if he wished, but that it did not automatically become a mandate.

78 See *n* 3 above.

79 Brunnemann, *Comm in pand* 3.5.6.13-14: *Circa ratihabitionem an ex ea mandati actio, an vero negotiorum gestorum, distinguitur. Si meum sit negotium et meo nomine a te gestum, si accedat ratihabitio, mandati datur actio ... cum qua tamen actio negotiorum gestorum concurrit ... Si vero meum negotium et meo nomine non gestum, tunc actio negotiorum gestorum*; Perezius, *Prael in cod* 2.19.2: *Nam qui domini mandato sponte suscepto gerit, habet actionem mandati, non negotiorum gestorum ... At si dominus non ab initio mandavit, sed postea ratum habuit, non denegabitur actio negotiorum gestorum ... Ratihabitio namque retrotrahitur et comparatur mandato ... et hoc casu actio negotiorum gestorum concurrit cum actione mandati* ... Cf Von Vangerow, *Pand* 664 n 3 (vol 5 p508-511).

80 Pothier, *Appendice* 218: *La ratification ou l'approbation que celui au nom de qui et pour qui on a fait quelque affaire, donne à la gestion, n'éteint pas l'action qu'il a pour s'en faire rendre compte; cette approbation n'a d'autre effet que d'empêcher qui'il ne puisse désapprouver l'affaire qui a été faite pour lui, et l'empêcher de la*

laisser pour le compte de celui qui l'a faite: mais elle ne l'exclut pas de l'action qu'il a pour s'en faire rendre compte: erit et post ratihabitionem negotiorum gestorum actio. Cf idem, *Appendice* 172: ... *si vous l'avez ratifié ce paiement pour vous ratifié, forme entre nous le quasi-contrat negotiorum gestorum*; idem, *Pandectae Justinianeae* 3.5.5. See also Noodt, *Comm ad dig* 3.5 (*op om* 1 p 75 and 78), who is likewise reluctant to depart from the classical Roman tradition.

81 Voet, *Comm ad pand* 3.5.14: ... *Videndum ego arbitror qua mente ratihabitio interposita sit. Si enim eo animo, ut in mandatum abiret negotiorum gestio, actio mandati haud deneganda foret: at si illud defuerit propositum, non aliud competeret quam quod ab initio natum fuit, negotiorum gestorum judicium.* Cf idem, op cit 3.5.12; 4.4.44; idem, *Compendium juris* ad D 3.5.7: *Ceterum, si dominus id, quod gestum est, ratum habuerit, si quidem eo animo, ut in mandatum abiret negotiorum gestio, actio mandati dabitur; alioquin negotiorum gestorum actio durabit* ...; Wessels, *Contract* 3632-3633.

82 Van Bynkershoek, *Observationes tumultuariae* 1805: *Sed cum specialia mandata intercesserint, frustra hic provocabatur ad actionem negotiorum gestorum*; Van der Keessel, *Dictata ad Inst* 3.28.3: *Si quis sciat negotium suum ab altero geri et tacite consentiat, mandatum erit, non negotiorum gestio.*

305/...

83 Van der Linden, Supplementum to Voet, Comm ad pand 3.5.14: ...post ratihabitionem adhuc competere actionem de negotiis gestis. See Rubin, Unauthorised Administration 29.

84 Huber, H R 3.28.7: Het schijnt dat deze actie van onderwint ook plaetse heeft, soo wanneer des saeksheer het gehandelde by den onderwinder eerst niet hebbende geweeten, daer nae heeft voor goedt gekeurt, hoewel andere meinen, dat in sulken gevalle de actie van lastgeevinge plaets heeft, maer alsoo dese beyde actien van eenderleije kracht zijn, en gy niet van noden hebt de namen der actien in uw eysch uit te drucken, soo is u aen dat verschil weinig geleegen. Cf Zoesius, Comm ad dig 3.5.13. The evaluation of S.R van Jaarsveld, Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg (1974) of the Roman Dutch authorities in this regard is summed up thus(at 62): "In die algemeen kan gesê word dat Van der Linden se sienswyse die meeste bevredig veral omdat dit so suiwer Romeinsregtelik gefundeer is. Voet se oplossing lewer die probleem op dat dit gewoonlik baie moeilik is om die bedoeling vas te stel van die persoon wat reeds oorgegaan het tot die daad van ratifikasie. Aan die ander kant moet daar miskien met Huber saamgestem word dat die probleem ten aansien van watter aksie toepaslik is van groter abstrak-teoretiese as dogmaties-praktiese belang is." Wessels, Contract 3632 points out that ratification does not augment nor diminish the rights of the parties but serves only

to facilitate the proof of the *gestio*.

85 See *Klug and Klug v Penkin* 1932 CPD 401 at 405 where the Court (*per* Watermeyer J) held that there had been a ratification of the unauthorised acts of an agent, in which case "the maxim *omnis ratihabitio retrotrahitur et mandato priori aequiparatur* would apply and the plaintiffs would in general acquire the rights and become subject to the liabilities of his agent in respect of the ratified action." It is true that this case did not deal with a *gestor* whose acts had been ratified by the *dominus* but, it is submitted, the approach of the Court in such a case and the effect of the relevant remedies would be no different. Cf *De Hart v De Jongh* 1903 TS 260. The difference between the reciprocal remedies in Roman and Roman-Dutch law was somewhat more marked, as Rubin, *Unauthorised Administration* 29, points out. For present purposes it is not necessary to examine the question in any depth. The relationship between the *dominus* and third parties with whom the *gestor* contracts may be mentioned in this regard (see also n 38 above and the discussion in chapter 4.3 below). Rubin, *Unauthorised Administration* 74-79, deals with the question in some detail. At 76-78 he discusses the *stipulatio alteri* and concludes that the contract between the *gestor* (as *stipulans*) and the third party (as *promittens*) is "concluded on the basis that the *dominus* must be given an opportunity either to reject or to ratify it" (p 78). If the *dominus* should ratify, reciprocal rights and duties arise

307/...

between the *dominus* and the third party. This subject is also dealt with by Rubin in an article "The Legal Consequences of Contracts Concluded by a Negotiorum Gestor" in Butt SAL Rev (1954) 124-133. S R van Jaarsveld, *Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg* (1974) 192-193 emphasises the relationship between ratification and *negotiorum gestio* and points out (at 192): "Die verskynsel is eintlik voor die handliggend want basies is die drie-party verhouding ook by saakwaarneming aanwesig terwyl die *gestor* se optrede in baie opsigte korrelasie toon met dié van die volmaglose verteenwoordiger omdat albei sonder magtiging namens en in belang van 'n prinsipaal (*dominus*) optree." He criticises Rubin's treatment of the *stipulatio alteri* in this regard, however, (at 193): "Dit is alles goed en wel om die volmaglose agent as *gestor* aan te dui indien die bedoeling daardeur is om die sogenaamde verteenwoordiger beter te tipeer en gevolglik meer begripsduidelikheid te bewerkstellig. Dit is egter 'n ander saak indien Rubin hiermee wil te kenne gee dat hier sprake van 'n besondere toepassing van *negotiorum gestio* is. In casu is daar slegs van een regsfiguur sprake, naamlik verteenwoordiging, want 'n persoon is nie geregtig om onder die dekmantel van *negotiorum gestio* kontrakte as sogenaamde verteenwoordiger in die naam van 'n bepaalde *dominus* te sluit en aldus vir hom aanspreeklikheid sonder sy kennis en samewerking teenoor 'n *promittens* te bewerkstellig nie. Selfs al sou die optrede van die *gestor utiliter gestum* wees (see chapter 2.4

below), sal die prinsipaal nie sonder ratifikasie aan die gevolge wat uit sodanige optrede voortvloei, gebonde wees nie - soos Rubin tereg opmerk." See further R W Lee, An Introduction to Roman-Dutch law (1953) 437-440 (appendix G: "Stipulations for the Benefit of a Third Person"): he does not agree that the "juristic nature" of the *stipulatio alteri* should be construed as a form of *negotiorum gestio*. See in general on the *stipulatio alteri* J C de Wet, Die Ontwikkeling van die Ooreenkoms ten behoewe van 'n Derde (1940).

86 S R van Jaarsveld, op cit 242: "Volledigheidshalwe is dit wenslik om daarop te wys dat die figuur van *negotiorum gestio*, netsoos in die Romeinse reg, ook in die Suid-Afrikaanse reg 'n besondere rol ten aansien van ratifikasie vervul. Indien 'n *dominus* oorgaan tot die ratifikasie van die *gestor* se handelinge, word sodanige *gestor* geag voortaan 'n verteenwoordiger van die *dominus* te wees. Dit sal natuurlik slegs die geval wees indien die *gestor* reeds *ab initio* in die naam van die *dominus* opgetree het. Daar kan aanvaar word dat die gemeenregtelike standpunt dat, na sodanige ratifikasie, nog steeds op grond van *negotiorum gestio* opgetree kan word, vandag nie meer geld nie aangesien daar deur ratifikasie 'n gewone verteenwoordigingsverhouding in die lewe geroep word."

87 See the full discussion in Seiler, *Negotiorum gestio* 114-144, where the subject is dealt with under the heading

Mandat und negotiorum gestio: die Geschäftsführung im Auftrag eines Dritten. He distinguishes between cases where the mandator is in the role of a gestor and those where the mandatarius is considered to be the gestor.

88 D 3.5.3.11 (Ulpianus): Apud Marcellum libri secundo digestorum quaeritur si, cum proposuissem negotia Titii gerere, tu mihi mandaveris ut geram, an utraque actione uti possim? Et ego puto utramque locum habere. Cf D 3.5.20.3; D 3.5.27. This is also the case where the gestor conducts the affairs of a pupillus on instructions of the tutor: the gestor is bound to the pupillus by the actio negotiorum gestorum and is not considered to have managed the affairs of the tutor. See C 2.18.2: Qui pupillae negotia tutoris mandato suscepit, pro tutore negotia non videtur gessisse, sed negotiorum gestorum actione pupillae tenebitur. In such cases, the pupillus (or pupilla, as in C 2.18.2) is himself (or herself) liable to the extent of his (or her) enrichment (see chapter 5.2 below). Cf C 2.18.14. Where A has simply persuaded B to manage the affairs of the dominus, B is the gestor in relation to the dominus. See D 3.5.11.

89 See Brunnemann, Comm in pand 3.5.3.11 (par 16): Haec est species volui tuum negotium sponte gerere, postea amicus tuus mandat mihi, ut hoc negotium geram, quaeritur, an concurrat actio mandati et actio negotiorum gestorum?

Videtur quod non, quia habere mandatum et non habere mandatum sunt contraria. Sed affirmatur, quia hic actiones illae non concurrunt contra eandem personam. Contra te datur actio negotiorum gestorum sed contra amicum tuum actio mandati ..., idem, *Comm in cod* 2.18(19).4 and 14; Pothier, *Appendice* 179: *La gestion que j'ai faite de votre affaire sans votre ordre, forme entre nous le quasi-contrat negotiorum gestorum, soit que je l'aie faite sans eu avoir reçu l'ordre de personne, soit que je l'aie faite par l'ordre d'un tiers; et en ce dernier cas j'ai le choix de me faire rembourser des frais de ma gestion, ou par vous, par l'action negotiorum gestorum, ou par celui qui m'en a donné l'ordre, par l'action mandati.* Cf idem, op cit 214, where he points out that the *gestio* arises between the *dominus* and the person who gave the instructions, since the latter has the intention of administering the affairs of the *dominus*, while the person who performs the act has the intention of performing a mandate. Pothier suggests, however, that an *actio utilis* be granted to the *dominus* against such mandatary. On the concurrence of actions in classical Roman law, see E Levy, *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* (1918-1922). See further Perezius, *Comm in dig* 3.5 (p 82): *Quod si alterius mandato, puta tutoris, quis pupilli negotia gerit, habet in pupillum actionem negotiorum gestorum, in tutorem autem mandati habet* ...; idem,

Prael in cod 2.19.2. Cf Voet, Comm in pand 3.5.2; Van Bynkershoek, Observationes tumultuariae 1393; Wessels, Contract 3606.

90 1939 CPD 360, esp at 363-367 and see n 72 above.

91 See in general Seiler, Negotiorum gestio 16-20; E Rabel, "'Negotium alienum' und 'animus'" in Studi Bonfante 4(1930) 279 sqq; Wessels, Contract 3555. This requirement is closely related to the animus negotia aliena gerendi, which is dealt with in chapter 2.3 below.

92 Pothier, Appendice 169: Il n'est pas moins évident qu'il ne peut y avoir de quasi-contrat negotiorum gestorum sans deux personnes, dont l'une gère l'affaire et dont l'autre soit celle à qui appartient l'affaire qui est gérée. Cf Wessels, Contract 3555.

93 D 3.5.3 pr (Ulpianus): Ait praetor: 'Si quis negotia alterius, sive quis negotia, quae cuiusque cum is moritur fuerint, gesserit, iudicium eo nomine dabo:' Cf D 3.5.3.2; D 3.5.3.10; D 3.5.5.12; D 3.5.18.4; D 3.5.22; D 3.5.24; D 3.5.27; D 3.5.30.3; D 18.1.34.7; D 26.7.39.2; D 42.5.9.4; D 46.3.34.4; C 2.12.4. The term negotium/negotia absentis also occurs: see D 3.5.2; D 3.5.10 (negotia absentis et ignorantis); D 13.6.17.3; D 20.6.1 pr; D 21.2.66.3; D 44.7.5 pr. The question as to whether the dominus should be absent or ignorant (unaware) of the negotiorum gestio is dealt with in chapter 2.2 below. See further,

in regard to the general principle: Cinus, Comm in cod 2.19(18).14; Schotanus, Examen juridicum in D 3.5: Cujus negotia geruntur? Semper alterius, etiam furiosi; Struvius, Syntagma jurisprudentiae 7.3.5.47: Negotium quod geritur debet esse alterius, atque tendere ad alterius commodum atque utilitatem ...; Dernburg, Pand 122 (Besorgung fremder Geschäfte); Pothier, Pandectae Justinianeae 3.5.3: Requiri ut alter alterius negotium gesserit. Nec satis est quod gessisse crediderit; Noodt, Probabilia juris civilis 3.9.1 (op om 1 p 51) (negotium alterius); Turkstra v Massyn 1959(1) SA 40(T) at 47 ("the business of another").

94 D.3.5.5.6 (Ulpianus): Si quis ita simpliciter versatus est, ut suum negotium in suis bonis quasi meum gesserit, nulla ex utroque latere nascitur actio, quia nec fides bona hoc patitur; Azo, Summa aurea in cod 2.18(19): Habet autem locum haec actio quando sunt aliena negotia gesta. Aliena dico id est, non eius qui gessit; Pothier, Appendice 169 ... C'est pourquoi si quelqu'un a fait une affaire qui ne concernoit que lui, qui étoit sa propre affaire et non celle d'aucun autre, quand même en la faisant il se seroit faussement persuadé qu'il faisoit l'affaire d'un autre, cette gestion ne pourra former le quasi-contrat negotiorum gestorum; car il n'y a pas deux personnes: c'est la même personne qui gère l'affaire, et à qui appartient l'affaire qui est gérée. Menochius, De Praesumptionibus 3.46.1-2 points out in this regard that there is a presumption that a person who contracts or acquires anything,

does so in his own name and not in that of another, the *ratio* being that one is presumed rather to care for one's own affairs than for those of another: *Qui contrahit, aliquidve acquirit, praesumitur proprio nomine, non autem alieno, contrahere et acquirere ... Et ratio ducitur ab alia iuris praesumptione, qua dicimus, quemlibet praesumi prius curare propria negotia quam aliena...*

95 1915 TPD 272 at 275-276 (*per* De Villiers JP)

96 D 3.5.5.6 (Ulpianus) ... *Quod si et suum et meum quasi meum gesserit, in meum tenebitur: nam et si cui mandavero, ut meum negotium gerat, quod mihi tecum erat commune, dicendum esse Labeo ait, si et tuum gessit sciens, negotiorum gestorum eum tibi teneri.* Seiler, *Negotiorum gestio* 19, points out that this text does not imply that a partnership, community of property or hereditary community comes into existence between the *gestor* and *dominus*, inasmuch as the actions relating to the division of common property (*actiones communi dividundo and familiae erciscundae*) exclude the *actio negotiorum gestorum* to a certain extent. See further D 3.5.30.7; D 10.3.6.2; D 42.5.9.4 and n 65 supra. Vinnius, *Quaestiones juris* 1.37 discusses whether and in what circumstances the *actio negotiorum gestorum* is concurrent with the *actio communi dividundo* and *actio familiae erciscundae*. See also Molinaeus, *Extricatio labyrinthi dividui et individui* 2.181 (*op om* 2 col 262): *Et sic actio negotiorum gestorum etiam directa,*

bene datur non modo pro alienis, sed etiam pro communibus etiam hereditariis negotiis, etiam necessariis nec commode separabilibus ...; Pothier, Appendice 170: Mais si l'affaire n'étoit que pour partie l'affaire de celui qui l'a faite, et qu'elle fût aussi en partie mon affaire, la gestion qu'il a faite de cette affaire formera entre nous le quasi-contrat negotiorum gestorum, et obligera celui qui a fait la gestion à me rendre compte de l'affaire pour la part que j'y ai, et moi à le rembourser pour cette part des frais de sa gestion. Cf Rademeyer and Others v Rademeyer and Others 1968(3) SA 1(C) at 10G.

97 D 3.5.5.1 (Ulpianus): Sed et si, cum putavi Titii negotia esse, cum essent Sempronii, ea gessi, solus Sempronius mihi actione negotiorum gestorum tenetur. Cf D 3.5.5.10; D 3.5.5.13; D 3.5.30.1; D 3.5.44.2; D 10.3.14.1 and see further : Cocceius, Jus civ controv ad D 3.5 qu 4, where he says, inter alia, in reply to the question: quando dicatur alicujus esse negotium ? ... Contraria (actio) quidem semper datur, quoties quis sciens rem alienam gessit, licet gestor putaverit alterius esse quam est. See also Struvius, Syntagma jurisprudentiae 7.3.5.47: ... Licet vero quis, cum putaret Titii negotia esse cum essent Sempronii, ea gesserit, tamen cum Sempronio et non cum Titio hic erit celebratus quis contractus; Domat, Les loix civiles dans leur ordre naturel 2.4.1.9 (Strahan 1464): Si quelqu'un par erreur à geré une affaire qu'il croyoit être celle d'un de ses amis, et qui étoit l'affaire d'un autre, il

ne se forme aucun engagement entre lui et cet ami de qui il croyoit que c'étoit l'affaire; mais seulement entre le maître de l'affaire et lui, de même que si la verité lui eût été connue. Cf Pothier, Appendice 186, 194. This principle is closely related to the prerequisite of animus negotia aliena gerendi (referred to, inter alia, as the animus obligandi), as appears from Voet, Comm ad pand 3.5.12: Caeterum, ut huic actioni locus sit, necesse non est, ut praecise habeat animum obligandi illum, cujus negotium vere gestum est: sed sufficit, quid ejus opinionis ac voluntatis fuerit, ut aliena negotia gerat: quid enim, si se Titii negotia gerere arbitretur, cum ea non Titii sed Maevii essent? Adversus Maevium hoc casu efficaciter agi, responsum est. This text was relied on in Klug and Klug v Penkin 1932 CPD 401 at 404. See also Trahair v Webb and Co 1924 WLD 227; New Club Garage v Milborrow and Son 1931 GWLD 86 at 99; Wessels, Contract 3576.

98 See chapter 5.2 below. The leading Roman sources in this regard are D 3.5.3.4; D 3.5.5.2; D 3.5.33; D 26.8.1 pr; D 26.8.5 pr and C 2.18.2. See also Voet, Comm ad pand 3.5.1.

99 See D 3.5.3.5 (Ulpianus): Et si furiosi negotia gesserim, competit mihi adversus eum negotiorum gestorum actio and the discussion in Seiler, Negotiorum gestio 263-275. Cf Lauterbach, Compendium juris ad D 3.5.

100 See D 3.5.28; Voet, Comm ad pand 3.5.1.

316/...

101 D 3.5.3 pr; D 3.5.3.6; D 3.5.11.1; D 3.5.21.1; Cujacius, In lib IX Pauli ad Edictum, recitationes ad L XIII de neg gest (vol 6 col 106): Ad hanc l sciendum est, ex edicto de neg gestis dari negotiorum gestorum actionem ultro citroque: directam domino negotiorum haeredive ejus: contrariam gestori: non tantum si viventis amici negotia gesserit, sed etiamsi mortui, id est haereditaria negotia jacente haereditate, cum nemo adhuc defuncto haeres extitisset ...; Voet, Comm ad pand 3.5.1.

102 D 3.5.3.1 (Ulpianus): Nam et mulieres negotiorum gestorum agere posse et conveniri non dubitatur; Voet, Comm ad pand 3.5.2: Nec refert cujus sexus sit, qui gessit; Noodt, Comm ad D 3.5 (op om 2 p 74): Nam et mulieres negotiorum gestorum agere et conveniri, non dubitatur ... Et hoc ad utrumque sexum refertur (a reference to D 3.5.3.3) ... nam ut masculis, sic foemenis, prodest negotiorum gestio: et his quidem eo magis, quo magis sexus imbecillitas in administrandis negotiis suis aliorum ope aut cura indiget. Possunt igitur foeminae alios convenire, et ab aliis conveniri, negotiorum gestorum ... nec interest cujus negotium gestum sit: modo sit alterius. Reference to the gestio of persons without legal capacity or to that relating to women, albeit in the capacity of dominus or gestor, is encountered in a great many of the common law sources - a multiplication of authorities in this regard is unnecessary.

317/...

103 Pothier, _Appendice_ 174: _Le principe que nous avons établi, que pour former le quasi-contrat negotiorum gestorum, il falloit deux personnes, dont l'une fît l'affaire de l'autre, s'entend des personnes réelles on fictives. C'est pourquoi si quelqu'un fait sans mandat une affaire qui dépend d'une succession vacante, cette gestion forme le quasi-contrat negotiorum gestorum entre celui qui a fait cette affaire, et la succession vacante: car la succession vacante est une personne fictive ...: elle peut contracter des obligations et on eu peut contracter envers elle._ Cf Lauterbach, _Compendium juris_ ad D 3.5: _Geruntur omnium, etiam fictarum personarum_...

104 1956(1) SA 277(A).

105 At 302 G: "It would appear that the _gerens_ may act on behalf of a person unknown to him, to a foetus _in utero_ and to a _hereditas jacens_, but I cannot imagine an unauthorised agent acting on behalf of an undetermined individual to be conceived in future."

106 At 303 F: "In the principle of _negotiorum gestio_ Roman-Dutch law recognises the position of a man who acts on behalf and for the benefit of another without a mandate from the latter, and I cannot see why the principle cannot be applied - or should not be extended so as to be applicable to a trustee in cases like the one before us."

107 Honoré, _The South African Law of Trusts_ (1976) 63-64.

108 See Honoré, op cit 81,94,96, 147 and 150. See also n 57 above.

109 D 3.5.1 (Ulpianus): Hoc edictum necessarium est quid magna utilitas absentium versatur.

110 Inst 3.27.1: Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum; D 13.6.17.3 (absentis negotia); D 44.7.5 pr (absentis negotia). See in general on absentia in Roman sources relating to negotiorum gestio, Seiler, Negotiorum gestio 47-51.

111 Grotius, Inleidinge 3.27.1: Onderwind is de moeite die iemand aanneemt ten opzichte van een afwezende zonder last, om zijne zaecken te verrichten. Cf Menochius, De praesumptionibus 3.71.1 (absentis nomine).

112 1905 TS 677.

113 At 678-679 per Solomon J. See the criticism of this case by Rubin, Unauthorised Administration 21-22 and the discussion in n 52 above. See also Ex parte Abbas 1920 CPD 346 at 347 (per Benjamin J): "A negotiorum gestor is one who acts upon his own authority for an absent person."

114 D 3.5.2 (Gaius): Si quis absentis negotia gesserit licet

ignorantis ...; D 3.5.10 (negotia absentis et ignorantis); D 3.5.40 (me ignorante vel absente); Odofredus, Lectura super digesto veteri 3.5.2 (licet ignorantis absentis negocia); Molinaeus, Comm in Cod 2.19 (18) (op om 3 col 114); Heineccius, Antiquitatum romanorum syntagma ad inst 3.28.1: Qui absentis aut ignorantis negotium curandum suscipit, nulloque adeo mandato instructus est, negotiorum gestor vocatur; idem, Recitationes in elementa jur civ secundum ordinem inst 3.28.969: Tota enim res huc redit, an utilitas alterius absentis et ignorantis promota sit; Schotanus, Examen juridicum in D 3.5 (in reply to the question whether the dominus should be absent): Non tantum illi, sed et qui praesentium: modo praesentes ignorent geri; Lauterbach, Compendium juris ad D 3.5: Geruntur omnium ... praesentium et absentium ... scientium et ignorantium; Struvius, Syntagma jurisprudentiae 7.3.5.46; idem, Evolutiones controversiarum 7.3.5 (thes 46): ignorantia vel absentia domini sufficit ad constituendum hunc quasi contractum ... Nullum vero mandatum subest si quis quidem praesens sit, sed ignoret, sua negotia geri. Similiter si absens sit, licet sciat ... Absentes et ignorantes videantur conjungi; Perezius, Institutiones 3.28: Quid est negotiorum gestio? Est quasi contractus quo quis negotia absentis atque ignorantis gerit sine mandato. Dico ignorantis; nam si quis sciat negotium suum geri et cum posset, non prohibuerit, mandasse intelligitur. Unde et hic dicuntur absentis negotia geri, quia absentes ignorare solent negotia sua geri: vix enim est ut quis praesens negotium suum geri ignoret;

Voet, *Comm ad pand* 3.5.1 (*absentis vel ignorantis negotia*); idem, *Compendium juris* ad D 3.5.1: *Negotiorum gestor est, qui absentis vel ignorantis negotia sine mandato gerit*; Noodt, *Comm ad dig* 3.5 (*op om* 2 p 74) (*absentium vel ignorantium negotia*); Van Leeuwen, *Censura forensis* 1.4.26.1 (*nec volente, nec nolente sed ignorante domino*); Van Bynkershoek, *Observationes juris Romani* 1.7 (*op om* 1 p 18) (*absentis vel ignorantis negotia*); idem, *Observationes tumultuariae* 1393; *Aanhangzel tot het Hollandsch rechtgeleerd woorden-boek* sv *negotiorum gestio* (vol 2 p 938): *Een onderwindhebber ... is die zig de zaaken van eenen afweezenden of die 'er geen bewustheid van heeft, zonder volmagt te hebben, onderwind ...*; Pacius, *Institutiones imperiales* 3.27.1: *Nota tertio: in toto hoc tractatu de negotiis gestis, et cum dicimus agi negotiorum gestorum, semper intelligi negotia ab alio gesta, domino non solum absente sed, etiam ignorante, ut hac ratione sit quasi contractus, non mandatum*; Westenberg, *Principia juris* ad D 3.5.9: his definition of *negotiorum gestio: quasi contractus cum quis alterius absentis, vel praesentis, sed ignorantis negotia, sine mandato gerit utiliter*. Zoesius, *Comm ad dig* 3.5.1 (*absentis et ignorantis negotia*); Ortwyn, *Standhoudend Roomsch regt* 3.28.1 (*saaken eens afwezenden ... ook dat zy 't niet weeten*).

115 Böhmer, *Introductio in jus digestorum* 3.5.1 (*ignorantis negotia*), 3.5.5 (*ut negotia ignorantis gerantur, quamvis praesens fuerit*); Brunnemann, *Comm in cod* 2.19.16 (*sororis*

ignorantis); Cocceius, Jus civile controversum ad D 3.5 qu 2 (quoted in n 119 below); Heineccius, Elementa iuris civilis secundum ord pand 3.5.445 (negotia alterius ignorantis); idem, Elementa iur civ sec ord inst 3.28.969; 3.28.971; Domat, Les loix civiles dans leur ordre naturel 2.4.2.1 (Strahan 1468): Celui de qui un autre a fait quelque affaire a son insçu, est obligé envers lui à ce que demandent les suites de ce qui a été geré. Et cette obligation se contracte quoiqu'on l'ignore, par le devoir de reconnoissance de ce bon office ...; Pothier, Appendice 167 (à son insu); Van der Linden, Koopmans handboek 1.15.15.1 (buiten zijn weten).

116 1939 CPD 360 at 369 (per Davis J).

117 See also Turkstra v Massyn 1959(1) SA 40 (T) at 47, where the said dictum in the Williams' Estate case is relied upon by Roper A J: "A negotiorum gestor is one who undertakes the business of another in his absence. Now 'absent' means not physically absent but absent from the transaction, that is ignorant of it, and not necessarily absent from the place where the transaction took place." Cf De Hart v De Jongh 1903 TS 260. See the criticism of the Williams' Estate-case in De Villiers and Macintosh, The Law of Agency in South Africa (1981) 271-272; quoted in n 33 above.

118 1938 CPD 140 at 145.

119 D 17.1.6.2 (Ulpianus): Si passus sim aliquem pro me fideiubere vel alias intervenire, mandati teneor ...; D 50.17.60 (quoted in n 77 above); Accursius, Glossa in digestum veteris 3.5.1; Cocceius, Jus civile controversum ad D 3.5 qu 2: An negotiorum gestio non sit nisi ubi dominus absens est? Resp. Distinguendum an praesens ignoret negotia sua geri, an vero sciat: illo casu vero erit negotii gestio; hoc vero mandatum... Absentia duplex est: alia ab urbe seu loco; alia a negotio, cum quis loco quidem praesens est, sed non in ipso negotio; quod accidit quoties ignorat negotium geri: nam si ipsi negotio quoque praesens est, utique non ignorat, adeoque tum mandare videtur; Schotanus, Examen juridicum in D 3.5: ... Si enim praesens in negotio et sciens sua administrari, non contradixerit, videtur mandasse; Glück, Pandekten 419 (ad D 3.5) (p 330):(W)enn Jemand gegenwartig ist, und wissentlich geschehen lässt, dass ein anderer sein Geschäft besorgt, ist eine stillschweigende Bevollmächtigung nach Vorschrift der Gesetze anzunehmen. Domat, les loix civiles 2.4.2.8 (Strahan 1475): Si celui de qui un autre a geré l'affaire, a ensuite approuvé ce qui a été fait, après l'avoir connu, il ne pourra plus s'en plaindre, quand il auroit quelque sujet de ne pas l'approuver ...; Pothier, Appendice 180: Sans cela (ie managing the affairs of the dominus à son insu) il n'y a pas lieu au quasi-contrat negotiorum gestorum; car lorsque vous avait fait l'affaire de quelqu'un à son vu et à son su, ou il l'a souffert, ou il s'y est opposé.

S'il l'a souffert, il est censé, en souffrant que vous fissiez pour lui cette affaire, vous avoir donné un mandat tacite de la faire ... et c'est le cas du contrat de mandat, et non celui du quasi-contrat negotiorum gestorum (cf op cit 175); Grotius, *Inleidinge*, 3.27.3: *Want een die jeghenwoordig is, ende een ander sijne saecken laet verrechten, werd verstaen last te gheven*; Perezius, *Institutiones* 3.28: *si quis sciat negotium suum geri, et cum posset, non prohibuerit, mandasse intelligitur*; Vinnius, *Comm ad Inst* 3.28.1.1: *Qui praesens patitur negotia geri mandare intelligitur ... Videlicet sine mandato aut ignorantis, nam si ex mandato gesserit, palam est ex contractu nasci inter eos obligationem mandati*; Noodt, *Comm ad dig* 3.5 (*op om* 2 p 74): *Porro qui praesens patitur negotium suum geri, is pro mandante habetur ... Contra ubi pro absente intervenitur aut praesente, sed ignorante, non sit actioni mandati locus, sed negotiorum gestorum*; Huber, *Prael jur civ* ad D 3.5.1: *Sed in negotiorum gestione dominus semper est absens, non utique a loco, ubi res geritur, sed a negotio, cui si praesens interfuerit, nec contradixerit, mandasse intelligitur*; Van der Keessel, *Praelectiones ad Grot* 3.27.3 (vol 5 p 238): *Plerumque scilicet dominus est absens, cuius negotium geritur, nam si praesens sit et alium sua negotia gerere patitur, tacite mandare creditur* ... Wessels, *Contract* 3558 points out (with reference to Meerman's *Thesaurus*) that, if an absent *dominus* should come to hear of the management of his

affairs but is unable to communicate with the gestor, it is a case of negotiorum gestio and not of tacit mandate.

120 The question of ratification of the gestor's actions has been dealt with in chapter 1.2 above. See the authorities cited in notes 73-86. On the relationship between negotiorum gestio and mandate, see the authorities set forth in n 19 above.

121 See in general Seiler, Negotiorum gestio 21-46; Rubin, Unauthorised Administration 34-42; idem, "Negotiorum Gestio and the Animus Negotia Aliena Gerendi" in AJ (1958) 54-63; Van Zyl, Saakwaarneming 2-3, 10-12, 39-40, 50-51, 56, 62-63, 76, 83-84, 90, 148-149; E Rabel, "'Negotium alienum' und 'animus'" in Studi Bonfante 4 (1930) 279 sqq. Cf C Sanfilippo, "La valutazione dell' animus nella 'pro herede gestio'" in Annali Catania 2 (1947-1948) 166 sqq; C Ferrini, "Appunti sulla dottrina romana della 'negotiorum gestio'" in Opere Ferrini 3 (1929) 205-234; T Mayer-Maly, "Probleme der negotiorum gestio" in ZSS 86 (1969) 416-435 at 426-428; A Wacke, "Paulus Dig 3,5,18,3: Zur bona fides bei Ersitzung, Geschäftsführung und Eviktionsregress" in Festgabe von Lübtow (1980) 269-289. Wessels, Contract 3569-3578; Kaser, Das römische Privatrecht 1 (1971) 588: Vom gestor wird, damit er vollen Aufwendungsersatz verlangen kann, das Bewusstsein dieser

Fremdheit und der Wille verlangt, das Geschäft als fremdes zu führen.

122 In Afrikaans this action may be called the "uitgebreide saakwaarnemingsaksie." See chapter 5 below (particularly chapters 5.1, 5.3 and 5.4) where this subject is dealt with in detail. D G John, 'n Oorsig van Onregverdige Verryking as Gedingsoorsaak in die Suid-Afrikaanse Reg (1951) 57, refers to this case as "abnormale of quasi negotiorum gestio." See also Gouws v Jester Pools (Pty) Ltd 1968(3) SA 563(T) at 569-571.

123 D 3.5.44.2 (animo gerendi sororis negotia); Cujacius, Comm in Lib II responsorum Aemilii Papiniani ad L XXXI de neg gest (op om 5 col 866) (animus gerendi negotii mei et me obligandi); Donellus, Comm de jur civ 15.16.6 (animus gerentis); Molinaeus, De fiefs 1.1.5 n 104 (op om 1 col 175-176) (animum et intentionem eius negotium gerendi); Brunnemann, Comm in pand ad D 3.5.6.4 (animum negotium tuum gerendi); Heineccius, Hist Edict, Edicti perpetui complectens, tit 24 (de neg gest)(op om 7 p 396) (animum gerendi); Struvius, Syntagma jurisprudentiae 7.3.5.49 (animo omnia gerendi); Perezius, Praelectiones cod 2.19 (18).1 (animus gerentis); Voet, Comm ad pand 3.5.9 (animo gerendi negotia) (cf idem, op cit 3.5.12); Pauw, Observationes tumultuariae novae 403 (gerendi animum).

124 Cocceius, _Jus civ controv_ ad D 3.5 qu 1 (_intentionem gerendi_); Molinaeus, _De fiefs_ 1.1.5 n 104 (_op om_ 1 col 175-176) (_animum et intentionem eius negotium gerendi_); Pothier, _Appendice_ 185 (_intention de faire l'affaire de cette personne_); cf idem, op cit 189 (_intention de faire votre affaire_).

125 D 3.5.5.3 (_tui contemplatione_); D 3.5.5.5 (_nei contemplatione_); D 3.5.5.8 (_contemplatione tui ... eorum contemplatione_); D 3.5.5.11 (_tua contemplatione_); D 15.3.10.5 (_contemplatione domini_); Azo, _Lect super cod_ 2.19.2 (_contemplatione alterius_); Cinus, _Comm in cod_ 2.19.14 (_contemplatione alterius_); Pothier, _Pandectae Justinianeae_ 3.5.4 (_tui contemplatione_); Voet, _Comm ad pand_ 3.5.5 (_domino contemplatione_); Westenberg, _Principia juris_ ad D 3.5.16 and 21 (_contemplatione ejus quod gestum est; contemplatio domini_).

126 D 3.5.18.2 (_gerendi negotii mei habuerit affectionem_); C 2.18.13 (_adfectioni tuae_); C 2.18.15 (_paterno adfectu_); Donellus, _Comm de jur civ_ 15.16.17: _Ducuntur enim aut ex opinione gerentis, aut ex affectu quem gerit erga eum, in cujus rem impendit_; Noodt, _Comm ad dig_ 3.5 (_op om_ 2 p 76) (_affectum negotii mei gerendi ... affectionem gerendi negotii mei_); idem, _Probab jur civ_ 3.9.1 (_op om_ 1 p 51) (_ejus contemplatione ... id est ut gerendi negotii affectione_).

127 D 10.3.14.1 (obligare volui); Cinus, Comm in cod 2.19.14 (animum sibi obligandi alium); Cocceius, Jus civ controv ad D 3.5 qu 1 (animum ducendi obligationem); Lauterbach, Compendium juris ad D 3.5 (animo inducendae obligationis); Böhmer, Introd in jus dig 3.5.1 and 6 (animo alterum obligandi; cum intentione alterum obligandi); Höpfner, Commentar über die heineccischen Iustitutionen 3.28.936 (animo eum obligandi); A Faber, Codex Fabrianus 2.10.3 n 2: ... sufficit ut gestor aliquem sibi obligare voluerit; Donellus, Comm de jur civ 15.16.8 (neminem sibi obligare voluit); Molinaeus, De fiefs 1.1.5 n 109 (op om 1 col 178) (animo alienum sibi obligandi); Pothier, Pandectae Just 3.5.13.3-4 (animo consulendi; animum sibi obligandi eum cujus negotium gessit); Glück, Pandecten 421 (p 345) (animus obligandi); Noodt, Comm ad dig 3.5 (op om 2 p 76) (volui mihi obligare te cujus negotia gessi); Zoesius, Comm ad dig 3.5.9 (animus obligandi sibi alium). Cf D 3.5.15 (nova voluntate aliud quoque adgredi coeperit); D 3.5.45 (qua mente ... eius voluntatis); Donellus, Comm de jur civ 15.16.5 (voluntas gerentis); Perezius, Prael cod 2.19.1 (ex expressa voluntate gerentis).

128 Voet, Compendium juris ad D 3.5.1 (in gratiam domini); Aanhangzel sv negotiorum gestio (zonder eigenbelang maar ten nutte en voordeele van den Eigenaar). The

question of benefit is subject to the requirement of _utiliter coeptum_, which is dealt with in chapter 2.4 below: an initial benefit in the sense that the _gestio_ is carried out reasonably at the outset, is sufficient, regardless of the final outcome thereof.

129 D 3.5.33 (_repetere ... si reputare velint_); C 2.18.15 (_ut repetiturus_); Accursius, _Corpus iuris civilis glossatum_, gloss _materna pietate_ ad C 2.18.11 (_animo repetendi_)(cf gloss _cum solveret_ ad C 2.18.12) Odofredus, _Lectura super cod_ 2.18(19).11; Donellus, _Comm de jur civ_ 15.16.5 (_animo ... ut ... repetat_); idem, op cit, 15.16.6 and 15.16.9-11; Brunnemann, _Comm in cod_ 2.19.5 and 2.19.11-12 (cf 1.19.15-16); Schotanus, _Examen juridicum_ in D 3.5; Struvius, _Syntagma jurispr_ 7.3.5.48; idem, _Evolutiones controversiarum_ 7.3.5 (thes 54); Treutler, _Selectae disputationes_ 1.10.3; Perezius, _Prael cod_ 2.19 (18).1 and 12-13; idem, _Institutiones_ 3.28; idem, _Comm in dig_ 3.5; Christinaeus, _Decisiones_ 2.112.3-4; Voet, _Comm ad pand_ 3.5.11; idem; _Compendium juris_ ad D 3.5.6; Huber, _Prael jur civ_ ad D 3.5.3; Groenewegen, _De leg abrog_ ad C 2.18.1-2; Van Bynkershoek, _Obs tum_ 2288; Zoesius, _Comm ad dig_ 3.5.9 and 11. The _Aanhangzel_ sv _negotiorum gestio_ speaks of _die intentie om weder te eisschen_.

130 C 2.18.11 (_recipiendi animo_); Révigny, _Lectura super cod_ 2.18(19).11 (fol 88) (_recipiendi animo_). The _animus recipiendi_ is not of classical Roman origin and probably

developed only during the post-classical period. See Kaser, Das römische Privatrecht 2 (1975) 418; Rabel, op cit 292 n 41; Jörs-Kunkel, Römisches Privatrecht (1949) 248 n 7; H Siber, Römisches Privatrecht (1968) 193; Pacchioni, Della gestione 334, 356.

131 A lively discussion has arisen among Romanists as to whether the animus negotia aliena gerendi was a requirement in the classical Roman law or only in post-classical Roman law. Partsch, Studien zur negotiorum gestio 1 p 37 sqq is of the opinion that classical law did not require the animus negotia aliena gerendi for liability, whereas Riccobono, "Dal diritto romano classico al diritto moderno" in Annali Palermo 3/4 (1917) 221 sqq and 244 sqq, considers it the most important element of classical negotiorum gestio, whereas it was not required as a post-classical concept. Rabel, op cit, points out that the animus-element is so closely linked with the negotium alienum prerequisite that it could hardly be considered an independent prerequisite in classical times. See also G Pacchioni, Della gestione 305 sqq; idem, "La 1.48(49) Dig. III, 5 ed il requisito dell'animus negotia aliena gerendi nell'actio negotiorum gestorum contraria" in BIDR 3 (1890) 42 sqq; idem, "Contributo critico alla dottrina delle azioni negotiorum gestorum" in BIDR 9 (1896) 5 sqq; idem, "Nuovi studi sulla negotiorum gestio" in Rivista del diritto commerciale 12 (1914)

835 sqq; idem, "Di alcune probabili interpolazioni nel titolo De negotiis gestis" in Scritti Chironi (1915) 211-217. Seiler, Negotiorum gestio 21-38 adopts a fairly neutral approach (p 38): Zu behaupten, die Klassiker hatten auf dem animus oder die contemplatio eine umfassende Theorie der neg gestio gegründet, wäre jedenfalls ebenso quellenfremd, wie zu leugnen dass für sie die Kenntnis und der Wille des Gestors von Bedeutung gewesen sind. See further T Mayer-Maly, op cit 426 sqq; G I Luzatto, review of Seiler's work in SDHI 35 (1969) 479 sqq; Jörs-Kunkel, Römisches Privatrecht (1949) 248 n 4; Van Zyl, Saakwaarneming 10-13.

132 According to the Summa Trecensis 2.8.7 there was no negotiorum gestio where the gestor aliquem sibi obligatum esse noluit. This emphasis on the animus obligandi alterius may have been the origin of the identification of the animus obligandi with the animus negotia aliena gerendi. On the Summa Trecensis, ascribed by Fitting to the glossator Irnerius, see H Fitting (ed), 'Summa codicis' des Irnerius (1894). H Kantorowicz and W W Buckland, Studies in the Glossators of the Roman Law (1969) 146 believe it is the work of the glossator Rogerius. Cf the Tractatus de equitate 9.5 (neminem enim sibi obligare voluit), edited by A Rota as "Il tractatus de equitate come pars tertia delle Quaestiones de iuris subtilitatibus e il suo valore storico e politico" in Arch giur 146 (fasc 1-2) 1954. The quoted passage does not appear from

Fitting's edition of the '*Questiones de iuris subtilitatibus des Irnerius* (1894). As appears from this title, Fitting ascribes the *Tractatus* to Irnerius whereas Rota says it is the work of the glossator Bulgarus. Kantorowicz and Buckland, op cit 174 and 343, consider it to be part of the *Summa Trecensis* and hence the work of Rogerius. See further the glossator Jacobus (*Dissensiones dominorum* in Haenel's edition, p 597 par 31) who refers explicitly to the *animus negotia aliena gerendi*, Johannes Bassianus (gloss ad D 3.5.6), who describes the intention as *contemplatio alterius* and Hugolinus (*Quaestiones* 29), who says the *dominus* is liable *maxime cum eius contemplatione fecit hoc* (cf idem, *Distinctiones* 33, in Haenel's edition p 565: *oportet quod sit gestum alterius contemplatione*). The *Brachylogus* 3.17.3 expresses this requirement in the following way: *sed is de gerendis non adstringitur nisi, cum alius vellet ea gerere, ipse se obtulit*. An anonymous work of this period, the *Libellus de verbis legalibus* 5.29 (referred to in H Fitting, *Juristische Schriften des früheren Mittelalters* (1876) 192) emphasises the will of the *gestor*: *gestor negociorum est qui sine alicuius mandato volens amici subvenire laboribus aliquid administrat*.

133 Pierre de Belleperche (Petrus de Bellapertica), *Quaestiones aureae* 264 (272 in the Basle-edition) emphasises the *animus obligandi: Modo, si tu quaeras, ubi qui fecit sumptus iure alieno, numquid illos sumptus possit re-*

<u>petere, multum refert, quia aut ille qui fecit sumptus circa rem alienam, habebat animum sibi obligandum dominum illius rei, et nomine domini fecit</u>. See also Révigny's commentary on C 2.18(19).14: <u>Nos loquimur de negocio quod est alicuius re ipsa, quia omni genere negocii hoc est verum, quod si neminem voluit sibi obligare gestor, non oritur actio.</u> Cf idem, commentary on D 3.5.5.5, C 4.26.7 and C 3.32.3; Johannes Faber on C 4.26.7 and Lambertus de Salinis, <u>Distinctiones</u> 84 (on C 3.32.5). On the latter work see E M Meijers, <u>Études d'histoire du droit</u> 3 (1959) 106 sqq.

134 The <u>animus</u>-requirement is related by most of the commentators to the case of "abnormal" <u>negotiorum gestio</u> (see n 122 above), where the <u>animus</u> is in fact not present. Terms such as <u>animus obligandi</u>, <u>intentio repetitionis</u>, <u>animus repetendi</u> and <u>contemplatio domini</u> occur frequently in their works. See the commentaries of Bartolus, Baldus, Castrensis, Albericus and Fulgosius on D 3.5.5.5 (dealt with in chapter 5.3 below) and cf Baldus on C 4.26.7 and Salycetus on D 12.6.33.

135 Rebuffus, <u>Tractatus varii, de except</u>, n 729 (<u>requiritur etiam quod eius contemplatione hoc faciam</u>); Molinaeus, <u>De fiefs</u> 1.1.5 n 104 (vol 1 p 175); Duarenus, <u>Opera omnia, in tit de neg gest</u> 3 (<u>inspicitur enim in hac actione cuius contemplatione negotium gestum sit</u>); Cujacius, <u>Afr Tract</u> 8 ad D 3.5.48 (<u>op om</u> 1 p 1431) (<u>non obligamur nisi volenti</u>); Donellus, <u>Comm de jur civ</u> 15.16.1, 5 sq and 15.17.2; Domat, <u>Les loix civiles</u> 2.4.2.10; Pothier, <u>Appendice</u>

185: *Selon la subtilité du droit, pour qu'il y ait lieu au quasi-contrat negotiorum gestorum, et pour que celui qui a fait l'affaire d'une personne ait l'action qui naît de ce contrat, pour répéter les frais de sa gestion, il faut qui'il ait eu l'intention, en faisant cette gestion, de faire l'affaire de cette personne, et qu'il ait eu une volonté formelle de répéter d'elle les frais de sa gestion.*

136 Among the exponents of the *usus modernus pandectarum* Cocceius requires no intention on the part of the *gestor*: see his *Grotius illustratus* 2.10.2 (*in negotiorum enim gestione non opus est ut gerens contemplatione eius cuius interest aliquid agat*) and 2.10.9 (*non inspici quo animo quave intentione alterius negotium geratur*). This is contrary to the general approach, which is illustrated by the use of expressions such as *animus negotia aliena gerendi* (Treutler, *Selectae disp* 1.10.2; Bachovius, *Comm in pand* 3.5; idem, *Notae ad disp Treutler* 1.10), *fundata intentio* (Böhmer, *Doctrina de actionibus* 2.6.4), *contemplatio alterius* (Mevius, *Decisiones* 2.94 sq; Zasius, *Paratitla, summa in tit de neg gest* n 8 sq); *animo obligandi* (Wolff, *Inst jur nat* 690; Böhmer, *Introd in ius dig* 3.5.1 - but see Bachovius, loc cit) and *animus repetendi* (Mevius *Consilia* 9.42 sq; Treutler, loc cit). Lauterbach, *Compendium juris* ad D 3.5 expresses the principle thus: *Negotiorum gestio est quasi contractus quo quis aliena negotia, sine mandato Domini, sponte et utiliter*

ratione intentionis ... gerendo, se alteri ad rationes reddendas et alterum sibi ad indemnitatem praestandam adstringit.. Quod introductum est utilitatis causa (the *utiliter*-requirement is discussed in chapter 2.4 below). The German historical school and pandectists likewise, in general, required the *animus negotia aliena gerendi.* See Windscheid *Pand* 430 (p918): *Der Geschäftsführer muss die Ausopferung mit den Willen gemacht haben, den Geschäftsherrn zum Ersatz zu verpflichten, also namentlich nicht in Schenkungsabsicht oder zum Zweck der Erfüllung einer Verbindlichkeit*; Von Vangerow, *Pand* 664 n 2: *Vor allen Dingen ist erforderlich, dass die gestio in der Absicht geschehen ist, um dadurch einen Anderen zu obligiren.* Cf E Zimmermann, *Aechte und unächte negotiorum gestio* (1872) 6: *Jede (ächte) negotiorum gestio setzt voraus, dass der Gestor mit Wissen und Willen in fremden Interesse handelt, also den Willen hat, sich dem Anderen zu verpflichten*; H Witte, *Die Bereicherungsklagen des gemeinen Rechts* (1859) 8, 21 sq, 271, 332 sq; Arndts, *Pand* 3.298; A Brinz, *Pand* 2.321; E Chambon, *Die negotiorum gestio* (1848) 42 sqq; Von Savigny, *System des heutigen römischen Rechts* 4 p 130, 279 sqq; Glück *Pand* 5.421; Puchta, *Vorlesung über das heutige römische Recht* 327 sqq; A Brinkmann, *Verhältnis der actio communi dividundo und der actio negotiorum gestorum zueinander* (1855) 17 n 1. R von Jhering, *Abhandlungen aus dem römischen Recht* (1844) 82 sq and Dernburg, *Pand* 2 p 328 n 6, 334 n 32 and 335 sq, are of the opinion,

however, that the intenion of the _gestor_ is irrelevant. This opinion represents a substantial minority.

137 In general the Roman-Dutch writers require the intention to manage the affairs of the _dominus_. Voet, _Comm ad pand_ 3.5.9 and Huber, _Praelectiones jur civ_ ad D 3.5.2 require an _animus negotia aliena gerendi_. Voet, op cit 3.5.12, however, does not consider an _animus obligandi_ necessary. This contradicts the views propounded by writers like Schultingh, _Ennaratio pand_ ad D 3.5.5, Busius, _Comm in pand_ 3.5.6, Reinoldus, _Opusc jurid ad tit D de acqu rer dom_ 4; Vinnius, _Comm in inst_ 2.1.30; Christinaeus, _Decisiones_ 2.112.1-8 (who points out that the _gestor_'s intention is to be determined in accordance with the discretion of the judge - _iudicis arbitrium_) and Van der Keessel, _Prael ad Grot_ 3.27.1 (vol 5 p 236): _Nam, ut sit negotiorum gestio, debet quis negotia gessisse tamquam aliena et animo alterum obligandi_. See further Noodt, _Probabilia_, 3.9; idem _Comm_ ad D 3.5; Greve, _Exercitationes ad pand_ 5.1; Vinnius, _Jurispr Contr_ 2.41; Van Leeuwen, _Cens for_ 4.26.1; Perezius, _Expos cod_ 2.19.1; Wissenbach, _Comm in cod_ 2.18(19).1. Cf Grotius, _De iure belli ac pacis_ 2.10.9.

138 Wessels, _Contract_ 3569. Cf 3571.

139 1968(3) SA 433(T) at 437 A.

140 1979(2) SA 383 (C) at 388 A-B.

141 See further Bernstein v Tayler 5 HCG (1888) 258 at 266; Molife v Barker N O 27 SC (1910) 9 at 12 ("there is nothing to show that he intended to act as a negotiorum gestor"); New Club Garage v Milborrow and Son 1931 GWLD 86 at 99 ("with the intention of holding the owner liable for all legitimate expenses connected with his care and custody"); Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 563(T) at 571 B-572C and 577 H. Cf Rademeyer and Others v Rademeyer and Others 1968(3) SA 1 (C) at 8 H.

142 See in general Seiler, Negotiorum gestio 38-46; Rubin, Unauthorised Administration 40-42; F Pringsheim, "Animus donandi" in ZSS 42 (1921) 273 sqq; G G Archi, "Donare e negotium gerere" in Studi Voltera 1 (1971) 669-692; Wessels, Contract 3577-3578

143 See the example in D 3.5.4 (Ulpianus): Sed videamus an fideiussor hic habere aliquam actionem possit: et verum est negotiorum gestorum eum agere posse, nisi donandi animo fideiussit; D 3.5.26.1 (Modestinus): Titium, si pietatis respectu sororis aluit filiam, actionem hoc nomine contra eam non habere respondi; D 3.5.43 (amicitia ductus); D 10.2.50 (pietate debita ductus); C 2.18.1 (munere pietatis); C 2.18.5 (officio ... obsequio); C 2.18.12 (donandi animo).

144 D 11.7.14.7 (Ulpianus): Sed interdum is, qui sumptum in funus fecit, sumptum non recipit, si pietatis gratia fecit, non hoc animo quasi recepturus sumptum quem fecit: et ita imperator noster rescripsit. Igitur aestimandum erit arbitro et perpendendum, quo animo sumptus factus sit, utrum negotium quis vel defuncti vel heredis gerit vel ipsius humanitatis, an vero misericordiae vel pietati tribuens vel affectione. Potest tamen distingui et misericordiae modus, ut in hoc fuerit misericors vel pius qui funeravit, et eum sepeliret, ne insepultus iaceret, non etiam ut suo sumptu fecerit: quod si iudici liqueat, non debet eum qui convenitur absolvere: quis enim sine pietatis intentione alienum cadaver funerat? Oportebit igitur testari, quem quo animo funerat, ne postea patiatur quaestionem; C 2.18.11: Alimenta quidem, quae filiis tuis praestitisti, reddi tibi non iusta ratione postulas, cum id exigente materno pietate feceris. Si quid autem in rebus eorum utiliter et probabili more impendisti, si non et hoc materna liberalitate, sed recipiendo animo fecisse ostenderis, id negotiorum gestorum actione consequi potes. Cf D 3.5.33; D 3.5.44.2; C 2.18.13; C 2.18.15.

145 Azo, Lectura super codicem 2.19.1.4-5 (fol 109): Distingue tamen, quia si pius est quis in eo quod gerit, et non fecit animo pietatis, quia credidit repetere, expendit tamen in opus pietatis, datur ei repetitio:

si vero fiat animo pietatis, non datur ... Cf idem, op cit 2.19.5.24; idem, Summa aurea in C 2.19.12.

146 Révigny, Lectura super codicem 2.18(19).11: Sed recipiendi animo fecisse ostenderit ... Dico ostenderit ex quantitate impensarum: quia si est magna impensa, presumitur non animo donandi; si modica, presumitur animo donandi.

147 Donellus, Comm de jur civ 15.16.5: Voluntas gerentis idem effecit, si is non hoc animo est, ut quod impendit, repetat. Quod sit, cum donandi animo alterius nomine quid impendit, aut donandi animo pro eo fidejubet.

148 Donellus, op cit 15.16.10: Et affectu gerentis animus non repetendi conjicitur, cum quis pietatis, caritatis aut amicitiae officio fungens aliquid in aliquem impendit. Qui affectus pro qualitate personarum aestimatur. He then proceeds to list the various relationships and forms of gestio which exclude an action, and continues: Geruntur, ut dixi, haec omnia ab iis, qui officio conjunctionis fungentes non alio animo esse videri possunt, quam ut huic officio satisfaciant, cui contrarius est animus repetendi. Nam repetendi spe proposita, etiam extranei idem facerent.

149 Donellus, op cit 15.16.11.

150 Domat, Les loix civiles 2.4.2.9-11 (Strahan 1476-1478):

9. Les dépenses qu'une personne peut faire pour une autre, par un motif de liberalité, ou par quelque devoir de charité, ne se reconvient point, et ne sont pas mises au rang de celles que font ceux qui gerent les affaires des autres, dans l'espérance de retirer a qui'ils auront avancé du leur ... 10. Si une personne a fait pour une autre de ces sortes de dépenses qui sont des devoirs de proximité ou de charité, qu'il est libre d'exercer ou liberalement, ou avec le dessein de recouvrer ce qu'on y aura employé, l'intention de cette personne servira de règle, ou pour obliger celui que ces dépenses regarderont, à les acquitter, ou pour l'en décharger. Et on jugera de cette intention par les circonstances de la qualité des personnes, de leurs biens, des précautions prises par celui qui fait de ces sortes de dépenses et les autres semblables. 11. La plus grande proximité des personnes ne suffit pas pour faire présumer que la dépense que'l'un a faite pour l'autre soit une liberalité. Et quand même il n'y auroit aucune protestation de recouvrer ce qui est avancé, s'il paroît par les circonstances, qu'il n'y ait pas eu d'intention de donner, la personne qui a fait de ces sortes de dépenses pourra les demander ...

151 Pothier, Appendice 196: Il est évident que je n'ai en ce cas aucune action pour la répétition de ces frais de ma gestion, les ayant faits sans intention de les répéter,

et dans la vue d'en gratifier celui dont je faisois l'affaire. La seule difficulté qu'il peut y avoir sur cette espèce, est de savoir quand cette intention doit être présumée. Il faut établir pour principe, qu'elle ne doit pas l'être facilement, suivant la règle: Nemo donare praesumitur ... 197. Il y a plusiers espèces de circonstances, lesquelles seules, et prises séparément, ne pourroient pas faire présumer que celui qui a fait l'affaire d'une personne, l'a faite avec l'intention de n'en pas répéter les frais, mais qui, étant réunies, peuvent former cette présomption. Ou peut apporter par example, 1) si c'est un pêre ou une mère qui a fait l'affaire de ses enfants ou de ses petits-enfants, si c'est un beau-père ou une belle-mère qui a fait l'affaire de son gendre, de sa bru ou de ses privignes; si c'est un frère aîné qui a fait l'affaire de ses puînes, si c'est un maître qui a fait l'affaire de son domestique, si celui qui a fait l'affaire avoit de grandes obligations à cette personne; 2) si celui qui a fait l'affaire de quelqu'un étoit un homme riche, et celui dont il a fait l'affaire, étoit pauvre; 3) si ces frais sont modiques; 4) si celui qui a fait la gestion n'en a pas répété les frais pendant tout le temps qu'il a vécu quoiqu'il ait vécu longtemps depuis; 5) si depuis la gestion les parties ont entre elles plusiers comptés pour des affaires qu'elles ont eues ensemble, et que les frais de cette gestion ne soient entrés dans aucun de ces comptes. Les présomptions qui résultent de ces circonstan-

ces peuvent être détruites ou affoiblies par d'autres circonstances qui servent à faire connoître la volonté qu'a eue celui qui a fait la gestion, d'en répéter les frais; comme par exemple, s'il a tenu un registre exact de tous les frais qu'il faisoit. In 198 he notes examples of the application of the above principles. See also 186-187.

152 Menochius, *De praesumptionibus* 3.71.1: *Qui absentis nomine alicui mutuo pecuniam dat, ipsi absenti donare non praesumitur*. This is also the opinion of Brunnemann, *Comm in cod* 2.19.1.4 and 2.19.11-12 and *Comm in pand* 3.5.34.1, but see Böhmer, *Introd in ius dig* 3.5.6: *si ex pietate vel amicitia negotium gestum ... praesumitur animus donandi*. Cf Windscheid, *Pand* 430 (p 918).

153 Groenewegen, *De leg abrog* ad C 2.19.1: *Si frater pro fratre ... aut filius pro fratre solverit ... non donandi, sed repetendi animo pecuniam dedisse intelliguntur ... praesertim cum hodie magna omnium rerum caritas omnem fere donationis praesumptionem exclusisse videatur*.

154 Voet, *Compendium juris* ad D 3.5.6: *Si pietatis intuitu, non animo repetendi, sumtus fecerit, quod in dubio praesumendum ...;* idem, *Comm ad pand* 3.5.11: *imo in dubio hunc repetendi animum ... praesumendum hodiernis moribus esse*.

155 See further Huber, *Prael jur civ* ad D 3.5.3; Perezius,

Inst 3.28; idem, Prael cod 2.19.1: Animus itaque gerentis hic maxime inspiciendus, num sponte gesserit negotia aliena animo repetendi sumtus, an mandato domini, an alterius caussa, an necessitate officii coactus, quod ex expressa voluntate gerentis ex qualitate rerum gestarum et personarum satis apparebit; Van Bynkershoek, Observationes tumultuariae 2288; Christinaeus, Decisiones 2.112.4 and 7; Zoesius, Comm ad dig 3.5.9 and 11.

156 See chapter 1.2 and n 62 above.

157 See n 63 above.

158 See n 72 above.

159 The question as to the concurrence of the actio mandati and actio negotiorum gestorum in such a case has been fully canvassed in chapter 1.2 (and see notes 73-86) above.

160 See notes 87-89 above.

161 Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360. In Knoll v S A Flooring Industries Ltd, 1951(1) SA 404 at 408 A, De Villiers J voiced some doubt as to whether the court in the Williams' Estate-case needed to rely on negotiorum gestio inasmuch as the "equitable doctrine of unjust enrichment is wide enough to cover the facts in Williams' case to my mind." See n 72 above.

162 See D 3.5.41.

163 See chapter 2.1 above.

164 See n 94 above.

165 See n 96 above.

166 See n 97 above.

167 Utiliter may be translated in various other ways, eg "serviceably," "beneficially,""profitably," "advantageously," "properly," "duly" or even "lawfully". All these terms may, it is suggested, be covered by the concept of reasonableness. See in general on the utiliter-requirement Pacchioni, Della gestione 209-304; idem, "L'utile gestione a favore di persona munita di gestore legale" in Rivista del diritto commerciale 18 (1920) 1 sqq; Seiler, Negotiorum gestio 51-61; Rubin, Unauthorised Administration 23-28; idem, "The Legal Consequences of Contracts concluded by a Negotiorum Gestor" in Butt SAL Rev (1954) 124-133; A Sturm, Das negotium utiliter gestum (1878); G Nicosia, "L'azione relativa alla 'male gesta procuratio'" in Studi Volterra 4 (1971) 787-797; J A Ankum, "'Utilitatis causa receptum'. On the pragmatical methods of the Roman lawyers" in Symbolae David 1 (1968) 1 sqq; Wessels, Contract 3620, 3552, 3625.

168 D 3.5.2 (Gaius): Si quis absentis negotia gesserit licet ignorantis, tamen quidquid utiliter in rem eius impenderit vel etiam ipse se in rem absentis alicui obligaverit, habet eo nomine actionem: itaque eo casu ultro citroque nascitur actio, quae appellatur negotiorum gestorum. Et sane sicut aequum est ipsum actus sui rationem reddere et eo nomine condemnari, quidquid vel non ut oportuit gessit vel ex his negotiis retinet: ita ex diverso iustum est, si utiliter gessit, praestare ei, quidquid eo nomine vel abest vel afuturum est. See also D 3.5.8; D 3.5.44 pr; D 17.1.50 pr; D 44.7.5 pr; Inst 3.27.1; C 2.18.2; C 2.18.10. In C 2.18.11 the utiliter-requirement is linked with that which should be done in accordance with what is probable and usual (probabili more).

169 See n 33 above in regard to the relationship between negotiorum gestio and necessity. See further D 3.5.21 and D 3.5.45 pr. Seiler, Negotiorum gestio 51-54, refers also, inter alia, to D 3.5.9.1 and C 2.18.2. At 51 he says: Die Gleichstellung von utilitas und necessitas ist unüblich. Pothier, Appendice 220-224 also emphasises the necessity of the management of affairs but does not seem to present necessity as a separate prerequisite for the actions arising from negotiorum gestio or as an essential characteristic of utiliter gestio.

170 Rubin, Unauthorised Administration 23.

171 Op cit 26.

172 D 3.5.9.1 refers to the repair of a building *quam dominus quasi impar sumptui dereliquerit vel quam sibi necessariam non putavit,* whereas D 3.5.45 pr (wrongly cited by Rubin p 24 n 94, as D 3.5.45 (46).1) makes reference to the purchase of goods *quae tibi necessaria esse scirem, et te eius voluntatis esse, ut emptum habere velles.* Domat, *Les loix civiles* 2.4.2.3 (Strahan 1470) speaks of expenses *telles que l'absent lui-même auroit pû ou dû faire*; in 2.4.2.7 (Strahan 1474) he likewise mentions a disbursement *telle que le maître dû la faire.* Similarly, Pothier, *Appendice* 220, discusses *une affaire indispensable, qu'il n'eût pas manqué de faire lui-même, s'il eût été à portée.* Cf Höpfner, *Commentar über die heineccischen inst* 3.28.936: *Doch muss es zu vermuthen seyn dass der Andere einwillige*; Van Leeuwen, *Cens for* 1.4.26.1.

173 D 3.5.9.1 (Ulpianus): *Is autem qui negotiorum gestorum agit non solum si effectum habuit negotium quod gessit, actione ista utetur, sed sufficit, si utiliter gessit, etsi effectum non habuit negotium*; D 3.5.11.2 (Ulpianus): *Sicut autem in negotiis vivorum gestis sufficit utiliter negotium gestum, ita et in bonis mortuorum, licet diversus exitus sit secutus;* Accursius, *Corpus juris civilis glossatum,* gloss *utiliter gessit* ad D 3.5.10 (*id est gerere inchoavit*); idem, gloss *nulla* ad C 2.19.1 (*sufficit utiliter ceptum, scilicet cunctus non sit secutus bonus*);

Odofredus, *Lectura super dig vet* 3.5.9.1 (*pone cepit aliquis gerere negocium tuum utiliter vel necessario tamen utilis effectus non est secutus*); *Liber iuris florentinus* 4.8 (*si ipse gestor utiliter gerere inchoavit et utiliter perfecit quantum ad se: non enim hic attenditur rei eventus*); Révigny, *Lect sup cod* 2.19.10 (fol 88) (*inspicimus initium et licet sequatur contrarius eventus, datur actio*); Donellus, *Comm de jur civ* 15.16.2: *Utiliter gestum sic accipiemus, si vel initio coeptum sit utiliter; ut si ita coeptum sit, quamvis res casu effectum non habuerit, nihilomimus eandem sit obligatio et actio.* A Faber, *Codex Fabrianus* 2.10.3 (*utiliter gestum, aut saltem gestio utiliter inchoata probetur, licet minus feliciter peracta*); Brunnemann, *Comm in cod* 2.19.10 (*sufficit ab initio utiliter rem gessisse*) (cf idem, *Comm in pand* 3.5.9(10).1, 3.5.11; *Comm in cod* 2.19.2.5); Heineccius, *Elementa iur civ secundum ord pand*3.5.449 (*utiliter gerendo obligare ignorantem, quamvis utilitas postea intercepta sit*) (cf idem, *Elem iur civ sec ord inst* 3.28.971; *Recitationes in elem iur civ sec ord inst* 3.28.970-971); Lauterbach, *Compend juris* ad D 3.5 (*etiamsi negotium diversum habuerit exitum ... modo gestor cum ratione susceperit*); Molinaeus, *Comm in cod* 2.19 (*op om* 3 col 114): *Sufficit autem negotium utiliter esse ceptum vel gestum, etiamsi eventus parum comodus sequitur ... sufficit me utiliter negotium, quod ad te pertineat, gessisse, licet malus exitus sit secutus.* Cf Böhmer, *Introd in jus dig* 3.5.4; Struvius, *Syntagma jurispr* 7.3.5.52; Schotanus, *Examen juridicum* in D 3.5; Schneidewein, *Comm in Inst* 3.28(27).9-10;

Baron, *Pand* 309 (p 518); Dernburg, *Pand* 122; Pothier, *Appendice* 220-225; idem, *Pandect Just* 3.5.53-58. This principle was accepted without demur by the Roman-Dutch authors. See Grotius, *Inleidinge* 3.27.5; Perezius, *Prael cod* 2.19.9; idem, *Comm in dig* 3.5; idem, *Inst* 3.28; Gudelinus, *Comm de jure novissimo* 3.8; Huber, *Positiones juris ad Inst* 3.28.7; Van Leeuwen, *Cens for* 1.4.26.1 and 4; Vinnius, *Part iur civ* 2.41; Voet, *Comm ad pand* 3.5.9-10; idem, *Compendium juris* ad D 3.5.5; P Voet, *Inst imp comm* 3.28.1.5; Wesenbeke, *Comm in pand jur civ* ad D 3.5.10-11; Westenberg, *Principia juris* ad D 3.5.19; Zoesius, *Comm ad dig* 3.5.12; Van der Keessel, *Prael ad Grot* 3.27.5; idem, *Dictata ad Inst* 3.27.5; Ortwyn, *Standhoudend Roomsch regt* 3.28.1; Barels, *Advysen* 93 (*mits de zaak ten besten ondernoomen zy, alhoewel dezelve geene uitwerkinge gehad hebbe*) (cf idem, *Advysen* 78); *Aanhangzel sv negotiorum gestio* (vol 2 p 944): *Of nu het nut der gedaane uitschotten nog in weezen is of niet, geeft geen verschil: want het is genoeg dat er utiliter is onderwonden, alschoon de zaak geen effect heeft gehad.*

174 1915 TPD 272 at 276 (*per* De Villiers JP).

175 See n 169 above.

176 18 SC (1901) 380 at 392 (*per* Buchanan ACJ).

177 21 SC (1904) 156 at 162 (*per* De Villiers CJ).

178 1903 TS 100 at 103 (per Innes C J).

179 1939 CPD 360 at 367 (per Davis J).

180 1979(2) SA 383 (C) at 392 (per Van Zijl J P).

181 1932 CPD 401 at 404 (per Watermeyer J).

182 See Union Bank v Beyers; Union Bank v Du Toit 3 SC (1881) 89 at 101 and 106; Natal Bank Ltd v Parsons 1906 TH 102; Reid and Others v Warner 1907 TS 961; Forster v Becker 1914 EDL 193; Karsten v Forster 1914 CPD 919 at 923; Pollock v Creydt 1915 NPD 350; Spencer v Gostelow 1920 AD 617; Lodge v Modern Motors Ltd 1957(4) SA 103 (SR).

183 Rubin, Unauthorised Administration 26.

184 See chapter 1.2 and notes 73-86 above. See also chapter 4.1 and notes 289-290 below.

185 Pothier, Appendice 222: ... Cela doit surtout avoir lieu lorsque celui qui a fait pour moi une affaire sans mon ordre, a été à portée et a eu le temps de me consulter avant que de la faire: je dois en ce cas être plus facilement écouté à dire, pour me défendre de sa demande, que s'il m'eût consulté, je n'aurois pas voulu m'engager dans cette affaire, et qu'il est en faute de l'avoir

entreprise sans me consulter. Mais s'il n'a pas été à portée de me consulter, je ne dois pas être si facilement écouté à dire, après la mauvaise réussite de l'affaire, que je n'aurois pas voulu m'y engager: il suffit dans ce cas, pour que je sois tenu des frais de la gestion, que le bien de mes affaires ait paru exiger qu'on fit pour moi cette affaire.

186 D 3.5.9.1; Voet, Commentarius ad pandectas 3.5.10. Lee and Honoré, The South African Law of Obligations (1978) 154-155 (par 433) suggest that the affairs should be reasonably undertaken in the sense that the principal (dominus) is absent and cannot be consulted or is incapable of acting on his own behalf. This proposition cannot be correct, as pointed out above.

187 D 3.5.9.1 (Ulpianus): ... et ideo si insulam fulsit vel servum aegrum curavit, etiamsi insula exusta est vel servus obiit, aget negotiorum gestorum; Pothier, Appendice 221: ... Par exemple, si en mon absence on a fait pour moi des réparations urgentes et nécessaires à ma maison; quoique par l'évènement je n'en aie pas profité, parceque peu après ma maison a été incendiée par le feu du ciel, je ne laisserai pas de demeurer obligé à rembourser des frais de sa gestion celui qui les a fait faire.

188 D 3.5.21; D 3.5.42; Rubin, _Unauthorised Administration_ 27: "There is one obvious exception to the _gestor_'s right to recover in these circumstances, namely, in a case where the fact that the _dominus_ has derived no benefit from the administration, is due to the _gestor_'s fault."

189 D 3.5.24 (Paulus): _Si quis negotia aliena gerens plus quam oportet impenderit, reciperaturum eum id, quod praestari debuerit_; D 3.5.30.4; Domat, _Les loix civiles_ 2.4.2.4 (Strahan 1471): _Si pour une dépense nécessaire, il a été mis plus qu'il ne falloit, elle sera réduite à ce qui a dû y être employé_; Pothier, _Appendice_ 227: ... _Si par sa faute il a déboursé plus qu'il n'étoit nécessaire, il ne doit être remboursé que de ce qu'il suffisoit de débourser_; Voet, _Comm ad pand_ 3.5.9: ... _Unde et si ultra, quam oportuerat, impenderit, id solum recuperat, quid erogare debuerat_.

190 See chapter 2.3 above and 5 below (more particularly 5.2 and 5.3).

191 1939 CPD 360 at 376 (_per_ Davis J).

192 The quoted _dictum_ is, of course, subject to what has been said above in regard to the criterion that the _gestor_ should have done no more than the _dominus_ himself

would have done. See also Wessels, *Contract* 3615. On the situation where a *gestor* mistakenly believes he is acting under a mandate, see chapter 1.2 and n 72 above.

193 D 3.5.42 (Labeo): *Cum pecuniam eius nomine solveres, qui tibi nihil mandaverat, negotiorum gestorum actio tibi competit, cum ea solutione debitor a creditore liberatus sit: nisi si quid debitoris interfuit eam pecuniam non solvi*; Voet, *Comm ad pand* 3.5.10 (quoted in n 195 below). On the payment of another's debt see also n 37 above).

194 D 3.5.24 (Paulus): *Si quis negotia aliena gerens plus quam oportet impenderit , reciperaturum eum id, quod praestari debuerit*; Voet, *Comm ad pand* 3.5.10 (quoted in n 195 below); Wessels, *Contract* 3616.

195 D 3.5.26 pr (*sumptus ... voluptatis causa factos*); D 15.3.3.4 (*pecunia ... quae magis ad voluptatem pertinent quam ad utilitatem*); Brunnemann, *Comm in pand* 3.5.26(27): *Si gestor voluptatis et splendoris causa quid impendet ... non eas repetit ... Sed semper tamen ad consuetudinem domini respiciendum*; Perezius, *Comm in dig* 3.5 (*sumptus ... non voluptatis causa*); Voet, *Comm ad pand* 3.5.10: *Cessat in universum haec actio contraria, si nulla prorsus utilitas initio inspecto potuerit ad dominum pervenire: veluti si indebitum solverit; vel plus quam debitum erat ... vel si quis*

pecuniam pro debitore solvit, cum debitoris interesset, eam non solvi; forte ob ius retentionis aut similem causam ... etsi crediderit, se id, quod domino utile est curare ... vel, si voluptatis causa tantum sumtus factus sit ... nisi tamen respectu rerum inutiliter, aut voluptatis tantum causa, aut etiam male gestarum, ratihabitionem dominus interposuerit; impensa enim qualiscumque rata habita reddenda est ...; Wessels, Contract 3619: "If the expenses of the negotiorum gestor merely affect the outward appearance of the thing and do not add to its value (voluptuariae impensae), he cannot recover them from the dominus ..." On the ratification aspect see n 198 below.

196 C 2.18.1; Pothier, Appendice 225: Il y a un cas auquel je ne contracte pas envers le negotiorum gestor, qui a fait utilement une affaire pour moi, l'obligation de le rembourser des frais de sa gestion, quoique j'en profite; c'est le cas auquel il seroit justifié que ce negotiorum gestor auroit empêché une autre personne de la faire, qui, par amitié pour moi, s'offroit à la faire à ses propres frais, sans en rien répéter; Voet, Comm ad pand 3.5.11; Wessels, Contract 3623.

197 Wessels, Contract 3624. On the question of the management of another's affairs out of piety, liberality or friendship, see chapter 2.3 and notes 142-155 above.

198 On ratification by the _dominus_ see chapter 1.2 and the authorities cited in notes 73-86 above. See also Voet, _Comm ad pand_ 3.5.10 (quoted in n 195 above).

199 The respective rights and duties of the parties are dealt with in chapters 3 and 4 below. See in general on these reciprocal actions: D 3.5.2; Inst 3.27.1; Cujacius, _In lib IX Pauli ad Edict recitationes ad L XIII de neg gest_ (vol 6 col 106 - quoted in n 101 above); Lauterbach, _Compendium juris_ ad D 3.5; Bachovius, _Comm ad Inst_ 3.27.1; Glück, _Pand_ 424-425 (pp 376-379); Molinaeus, _Extric lab div et indiv_ 2.178 (_op om_ 2 col 261); Pothier, _Appendice_ 199,214; Van der Keessel, _Prael ad Grot_ 3.27.5 (vol 5 p 240); Wessels, _Contract_ 3586; _Williams' Estate v Molenschoot and Schep (Pty) Ltd_ 1939 CPD 360 at 367; _Standard Bank Financial Services Ltd v Taylam (Pty) Ltd_ 1979 (2) SA 383(C) at 392D-H. In the latter case attention was directed more particularly at the _actio negotiorum gestorum contraria_ of the _negotiorum gestor_. See in this regard also H Peters, "Generelle und spezielle Aktionen" in ZSS 32 (1911) 179 sqq; J E Scholtens, "The Actio Contraria of the Negotiorum Gestor and his Duty to Account" in SALJ 87(1970) 284-288; F Schwarz, "Die Konträrklagen" in ZSS 71(1954) 111 sqq; Van Zyl, _Saakwaarneming_ 6-7.

200 Cicero, _Topica_ 17.66 (_ex fide bona ... aequius melius ... aequum bonum_); Gaius, _Institutiones_ 4.62 (where the

actio negotiorum gestorum is referred to as one of the *bonae fidei iudicia*); D 44.7.5 pr (*an actio ex bona fide*); Just, *Inst* 4.6.30 (*ex bono et aequo*). In Roman law there were apparently two kinds of actions arising from *negotiorum gestio*, namely a praetorian *actio in factum* and an action based on the *bona fides*. The latter were termed *iudicia bonae fidei*. See G Pacchioni, "Contributo critico alla dottrina delle azioni negotiorum gestorum" in BIDR 9 (1896) 5 sqq; O Lenel, *Das Edictum Perpetuum* (1956) 103 sqq; V Arangio-Ruiz, *Istituzioni di diritto romano* (1960) 358; Van Zyl, *Saakwaarneming* 4-5. In later legal development the principles of equity and *bona fides* were accepted, without much further comment, as the foundation of the *actiones negotiorum gestorum*. See Cujacius, *Ad Africanum tractatus 2, ad L Si eum servum 23, de reb cred* (*op om* 5 col 26-27) (*ex bono et aequo*); Molinaeus, *Comm* in C 2.19(18) (*op om* 3 col 114): *Et animadvertendum est quod illa actio negotiorum gestorum est bonae fidei ... quod est magni effectus. Nam ex mora venient fructus, venient usurae, venient accessiones etiam ante litis contestationem, quod non sit in actionibus stricti iuris* (on the *gestor*'s duty to deliver that which has accrued from the *gestio*, see chapter 3.3 below); Cocceius, *Ius civile controv* ad D 3.5 qu 1 (*contrariae actiones non dantur nisi ex aequitate*); Voet, *Comm ad pand* 3.5.2: *Directa negotiorum gestorum actio est personalis, bonae fide ... ex quasi contractu ... civilis*); Wesenbeke,

Comm in pand 3.5.11: *Est enim haec bonae fidei actio*; *Aanhangzel sv neg gest* (vol 2 p 938): *De directe actie van onderwind is personeel en van goede trouw*. Cf Grotius, *De iure belli ac pacis* 2.10.9.1: *Nam negotiorum gestorum actio ex lege civili nascitur: nullum enim habet eorum fundamentorum ex quibus natura obligationem inducit*. See in general on the concept *bonae fidei iudicia* B Biondi, "Iudicia bonae fidei" in Annali Palermo 7 (1918) 3 sqq; Seiler, *Negotiorum gestio* 7-8.

201 The exact ambit of the *actio utilis* in Roman law was energetically debated. See J Partsch, *Studien zur negotiorum gestio* 1 (1913) 34 sqq; F Schulz, *Classical Roman Law* (1961) 621 sq; Seiler, *Negotiorum gestio* 7, 116, 118 sqq; Van Zyl, *Saakwaarneming* 5-6.

202 *Actio directa* is used here as opposed to *actio utilis* and not as opposed to *actio contraria*. See Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 382-383.

203 D 3.5.46.1 (Paulus): *Nec refert directa quis an utili actione agat vel conveniatur, quia in extraordinariis iudiciis, ubi conceptio formularum non observatur, haec suptilitas supervacua est, maxime cum utraque actio eiusdem potestatis est eundemque habet effectum*. Seiler, *Negotiorum gestio* 103 sq deals with this text

and at 331 sq he describes the actio utilis as a controversial post-classical development.

204 See chapters 2.3 and 2.4 above.

205 See n 122 above and the full discussion in chapter 5 below. As will be seen there, lawyers have developed a variety of descriptions for this action, apart from those already mentioned.

206 See chapter 3.1 below. On the termination of the gestio see chapter 4.5 below.

207 The vast majority of the old authorities mention the transferability of the actions arising from negotiorum gestio. See D 3.5.3.7 (Ulpianus): Haec autem actio cum ex negotio gesto oriatur, et heredi et in heredem competit; D 3.5.20.2; Lauterbach, Compendium juris ad D 3.5: Directa datur domino et heredibus ... adversus gestorem et ejus heredes ... Contraria datur gestori et heredibus contra dominum et heredes; Domat, Les loix civiles 2.4.1.7 (Strahan 1462): Si celui de qui un autre a entrepris l'affaire vient à mourir avant que l'affaire soit consommée, ou s'il étoit déja mort avant que cette personne s'y fût immiscée, elle sera obligée de continuer pour l'interêt des heritiers, ou des autres personnes que l'affaire pourra regarder. Car c'est une suite de son engagement qu'il faut considerer dans son origine,

indépendamment des changemens de maître qui peuvent arriver; Pothier, Appendice 216: Il est évident que cette action passe à l'héritier de celui dont on a fait les affaires, qui peut, en sa qualité d'héritier, démander qu'on lui rende le compte qui étoit dû au défunt; et qu'elle passe pareillement contre l'héritier au negotiorum gestor, qui doit rendre le compte que le défunt étoit tenu de rendre de sa gestion; Cf idem, op cit 201, 202, 204, 217; idem, Pandectae Just 3.5.34: Haec autem (utraque tam directa quam contraria negotiorum gestorum) actio, quum ex negotio gesto oriatur, et heredi et in heredem competit; Heineccius, Elementa iur civ sec ord pand 3.5.451-452; idem, Elementa iur civ sec ord inst 3.28.974; idem, Hist edict tit 24 (de neg gestis) (vol 7 pp 393-396); Voet, Comm ad pand 3.5.6 and 8; P Voet, Inst imp comm 3.28.1.2; Van der Keessel, Dictata ad Inst 3.27.4: Haec actio datur ei cujus interest ... adeoque praecipue domino rei quae administrata fuit. Datur etiam heredibus, nam actiones quasi ex contractu quoque transeunt in heredes.

208 See in general Rubin, Unauthorised Administration 49-59; Wessels, Contract 3586-3612.

209 Domat, Les loix civiles 2.4.1:1 (Strahan 1456); Glück, Pand 423 (p 374) (dass er das unternommene Geschäft nicht liegen lasse sondern ganz zu Ende bringe); Hochmetals

Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968(1) SA 571(A) at 580 C (per Van Blerk J A): "It is one of the duties of a negotiorum gestor to complete his administration. He is obliged to complete what he has begun." See also Rubin, Unauthorised Administration 50.

210 D 3.5.5.14 (a discussion by Ulpian of the legal position of the person qui negotia administrat, si quaedam gessit, quaedam non); C 2.18.20.1; Domat, loc cit. Pothier, Appendice 202 puts it thus: Un negotiorum gestor qui ne l'a pas été d'une affaire unique, mais qui s'est porté pour faire en général les affaires d'une personne, est quelquefois responsable de celles qu'il n'a pas faites; savoir, lorsqu'en se portant pour faire en général les affaires de cette personne, il a empêché par-là que d'autres ne se soient immiscés, et n'aient fait les affaires qu'il n'a pas faites, qu'ils auroient faites s'ils ne s'en fussent pas reposés sur lui. If the gestor has prevented other persons from managing the affairs under such circumstances, he would not be acting utiliter (see chapter 2.4 and n 196 above). See further: Voet, Comm ad pand 3.5.6: Nec tantum conveniri potest gestor propter ea, quae gessit; sed et de non gestis, seu neglectis, si modo gerere debuerit. Gerere vero debuit et perficere ea, quae inchoavit: nova inchoare non tenetur ... Nisi alius ea inchoaturus fuisset,

qui nunc, quod alium gerere videret, destitit; vel nisi sequens negotium neglectum priori perfecto fuerit connexum, sicut alius vir diligens illud quoque fuisset gesturus ... vel denique gestor ab initio sic accesserit, ut omnia gereret absentis negotia; idem, Compendium juris ad D 3.5.4; Van Leeuwen, Cens for 1.4.26.2: Qui alienum negotium gerendum suscepit, duplicem obligationem in se recipit, gesti et non gesti: quod enim semel suscepit, explicare et consummare debet ..; Noodt, Comm ad dig 3.5 (op om 2 p 77): non sufficit coeptum esse, sed comsummatum esse oportet .. Nova plane inchoare mihi necesse non est. Vetera explicare ac conservare, necessarium est ...; Wessels, Contract 3592-3593. On the general liability of the gestor, see chapter 3.4 below.

211 D 3.5.15; D 3.5.38; C 2.18.20.2; Pothier, Appendice 201: Quoique celui qui a fait une affaire d'une personne ne soit pas obligé de faire ses autres affaires, il est néanmoins obligé de faire tout ce qui est une dépendance de l'affaire qu'il a commencé de gérer, et tout ce qui est nécessaire pour la mettre à chef ... Cf idem, op cit 206; Voet, Comm ad pand 3.5.6; Van der Keessel, Prael ad Grot 3.27.4 (vol 5 p 240): Si unum negotium gesserit, de aliis non gestis, quae non inchoavit, non tenetur, nisi vir diligens ea non fuisset omissurus; Wessels, Contract 3591.

212 Domat, <u>Les loix civiles</u> 2.4.1.1 (Strahan 1456): <u>Mais celui qui s'engage volontairement à prendre soin de l'affaire d'un autre, n'est plus libre de l'abandonner; car il sera tenu des suites de son administration, de continuer ce qu'il aura commencé, jusqu'à ce qu'il l'achève, ou que le Maître soit en état d'y pourvoir lui-même</u> ...; Grotius, <u>Inleidinge</u> 3.27.4: <u>Den onderwinder mag uit het onderwind scheiden, soo wanneer de saeck is in haer gheheel, ofte dat sulcks kan geschieden sonder des anders schade</u>. See also <u>Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd</u> 1968(1) SA 571(A) at 580 C-D

213 1968(1) SA 571(A).

214 At 579 G-580A (<u>per</u> Van Blerk J A).

215 See the authorities cited in n 207 above. In regard to the <u>gestio</u> on behalf of a deceased estate, see further D 3.5.3 pr and 6; Voet, <u>Comm ad pand</u> 3.5.1; <u>Williams' Estate v Molenschoot and Schep (Pty) Ltd</u> 1939 CPD 360 at 375 (<u>per</u> Davis J): "It is clear, in any event, that the fact that the estate could not itself contract would not deprive the <u>negotiorum gestor</u> of a claim to be reimbursed."

216 See notes 207 and 215 above and further: D 3.5.37; Pothier, <u>Appendice</u> 217, who points out that, if any

new affairs are undertaken by the heir after the death of the *gestor*, the heir personally, and not the estate of the *gestor*, will be liable: *Mais si l'héritier du negotiorum gestor a fait, depuis la mort du défunt, des nouvelles affaires, c'est un nouveau quasi-contrat negotiorum gestorum qui se forme entre lui, et celui pour qui il a fait ces nouvelles affaires, à qui il est tenu de son chef d'en rendre compte*. See also Wessels, *Contract* 3612. On the termination of *negotiorum gestio* see chapter 4.5 below.

217 D 3.5.25; Voet, *Comm ad pand* 3.5.2 (the relevant portion quoted in n 65 above); Pothier, *Appendice* 215: *Lorsque deux personnes ont géré sans procuration les affaires d'un absent, ils ne sont tenus chacun de l'action negotiorum gestorum que pour ce que chacun d'eux a géré; ils n'en sont pas tenus solidairement*. See also Wessels, *Contract* 3607. On the liability of the *gestor* see chapter 3.4 below.

218 D 3.5.2 (*aequum est ipsum actus sui rationem reddere*); Inst 3.27.1 (*tenetur ut administrationis rationem reddat*); Böhmer, *Introd in jus dig* 3.5.7 (*ad rationes administrationes reddendas*); Heineccius, *Elementa iur civ secundum ord inst* 3.28.973 (*ad rationes reddendas*); Lauterbach, *Compendium juris* ad D 3.5 (*et rationes debet*); Schneidewein, *Comm in Inst* 3.28.1.6: *Directa datur ei ... cujus negotia gesta sunt, et ejus haeredi contra gerentem,*

<u>ut reddat rationem suae administrationis</u>; Domat, <u>Les loix civiles</u> 2.4.1.1 (Strahan 1456) (<u>il rendra compte de ce qu'il aura fait ou manqué de faire</u>); Pothier, <u>Appendice</u> 199 (<u>l'obligation de lui en rendre compte</u>). Cf idem, op cit 212; Grotius, <u>Inleidinge</u> 3.27.3: ... <u>Hy, wiens saeck onderwonden is, heeft hier uit recht om van den onderwinder reeckening te eisschen</u> ...; Huber, H R 3.28.4: <u>Directelijk spreek des saeks-heer den onderwinder aen, het zy man of vrouwe, ten eynde hy reekenschap en oplossinge sal geeven van sijn doen</u> ...; Noodt, <u>Comm ad dig</u> 3.5 (<u>op om</u> 2 p 77),(<u>ut gestor domino reddat actus sui rationem</u>); Voet, <u>Comm ad pand</u> 3.5.3 (<u>ut gestor reddat rationes administrationis;</u> idem, <u>Compendium juris</u> ad D 3.5.2; Vinnius, <u>Comm ad Inst</u> 3.28.1.2 (<u>ut gesti rationem reddet</u>); Pacius, <u>Inst imp</u> 3.27.1: <u>negotiorum gestione principaliter obligatur negotiorum gestor ad rationem administrationis suae reddendam</u>; Gudelinus, <u>Comm de jur noviss</u> 3.8; Van der Keessel, <u>Dictata ad Inst</u> 3.28.4 (<u>tenetur rationes administrationis reddere</u>); Van der Linden, <u>Koopmans handboek</u> 1.15.15.1: <u>Tegen zulk eenen onderwinder heeft de eigenaar, schoon gij door geen regelregt contract aan hem verbonden is, eene actie tot het vorderen van rekening en verantwoording, en tot vergoeding van schade, die door eenig verzuim van den onderwinder aan hem zoude mogen zijn toegebragt</u> (on the liability for damages see chapter 3.4 below). See further <u>Greenshields v Chisholm</u>

3 SC (1884) 220 at 226 (per De Villiers C J): "It is clear that he is liable to account to the plaintiff for the proceeds of the sale ..."; Grant's Farming Co Ltd v Attwell 9 HCG (1901) 91 at 95-96 ("liable to account for the profits received"). Vernall v Naested 1924 SR 103; Rubin, Unauthorised Administration 51; Wessels, Contract 3587.

219 Pothier, Appendice 200: Au contraire, lorsqu'un negotiorum gestor a fait une de vos affaires, il n'est tenu qu'à vous rendre compte de l'affaire qu'il a bien voulu faire: il n'est pas tenu de ce que vous souffrez dans vos autres affaires qui n'ont pas été faites; car il n'en étoit pas chargé, puisque ni vous, ni aucun autre pour vous, ne l'avoit chargé de ces autres affaires. See further chapter 3.1 above.

220 Pothier, Appendice 215: ... En cela les negotiorum gestores sont différents des mandataires, et la raison de différence est évidente. Lorsqu'un mandant, par sa procuration, charge plusieurs mandataires de la gestion de ses affaires, sans partager entre eux la gestion, il charge chacun d'eux du total de sa gestion: chacun d'eux, en acceptant la procuration, se charge du total de cette gestion; ils s'obligent donc chacun à rendre compte du total de la gestion; ils en sont donc tenus solidairement, ou l'un pour l'autre. Au contraire, lorsque

deux ou plusieurs negotiorum gestores ont géré les affaires de quelqu'un sans mandat, celui dont ils ont géré les affaires ne les en ayant pas chargés, ils ne sont chargés chacun que de la partie que chacun d'eux a bien voulu gérer: ils ne doivent donc chacun rendre compte que pour cette partie; ils ne sont point tenus l'un pour l'autre.

221 Pothier, Appendice 226 (quoted in n 223 below). Ortwyn, Standhoudend Roomsch regt 3.28.1 says the gestor is liable op dat hy rekenschap der bestieringe doe. In welk geval ieder een word genoopt rekenschap te geven tot de naarstigste vlijd toe: en het is niet genoeg zoodanige vlijd aan te wenden als hy gewoon is aan te wenden tot zijn zaaken; indien maar een ander vlijtiger als hy de zaaken beter zou hebben waargenomen. This smacks of the standard of liability required of the gestor (see chapter 3.4 below).

222 Leyser, Meditationes ad pandectas sp 55 ad D 3.5.8: Negotiorum gestorum in omne id condemnari, quod ex re domini consecutus est ... Debet itaque ante omnia fructuum perceptorum rationem reddere, eamque, si adversarius id exigat, jurejurando confirmare. Glück, Pand 423 a (p 374-375) similarly suggests that the gestor should, nach geendigten Geschäft Rechnung abzulegen, Einnahme und Ausgaberichtig zu specificeren, jeden Kosten gehörig zu bescheinigen und den Ueberschuss,

welcher nach Abzug der Unkosten und Ausgaben übrig bleibt, mittelst eines Inventariums oder ein eidlichen Specification an den Herrn des Geschäfts, und zwar mit Zinsen, herauszuzahlen.

223 Pothier, Appendice 226: Le negotiorum gestor ne peut pas donner cette action contre celui dont il a fait l'affaire, qu'il ne lui présente un compte détaillé de sa gestion, et qu'il ne lui offre la communication de toutes les pièces justificatives. Il est en cela semblable à un mandataire. La raison est que dans tous les contrats et quasi-contrats qui sont synallagmatiques, l'une des parties n'a pas droit de demander à l'autre qu'elle remplisse son obligation, si elle n'est prête elle-même de remplir la sienne: d'ailleurs ce n'est que par le compte que doit donner le negotiorum gestor, qu'on peut connoitre la somme qu'il a droit de demander pour les frais de sa gestion. Si celui à qui le compte est présenté, fournit des débats contre le compte, le negotiorum gestor doit y répondre; et il se forme en ce cas une instance de compte. S'il n'en fournit aucuns, le negotiorum gestor, après l'avoir mis en demeure d'en fournir, peut poursuivre contre lui la condamnation de la somme qui se trouve par le compte lui être due pour les frais de sa gestion. It would appear that the opportunity which the gestor should grant the dominus to query the account, should be a reasonable time. Cf idem,

op cit 219.

224 Wessels, Contract, 3631.

225 1969(4) SA 559(N).

226 At 561 G-562B (*per* Henning J).

227 J E Scholtens, "The Actio Contraria of the Negotiorum Gestor and his Duty to Account" in SALJ 87 (1970) 284-288. See also his discussion of the said case in Annual Survey (1969) 131-133.

228 At p 287.

229 At p 288.

230 D 3.5.2 (*quidquid ... ex his negotiis retinet*); D 3.5.7.1; D 3.5.10 (Paulus): *non tantum sortem, verum etiam usuras ex pecunia aliena perceptas negotiorum gestorum iudicio praestabimus, vel etiam quas percipere potuimus*; D 3.5.30.3 (Ulpianus): *Qui aliena negotia gerit, usuras praestare cogitur eius scilicet pecuniae, quae purgatis necessariis sumptibus superest*; D 17.1.10.3; Heineccius, *Elementa iuris civilis sec ord inst* 3.28.973 (*restituenda reliqua*); Lauterbach, *Compendium juris* ad D 3.5 (*debet ... et gratuito reddere omnia ... etiam usuras, quas ex gestione accepit vel percipere potuit*); Böhmer, *Introd in jus dig* 3.5.7 (*restituendum quod ad eum pervenit*

vel pervenire potuit, etiam cum usuris); Leyser, *Medi-*
tationes ad pand sp 55 ad D 3.5.8 (quoted in n 222 above);
Windscheid, *Pand* 430 (p 916): *Der Geschäftsführer ist*
verpflichtet dem Geschäftsherrn alles herauszugeben was
er auf Grund seiner Tätigkeit in händen hat ...; Cuja-
cius, *In lib IX Pauli ad Edict recit ad L XVIII et XIX*
de neg gest ad § penult (vol 6 col 112): *In actione nego.*
gest. directa non tantum sortem venire sed etiam usuras,
quas ex pecunia aliena negotiorum gestor percepit, ne
de alieno lucrum sentiat ... vel etiam usuras quas per-
cipere potuit nec percepit; Pothier, *Appendice* 199
(*l'obligation ... de lui remettre tout ce qui lui est*
parvenu de sa gestion); idem, op cit 212-213; idem,
Pandectae Justinianeae 3.5.40: *Qui aliena negotia gerit,*
usuras praestare cogitur, ejus scilicet pecuniae quae,
purgatis necessariis sumptibus, superest: idem, op cit
3.5.51-52; Grotius, *Inleidinge* 3.27.3 (*alle 't gunt*
den onderwinder heeft bekomen ter saecke van 't onder-
wind met de vruchten ende baten); Voet, *Comm ad pand*
3.5.3: *Tendit vero haec actio ad id, ut gestor reddat*
rationes administrationis ... et restituat omne id, quod
ad ipsum ex administratione pervenit, sive sors sit,
sive usura, aliudve lucrum; idem, *Compendium juris*
ad D 3.5.2; Vinnius, *Comm ad Inst* 3.28.1.2 (*restitu-*
tionem ejus, quod per occasionem negotii ad gerentem
pervenit); Van Leeuwen, *Cens for* 1.4.26.2 (*ut quid ne-*
gotii occasione ad eum pervenit, cum fructibus et usuris
restituat); Noodt, *Comm ad dig* 3.5 (*op om* 2 p 77)

(quidquid ex his negotiis retinet); Huber, H R 3.28.4 (overleeveren wat desweegen by hem mach zijn verbleeven); Perezius, Comm in dig 3.5; Gudelinus, Comm de jur noviss 3.8; Van der Keessel, Dictata ad Inst 3.28.4; Wessels, Contract, 3587, 3590; Grant's Farming Co Ltd v Attwell 9 HCG (1901) 91; Jacobs v Maree 19 SC (1902) 152.

231 9 HCG (1901) 91.

232 D 3.5.5.14.

233 D 3.5.5.14; D 3.5.18.4; D 3.5.36.1; D 15.3.10.5; Schotanus, Examen juridicum in D 3.5: Si in mora restituendi fuerit, solvet usuras a tempore morae; Domat, Les loix civiles 2.4.1.8 (Strahan 1463); Molinaeus, Comm in cod 2.19 (op om 3 col 114) (quoted in n 200 above); Pothier, Appendice 205; Voet, Comm ad pand 3.5.3-6; idem, Compendium juris ad D 3.5.2; Wessels, Contract 3594-3595.

234 D 3.5.36.1; Groenewegen, De leg abrog ad D 3.5.37: Hodie usurae non debentur nisi a tempore litis contestatae; idem, op cit ad C 2.19.18: Nostris et Gallorum moribus sumptuum factorum usurae negotiorum gestorum actione non praestantur, nisi a tempore litis contestatae. On the liability of the gestor in general see chapter 3.4 below.

235 Pothier, *Appendice* 203; Wessels, *Contract* 3596. On the prescription relating to the *actiones negotiorum gestorum*, see chapter 4.5 below.

236 See the authorities cited in n 211 above and further: Pothier, *Appendice* 206: *Si on peut imputer à celui qui s'est immiscé sans procuration à la gestion des affaires de son créancier, qu'il n'ait pas exigé de lui-même ce qu'il lui devoit, on ne peut pas de même lui imputer qu'il n'ait pas exigé ce qui étoit dû par les autres débiteurs; car n'ayant pas de procuration, il ne pouvoit pas les obliger à lui payer ce qu'ils devoient*.

237 Pothier, *Appendice* 207: *Lorsque c'est un créancier qui a géré les affaires de son débiteur, on peut lui imputer de ce qu'il n'a pas employé les sommes de deniers qui lui sont parvenues de sa gestion, à se payer de ce que lui devoit la personne dont il géroit les affaires, et à payer les autres créanciers de cette personne*; Voet, *Comm ad pand* 3.5.6: *Proinde, si fuerit creditor ejus,cujus gerit negotia, ac paratam habeat absentis pecuniam, non aliis tantum absentis creditoribus, sed et sibi ipsi, solvere jubetur; tum ut evitet nummorum periculum; tum ut interrumpat ulteriorem usurarum cursum*. Cf Domat, *Les loix civiles* 2.4.1.8 (Strahan 1463) (*s'il manquoit d'acquitter une dette de l'absent*); Wessels, *Contract* 3598-3599.

370/...

238 D 3.5.7.1; D 3.5.22 (Paulus): Si quis negotia aliena gerens indebitum exegerit, restituere cogitur; de eo autem quod indebitum solvit, magis est ut sibi imputare debeat; D 22.3.25.1; Pothier, Appendice 212 ..(L)e negotiorum gestor ...est tenu de me rendre tout ce qui lui est parvenu de la gestion de mes affaires, et tout ce qu'il a reçu pour moi, non seulement lorsque ce qu'il a reçu pour moi m'étoit dû, mais même dans le cas auquel il auroit reçu pour moi quelque chose qui ne m'etoit pas due. Lorsque je juge à propos d'approuver le paiement qui lui en a été fait pour moi, et de lui en demander compte, il n'est pas recevable, pour se défendre de me rendre cette somme, à alléguer qu'elle ne m'étoit pas due: il suffit qu'il l'ait reçue pour moi, pour qu'il soit tenu de me la rendre ... Mais si ce negotiorum gestor, avant que de me rendre compte de cette somme, et avant que j'eusse approuvé le paiement qu'il en a reçu pour moi, ayant découvert qu'elle ne m'etoit pas due, l'eût rendue à celui qui la lui a payée, il ne seroit pas tenu de m'en rendre compte: mais ce seroit à lui à prouver que cette somme ne m'étoit pas due, et qu'il a eu raison de la rendre; car le paiement qui lui a été fait, la fait présumer due, tant qu'on ne justifie pas le contraire. See also Voet, Comm ad pand 3.5.3 who says the gestor is liable etiamsi plus justo, vel etiam id, quod indebitum erat, pro alio tamquam gestor accepisset; Wessels, Contract 3588-3589.

239 Pothier, _Appendice_ 213: _Le negotiorum gestor, de même que le mandataire, étant tenu de rendre à celui dont il a géré les affaires, tout ce qui lui est parvenu de sa gestion, il doit le subroger à toutes les actions qu'il a acquises par sa gestion, et lui en laisser la disposition_; Mascardus, _De probationibus_ 1.349.4: _negotiorum gestor teneatur actiones cedere_.

240 See in general A H Berghuis, _De culpa a mandatario et negotiorum gestore praestanda_ (1754); B Kübler, "Die Haftung für Verschulden bei kontraktsähnlichen und deliktsähnlichen Schuldverhältnissen" in ZSS 39 (1918) 172 sqq; F Haymann, "Die Haftung des negotiorum gestor wegen Verschuldens im klassischen und iustinianischen Recht" in _Atti Roma_ 2(1935) 449-470; E Sachers, "Die Haftung des auftraglosen Geschäftsführers" in SDHI 4 (1938) 309-362 (with emphasis on the _fides_ which the _gestor_ should have during performance of the _gestio_). H Pflüger, "Zur Lehre von der Haftung des Schuldners nach Römischem Recht" in ZSS 65 (1947) 121 sqq; F de Robertis, "La responsabilità del 'negotiorum gestor' nel diritto giustinianeo" in Eos 48.3 (1956) 197-205; V Arangio-Ruiz, _Responsabilità contrattuale in diritto romano_ (1958); H H Seiler, "Zur Haftung des auftraglosen Geschäftsführers im römischen Recht" in _Studien Kaser_ (1973) 195 sqq. See further Rubin, _Unauthorised Administration_ 52-59; Wessels, _Con-_

tract 2098, 3600-3611; De Villiers and Macintosh, *The Law of Agency in South Africa* (1981) 277.

241 D 3.5.2 (*quidquid vel non ut oportuit gessit*); D 3.5.20.3 (*quod is non recte gessit ... quidquid detrimenti neglegentia eius fecit*); D 3.5.24; D 3.5.31.2; Heineccius, *Elementa iur civ sec ord inst* 3.28.973 (*culpamque praestandum*); Böhmer, *Introd in jus dig* 3.5.7 (*resarciendum damnum quavis ejus culpa datum*); Voet, *Comm ad pand* 3.5.3 (*quod culpa ejus factum, quominus perveniret*); Van Leeuwen, *Cens for* 1.4.26.2: *De damno, si quod ex ejus mala administratione dominus patiatur, teneatur ... Non gesti, ut lucri cessantis, et damni propter negligentiam dati aestimationem praestet*.

242 D 3.5.5.14; D 3.5.18.4; D 3.5.36.1; D 15.3.10.5; Pothier, *Appendice* 205; Van Leeuwen, *Cens for* 1.4.26.2 (*lucri cessantis ... aestimationem praestet*); Vinnius, *Comm ad Inst* 3.28.1.2 (quoted in n 243 below). Cf Voet, *Comm ad pand* 3.5.3-6; Wessels, *Contract* 3594-3595.

243 D 3.5.5.14; C 2.18.20.1; Pothier, *Appendice* 202: *Un negotiorum gestor qui ne l'a pas été d'une affaire unique, mais qui s'est porté pour faire en général les affaires d'une personne, est quelquefois responsable de celles qu'il n'a pas faites* ...; Voet, *Comm ad pand* 3.5.6: *Nec tantum conveniri potest gestor propter ea,*

quae gessit; sed et de non gestis, seu neglectis, si modo gerere debuerit; Vinnius, Comm ad Inst 3.28.1.2: ... In non gesto non tantum damni culpa aut negligentia dati ratio habetur, sed etiam lucri omissi.

244 D 3.5.10 (Pomponius): ... Nam si quid damnum ex ea re secutum fuerit, te sequetur, lucrum vero absentem: quod si in quibusdam lucrum factum fuerit, in quibusdam damnum, absens pensare lucrum cum damno debet; Domat, Les loix civiles 2.4.1.4 (Strahan 1459):... Mais s'il se trouvoit dans cette même affaire de la perte d'une part, et du gain de l'autre, celui qui l'auroit entreprise pourroit compenser ce qu'il y auroit de gain sur la perte qu'il devroit porter; Pothier, Pandectae Justinianeae 3.5.52; Voet, Comm ad pand 3.5.5: si quod damnum ex ea re secutum fuerit, gestorem gravabit; si quod lucrum, proderit domino: ut tamen, si in quibusdam lucrum factum fuerit in quibusdam damnum, absens dominum lucrum debeat cum damno pensare; Vinnius, Comm ad Inst 3.28.1.2: ... Caeterum hic lucrum cum damno casu dato pensatur.

245 D 3.5.10 (Pomponius): Si negotia absentis et ignorantis geras, et culpam et dolum praestare debes. Sed Proculus interdum etiam casum praestare debere, veluti si novum negotium, quod non sit solitus absens facere, tu nomine eius geras: veluti venales novicios coemendo vel aliquam negotiationem ineundo ... (the remainder of this

374/...

text is quoted in n 244 above). Cf D 50.17.23; D 3.5.31 pr.

246 D 10.2.25.16 (talem igitur diligentiam praestare debet qualem in suis rebus).

247 On the various forms of culpa in Roman law, which concept means "fault" in the wide sense and "negligence" in the narrow sense, see D H van Zyl, Geskiedenis en Beginsels van die Romeinse Privaatreg (1977) 261-263. Culpa, in the sense of negligence, was broadly categorized as culpa levis and culpa lata, the latter form of culpa being characterised by such reckless negligence that it was virtually the equivalent of dolus (fraud). Culpa levis, in turn, occurred in two forms, namely culpa levis in abstracto and culpa levis in concreto. In the former, the debtor was required to display the utmost diligence (exactissima diligentia) in whatsoever he did, failing which he would be guilty of culpa levissima, whereas in the latter no more was required than the diligence he was accustomed to apply in his own affairs (diligentia quam suis rebus adhibere solet), which, if it should not be applied, would be considered as culpa levis.

248 C 2.18.20.1 (non tantum dolum et latam culpam, sed et levem praestare necesse habeat).

249 Inst 3.27.1. After referring to the gestor's duty to render

an account (see chapter 3.2 above), the text proceeds: *quo casu ad exactissimam quisque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere solet, si modo alius diligentior commodius administraturus esset negotia.*

250 D 3.5.3.9 (Ulpianus): *Interdum in negotiorum gestorum actione Labeo scribit dolum solummodo versari: nam si affectione coactus, ne bona mea distrahantur, negotiis te meis optuleris, aequissimum esse dolum dumtaxat te praestare: quae sententia habet aequitatem.* D 3.5.3.10 (idem): *Hac actione tenetur non solum is qui sponte et nulla necessitate cogente immiscuit se negotiis alienis et ea gessit, verum et is qui aliqua necessitate urguente vel necessitatis suspicione gessit.*

251 D 3.5.10 (see n 245 above); D 3.5.36.1.

252 C 2.18.22: *Negotium gerentes alienum non interveniente speciali pacto casum fortuitum praestare non compelluntur.*

253 Leyser, *Meditationes ad pandectas* sp 55 ad D 3.5.2 suggests that the qualification refers to persons who manage the affairs of another on the authority or by mandate of the *dominus*: *Limitatio autem adjecta, non interveniente speciali pacto, non ad negotiorum gestorem, sed ad alios, qui negotia aliena ex mandato domini gerunt,*

pertinet. Voet, *Comm ad pand* 3.5.5 expresses the opinion that the qualification must be a stray clause relating to mandate, but inserted in C 2.18.22 by a mistake of the compilators: *Unde et vix dubitandum quin ... fugitiva sit, per incuriam compilatorum illic posita, cum debuisset ad titulum mandati esse translata*. Van Bynkershoek, *Observ jur rom* 1.7 (*op om* 1 p 18) believes the words *interveniente speciali pacto* should read *interveniente speciali facto*, on the basis that the particular conduct of the *gestor* may render him liable for *casus fortuitus*, as in the case where he does something that the *dominus* himself was not accustomed to do (see D 3.5.10 quoted in n 245 above): *Nempe, quemadmodum nemo casum praestare cogitur ... ita neque negotiorum gestor, ... nisi speciale aliquid fecit, gessit, quod dominus ipse facere, gerere non solebat, ex eo enim quodcunque damnum secutum fuerit, in gestorem redundabit, atque adeo casum ea in specie praestabit*. See also Van der Linden, *Suppl ad Voet* 3.5.5, who who links the *casus fortuitus* with previous *culpa* of the *gestor*: *Tenetur autem etiam de casu si culpa praecessit, neque sine hac casus accidisset*. (Cf Pothier, *Appendice* 210 (in fin).

254 Odofredus, *Lectura super cod* 2.19(18).17; Cinus, *Comm in cod* 2.19.17; Révigny, *Lectura super cod* 2.19 (18).17 (fol 88): *Sed si sponte inciperet gerere aliquo tenetur de dolo et lata culpa et levi* (cf also 2.19(18).

20 (fol 89); *Liber iuris florentinus* 51: *In actione illa venit ratio negotiorum gestorum in qua attenditur dolus et culpa lata et levis, non autem fortuitus casus, nisi illum expresse gestor negotiorum promisit, vel nisi novum negotium gesserit quod gerere non est solitus ille cuius sunt negotia* (see the criticism of this approach in n 253 above). Cf Wesenbeke, *Comm in pand jur civ* ad D 3.5.10, who suggests liability for *dolus* and *culpa levis* but not for *casus fortuitus*: *nam de casu et inopinato eventu non tenetur*; Noodt, *Comm ad dig* 3.5 (*op om* 2 p 78) :.... *de fortuito tamen casu non tenetur*.

255 See in general: Accursius, *Corpus Iuris Civilis Glossatum*, gloss *et levem* ad C 2.18(19).20: *Item in gestore est hoc regulare, quandoque enim de dolo solo, quandoque etiam de levissima culpa tenetur, quandoque de fortuito casu* (cf his gloss *negotium gerentes* ad C 2.18(19).22 and gloss *communi* ad C 2.18(19).19); Placentinus, *Summa cod* 2.19 (p 62 and 64); Cujacius, *In lib IX Pauli ad Edictum recitationes ad l XIII de neg gest* (vol 6 col 107): *Nec vim majorem gestores negot praestare debent, sed dolum tantum et culpam etiam levissimam* (but cf his commentary on *l XXI de neg gest (non tantum dolus venit sed etiam culpa, negligentia*) and *In Julii Pauli receptarum sententiarum ad filium lib V interpretationes tit XI de neg gest* 1 (vol 6 col 954): *Qui negotia aliena gerit et bonam fidem et exactam diligentiam rebus ejus pro quo intervenit praestare debet*);

Donellus, *Comm in cod* 4.32.24: *Hoc ideo, quia qui negotia aliena gerit omnem diligentiam et omnem culpam in iis negotiis administrandis praestare debet* (cf his very full discussion in *Comm de jur civ* 15.15.7-8); Molinaeus, *Comm in cod* 2.19 (*op om* 3 col 114); Domat, *Les loix civiles* 2.4.1.2-7; Pothier, *Appendice* 208-211; Brunnemann, *Comm in cod* 2.19.20.11-13 (cf his *Comm in cod* 2.19.17-18 and 22; *Comm in pand* 3.5.3.10-13; 3.5.10(11) and *Repetitio paratitlorum* 5 ad Cod 2.19.18); Heineccius, *Antiquitatum roman syntagma* ad Inst 3.28.3: *Negotiorum vero gestor et bonam fidem et exactissimam diligentiam praestare tenebatur, adeo ut nonnunquam et casus esset praestandus*; idem, *Elementa iur civ sec ord inst* 3.28.970 (cf idem, op cit 3.5.449); Höpfner, *Comm über die heinecc Inst* 3.28.937; Böhmer, *Introd in jus dig* 3.5.4; Lauterbach, *Compend iuris* ad D 3.5; Windscheid, *Pand* 430 (p 915); Schneidewein, *Comm in Inst* 3.28.1.7; Dernburg, *Pand* 122: *Wer in einem Nothfall Nothwendiges besorgte, haftet nur für dolus und culpa lata*; Arndts, *Pand* 297: *Er haftet für jede Fährlässigkeit*; Glück, *Pand* 422 (p 351-368); Pacius, *Inst imp* 3.27.1; Struvius, *Syntagma jurispr* 7.3.5.50; idem, *Evolutiones controversiarum* 7.3.5 (thes 50); Schotanus, *Examen juridicum* in D 3.5; Treutler, *Select disp* 1.10.6; Perezius, *Comm in dig* 3.5; idem, *Prael cod* 2.19.4; Voet, *Comm ad pand* 3.5.4-3.5.5; idem, *Compendium juris* ad 3.5.3: *Culpam autem negotiorum gestor praestat levissimam ... nisi accesserit ad negotia alias peritura, quo casu*

solum dolum praestat ... Non vero tenetur de caso fortuito, nisi insolita gesserit ...; P Voet, Inst imp comm 3.28.13; Noodt, Comm ad dig 3.5; Vinnius, Partitiones iur civ 2.41; idem, Comm ad Inst 3.28.1.1 and 3; Groenewegen, De leg abrog ad C 2.18.20; Van Leeuwen, Cens for 1.4.26.3; Huber, Positiones juris ad Inst 3.28.6; Schorer, Aanteekeningen ad Grot Inl 3.27.3.6; Van der Keessel, Prael ad Grot 3.27.3 (vol 5 p 238-240); idem, Dictata ad Inst 3.28.4; Barels, Advysen 78 (25th November 1716): Zo dat wanneer iemand by dringende nood een anders zaecken op zich neemt ter bestieringe, het een aengenomen gebruik is dat hy alleen gehouden is wegens frauduleuse behandelinge omtrent het geen hij verricht heeft; Westenberg, Principia juris ad D 3.5.12; Wissenbach, Disputationes ad inst imp 39 (thes 1.6); Zoesius, Comm ad dig 3.5.5 and 8.

256 Domat, Les loix civiles 2.4.1.2 (Strahan 1457): Celui qui s'est engagé à l'affaire d'un autre à son insçu, est obligé d'en prendre le même soin que s'il étoit Procureur constitué; car il en tient lieu: et rendant un office, il doit le rendre tel qu'il ne soit pas nuisible ou par sa négligence, ou par quelqu'autre faute. Ainsi il sera tenu, non seulement de ce qu'il pourroit y avoir de sa part de dol ou de mauvaise foi, mais aussi du manque de soin. Et quand même il seroit négligent en ses propres affaires, il doit pour celles d'un autre dont il s'est chargé, un soin très exact,

380/...

et il répondra des fautes contraires à ce soin...

257 Domat, op cit 2.4.1.12 (Strahan 1467): Quoique ceux qui s'ingerent aux affaires des autres soient tenus regulierement d'un soin très-exact ... Si les circonstances sont telles qu'il y eût de la dureté d'exiger un tel soin de celui qui auroit geré l'affaire d'un autre, on pourroit y apporter du temperament, et ne la pas rendre responsable des fautes qu'on ne pourroit imputer a une mauvaise foi. Ce qui doit dépendre de la qualité des personnes, de leur liaison d'amitié ou de proximité, de la nature de l'affaire, de la necessité qu'il y avoit d'y pourvoir, comme si c'étoit pour prévenir une saisie ou une vente des biens de l'absent, des difficultez qui pourroient s'y rencontrer, de la conduite de celui qui s'y est immiscé, et des autres circonstances semblables.

258 Pothier, Appendice 208: ... Le negotiorum gestor est tenu d'apporter à sa gestion le même soin qu'un mandataire est tenu d'apporter à la sienne: il est tenu de même qu'un mandataire, de levi aut de levissimâ culpâ, selon la nature de l'affaire. He then refers to D 3.5.10 (quoted in n 245 above) as authority for this proposition. In 209 he points out that the gestor in some cases has to apply exactissima diligentia whereas the mandatary only has to apply the diligence qualem suis

rebus adhibere solet. Cf idem, Pandect Iust 3.5.41 and 51-52.

259 Pothier, op cit 210: Quelquefois même le negotiorum gestor est tenu des pertes qu'il a souffertes par cas fortuit dans la gestion de l'affaire qu'il a faite pour quelqu'un. C'est ce qui arrive lorsqu'il a fait pour moi et en mon nom un commerce que je n'avois pas coutume de faire. S'il n'a pas reussi dans ce commerce, et qu'il y ait de la perte, n'ayant pas approuvé ce commerce qu'il faisoit pour moi, je pourrai lui laisser la perte pour son compte.

260 Pothier, op cit 211: Au contraire, il y a un cas dans lequel le negotiorum gestor n'est obligé d'apporter que de la bonne foi à sa gestion, et n'est pas tenu des fautes qu'il auroit commises dans sa gestion par imprudence ou par impéritie. C'est le cas auquel les affaires d'un absent se trouvant abandonnées , personne ne se présentant pour en prendre soin, une personne, quoique peu habile et peu intelligente dans les affaires, en auroit entrepris la gestion, pour ne les pas laisser à l'abandon. ... Lorsque la négligence qu'il a apportée à sa gestion est une négligence qu'il n'a pas pour ses propres affaires, de telles fautes sont comprises sous le terme général de dol; car c'est quelque chose de contraire à la bonne foi, et par conséquent une espèce de dol, que de n'avoir pas des affaires d'autrui

le même soin qu'on a des siennes. Il est évident que le précepte qui nous oblige d'aimer notre prochain comme nous-mêmes, nous oblige d'apporter aux affaires du prochain, lorsque nous les gérons, le même soin que nous apportons aux nôtres. Les fautes dont ce negotiorum gestor est excusé dans ce cas, sont seulement celles qui proviennent du défaut d'une habileté et d'une intelligence dans les affaires qu'il n'a pas, ou même du défaut d'un soin dont il n'est capable.

261 Automne, La conférence du droict françois avec le droict romain civil et canon ad C 2.19.20.

262 Groenewegen, De leg abrog ad C 2.19.20: Jure Gallico negotiorum gestorem non praestare levem culpam tradit Autumn ... at moribus nostris hoc pro ratione circumstantiarum judicis arbitrio relinquendum censeo.

263 Van Leeuwen, Cens for 1.4.26.3: Quare nec heredem de dolo tantum et culpa levi, sed et levissima teneri, exactissimamque diligentiam praestare volunt ... Quibus et casum fortuitum addunt, cui culpa eius causam dederit. Quod quum admodum durum sit, praesertim iis qui mera affectione ducti solius ejus gratia, cujus negotium geritur, ne forte damnum patiatur absens, ad res ejus accedunt; nec ad omnes casus commode applicari possit ... adeoque, si nec sufficeret ea diligentia, quam quis suis rebus ipse adhiberet, absentium negotium facile

deperirent, quomodo etiam argumentatur Imperator (ie Justinian) ... judicis arbitrio illud potius pro varia negotiorum conditione et qualitate relinquendum est, ut eam diligentiam praestet, quam ipsum negotium desiderat.

264 Voet, Comm ad pand 3.5.4: ... Quibus tam varie pro circumstantiarum diversitate in jure nostro definitis, non desunt, qui hodie in universum arbitrio judicis relinquendum arbitrantur, qualis in negotio unoquoque gesto culpa praestanda sit, pro varia ejus conditione ac qualitate.

265 Schorer, Aanteekeningen over de Inleidinge tot de Hollandsche Rechts-geleerdheid van Hugo de Groot (Austen's translation): ... doch Van Leeuwen is van gedachten, dat de bepaalinge aan den rechter moet gelaten worden in welke gevallen de onderwinder de schade, die door zijne onoplettendheid of onachtsaamheid der zake is toegebracht, moet vergoeden. The relevant portion of the Latin text reads: alius judicis arbitrio relinquendum putat, pro rei gestae qualitate, qualis a negotiorum gestore praestanda sit culpa.

266 19 SC (1902) 152.

267 At 154-155 (per De Villiers C J).

268 1903 TS 100.

269 At 103 (*per* Innes C J). To what extent the official permit obtained by the *gestor* prior to the *gestio* might affect his liability was not considered by the Court. This fact, if not a complete defence in its own right, should certainly be considered as strongly indicative of the *gestor's* *bona fides*.

270 1930 TPD 402.

271 At 407 (*per* Tindall J).

272 *Minister of Justice v Lawrie* 1930 TPD 877 at 878 (*per* Tindall J): "In my judgment in the previous appeal I dealt with the diligence which is expected of a *negotiorum gestor*. Applying the test there laid down I am of opinion that the evidence shows that the police did not take the precautions for the safe-custody of the car which might be expected of a reasonably prudent person under the circumstances. The evidence does not show that the police left any one on duty to look after the car during the night. That being so, in my opinion, their failure to put a lock on the gate of the yard discloses a want of that prudence which a reasonably careful man might have been expected to exercise under the circumstances."

273 1938 CPD 140.

274 At 144-145 (*per* Davis J).

275 See also *Boyce N O v Bloem and Others* 1960(3) SA 855 (T) at 866 D-H.

276 Rubin, *Unauthorised Administration* 59. See also Lee and Honoré, *The South African Law of Obligations* (1978) 155 (par 434); De Villiers and Macintosh, *The Law of Agency in South Africa* (1981) 277.

277 D 3.5.25; Pothier, *Appendice* 215; Voet, *Comm ad pand* 3.5.2. See further notes 65 and 217 above. On the question of liability when the *gestor* gives a mandate to a third party to conduct the affairs of the *dominus*, see notes 87-89 above. The transferability of liability to the heirs of the *gestor* has likewise already been dealt with - see n 207 above.

278 See in general on the rights of the *gestor* Rubin, *Unauthorised Administration* 60-73; Wessels, *Contract* 3613-3631; De Villiers and Macintosh, *The Law of Agency in South Africa* (1981) 277-279.

279 D 3.5.2 (*quidquid utiliter in rem eius impenderit ... habet eo nomine actionem*); D 3.5.9.1; D 3.5.44 pr;

D 44.7.5 pr; Inst 3.27.1; Domat, *Les loix civiles* 2.4.2.3 (Strahan 1470): *Si celui qui a géré l'affaire d'un absent, y a fait des dépenses nécessaires ou utiles, et telles que l'absent lui-même auroit pû ou dû faire, il les recouvrera*; Pothier, *Appendice* 199 and 219; Pacius, *Inst imp* 3.27.1: *Vero quandam ex bono et aequo dominus obligatur gestori, ut ei restituat impensas in negotia gerenda factas, quia nemini debet officium suum esse damnosum*; Böhmer, *Introd in dig* 3.5.8 (the *gestor* who *utiliter gessit negotium ad indemnitatem consequendam* is entitled to *repetitione impensarum necessarium et utilium*); Brunnemann, *Comm in pand* 3.5.2; Arndts, *Pand* 298 (the *gestor* has an action *auf Erstattung des im Interesse des letzten gemachten Aufwandes*); Grotius, *Inleidinge* 3.27.5 (he is entitled to be recompensed for *gedane kosten*); Perezius, *Comm in dig* 3.5; Voet, *Comm in pand* 3.5.8: *Praecipue vero comparata fuit haec actio, ut gestor necessarias et utiles impensas recuperet*; idem, *Compend juris* ad D 3.5.5; Huber, HR 3.28.6: *De onderwinder heeft contrarie aenspraek op des saeks-heer tot weder-eysch van sijn kosten* ...; Schorer, *Aanteekeningen ad Grot Inl* 3.27.1-2: *moribus (nostris) tamen negotiorum gestori actio negotiorum pro necessariis et utilibus expensis competit*; *Klug and Klug v Penkin* 1932 CPD 401 at 404 ("necessary and useful expenses"). In *New Club Garage v Milborrow and Son* 1931 GWLD 86 at 99, reference is made to the *gestor's*

claim "for all legitimate expenses connected with his care and custody" but at 99-100 this proposition is more clearly defined: "And the owner is bound to reimburse the negotiorum gestor for all useful and necessary expenses incurred by him in connection with his administration of the owner's business ..." Cf Theron v Africa 10 SC (1893) 246; Killian v Reilly 18 CTR (1908) 159; Meyers v Marks Ltd 1916 CPD 716. See futher, in general, B Biondi, "La compensazione nel diritto romano" in Annali Palermo 12 (1929) 161 sqq; M Kaser, Quanti ea res est. Studien zur Methode der Litisästimation im klassischen römischen Recht (1935); S Solazzi, La compensazione nel diritto romano (1950); Rubin, Unauthorised Administration 65-66; L R Caney, The Law of Suretyship (1970) 35 and 136; Wessels, Contract 3613; De Villiers and Macintosh, The Law of Agency in South Africa (1981) 277-278.

280 Pothier, Appendice 199. After discussing the actio directa of the dominus he continues: et réciproquement celui dont on a fait l'affaire contracte envers le negotiorum gestor l'obligation de l'indemniser des frais de sa gestion; obligation semblable à celle que contracte un mandant envers son mandataire; et de cette obligation naît l'action negotiorum gestorum contraria que le negotiorum gestor a contre celui dont il a géré l'affaire, pour se faire rembourser et indemniser des frais de sa gestion. Cf idem, op cit 219.

281 D 25.1.1 (Ulpianus): Necessariae hae dicuntur, quae habent in se necessitatem inpendendi: ceterum, si nulla fuit necessitas, alio iure habentur; D 50.16.79 pr (Paulus): Impensae necessariae sunt, quae si factae non sint, res aut peritura aut deterior futura sit ... Cf D 3.5.30.3 and 7; D 3.5.20.2; D 25.1.14 pr.

282 D 50.16.79.1 (Paulus): Utiles impensas esse Fulcinius ait, quae meliorem dotem faciant, non deteriorem esse non sinant ... (a reference to the law of dowry). Cf D 3.5.38; D 3.5.44 pr and see Voet, Comm ad pand 3.5.8 (in quibus utilibus etiam est sumtus honeste ad honores per gradus pertinentes factus).

283 Domat, Lex loix civiles 2.4.2.6 (Strahan 1473): Les dépenses qui auront été faites imprudement pour une personne qui ne voulût pas les faire, ou qui même ne fût pas en état de s'y engager, tomberont sur celui qui les aura faites de son mouvement. Comme si, par exemple, il a fait dans une maison quelques réparations inutiles, ou quelque changement que le maître ne pût ni ne voulût faire; car il n'a pas dû l'engager indiscrètement à une dépense qui lui fût à charge.

284 See chapter 2.4 above.

285 See the authorities quoted in n 173 above and further: D 3.5.44 pr (Ulpianus): Quae utiliter in negotia alicuius

erogantur, in quibus est etiam sumptus honeste ad honores per gradus pertinentes factus, actione negotiorum gestorum peti possunt; D 44.7.5 pr (quod utiliter de suo impendisset); Grotius, Inleidinge 3.27.5 (the gestor has a claim for reimbursement welverstaende indien de zake wel is ghelukt, ofte immers zoo beleid, dat nae ghemeen oordeel van verstandige luiden een goede uitkomste daer uit stond te verwachten); Voet, Comm ad pand 3.5.8 (referred to in n 282 above); Groenewegen, De leg abrog ad D 3.5.26(27): si vel ipse praedo utiles impensas repetat ... multo magis frater, qui ampla aedificia aedificavit, impensas, quatenus utiliter in fratris negotia erogata sunt, repetere potest; Perezius, Comm in dig 3.5: Hinc sumptus necessario et utiliter facti, non voluptatis causa ... hac actione petuntur, in quibus comprehenduntur sumptus ad honores et gradus consequendos utiliter facti; Van der Linden, Koopmans handboek 1.15.15.1: Weederkeerig heeft de onderwinder regt, om van den eigenaar schadeloosstelling wegens de uitschotten, welken hij teen zijnen nutte gedaan heeft, te vorderen.

286 1915 CPD 789.

287 At 792 (per Gardiner J).

288 1932 CPD 401 at 404 (per Watermeyer J).

289 Wessels, Contract 3614, which is preceded by the heading: "Expenditure must have benefited the Dominus."

290 On the criticism of this "benefit-theory" see the discussion in chapter 2.4 above and the authorities cited in notes 182-184 above. It would appear that the "benefit" requirement stems from an erroneous interpretation of Voet, Comm ad pand 3.5.10, which interpretation is evidently in conflict with Grotius, Inleidinge 3.27.5 (correctly quoted by Wessels, Contract 3625). It is respectfully submitted that Wessels is likewise wrong in 3618, where the learned author, relying on Voet, Comm ad pand 3.5.9, suggests that useful expenses cannot be recovered where it is shown that "the dominus had not in fact been benefited by what was done."

291 1939 CPD 360 at 376 (per Davis J).

292 See notes 72 and 192 above. Cf Colonial Government v Smith and Company 18 SC(1901) 380 at 392-393; Grant's Farming Co Ltd v Attwell 9 HCG (1901) 91 at 95; Gouws v Jester Pools (Pty) Ltd 1968(3) SA 563(T)

293 Wessels, Contract 3617.

294 See the full discussion of this subject in chapters

5.3 and 5.6 below.

295 See the authorities cited in n 189 above.

296 See the authorities cited in n 195 above. See also the definition of the various forms of impensae in Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970(3) SA 264(A) at 270H-271A.

297 D 3.5.2 (Ulpianus): ... ita ex diverso iustum est, si utiliter gessit, praestari ei, quidquid eo nomine abest ei vel afuturum est; Liber iuris florentinus (ed Cohn) p 50 par 8: alias autem tenetur ille cuius negotium est gestum non solum ad id quod gestori abest, sed ad id quod abfuturum est. Ad id quod abest, ut si inpendit in rem alterius, ad id quod abfuturum est, ut si gestor negotiorum accepit pecuniam sub usuris qua gereret negotium; Voet, Comm ad pand 3.5.8 ... Ad id ut indemnis servetur, ac praestetur, quod nomine gestionis ei vel abest vel abfuturum est, ne officium ipsi damnosum sit; Vinius, Comm ad inst 3.28.1: ... quod abest ei ... aut quid consecutus non sit, quod alias consequi potuisset et quod abfuturum est, veluti si se in rem absentis alicui obligaverit; idem, Part iur civ 2.41; Noodt, Comm ad dig 3.5 (op om 2 p78) (ut ei praestetur quidquid eo nomine vel abest ei, vel abfuturum est).

298 Van Leeuwen, Cens for 1.4.26.4: Ne autem huic negotiorum gestori officium suum sit damnosum, tenetur et is cujus negotium gestum est, ei qui gessit, utili actione refundere, id, quod ei ratione negotii gesti, abest, aut pro eo, quod quandoque abfuturum est, indemnitatem praestare tenetur.

299 D 3.5.12; D 3.5.30.3 (Papinianus): Qui aliena negotia gerit, usuras praestare cogitur eius scilicet pecuniae, quae purgatis necessariis sumptibus superest. Although the latter text refers only to necessary expenses, it is submitted that the principle will be applicable also to useful expenses.

300 See the authorities cited in n 96 above.

301 See the full discussion of this aspect in chapter 3.2 and the authorities cited in notes 223-229 above.

302 D 3.5.18.4 (Paulus): Non tantum sortem, verum etiam usuras ex pecunia aliena perceptas negotiorum gestorum iudicio praestabimus, vel etiam quas percipere potuimus. Contra quoque usuras, quas praestavimus vel quas ex nostra pecunia percipere potuimus quam in aliena negotia impendimus, servabimus negotiorum gestorum iudicio. Cf D 3.5.2; D 22.1.37 and see further Brunnemann, Comm in Cod 2.19.18 (usuras repetere potest); Pothier, Pand Just 3.5.59: Et in contraria negotiorum gestorum actione usurae veniunt; Voet, Comm ad pand 3.5.8: ...

una cum usuris, quas vel ipse praestitit nomine pecuniae, in usum domini ab aliis mutuo acceptae erogataeque, vel ex sua pecunia, in utilitatem domini expensa, potuisset percipere; idem, Compendium juris ad D 3.5.5; Huber, HR 3.28.6: De onderwinder heeft contrarie aenspraek op des saeks-heer tot wedereysch van sijn kosten, schaden en interessen, by het uitvoeren van des anderen sijne saken gehadt en geleeden ...; See also Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979(2) SA 383(C) at 387H-388A

303 C 2.18.18: Ob negotium alienum gestum sumptuum factorum usuras praestari fides bona suasit: quo iure contra eos etiam, quorum te necessitate compulsum negotium gessisse proponis, per iudicium negotiorum gestorum uteris. Cf Domat, Les loix civiles 2.4.2.5 (Strahan 1472): Si pour ces dépeses celui qui les a faites a été obligé ou d'emprunter à intéret, ou de faire une avance qui lui soit à charge, le maître de l'affaire sera tenu des intérets des sommes avancées, quand même celui qui les a fournies auroit été obligé par quelque nécessité à se charger du soin de cette affaire.

304 D 3.5.2. See also the authorities cited in notes 297 and 298 above.

305 Molinaeus, Tractatus contractuum et usurarum redituum-

que pecunia constitutorum 49.350 (op om 2 col 1394): ... ei qui utiliter gessit negocia, adiudicantur usurae. On the utiliter-requirement see chapter 2.4 above.

306 Liber iuris florentinus (ed Cohn) p 52 par 9: tenetur ille ei cuius sunt negotia ad usuras habita tamen ratione et compensatione commodi quod est ex gesto negotio et dampni quod est ex usuris: si enim plus onerant usure quam iuvent negotia, non tenetur.

307 See n 189 above.

308 Decisien et resolutien van den hove van Holland no 91 (1604). There appears to have been a similar decision in the Hof van Utrecht on 20th September 1602, as reported in the Holl Cons vol 6 no 121 (p 581-583). The sub-heading to the opinion reads (p 581): Aan iemand die iet voor een ander heeft uitgevoert, moet men alle zijne uitgeschoten en onkosten betalen, met interest. With reference to the said decision it is then pointed out that judgement should be given met de interessen van dien sedert dat die gedebourseert zijn.

309 Groenewegen, De leg abrog ad C 2.19.18: Nostris et Gallorum moribus sumptuum factorum usurae negotiorum gestorum actione non praestantur nisi a tempore litis contestatae. For French law he relies on Automne, La conférence du droict françois ad D 3.5.37(38).

310 Voet, <u>Comm ad pand</u> 3.5.8: ... <u>Hodie tamen ad sumtuum erogatorum usuras non a tempore erogationis, sed litis contestatae, condemnari eum, cujus negotia gesta sunt, communiter receptum est</u>; idem, <u>Compend juris</u> ad D 3.5.8: <u>Usuras vero impensarum nullus gestor exigere potest, nisi a tempore litis contestatae: quod fere generaliter in omnibus causis obtinet.</u>

311 Schorer, <u>Aanteekeningen ad Grot Inl</u> 3.27.1 notes 2-3: <u>Imo et usuras a tempore litis contestatae,</u> rendered in Dutch as follows: <u>Ook kan een onderwinder interessen rekenen; zoodra de betaalinge in rechten is geweigerd</u> (<u>na litiskontestatie</u>).

312 Van der Keessel, <u>Prael ad Grot</u> 3.27.5 (vol 5 p 240): <u>Si ad negotium alterius gerendum propriam pecuniam adhibuerit gestor, eius quoque usuras iure romano consequi poterat. L.18 C de neg gest. Sed illud de iure hodierno negat Groenewegius ad d l. nisi post litem contestatam</u>. <u>Sed contrariam sententiam recte tuetur, et ex d.l. 18.C. tamquam certum ius docet Iurisconsultus in De Holl Cons 6 D St cons 121 f p 581 et ita quoque decidit Curia Hollandiae, in De decis en res van den hove n 91</u> (see n 308 above); Van der Linden, <u>Suppl ad Voet</u> 3.5.8. Cf Donellus, <u>Comm de jur civ</u> 15.16.12: ... <u>Sed repetet etiam pecuniae a se impensae usuras, non ex mora, sed statim, si vel eas praestitit, vel cum consequi posset, non est consecutus</u>.

313 Wessels, _Contract_ 3626.

314 Rubin, _Unauthorised Administration_ 66.

315 D 3.5.2. See also Donellus, _Comm de jur civ_ 15.16.12; Grotius, _Inleidinge_ 3.27.5; Voet, _Comm ad pand_ 3.5.8; Van Leeuwen, _Cens for_ 1.4.26.4; Vinnius, _Comm ad Inst_ 3.28.1; _New Club Garage v Milborrow and Son_ 1931 GWLD 86 at 99-100. Lee and Honoré, _The South African Law of Obligations_ (1978) 156 (par 435) point out in this regard: "The _negotiorum gestor_ is entitled to an indemnity, not damages. Indemnity is taken to include compensation for what he would have earned had he not been engaged in managing the principal's affairs." Cf De Villiers and Macintosh, _The Law of Agency in South Africa_ (1981) 277.

316 Heineccius, _Recitationes in elem iur civ sec ord inst_ 3.28.969 (_negotiorum gestio_ is a _contractus gratuitus_); idem, _Elementa iuris civ sec ord pand_ 3.5.445 (_gratis et sponte suscipit_); idem, _Elem iur civ sec ord inst_ 3.28.969; idem, _Elem iur nat et gent_ 1.13.348 (_ultro et gratis_); Höpfner, _Comm über die heinecc Inst_ 3.28.938; Stryk, _Usus mod pand_ 3.5.4; Huber HR 3.28.6 (_loon of salaris kan hy niet eyschen_); Van der Keessel, _Theses selectae_ 771: _Negotiorum gestionem apud nos quoque_

regulariter esse gratuitam cum ratio juris civilis apud nos recepti ... tum affinitas ejus cum mandato satis probare videntur; idem, Prael ad Grot 3.27.1(quoted in n320 below); Utrechtsche consultatien 1.123.42: Sic neque tutoribus ratione suae administrationis salarium debetur ... nec negotiorum gestoribus.

317 Van Leeuwen, Cens for 1.4.24.13 n 1: Si negotiorum gestor erat solitus recipere salarium pro rebus a se gestis, itidem et ille, cujus negotium gestum fuit, salarium pro administratione suarum rerum concedere solebat, omnino salarium est praestandum; secus tamen erit, ubi neque gestor accipere, neque is cujus negotium est, salarium praestare assueverat.

318 Grotius, Inleidinge 3.27.6 (quoted in n 53 above) and 7; Schorer, Aanteekeningen ad Grot Inl 3.27.6. See discussion of the so-called "salvage cases" in chapter 1.2 above.

319 Van Bynkershoek, Quaest jur pub 1.5 (op om 2 p 171-173 at 173): Sed an dominus vindicabit a recuperatore, non soluto servaticio sive praemio recuperationis? Absque ulla mercede pro operis et impensis, recuperationem factis? Id vero aequitas, juris gentium magistra, non patitur. Haec postulat, ut detur sevaticium, sive praemium, sive merces, quocunque nomine appellare placet. Recuperator sevavit navem et merces, alioquin domino

perituras; cur sine spe mercedis, se objiciet periculo? Cur pro re aliena pugnabit tamquam pro aris et focis? Cur arma virosque adhibebit, atque oleum et operam perdet? Utiliter utique gessit negotium domini, et pro impensis in recuperationem factis, ipsa negotiorum gestorum actio ipsi praesto erit. Aliam actionem, quae recuperatori competeret, ipse non novi, si ex regulis juris Romani res esset definienda et cum haec actio etiam hodie ad mercedem porrigatur ... et eo quoque jure utamur, hac sola etiam hodie defungi licet cum ad impensas, tum ad mercedem.

320 Van der Keessel, Prael ad Grot 3.27.1: ... Sane Bynkershoekius ... ait hanc actionem etiam hodie ad mercedem porrigi ... et nos eo quoque iure uti; quae verba Viri amplissimi tam sunt generalia, ut de quolibet negotiorum gestore intellegi possint, quamvis ibi de illis proprie agat, qui navim ab hostibus captam recuperarunt, et praemium periculi et laboris merito sibi dari postulant, et quibus non minus quam illis, qui res naufragas colligunt, servaticium praestandum est ... An autem et extra hunc casum negotiorum gestor salarium petere possit, valde dubitaverim, cum salarii exactio contraria sit naturae huius negotii, quod ex benevolentia et amicitia oritur, et causa cur actionem gestori promiserit lex in eo sit, ne officium eius ipsi sit damnosum, non ut ex administratione sponte suscepta aliquid lucretur;

quae natura rei ex iure Romano apud nos quoque receptae cum non sit mutata, non videtur apud nos aliud iuris esse debere.

321 See also the discussion in Rubin, Unauthorised Administration 66-69.

322 1939 CPD 360 at 370-372.

323 At 372 (per Davis J).

324 Cf Nortje en 'n Ander v Pool N O 1966(3) SA 96(A) at 121 A-B; Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd 1979(1) SA 570 (R) at 573F-H; Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979(2) SA 383(C) at 392E-H.

325 9 HCG (1901) 91 at 95.

326 21 SC (1904) 156 at 162.

327 Cf Killian v Reilly 18 CTR (1908) 159 at 160.

328 Wessels, Contract 3627.

329 18 SC (1901) 31 at 35. (per Buchanan A C J).

330 See also The "Mangoro." Union Government (Railways and Harbours) v New Transvaal Chemical Co Ltd; Charente Steamship Co Ltd v New Transvaal Chemical Co Ltd 1913 WLD 60 at 68 (per Ward J): "The Court has to take into consideration the condition under which the services were rendered. The degree of risk and peril incurred by the salvors; the degree of labour and skill exerted by them; the value of the vessels employed; the loss occasioned, either through injury or delay, to the salvors; the degree of danger to which the salved ship and its cargo were exposed, and its value." Cf Associated Boating Companies v Baardsen. In re The "Lief" 12 SC (1895) 330; Maytom v The Master "Harry Escombe" and Others 1920 AD 187; S A Railways and Harbours v Wilcock N O 1935 CPD 489; Heimdal Steamship Company of 1912 Ltd v Union Government; Steamship Company Svendborg Ltd v Union Government; East Asiatic Company Ltd v Union Government; A/S Motor Tramp v Union Government 1951(3) SA 899(N). See further notes 53 and 54 above.

331 D 3.5.2 (vel etiam ipse se in rem absentis alicui obligaverit, habet eo nomine actionem). See n 38 above.

332 Domat, Les loix civiles 2.4.2.2 (Strahan 1469): Celui de qui l'affaire a été bien conduite est obligé envers celui qui en a pris le soin, de le dégager et desinteresser des suites de son administration; comme d'acquitter

pour lui ce qu'il a promis, de l'indemnifer des engagemens où il est entré, et de ratifier ce qu'il a bien géré. On the question of ratification by the dominus of the acts of the gestor, see the discussion in chapter 1.2 and the authorities cited in notes 73-86 above.

333 Pothier, Appendice 228: Le second objet de cette action est la décharge que le negotiorum gestor a droit de demander des obligations qu'il a contractées pour sa gestion. Par exemple, s'il a fait des marchés avec des ouvriers pour des réparations aux maisons de la personne dont il faisoit les affaires, et qu'il se soit obligé en son propre nom par ces marchés à en payer le prix, la personne dont il a fait les affaires, pour lui procurer la décharge qu'elle lui doit de ces obligations, doit lui rapporter ou la quittance des créanciers envers qui le negotiorum gestor s'est obligé, ou une décharge par laquelle ces créanciers acceptent pour débitrice en sa place la personne dont il a fait les affaires, et le dechargent. Faute par cette personne de rapporter au negotiorum gestor, ou la quittance, ou la décharge des créanciers envers qui il s'est obligé, il peut la poursuivre pour le paiement des sommes qu'il s'est obligé de payer; pourvu néanmoins que ce negotiorum gestor ne se soit pas, par sa faute, obligé à plus qu'il n'étoit nécessaire pour sa gestion; car la personne dont il a fait les affaires ne se seroit obligée de l'indemniser que jusqu'à concurrence de ce qui étoit nécessaire.

334 On the prerequisite of _utiliter coeptum_ see chapter 2.4 above.

335 Van Leeuwen, _Cens for_ 1.4.26.4. The initial portion of this text has been quoted in n 298 above. Van Leeuwen then proceeds to define the terms _abesse_ and _abfuturum esse_ as follows: _abesse intelligitur, non solum quod de suo erogavit, sed quod propter gesti causam consecutus non est, quum alioqui consequi potuisset ... Abfuturum, in quod se propter negotium obligavit_.

336 Grotius, _Inleidinge_ 3.27.5: _Wederom heeft den onderwinder recht, om van de ghene wiens zaecken hij heeft onderwonden, bevrijd te werden van alle verbintenissen daer door met anderen aengegaen_ ...; Voet, _Comm ad pand_ 3.5.8; idem, _Compendium juris_ ad D 3.5.5: _Contraria gestori competit adversus dominum, ut indemnis servetur, ne officium damnosum sit_; Van der Linden, _Koopmans handboek_ 1.15.15.1: _Weederkeerig heeft de onderwinder regt, om van den eigenaar schadeloosstelling wegens de uitschotten, welken hij ten zijnen nutte gedaen heeft, te vorderen_. Cf Arndts, _Pand_ 298: the _gestor_ has an action _auf Befreiung von eingegangenen Verbindlichkeiten_.

337 _New Club Garage v Milborrow and Son_ 1931 GWLD 86 at 100 (_per_ Hutton J): "And the owner is bound ... to indemnify

him against all obligations incurred by him on account of this claim ..." See also Wessels, Contract 3628; Rubin, Unauthorised Administration 69-70; De Villiers and Macintosh, The Law of Agency in South Africa (1981) 278. On the relationship between the dominus and third parties with whom the gestor has contracted, see n 85 above.

338 See in general Wessels, Contract 3629; Rubin, Unauthorised Administration 64-65; De Villiers and Macintosh, The Law of Agency in South Africa (1981) 279.

339 D 12.6.33 (nullo alio modo quam per retentionem impensas servare posse); Noodt, Prob jur civ 3.9 (op om 1 p 53-54); idem, Comm ad dig 3.5 (op om 2 p 76). Cf Voet, Comm ad pand 16.2.20; Schorer, Aanteekeningen 2.3.5 (notes 11 and 12).

340 Christinaeus, Practicarum quaestionum decisiones ad C 2.19, dec 113: Cum quidam rem alterius emisset, ut eam domino restitueret, quae ab hostibus depraedata erat, quaesitum fuit: an haberet actionem contra verum dominum ad restitutionem pretii et interesse? Resolutumque fuit quod sic: quia cum hostes tempore belli alterius castrum occupant, et a domino expelli non possunt, si vicinus suus, qui exinde damnum aliquod patitur, idem castrum recuperet, tenebitur ei dominus restituere im-

pensas, quas in recuperando fecit, nec antea tenetur ei castrum restituere.

341 1931 GWLD 86.

342 At 100 (per Hutton J).

343 Cf Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968(1) SA 571(A).

344 See the discussion in chapter 5.6 below.

345 See especially United Building Society v Smookler's Trustees and Golombick's Trustee, 1906 TS 623 at 627 and Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970(3) SA 264(A) at 270F and 271C. See further Gillingham v Harris and Morgan 1905 TS 94; Killian v Reilly 18 CTR (1908) 159; Holmes Garage Ltd v Levin 1924 GWLD 58; Anderson and Co v Pienaar and Co 1922 TPD 435; Colonial Cabinet Manufacturing Co v Wiid 1927 CPD 198; Land Bank v Mans 1933 CPD 16; Ploughall (Edms) Bpk v Rae 1971(1) SA 887(T); Howes and Clover (Pty) Ltd v Ruskin and Others 1978(1) SA 99(W); Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979(2) SA 383(C) at 393A; Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk 1979(4) SA 467(T); D Glaser and Sons (Pty) Ltd v The Master and Another N O 1979(4) SA 780

(C); Soane v Lyle N O 1980(3) SA 183(D)

346 1913 NPD 112.

347 See chapter 6.8 below.

348 At 117 (*per* Broome J).

349 On the *gestor*'s duty to complete the *negotiorum gestio*, see chapter 3.1 above.

350 See the authorities cited in notes 207 and 215 above.

351 On the relationship between *negotiorum gestio* and *mandatum* see n 19 above. See also the full discussion of ratification of *negotiorum gestio* in chapter 1.2, together with notes 73 to 86 above.

352 See chapter 3.4 above.

353 On the *longi temporis praescriptio* see D H van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 146. The period of time required for this form of prescription was ten years *inter praesentes* and twenty years *inter absentes*. See C 7.35.7 (cf C 7.33.12) and Inst 2.6 pr and 12.

354 C 2.18.8: <u>Adversus eos, qui negotia tua gesserunt, negotiorum gestorum iudicio civiliter consiste: nec tibi oberit, si propter occupationes militares eam litem tardius fuisses exsecutus, cum hoc genus actionis longi temporis praescriptione excludi non possit.</u>

355 Brunnemann, <u>Comm in cod</u> 2.19.8: <u>Negotiorum gestorum actio est perpetua, nec viginti annis praescribitur, sed demum triginta annis, quibus omnis actio in personam, qualis haec etiam est, praescribi potest.</u> The <u>Codex</u> text he refers to is C 7.39.3.

356 Pothier, <u>Appendice</u> 203 (with reference to D 3.5.5.14 (6.12) and D 3.5.7(8)):... <u>Cela sur-tout doit avoir lieu lorsque la dette que me devoit celui qui s'est immiscé à la gestion de mes affaires, étoit une dette sujette à se prescrire par un certain laps de temps, et dont le temps de la prescription n'a été accompli que pendant le temps de sa gestion. Si, contre la demande que je lui ferai de cette dette, il m'oppose la prescription, je lui répliquerai qu'il n'est pas recevable à l'opposer, parceque s'étant immiscé à la gestion de mes affaires, il étoit obligé de l'exiger pour moi de lui-même avant qu'elle fût prescrite.</u>

357 1955(3) SA (A) at 358B-359E.

358 Rubin, Unauthorised Administration 59 and 73.

359 De Vos, Verrykingsaanspreeklikheid 194.

360 See De Vos, Verrykingsaanspreeklikheid 194-195. Cf Rubin, Unauthorised Administration 59: "It is submitted that, since the basis of the *dominus*' right of action is an administration which has taken place without his knowledge, the right of action will accrue, not on the date when it took place, but on the date when the *dominus* first became aware of it" (see section 7(1) (d) of the Act). At 73 Rubin says, in respect of the *actio contraria*, that it accrues on the date on which the *gestor* has completed the *gestio*.

361 In terms of section 16(2) of Act 68 of 1969, the old Act 18 of 1943 is still applicable where the claim arose before the commencement of the new Act, namely 1st December 1970.

362 See De Vos, Verrykingsaanspreeklikheid 195.

363 See the reference to Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360 in chapter 2.4 and notes 191-192 above.

364 D 12.6.14 (Pomponius): _Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem._ See also D 50.17.206 (Pomponius): _Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem._

365 J G Lotz, "Enrichment" in LAWSA 9 (1979) 46 (par 62): "The term 'enrichment' is used to describe the situation which occurs when one person's estate is increased unjustifiably at the expense of another. From the fact of such increase an obligation arises in certain circumstances in terms of which the person whose estate has been increased has a duty to restore the increase to the person at whose expense the increase has taken place. Enrichment is therefore a source of obligation." W de Vos, _Verrykingsaanspreeklikheid_ 2 defines enrichment liability as:" ŉ aanspreeklikheid of verbintenis wat ontstaan deurdat een persoon se vermoë ten koste van ŉ ander se vermoë vergroot is, sonder dat daar ŉ grond is wat die reg as afdoende beskou vir die verskuiwing van waarde en wat die verrykte verplig om sodanige verryking aan die verarmde af te gee."

366 The _condictio sine causa_ sometimes occurs as _generalis_ or _specialis_ - see De Vos, _Verrykingsaanspreeklikheid_ 28-35, 67-78. Roman law also developed the _actio de in rem verso_ as an enrichment action, with much the same

function as a condictio. Of some interest in this regard are the so-called "praetorian" enrichment actions directed mainly at the recovery of the actual enrichment as at the time of litis contestatio. See Van Zyl, Saakwaarneming 9-10.

367 This was, more particularly, the case in eighteenth century Dutch practice, as appears from a number of decisions of the Hoge Raad as reported by Van Bynkershoek in his Observationes tumultuariae and Pauw in his Observationes tumultuariae novae. See De Vos, Verrykingsaanspreeklikheid 100-107. See also R Feenstra, "De Betekenis van De Groot en Huber voor de Ontwikkeling van een algemene actie uit ongerechtvaardigde verrijking" in Opstellen Verdam (1971) 137-159.

368 1966(3) SA 96(A).

369 See the criticism of this judgement in De Vos, loc cit; idem, "Vaarwel aan die Algemene Verrykingsaksie" in A J (1965/1966) 269 sqq; J E Scholtens, "The General Enrichment Action that Was" in SALJ 83 (1966) 391-402; J C van der Walt, "Vonnisbespreking: Nortje en 'n Ander v Pool N O 1966(3) SA 96(A)" in THRHR 29 (1966) 374-380.

370 See in general on liability for unjustified enrichment De Vos, Verrykingsaanspreeklikheid (1971); D G John,

'n Oorsig van Onregverdige Verryking as Gedingsoorsaak in die Suid-Afrikaanse Reg (1951); J G Lotz, "Enrichment" in LAWSA 9 (1979) 45-66 (par 62-101). From the comparative point of view see J P Dawson, Unjust Enrichment. A Comparative Analysis (1951).

371 See Cujacius, Ad Africanum tractatus II, ad L si eum servum 23 de reb cred (vol 5 col 26-27): Quaero an in hac specie concurrat condictio sine causa cum actione negotiorum gestorum: quod videtur ... Sed non ut verum est cum actione negotiorum gestorum concurrere certi condictionem generalem ... ita verum esse arbitror concurrere actionem neg gest cum condictione sine causa, nam haec condictio datur ex bono et aequo, deficiente igitur justa actione; Van der Keessel, Dictata ad inst 3.28.5: Uti aequum non est aliquem cum alterius damno fieri locupletiorum et ab altera parte officium suum nemini debet esse damnosum, sic merito receptum ut negotiorum gestor dominium negotii sibi habeat obligatum actione negotiorum gestorum contraria ad restituendum omne quod occassione negotii administrati impendit, vel in quod sese obligavit, dummodo impensae ab initio utiliter fuerint factae, licet forte postea nullum ex iisdam commodum ad dominium perveniat. A similar impression appears to be created in the decisions of L Ferera (Private) Ltd v Vos N O and Others 1953(3) SA 450(A) at 465 and Lodge v Modern Motors Ltd 1957 (4) SA 103(SR).

372 On the <u>actio negotiorum gestorum</u> as an enrichment action see in general D H van Zyl, <u>Die Saakwaarnemingsaksie as Verrykingsaksie in die Suid-Afrikaanse Reg</u> (1970) (abbreviated: "Saakwaarneming") (reviewed by W de Vos in THRHR 34 (1971) 95-98; C G van der Merwe in SALJ 88 (1971) 251-252); W de Vos, <u>Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg</u> (1971) (abbreviated: "Verrykingsaanspreeklikheid") 38-41, 78-81, 190-195; D G John, <u>'n Oorsig van Onregverdige Verryking as Gedingsoorsaak in die Suid-Afrikaanse Reg</u> (1951) 18-88, 133-141; Rubin, <u>Unauthorised Administration</u> 42-48, 70-73; J G Lotz, "Enrichment" in LAWSA 9 (1979) 56-68 (par 78-82). See further: Schlossmann, "Über die sog actio negotiorum gestorum ad exemplum institoriae actionis und die utilis actio de in rem verso" in Jher Jahrb 28(1889) 287 sqq; M H Bregstein, <u>Ongegronde Vermogensvermeerdering</u> (1927) 113-116; Wessels, <u>Contract</u> 3572; J E Scholtens, "Negotiorum Gestio and Unjust Enrichment" in SALJ 68 (1951) 134-137; B Kupisch, <u>Die Versionsklage</u> (1965) 27-30, 54-91, 98-113, 124-126; W de Vos, "Miskenning van Negotiorum Gestio" in THRHR 28 (1965) 229-231; T Mayer-Maly, "Probleme der Negotiorum Gestio" in ZSS 86 (1969) 416-435; A von Tuhr, <u>Actio de in rem verso. Zugleich ein Beitrag zur Lehre von der Geschäftsführung</u> (1970); J Neethling, "Negotiorum Gestio of Verryking?" in THRHR 33 (1970) 280-284; R Feenstra, "De Betekenis van De Groot en Huber

voor de ontwikkeling van een algemene actie uit ongerechtvaardigde verrijking" in _Opstellen Verdam_ (1971) 137-159; idem, "Die ungerechtfertigte Bereicherung in dogmengeschichtlicher Sicht" in Ankara University Law Journal 29 (1973) 289-305 at 295-298; B Beinart, "The English Legal Contribution in South Africa: The Interaction of Civil and Common Law" in AJ (1981) 7-63 at 54.

373 The _pupillus_ (or _pupilla_) was a _sui iuris_ person under the age of puberty, namely fourteen years in the case of boys and twelve years in the case of girls: such person's interests were protected by a guardian (_tutor_) in accordance with the principles of _tutela impuberum_. Where the age of puberty was passed but the age of majority (twenty five years) not yet reached, the said person was termed a _minor_ and was assisted by a _curator_ in terms of the principles of _cura minorum_. See Van Zyl, _Geskiedenis en Beginsels van die Romeinse Privaatreg_ (1977) 107-116.

374 D 26.8.1 pr (Ulpianus): ... _divus Pius Antonimus rescripsit iure pupillam non teneri, sed in quantum locupletior facta est dandam actionem_ ...; D 26.8.5 pr (Ulpianus): ... _naturaliter tamen obligabitur in quantum locupletior factus est: nam in pupillum non tantum tutori, verum cuivis actionem in quantum locupletior factus est dandam divus Pius rescripsit_. See further D 3.5.3.4; D 3.5.5.2;

D 3.5.5.8; D 3.5.33; D 3.5.36 pr; C 2.18.2 (general referred to as C 2.19.2). On the rescriptum of Antoninus Pius see the important contribution of L Labruna, Rescriptum divi Pii. Gli atti del pupillo sine tutoris auctoritate (1962) (reviewed by W Gordon in JRS 54 (1964) 214-215; F Wieacker in Iura 14 (1963) 316-323; M Kaser in ZSS 80 (1963) 491-501; M Talamanca in Labeo 10 (1964) 83-90). Cf H Siber, "Das angebliche rescriptum divi Pii über Bereicherungsklagen gegen Mündel" in ZSS 53 (1933) 471-477; E Albertario, "A proposito di obligatio naturalis" in Studi Albertario 3 (1936) 55 sqq. See in general on the liability of the pupillus and minor in Roman law in respect of negotiorum gestio, Van Zyl, Saakwaarneming 12-22; S Solazzi, "Le azioni del pupillo e contra il pupillo" in BIDR 23 (1911) 119 sqq; idem, Curator impuberis (1917); G Pacchioni, "Di alcune probabili interpolazioni nel titolo De negotiis gestis" in Scritti Chironi (1915) 211-217; C Ferrini, "La 'negotiorum gestio' a favore di un incapace" in Opere Ferrini 3(1929) 235-241; A Ascoli, "L'actio negotiorum gestorum directa contro il pupillo" in Studi Bonfante 2 (1930) 681-686; E Albertario, "La responsabilità del pupillo derivante dal suo arricchimento per gli atti compiuti senza l'auctoritas tutoris" in Studi Albertario 4 (1946) 339 sqq (esp 339-366); M Talamanca, "La responsabilità del pupillo nei limiti dell'arricchimento" in Labeo 10 (1964) 83-90;

J A C Thomas, "Naturalis obligatio pupilli" in _Festgabe von Lübtow_ (1970) 457-479.

375 _Summa trecensis_ 2.8.4. Cf _Tractatus de equitate_ (ed Rota) 9.4.

376 See chapter 2.4 above.

377 Rogerius, _Summa codicis_ 2.10.8 ascribes the limited liability of the _pupillus_ to a privilege accorded the _dominus_ (_favor domini_) or a prejudice falling to the _gestor_ (_odium gerentis_). Azo's attitude is that the _pupillus_ should be liable because of the _utilitas_ he derives from the _gestio_: see Azo, _Lect sup cod_ 2.19.4: '... _aget neg gest si expendit in utilitatem pupillae et facta est locupletior_. Cf his _Lect sup cod_ 2.19.2 and 2.19.10. See further Odofredus, _Lect sup cod_ 2.19.2 and cf his _Lect sup dig vet_ 3.5.3.4 and 3.5.5.2; Roffredus, _De contraria actione neg gest_; _Liber iuris florentinus_ 4.4.5 and 8; _Lo Codi_ 2.8.7-8 (ed Fitting). These and other texts are discussed in Van Zyl, _Saakwaarneming_ 40-42.

378 Révigny, _Lect sup dig_ vet 3.5.5.2. Cf J Faber, _Brev in cod_ 2.19.2. See Van Zyl, _Saakwaarneming_ 51.

379 See, among the commentators, Angelus, _Comm in cod_ 2.19.2;

Butrigarius, *Lect sup cod* 2.19.2; Castrensis, *Comm in dig vet* 3.5.5.2; Fulgosius, *Controv forens* 12.23; Baldus, *Comm in dig vet* 3.5.3.4 and 3.5.5.2; Tartagnus, *Comm in cod* 2.19.2. The French writers are represented by Cujacius, *Obs* 13.7 (*op om* 3 p 365 sq), who suggests that *pupillus* in D 3.5.3.4 should read *pupilli*, a view which cannot be accepted. See further Rebuffus, *Tract var de except* n 722 and 730; Duarenus, *Op om in tit de cond indeb* cap 6; Donellus, *Comm de iur civ* 15.15.10 and 15.16.13; Gothofredus, *Op minora, de div reg iuris* 206 (col 1228); A Faber, *Rationalia in pandectas* 3.5.3.4.

380 See Pothier, *Pand Iust* 3.5.4 and 23; idem, *Appendice* 173.

381 Pothier, *Appendice* 224: ... *Il n'en est pas de même des quasi-contrats. Les obligations que les quasi-contrats produisent, étant formées sans le consentement des personnes qui les contractent, il est indifférent que les personnes qui les contractent soient capables ou non de donner un consentement valable, puisque c'est sans leur consentement qu'elles contractent ces obligations.* See in general on the commentators and French development between 1500 and 1800 Van Zyl, *Saakwaarneming* 56-57 and 63-64.

382 Thomasius, *Diss acad* 2.40-81: ... *doctrina illa et aequitate naturale et principiis iuris Romani et regulis bonae interpretationis repugnare, atque ideo in praxi vel nullum habere usum vel certe nullum habere debere ... Conclu-*

416/...

<u>damus igitur: in actione negotiorum gestorum nullam esse inter pupillum et adultum differentiam, sed (1) pupillum negotia gerentem teneri etiam de damno data ultra, quam ipse locupletior factus est; (2) adultum, cuius negotia gesta sunt, aeque teneri saltem in id, in quod locupletior factus est, non ulterius.</u>

383 Kohler, "Die Menschenhilfe im Privatrecht" in Jher Jahrb 25 (1887) 1 sqq at 144: <u>Die Consequenz ist die, dass der Pupill, dessen Geschäfte geführt werden, nur bis zur Bereicherung haftet - ein Satz so unrichtig so zweckwidrig und gegen das eigene Interesse des Pupillen verstossend, dass man ihn dringend aus dem römischen Rechte hinwegwünschte.</u>

384 See Cocceius, <u>Introd ad Grot illustr</u> 12.5.7.558 n 4; Brunnemann, <u>Comm in pand</u> 3.5.3.4; idem, <u>Comm in cod</u> 2.19.2; Bachovius, <u>Comm in pand</u> 3.5; Schlossmann, "Nochmals die actio de in rem verso utilis" in Jher Jahrb 36 (1896) 316 sqq at 332; Brinz, <u>Pand</u> 2.321 n 47; Glück, <u>Pand</u> 5.416 sqq (p 323) and 5.426 (p426); Dernburg, <u>Pand</u> 2 (p 334 n 35); Puchta, <u>Vorlesungen</u> 279; Arndts, <u>Pand</u> 3.297 and 298 n 3; Windscheid, <u>Pand</u> 2.430. See in general on the various German schools Van Zyl, <u>Saakwaarneming</u> 76-77 and 84-85.

385 Grotius, <u>Inleidinge</u> 1.8.5, 3.1.26 and 3.6.9; idem,

Advies no 255 in Holl Cons 1.255 (p 414); idem, De iure belli ac pacis 2.10.2.2; Voet, Comm ad pand 3.5.2, 3.5.8, 4.4.22, 15.1.11, 23.2.43, 26.8.2, 44.7.5; idem, Elementa juris 1.21.7; Noodt, Comm ad dig 3.5 (op om 2 p 75); Van Leeuwen, Cens for 1.4.3.2 and 1.1.17.10; idem, RHR 1.16.8 and 4.2.3; Van der Keessel, Prael ad Grot 1.8.5, 1.11.5, 3.1.26, 3.6.9, 3.30.3; idem, Thes sel 529; Huber, Prael ad D 3.5.2; idem, Prael ad inst 3.20.2 sq and 3.28.4; idem, Eunomia romana ad D 3.5.5.5 (p 156 sqq); Vinnius, Jurispr contr 2.41; idem, Tractatus quinque, de pactis 14.11; Groenewegen, De leg abrog ad C 2.19; A Matthaeus, Collegia iuris sex, ad fund iur disp 19 and ad inst 1 disp 2; Wissenbach, Exercit ad pand, disp 12 par 22; Wesenbeke, Comm in pand jur civ ad D 3.5.3; Schultingh, Thes controv decas 7; idem, Enarratio pand 3.5.3; idem, Notae ad pand 3.5.3.4; Perezius, Expos cod 2.19.3; idem, Prael cod 2.19.3; Zoesius, Comm ad dig 3.5.5; Greve, Exerc ad pand 5.2; Busius, Comm in pand 3.5.3; Holl Cons 6.30 (p 390 sq); Bronckorst, Enant 1.23; P Matthaeus, De div reg iur ad D 50.17.206; Scheltinga, Verklaringe ad Grot Inleidinge 2.8.5 n 12 and 3.1.26 n 28. See further Van Zyl, Saakwaarneming 90-91.

386 Wessels, Contract 3579-3583, 3621-3622; L I Coertze, "Die Gebondenheid van 'n Minderjarige uit 'n Kontrak" in THRHR 2(1938) 280 sqq; PQR Boberg, The Law of Persons

and The Family (1977) 593-598. Cf M Donaldson (Minors in Roman-Dutch Law (1955) 9-33. At 34-35 Donaldson points out that the incapacity of a pupil can be supplemented by the tutor's *negotiorum gestio*.

387 Rubin, Unauthorised Administration 49 accepts Pothier's argument (see n 381 above): "In contract the obligation arises from consent and the consent of a minor may, though given freely, be contrary to his interests because of his inexperience. Where he intervenes as a *gestor*, the liability imposed upon him under the *actio directa* arises, not from his consent, but simply from his act of interference in the affairs of the *dominus*. In this case it is necessary to protect the *dominus* from such interference. The need for protecting the minor does not arise." See also idem, op cit 60-61.

388 De Vos, Verrykingsaanspreeklikheid 40-41 and 191.

389 8 SC (1890) 16 at 18-19 (*per* De Villiers C J). Cf Wessels, Contract 3621.

390 1952 (3) SA 1(A) at 12H-13H (*per* Van den Heever J A).

391 1 Menzies (1830) 435 at 437.

392 See chapter 5.3 below.

393 See also _Nel v Divine Hall and Co_ 8 SC (1890) 16 at 18; _Pretorius v Van Zyl_ 1927 OPD 226 at 229-230; _Van Rensburg v Straughan_ 1914 AD 317 at 329-330; _Karsten v Forster_ 1914 CPD 919 at 923. Cf _Nortjé en 'n Ander v Pool N O_ 1966(3) SA 96(A) at 138E-F. See further Van Zyl, _Saakwaarneming_ 149-150.

394 See chapter 2.3 above.

395 D 3.5.5.5 (Ulpianus): _Sed et si quis negotia mea gessit non mei contemplatione, sed sui lucri causa, Labeo scripsit suum eum potius quam meum negotium gessisse (qui enim depraedandi causa accedit, suo lucro, non meo commodo studet): sed nihilo minus, immo magis et is tenebitur negotiorum gestorum actione. Ipse tamen si circa res meas aliquid impenderit, non in id quod ei abest, quia improbe ad negotia mea accessit, sed in quod ego locupletior factus sum habet contra me actionem_. On the controversial nature and interpretation of this text see Van Zyl, _Saakwaarneming_ 22-28. Cf D 42.5.9.4 and see further E Rabel, "'Negotium alienum' und 'animus'" in _Studi Bonfante_ 4 (1930) 279 sqq; Pacchioni, _Della gestione_ 362 sq; E Ruhstrat, "Beiträge zur Lehre von der negotiorum gestio" in Arch civ Prax 34 (1851) 69-74 (an old contribution with considerable depth).

396 See the _Summa trecensis_ and _Tractatus de equitate_ (ed Rota) 9.5 (quoted in Van Zyl, _Saakwaarneming_ 42 n 18);

Liber iuris florentinus (ed Conrat) 4.4.8 (p.52), Rogerius, *Summa cod* 2.10.8; Azo, *Summa cod* 2.19.10; idem, *Summa aurea* in C 2.19.3; Placentinus, *Summa 'cum essem Mantue'* 32; idem, *Summa cod* 2.19; Vacarius, *Liber pauperum* 2.14 gloss iii on D 3.5.5.5. Martinus refers to the action as *actio utilis ex aequitate* - see *Dissensiones dominorum* (ed Scialoja) in Studi e documenti di storia di diritto 9 (1890) 428. Cf the *Dissensiones dominorum* (ed Haenel) 275.

397 On this early document dating back to the period of glossators and written in the dialect of Provence in Southern France, see Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1979) 79.

398 Lo Codi 2.18.16: *Sed si utiliter non est inceptum negocium meum, sicuti si emit michi id quod non erat michi necessarium, non teneor ut reddam ei expensam, quamvis hoc fecit meo amore, nisi in quantum melioratus sum.*

399 Gloss *actionem* on D 3.5.5.5: *Collige hic secundum M(artinum) quod malae fidei possessor, etiam si suo nomine expensas fecit, habeat non solum retentionem ... sed etiam actionem, ut hic: quia nemo debet locupletari etc. ... Ioan (nes Bassianus) contra et B(ulgarus)* ... Like Johannes Bassianus and Bulgarus, Azo and Accursius likewise

rejected the proposal of Martinus, as appears from Odofredus, _Lect sup dig vet_ 3.5.5.5, who likewise rejects the opinion of Martinus as not being _bona_. Cf Azo, _Summa cod_ 2.18.3 and 3.32.26. Cf also Odofredus, _Comm in Cod_ 3.32.5. See in general on the development in the time of the glossators Van Zyl, _Saakwaarneming_ 42-45.

400 See Van Zyl, _Geskiedenis van die Romeins-Hollandse Reg_ (1979) 110-121.

401 See chapter 2.3 above.

402 Révigny, _Lect sup dig vet_ 3.5.5.5: _Sed Martinus dicebat quod si edificam aream tuam male fidei, habeo actionem in hoc quod es locupletior, ut hic. Dicendum quod immo, et si bona fide, non habeo actionem pro impensis, sed retentionem ... Unde dicendum ad § istum quod loquitur hic ut ille, qui accessit animo defraudendi gerebat non tamquam in re sua sed tamquam in re aliena habens animum obligandi alium. Sed ubi impendit quis tamquam in rem suam, habens bonam fidem vel malum (sic), non habet animum alium obligandi._ See, however, his commentary on D 12.6.33, dealt with in chapter 5.4 below. See further Van Zyl, _Saakwaarneming_ 51-52.

403 See Cinus, _Comm in cod_ 3.32.5; Bartolus, _Comm in dig_

3.5.5.5; Fulgosius, Comm in pand 3.5.5.5; Baldus, Comm in dig vet 3.5.5.5; Salycetus, Comm in dig vet 12.6.33. Albericus de Rosate, Comm in dig vet 3.5.5.5, and Castrensis, Comm in dig vet 3.5.5.5 are not, however, prepared to grant an action under these circumstances. Castrensis, loc cit, expresses the view that the mala fide possessor who has effected improvements on the property of another must be considered to have made a donation to the latter: Nec ab iste tex. quia hic loquitur in eo, qui non impendit in re mea tanquam sua, immo tanquam mea, et ita verbo asserebat tamen hoc faciebat non propter me vel meam utilitatem, sed propter se et utilitatem suam. Gerebat ergo negocium meum verbo, sed non mente, et habebat intentionem repetendi et me obligandi. Sed quando impendit, tanquam in re sua, si sciebat non esse suam, videtur donasse. See further Van Zyl, Saakwaarneming 57-58.

404 Molinaeus, Extricatio labyrinthi dividui et individui 2.183 (op om 2 col 262): Quod si quis tanquam in rem suam nomine proprio gessit, tunc licet stricto iure deficiant actiones illae, quae est (leg. ex) formula contractus, vel quasi oriuntur, scilicet directae: non tamen deficiunt utiles, sive actio in factum ex aequitate rei subjectae. Cf idem, De fiefs 1.1.5 n 104 (op om 1 col 175-176); Mornacius, Observ in dig 3.5.5.5;

A Faber, Rationalia in pand 3.5.5.5; Heraldus, De re iud auct 2.23.5-7.

405 Cujacius, Ad Afr tract 8 ad D 3.5.48 (op om 1 col 1430 sqq). He suggests that the action should be employed where the gestor has erroneously not made use of his right of retention: Illis autem verbis, Esse actionem in id quo ego locupletior factus sum, significatur esse reputationem et compensationem si conveniatur directa actione neg gestorum, vel esse condictionem incerti ex causa indebiti si retentione usus non sit per errorem.

406 See also Rebuffus, Tractatus varii, de except n 721; Duarenus, Opera omnia in tit de neg gest 4 (who sees the action as a subsidiary remedy); Donellus, Comm de jur civ 15.16.9 (who creates the impression that the action of D 3.5.5.5 is an ordinary, and not an enrichment, action).

407 Pothier deals with D 3.5.5.5 in his Appendice 190-193. In 193 he says: Au contraire, l'action qui est donnée dans l'espèce de ce paragraphe, n'étant fondée que sur la seule raison de l'équité naturelle, qui ne permet pas de s'enricher et de profiter aux dépens d'autrui, elle ne peut donner la répétition des impenses à celui qui les a faites, que jusqu'à concurrence de ce que je me trouve en profiter au temps de sa demande; et il

424/...

n'en peut rien répéter, si je n'en profite point.

408 See Boerius, Decisiones burdegalenses 44 n 14; Argentré, Comm in consuet Britt 536 gloss 1; J Gothofredus, Opera iuridica minora, de div reg iur 206; D Gothofredus, Corpus iuris civilis ad D 5.3.38 notes "p" and "x"; Heraldus, De rer iud auct 2.23.9 and 5.3.38; A Faber, De erroribus pragmatibus, decad 26, error 9.9; idem, Rationalia in pand 3.5.5.5 and 5.3.38; Automne, Conférence ad D 3.5.27 and C 3.32; idem, Censura gallica ad D 3.5.18.3; Merillius, Observ iur, expos in Just 33 ad D 3.5.48.

409 Cujacius, Observ 10.1 (op om 3 col 251 sqq); idem, Lib 3 dig Salv Jul ad D 3.5.5.5 (op om 6 col 12 sq): Certum est etiam malae fidei possessori, si rem domino per errorem restituerit, sive retentione sumptuum, competere non quidem certi condictionem ... sed condictionem incerti, id est, condictionem possessionis, quam retinere potuit, donec sibi sumptus redderentur, et per errorem non retinuit. Cf idem, Lib 39 dig Salv Jul ad D 12.6.33 (op om 6 col 266 sq).

410 Molinaeus, De fiefs 1.1.5 n 101 (illa sola aequitate naturali, ne quis aliena iactura locupletetur).

411 See in general on the French development Van Zyl, Saakwaarneming 64-68.

425/...

412 Stryk, Iur publ disp 8.3.26 (op om 51 and 17.3.59(op om 4); idem, Spec us mod pand ad D 3.5.5; Struvius, Syntagma jurispr 7.3.5.55; Böhmer, Introd in ius dig 3.5.3; idem, Doctr de act 2.6.7; Cocceius, Grot illustr 2.10.9; idem, Ius civ controv 3.5.1; Brunnemann, Comm in pand 3.5.5.5; Thomasius, Diss acad 2.40.8; (he calls it a condictio sine causa); Bachovius, Comm in dig 3.5; Lauterbach, Colleg pand 3.5.9 (he refers to it as an utilis actio which is granted ex aequitate); Schaumburg, Compend iur dig 3.5.3. Cf Heineccius, Elem jur civ 1.453 and Averanius, Interpret juris 5.19.11. B Bornemann, Systematische Darstellung des preussischen Civilrechts 3.221 (p 266) points out that the principle also applied in Prussian law. In regard to the historical school and the pandectists see E Chambon, Die negotiorum gestio. Eine civilistische Abhandlung (1848) 138 sq; E Zimmermann, Aechte und unächte negotiorum gestio (1872) 27 sqq; F O Köllner, Die Grundzüge der obligatio negotiorum gestio (1856) 24 sq and 68 sq; Baron, Pand 309; Vangerow, Pand 3.664; Brinz, Pand 2.321; Puchta, Pand 327; idem, Vorlesungen 327-329. Ruhstrat "Beiträge zur Lehre von der Negotiorum Gestio" in Arch civ Prax 34 (1851) 59-84 at 70 sqq, refers to the action as an actio negotiorum gestorum utilis or actio in factum. Cf A Brinkmann, Verhältnis der actio communi dividundo und die actio negotiorum gestorum zueinander (1855) 19 sqq; H Dankwardt, Die negotiorum

gestio (1855) 38 n 8; J Kohler, "Die Menschenhilfe im Privatrecht" in Jher Jahrb 28 (1887) 1 sqq at 114; Glück, Pand 5.421 (p 342 sqq) and 426 (p 379 sq).

413 Bachovius, Comm in dig 3.5 says it is wrong to give an actio utilis to a mala fide possessor: Et malae fidei possessoris alia ratio est, qui pro domino gerens, omnia nomini proprio facit: ut proinde male quidam hinc indefinite colligant, quod possessor malae fidei negot. gestorum utilem actionem pro repetendis habeat. Cf idem, Notae ad disp Treut 2.20.6. On the viewpoint of the pandectists and historical school see H Witte, Die Bereicherungsklagen des gemeinen Rechts (1859) 22 sq, who points out that there is a substantial difference between the mala fide gestor and mala fide possessor. See further Dernburg, Pand 2.335 and 339 n 1; Windscheid, Pand 2.431 (p 869).

414 Goeddaeus, Comm rep prael ad D 50.16.79: Fit autem haec impensarum deductio aut per retentionem, aut per exceptionem vel etiam petitionem, hoc est per actionem negotiorum gestorum utilem; aut per implorationem officii judicis. This seems also to have been the case in Prussian law - see B Bornemann, op cit 3.221 (p 265 n 3) and Korte, "Geschäftsführung ohne Auftrag und nützliche Verwendung" in Beiträge zur Erläuterung des preussischen Rechts durch Theorie und Praxis 1 (1857) 365 sqq at 368.

415 Glück, <u>Pand</u> 8.592 (p 309 sq): <u>Ob dem Besitzer deshalb auch eine Klage zustehe, ist unter den Rechtsgelehrten streitig. Mehrere glauben es, und zwar gestatten einige dem Besitzer eine condictio incerti, andere die actio negotiorum gestorum utilis. Noch andere eine actio in factum. Allein nach der Theorie lässt sich weder die eine noch die andere Meinung rechtfertigen. Denn der Besitzer verwandte diese Unkosten instar domini. Man kann also nicht sagen, dass er negotium alienum gerirt habe. Sodann sagen es auch die Gesetze ganz klar, dass dem Besitzer deswegen keine Klage, sondern bloss eine Retention zustehe. Indessen räumt ihm doch die Praxis eine actio negotiorum gestorum utilis ein.</u>

416 See in general on the German development Van Zyl, <u>Saakwaarneming</u> 77-79 and 85-86.

417 Grotius, <u>De iure belli ac pacis</u> 2.10.2.2; 2.10.9.2; Voet, <u>Comm ad pand</u> 3.5.5: <u>Si praedonem potius egerit quam gestorem, non domini contemplatione, sed sui lucri causa, improbe ad negotia gerenda accedens ... quoties non potest dominum convenire actione contraria, nisi quatenus is locupletior factus est.</u> Cf idem, op cit 3.5.9; idem, <u>Compend jur</u> ad D 3.5.6; Groenewegen, <u>De leg abrog</u> ad D 3.5 and Inst 2.1.30; Van der Linden, <u>Suppl ad Voet</u> 3.5.14; Schultingh, <u>Emarratio pand</u> 3.5.3;

Christinaeus, Decisiones 2.112.8; Westenberg, Principia juris 3.5.21; Zoesius, Comm ad dig 3.5.9; Perezius, Prael cod 2.19.16; T Faber, Disp Anniv 25; Van Bynkershoek, Observationes tumultuariae 303; Pauw, Observationes tumultuariae novae 12 and 558. Noodt, Prob 3.9 (op om 1 p 51-52) believes that the reference to actio in D 3.5.5.5 is a scripturae error and that it should have read exceptio, retentio or pensatio. Cf idem, Comm ad dig 3.5(op om 2 p 76); Reinoldus, Opusc jurid, ad tit D de neg rer dom 4. Voet, Comm ad pand 3.5.9 rejects this and points out, in his Comm ad pand 5.3.23, that "natural equity" requires that an action be given under such circumstances (see n 422 below). Cf idem, Elementa juris 2.1.52 (as opposed to Comm ad pand 6.1.36 and 12.6.9); idem, Beginselen des rechts 3.28.7 and 3.30.4; Huber, Eunom rom ad D 3.5.5.5 (p 156 sqq); idem, HR 3.28.8; idem, Prael ad D 5.3.14.18 sq; Wächtler, Opuscula, notae ad Noodt 3.9 (p 324 sqq); Jensius, Strictura juris ad pand 3.5.6.3; Matthaeus, Colleg iur sex ad pand, disp 31; Christinaeus, Decisiones 2.113.3; Schultingh, Notae ad pand 3.5.5.5 (6.3); idem, Enarratio 3.5.3; Aanhangzel sv negotiorum gestio; Van der Linden, Suppl ad Voet 3.5.9.

418 Vinnius, Comm in inst 2.1.30; idem Sel jur quaest 1.24; T Faber, Disp anniv 13.13; Sande, De prohib rer al 3.8.5 n 57 sqq.

419 Greve, Exerc ad pand 5.5; Schultingh, Notae ad dig 12.6.33; Perezius, Expos cod 3.32.20 sqq; idem, Prael cod 3.32.26 sqq; Busius, Comm in pand 12.6.33; Zypaeus, Notitia juris Belg 3. de rei vind, ad rigide.

420 Van der Keessel, Thes sel 212: Qui in solo alieno bona fide possesso aedificavit, utiles impensas, amissa possessione, etiam per actionem, jure Hollandico, repetit; idem, op cit 214: Malae fidei possessorem utiles impensas deducere posse, etsi contra Grotium, jus civile secutum, doceant multi; eorum tamen sententia admitti nequit; idem, Prael 2.10.8. This approach is likewise followed by Bronchorst, Enant 3.17. Cf Borcholten, Comm in inst 2.1; Busius, Comm in pand 12.6.33; Wissenbach, Disp ad inst imp 10.20 sq.

421 Grotius, Inleidinge 3.1.15: Hier uit comt dat een bezitter, schoon ter quader trouwe, de begeven Zaecke wedergevende, mach eyschen de nodige costen ende verbeteringen by hem gedaen. See also Schorer's Aanteekeningen on Grot 2.10.9; Van Leeuwen, Cens for 1.2.5.10; idem, RHR 2.6.4; Groenewegen, De leg abrog ad Inst 2.1.30; idem, op cit ad C 2.18.24 and C 3.32.5; Matthaeus, De auct 1.18.16 sq and 1.21.16 sq; Zoesius, Comm ad dig 41.1.51 sqq; idem, Comm ad inst 2.1.45 sqq. Cf H Kinschot, Responsa 105; F Kinschot, Responsa 24 nn 3 and 11.

430/...

422 Voet, _Comm ad pand_ 5.3.23: ... _Sed quod Romanis ita placuit in certis casibus, hodie ex naturali aequitate generaliter receptum est, ut scilicet non sola retentione, sed et actione consulatur non tantum bonae, sed et malae fidei possessoribus, pro recuperandis impensis illis, quarum deductionem iisdem concessam fuisse, supra dictum est, necessariis scilicet, nec non utilibus quatenus inde res melior facta; ne alioquin domini rerum cum aliena jactura locupletarentur_.

423 On the Roman-Dutch legal development see further Van Zyl, _Saakwaarneming_ 91-94. See also Rubin, _Unauthorised Administration_ 42-43, who says, at 42: "The high-water mark in the process of extending the scope of the _actio contraria_ on equitable grounds, is reached by the granting of the action (though only to the extent of the _dominus_' enrichment) to a _gestor_ who intervened in bad faith and with the intention of furthering his own interests." Cf Wessels, _Contract_ 3574-3575. On the _actio negotiorum gestorum_ as a possessory remedy, see further chapter 5.6 below.

424 5 HCG (1888) 258 at 266 (_per_ Laurence J P).

425 1903 TS 100 at 103 (_per_ Innes C J).

426 See chapter 3.4 above on the liability of the _gestor_.

427 1924 GWLD 33 at 36 (*per* Hutton J).

428 1965(1) SA 852 (T).

429 At 854 (*per* Vieyra J).

430 See W de Vos, "Miskenning van Negotiorum Gestio" in THRHR 28 (1965) 229-231. At 230 the learned author says: "Wat is die juiste posisie dan? Kort en bondig dit, dat iemand wat n ander se sake behartig, bv deur sy skulde te betaal, maar dit doen om homself te bevoordeel en nie,of nie slegs, met die voordeel van die *dominus* in gedagte nie ... wel n aksie as *gestor* kan instel. Dit is egter nie die gewone *contraria*-aksie waarmee die *gestor* al sy uitgawes kan eis nie, maar n abnormale of *quasi actio negotiorum gestorum contraria*, wat beperk is tot die *dominus* se werklike verryking. Dit is in wese n verrykingsaksie wat onder die vlag van *negotiorum gestio* vaar." See also R C Beuthin, "Third Time Unlucky" in SALJ 82 (1965) 464 sqq at 468; J E Scholtens, review in Annual Survey (1965) 169-170. Cf *Turkstra v Massyn* 1959(1) SA 40(T), which also concerned the payment of another's debt and in which the Court apparently overlooked the extended *actio neg gestorum* as a remedy available to the person who had paid the debt. This case has likewise been criticised by J E Scholtens, "Rights of Recourse of Sureties and Third

Persons who paid Another's Debt" in SALJ 76 (1959) 266-271.

431 1 Menzies (1830) 435, referred to also in chapter 5.2 above.

432 3 Menzies (1835) 448.

433 1955(2) SA 302(N).

434 At 308 (per Milne J).

435 1968(3) SA 433(T).

436 At 438H-439A (per De Kock J).

437 1966(3) SA 96(A).

438 At 441 G-442A.

439 At 442E-F.

440 See chapter 2.4 above.

441 As pointed out by J E Scholtens, "An Old Question of Enrichment Liability: Payment of Another's Debt" in SALJ 86 (1969) 131-135 at 135. See also his brief discussion of this case in Annual Survey (1968) 152-153.

Certain *obiter* remarks by the Court in respect of *negotiorum gestio domino prohibente* will be dealt with in chapter 5.5 below.

442 1979(2) SA 383(C).

443 At 387F (*per* Van Zijl J P). This case will be dealt with more fully in chapter 5.5 below.

444 Cf *Grant's Farming Co Ltd v Attwell* 9 HCG (1901) 91 at 95; *African Universal Stores Ltd v Dean* 1926 CPD 390; *Nortje en n Ander v Pool NO* 1966(3) SA 96(A) at 120B-C; *ASA Investments (Pty) Ltd v Smit* 1980(1) SA 897 (C). On the development of *mala fide gestio* in South African case law in general, see Van Zyl, *Saakwaarneming* 153-159.

445 D 3.5.48 (Africanus): *Si rem, quam servus venditus subripuisset a me venditore, emptor vendiderit eaque in rerum natura esse desierit, de pretio negotiorum gestorum actio mihi danda sit, ut dari deberet, si negotium quod tuum esse existimares, cum esset meum, gessisses: sicut ex contrario in me tibi daretur, si, cum hereditatem, quae ad me pertinet tuam putares, res tuas proprias legatas solvisses, quandoque de ea solutione liberarer*. On the various problems and controversies surrounding this text see Van Zyl, *Saakwaarneming* 29-36 and see further G Pacchioni, "La 1.48(49) Dig. III, 5 ed il requisito dell 'animus negotia aliena gerendi' nell ac-

tio negotiorum gestorum contraria" in BIDR 3 (1890) 42 sqq; G H Maier, "Regress wegen Zahlung fremder Schulden wenn nicht nomine debitoris gezahlt ist?" in ZSS 50 (1930) 486 sqq; H H Pflüger, Zur Lehre vom Erwerbe des Eigentums nach römischen Recht (1937) 125; G von Beseler, "Fruges et paleae" in Scritti Ferrini 3 (1948) 256 sqq; A d'Ors, "Observaciones sobre el' edictum de rebus creditis" in SDHI 19 (1953) 134 sqq at 142 sq; M Kaser, "Zur Frage einer condictio aus gutgläubigem Erwerb oder gutgläubiger Leistung im römischen Recht" in Festschrift Felgenträger (1969) 277 sq ; T Mayer-Maly, "Probleme der negotiorum gestio" in ZSS 86 (1969) 416-435. At 427 Mayer-Maly says: Doch dient die actio negotiorum gestorum van D 3.5.48 in Wahrheit nur zur Etablierung eines bereicherungsrechtlichen Anspruchs in einer für das Recht der negotiorum gestio völlig untypischen Situation.

446 D 12.1.23 (Africanus): Si eum servum qui tibi legatus sit, quasi mihi legatum possederim et vendiderim, mortuo eo posse te mihi pretium condicere Iulianus ait, quasi ex re tua locupletior factus sim.

447 Dissensiones dominorum (ed Haenel) 173 sq, 565 and 574 sq. The other doctores, Jacobus, Bulgarus and Hugo, disagree with Martinus, as also do Placentinus, Johannes Bassianus, Hugolinus, Odofredus and Azo. See Dissensiones dominorum 173 sq and 565; Placentinus,

De div reg iur 206 (p156); Hugolinus, _Distinctiones_ 70 (referred to in Haenel's _Dissensiones dominorum_ p 574); Odofredus, _Lect sup dig vet_ 12.6.33; Azo, _Lect sup cod_ 3.23.3 _cum malae fidei_; idem, _Summa cod_ 3.32.26. Rogerius, _Summa cod_ 2.10.10 is prepared to grant an _actio negotiorum gestorum_ where the _bona fide gestor_ or _possessor_ has no other remedy, his reason being _quia iniquum est aliquem locupletari cum aliena iactura_. Placentinus, _Summa cod_ 2.19 is likewise prepared to assist with an _utilis actio neg gest_ where no other remedy is available (hence _in subsidium_ or _in subsidio_). Cf _Quaestiones de juris subtilitatibus_ (ed Fitting, 18.2; ed Zanetti 19.2); E Besta, _L'Opera d'Irnerio_ (1896) 2 p 121; E M Meijers, _Études d'histoire du droit_ 3 (1959) 212 sq. See also Vacarius, _Liber Pauperum_ 2.14 gloss iii ad D 3.5.5.5 and D 3.5.48; Accursius, _Corpus iuris civilis glossatum_, gloss _desideratur_ ad D 5.3.38, gloss _ipso gestu_ ad D 3.5.5.13, gloss _condicere_ ad D 12.1.23, gloss _melior sit ad_ D 5.3.38 and gloss _precium_ ad C 4.51.1. Cf Odofredus, _Lect sup cod_ 3.32.3 and see in general on the glossators, Van Zyl, _Saakwaarneming_ 45-48.

448 Révigny, _Lect sup dig vet_ (MS D'Ablaing 2 fol 188 sq) and _Lect cod_ 3.32.3. Cf idem, _Lect sup dig vet_ 3.5.48, 5.3.38.

449 Révigny, _Lect sup dig vet_ 12.6.33 (MS D'Ablaing 2 fol

205) where he refers to the action as an actio in factum ad estimationem materiae suae ad instar fermentorum. Cf idem, Lect cod 4.26.7; De Cuneo, Lect sup cod 3.32.3. Bellapertica, Quaestiones et decisiones aureae 264 (272 in Basle ed) and Repetitiones ad C 4.26.7 refuses an action to the bona fide possessor in these circumstances, as does his pupil, Lambertus de Salinis, Quaestiones 84 ad C 3.32.5. See in general Van Zyl, Saakwaarneming 52-54.

450 Castrensis, Comm in dig vet 3.5.48, 12.1.23 and 12.6.33; idem Comm in cod 3.32.3. See also Cinus, Comm in cod 3.23.3; Albericus, Comm in dig 3.5.48 and Comm in cod 3.32.3; De Mayno, Comm in dig 12.1.23 and 12.1.32; Salycetus, Comm in dig 12.1.23; Tartagnus, Comm in dig 12.1.23; Bartolus, Comm in dig 12.1.23. See further Van Zyl, Saakwaarneming 58-60.

451 "Third party enrichment" is the term used by A M Honoré in an article with such title, appearing in AJ (1960) 236-253. See also chapter 5.7 below.

452 Baldus, Comm in cod 4.26.7, says A has no action against C unless C has been enriched or has ratified A's actions: Respondeo quod non, nisi ipse gestor pecuniam verterit in res meas, vel nisi ratam habuit. Salycetus, Comm in cod 4.26.7 says that an utilis actio negotiorum gestorum should be available to the gestor. Cf, however, his

commentary on C 3.32.3, which is not quite so clear on the point. See further Van Zyl, Saakwaarneming 60-61. In his article (see n 451 above) at 237-243, Honoré deals fully with the Roman law relating to indirect or third party enrichment on the basis of extensions of the actio de in rem verso, extensions of the actio negotiorum gestorum contraria and the remedy for enrichment when one person's property has come into the hands of another sine causa. The examples he mentions indicate that Roman law may already have laid a basis for the later development of the concept of indirect enrichment.

453 Pothier, Pand Just 3.5.22. In Appendice 189-193 he deals specifically with the case where a gestor manages another's affairs in the belief that they are his own. In 189 he points out that the animus negotia aliena gerendi is lacking in such a case, but that the equitable principle relating to unjustified enrichment comes to the assistance of the gestor: Mais l'équité, qui ne permet pas qu'on s'enrichisse aux dépens d'autrui, m'accorde en ce cas, contre la subtilité du droit, une action contre vous, pour répéter de vous les frais de ma gestion, jusqu'à concurrence de ce que vous en avez profité. See also Donellus, Comm de jur civ 4.25.5; A Faber, Rationalia in pand 3.5.48 (but cf his comments on D 12.1.23, 12.1.31.1, 12.1.32; 12.6.6; 12.6.14 sq and 12.6.33).

454 Molinaeus, _De fiefs_ 1.1.5 nn 105-113 (_op om_ 1 col 176-178) explains the apparent conflict between D 3.5.48 and D 12.6.33 on the basis that the latter text's refusal to grant a _condictio_ to a _bona fide possessor_ who has effected improvements on another's property arises _de mero iure et rigore iuris civilis vel positivi_. This does not exclude him _a remedio aequitatis negotiorum gestorum sive in factum_. He points out that, insofar as the _mala fide gestor_ or _possessor_ is granted an enrichment action in terms of D 3.5.5.5, all the more justification exists for granting such action to the _bona fide gestor_ or _possessor_. Cf eod 1.1.5 n 82 (col 166-167). See also Argentré, _Comm in consuet britt_ 536 gloss 1; Automne, _Conférence_ ad D 12.6.33 (cf his comments ad D 3.5.27 and C 3.32); Mornacius, _Observationes_ ad D 12.6.33; Faber, _Rationalia in pand_ 5.3.31 pr and 12.6.33; idem, _De erroribus pragmatibus_ dec 26 error 8 sqq. A contrary approach appears from Cujacius, _Ad Afr tract_ 8 ad D 3.5.48 (_op om_ 1 col 1430 sqq), and Donellus, _Comm de jur civ_ 4.33.22 sqq.

455 Pothier, _Appendice_ 192: _Dans notre jurisprudence françoise, qui n'admet pas les subtilités du droit romain, et qui regarde la seule équité comme suffisante pour produire une obligation civile, et pour donner une action, il ne doit pas être douteux que ... celui qui a fait des impenses dont je profite, doit avoir action_

contre moi, jusqu'à concurrence de ce que j'en profite. See further Van Zyl, Saakwaarneming 68-71. On the face of it, the granting of an action to the bona fide possessor on the same basis as to the bona fide gestor of D 3.5.48 is in conflict with texts like D 12.6.33 and D 10.3.14.1, which indicate that the bona fide possessor does not have an action. It is submitted that what Pothier says about French law in this regard is also valid for European ius commune in general and Roman-Dutch law in particular: the later legal development clearly gives the bona fide possessor an action.

456 Lauterbach, Colleg pand 3.5.9; Schaumburg, Compend iur dig 3.5.3 and 6; Böhmer, Introd in ius dig 3.5.2; Bachovius, Comm in pand 3.5; Mühlenbruch, Doctr pand 668; Chambon, Die negotiorum gestio (1848) 128; Witte, Die Bereicherungsklagen des gemeinen Rechts (1859) 328 sqq; Dankwardt, Die negotiorum gestio (1855) 37 n 5; Von Jhering, Abhandlungen aus dem römischen Recht 82 sq; Von Savigny, System des heutigen römischen Rechts 5 p 523; Zimmermann, Aechte und unächte negotiorum gestio (1872) 24 sqq; E von Monroy, Die vollmachtslose Ausübung fremder Vermögensrechte (1878) 9sqq; Brinkmann, Verhältnis der actio communi dividundo und der actio negotiorum gestorum zueinander (1855) 19 sqq; Kohler "Die Menschenhilfe im Privatrecht" in Jher Jahrb 28 (1887) 1 sqq at 103 and 104 n2; Ruhstrat, "Beiträge zur Lehre von der negotiorum gestio" in Arch civ Prax

34 (1851) 69-74 at 68 sqq; Brinz, Pand 2.32 (p 646 sq); Windscheid, Pand 2.431; Glück, Pand 5.421 (p 346). A contrary opinion was expressed by Kämmerer in Zeitschrift für Civilrecht und Prozess 8 (1835) 137 sqq, 341 sqq, and likewise by Puchta, Vorlesung 327 sqq; idem, Pand 312, 327; Von Vangerow, Pand 3.664.2, who were not prepared to grant an enrichment action in the form of an actio utilis.

457 Goeddaeus, Comm rep prael in D 50.16.79 pr; Böhmer, Doctr de act 2.5.30; Leyser, Med ad pand 3 sp 167.5; Mevius, Decisiones 2.227; idem, Consilia 9.42 sq; Bornemann, Preuss Civilrecht 3.221; Korte, "Geschäftsführung ohne Auftrag und nützliche Verwendung" in Beiträge zur Erläuterung des preussischen Rechts durch Theorie und Praxis 1 (1857) 365 sqq at 368; Dernburg, Lehrbuch des preuss Privatrechts 2 p 665; B Kupisch, Die Versionsklage (1965) 88. Among the members of the historical school and pandectists an interesting controversy arose in this regard, as appears from Windscheid, Abhandlungen 301 sqq; Von Jhering, Jher Jahrb 16 (1878) 230 sqq; P Krüger, Arch civ Prax 63 (1880) 379-389; Eisele, Arch civ Prax 66 (1883) 1 sqq. There remained no doubt, however, that the action emanating from D 3.5.48 is an enrichment action which is also available to the bona-fide possessor. See further Puchta,

Vorlesung 327 sqq; Windscheid, *Pand* 2.4.31; Witte, op cit 328 sqq; Dernburg, *Pand* 2 p 335 sq; Arndts, *Pand* 345 n 2; Köllner, *Die Grundzüge der obligatio negotiorum gestio* (1856) 48 sqq; Trampedach, "Die condictio incerti" in ZSS 17 (1896) 7 sqq at 113. Bachovius, *Notae ad disp Treut* 2.20.6, is not disposed to grant an action to the *bona fide possessor* under such circumstances, on the ground that the *aequitas* allows only an *exceptio*.

458 Wolff, *Inst iur nat* 548, creates the impression that it is the ordinary *actio negotiorum gestorum* which is applicable. Cocceius, *Grot illustr* 2.10.2, however, grants an *actio negotiorum gestorum utilis*, whereas Leyser, *Med ad pand* 2 sp 130.8, and Stryk, *Cont alt us mod pand* 15.3.3 allow an *actio de in rem verso (utilis)*. Cf Schaumburg, *Compend iur dig* 15.3.3; Brunnemann, *Comm in cod* 4.26.7.1; Mühlenbruch, *Doctr pand* 670; Korte, "Geschäftsführung ohne Auftrag und nützliche Verwendung" in Beiträge zur Erläuterung des preussischen Rechts durch Theorie und Praxis 1 (1857) 365 sqq at 374 and see B Kupisch, *Die Versionsklage* (1965) 47 and 61. See further Glück, *Pand* 14.917 (p 419 sq); Dernburg, *Pand* 3.14 n 2; Lenel, "Der sog actio de in rem verso utilis" in Arch civ Prax 78 (1892) 354 sqq at 362; Witte, op cit 254 sqq, esp at 257, 260 and 265; Puchta, *Vorlesung* 279; Chambon, op cit 125 sqq and 184 sqq,

esp 191 sqq. Cf Glück, _Pand_ 5.424 sqq (p 378 sq); Baron, _Pand_ 221; Ruhstrat, _Die negotium des dritten Kontrahenten_ (1883). See in general on the German development Van Zyl, _Saakwaarneming_ 79-81 and 86-88 and see further chapter 5.7 below.

459 Voet, _Comm ad pand_ 3.5.13; idem, _Compend juris_ 3.5.8; Schultingh, _Notae ad dig_ 3.5.48 and 12.1.23; idem, _Enarratio dig_ 3.5.3.

460 See chapter 4.3 above.

461 Westenberg, _Principia juris_ 15.3.7; Schrassert, _Consultatien_ 2.53; Huber, _Prael_ 15.3.2 (who refers to D 12.1.32 and Grotius, _Inleidinge_ 3.30.18 and suggests that the action should be granted _in subsidium_); Van Bynkershoek, _Observ tumultuariae_ 303 (cf eod 134, 277, 586 and 1805). Cf Grotius, _De iure belli ae pacis_ 2.10.2.3; idem, _Holl Cons_ 3 p 422 sq, _advies_ no 143; Christinaeus, _Decisiones_ 2.112.5. Noodt, _Comm in dig_ 15.3 rejects an action under such circumstances. On the Roman-Dutch law relating to _bona fide gestio_ in general see Van Zyl, _Saakwaarneming_ 94-96 and on "indirect enrichment" see chapter 5.7 below.

462 1932 CPD 401.

463 At 404 (_per_ Watermeyer J). Cf _Guarantee Investment_

Corporation Ltd v Shaw 1953(4) SA 479(SR); Gouws v Jester Pools (Pty) Ltd 1968(3) SA 563(T) at 57 A-B.

464 1979(2) SA 383(C) at 388A-D (per Van Zijl J P). See also Wessels, Contract 3573; Rubin, Unauthorised Administration 38, Van Zyl, Saakwaarneming 152-153.

465 See chapter 5.4 above.

466 On the actio negotiorum gestorum as a possessory remedy see chapter 5.6 below. The question of "indirect enrichment" in modern South African law is dealt with in chapter 5.7 below.

467 The lawyer, Salvius Julianus, refused an action under such circumstances and this approach was supported by Justinian in C 2.18.24: Si quis nolente et specialiter prohibente domino rerum administrationi earum sese immiscuit, apud magnos auctores dubitabatur, si pro expensis, quae circa res factae sunt, talis negotiorum gestor habeat aliquam adversus dominum actionem. Quam quibusdam pollicentibus directam vel utilem, aliis negantibus, in quibus et Salvius Iulianus fuit, haec decidentes sancimus, si contradixerit dominus et eum res suas administrare prohibuerit, secundum Iuliani sententiam nullam esse adversus eum contrariam actionem, scilicet post denuntiationem, quam ei dominus transmiserit nec concedens ei res eius attingere, licet

res bene ab eo gestae sint. Cf D 3.5.7.3; D 11.7.14.13; D 17.1.40; Pacchioni, Della gestione 568 sq; V Scialoja, "Della negotiorum gestio prohibente domino ed in ispecie dell'azione di regresso del terzo che paghi un debito altrui contro la volontà del debitore" in Studi Scialoja 3 (1932) 389-403; Seiler, Negotiorum gestio 60 sq.

468 See chapter 5.3 above.

469 Dissensiones dominorum (ed Haenel) 275: Alii, ut M(artinus), ex aequitate utilem ei indulgent, ad instar illius, qui animo depraedandi adcessit ad aliena negotia gerenda. Cf Dissensiones dominorum (ed Scialoja) 428: gloss currentem ad C 2.18.24; Pillius, Questiones aureae 6. The Roman principle of C 2.18.24 and D 17.1.40 was, however, followed by the majority of the glossators, such as Rogerius, Summa cod 2.10.12; Placentinus, Summa cod 2.19; Odericus, Bulgarus, Johannes Bassianus (Dissensiones dominorum (ed Haenel) loc cit); Otho Papiensis (Dissensiones dominorum (ed Scialoja) 428); Azo, Lect sup cod 2.19.24; idem, Summa sup cod 2.19; idem Summa aurea ad C 2.18(19) n 21; Odofredus, Lect sup cod 2.18.24; Accursius, Corp iur civ glossat, gloss non consentio ad D 17.1.40; gloss bene ab eo gestae sint, specialiter and currentem ad C 2.18.24. Cf Liber iuris florentinus 4.4.11; Lo codi 2.8.9; 2.8.19; V Rivalta,

Dispute celebri di diritto civile; estratte dalle dissensiones dei glossatori (1895) 111 sqq; V Scialoja, op cit 393-394. In the Dissensiones dominorum (ed Haenel) 275 we are told that Azo distinguished in accordance with the nature of the prohibition: if it was simply done in anger, the prohibition could be ignored, but if it was done after full consideration, the prohibition stood: Sed dominus Azo distinguit, qualiter prohibuit: an irato animo, an etiam plana voluntate, ut in primo casu agat gestor, quia perinde est, ac si non esset prohibitus, quum calore iracundiae sit prohibitus ... Sin autem plana voluntate prohibuit, non agit gestor. See further Van Zyl, Saakwaarneming 48-50.

470 Révigny, Lectura codicis 2.18.24. But see J Faber, Breviarium super codice 2.18.24, who refuses an action; Van Zyl, Saakwaarneming 55.

471 See Dinus, Comm de reg iur, ratihabitionem; Bartolus, Comm in dig 17.1.40; idem, Comm in cod 2.18.24; Baldus, Comm in cod 2.18.24; Angelus Ubaldus, Comm in cod 2.18.24; Butrigarius, Lect sup cod 2.18.24; Tartagnus, Comm in cod 2.18.24; idem, Comm in dig 12.1.23. Cf Alciatus, Comm in dig 12.6.33. Cinus, Comm in cod 2.18.24 and Albericus, Comm in cod 2.18.24 are, however, more amenable in allowing the gestor an actio in factum ex aequitate.

Cf Castrensis, _Comm in cod_ 2.18.24, who grants the _mandatarius_ who exceeds his mandate an _actio negotiorum gestorum ex aequitate_. Cf also Averanius, _Interpret juris_ 3.20.15 and see further Scialoja, op cit 394-396; Van Zyl, _Saakwaarneming_ 61-62.

472 Molinaeus, _De fiefs_ 7.1 n 103 (_op om_ 1 col 175). Cf Boerius, _Decisiones burdegalenses_ 47; Automne, _Conférence_ ad C 2.18(19).24 (p 82 sq); idem, _Censura Gallica_ ad C 2.18.24. Against the granting of an action are Rebuffus, _Tract de except_ n 714; Duarenus, _Op om, in tit de neg gest_ 4; Gothofredus, _Op min, de div reg iur_ 206.

473 Pothier, _Appendice_ 182, says of the strict Roman principle that disallows an action: _Cela ne résiste-t-il pas à l'équité naturelle, qui ne permet pas que vous puissiez vous enrichir à mes dépens? Neminem aequum est cum detrimento alterius locupletari. Cette équité ne doit-elle pas venir à mon secours? Et à défaut de l'action contraria negotiorum gestorum, que je n'ai pas, ne doit-elle pas me donner pour la répétition de la somme que j'ai payée, et dont vous avez profité, l'action générale in factum, action qui a lieu quoties alia actio deficit?_ The whole subject is dealt with exhaustively in the _Appendice_ 181-184. Cf his more Roman orientated approach in _Pand Just_ 3.5.12. See further Scialoja, op cit 397-399 (a discussion of French and Dutch autho-

rities); Van Zyl, _Saakwaarneming_ 71-73.

474 The majority of representatives of the _usus modernus pandectarum_ reject an action and adhere to the Roman principle in this regard. See Bachovius, _Comm in dig_ 3.5; Zasius, _Paratitla, sum neg gest_ n 20 (but cf his _Enarratio, in tit si cert pet_); Stryk, _Spec us mod pand_ ad D 3.5.5; idem, _Jur publ disp_ 17.3.59; Treutler, _Sel disp ad ius civ Just_ 1.10.6; Struvius, _Syntagma jurispr_ 7.3.5.54; Mühlenbruch, _Doctr pand_ 668; Wolff, _Inst jur nat_ 690; Thomasius, _Notae ad pand_ 3.5; idem, _Diss acad_ 1.26.10; Heineccius, _Elem iur civ sec ord inst_ 974; idem, _Recitationes_ 965. Cocceius, _Grot illustr_ 2.10.2 and 2.10.9, on the other hand, grants an action unreservedly. Cf idem, _Ius civ controv_ 3.5.1. Brunnemann, _Comm in cod_ 2.18(19).24, leaves it to the reader to decide whether the enrichment principle should apply. Cf Leyser, _Med ad pand_ 1 sp 55 n 5 sq; Böhmer, _Doctr de act_ 2.6.7; ALR 241, 249-251; Bornemann, _Preuss Civilr_ 3.221 (p 268 n 2); Dernburg, _Lehrb des preuss Privatrechts_ 2 p 667 sqq. Among the pandectists and members of the historical school, it is only Kohler Jher Jahrb 25 (1887) 51 sq and Puchta, _Vorlesung_ 327 sqq (but cf his _Pand_ 327) who are prepared to grant the _gestor domino prohibente_ an enrichment action. The other authorities follow the Roman law: see Witte, _Die Bereicherungsklagen des gemeinen Rechts_ (1859) 8 n 3;

Dernburg, Pand 2 p 332; Vangerow, Pand 3.664 II; Windscheid, Pand 2.430; Arndts, Pand 3.298; Baron, Pand 309; Brinz, Pand 2.321 nn 32 and 46; Glück, Pand 5.420 (p 338 sqq). See further Scialoja, op cit 396; Van Zyl, Saakwaarneming 81-82 and 88.

475 Huber, HR 3.28.8; idem, Prael ad Inst 3.28.2; idem, Prael ad dig 3.5.3; Vinnius, Jurispr contr 2.41; Noodt, Comm in dig 3.5(op om 2 p 79); Schultingh, Enarrat dig 3.5.7; Schorer, Aanteekeningen ad Grot Inl 3.27.1-2; Wissenbach, Comm in cod 2.18(19).24; idem, Disp ad inst imp 39.8; Wächtler, Opuscula, Notae ad Noodt 3.9 (p 324 sqq); Westenberg, Principia juris 3.5.21; Perezius, Expos cod 2.19.6 and 13; Greve, Exerc ad pand 5.1; Zoesius, Comm ad dig 3.5.9; Van der Keessel, Praelectiones 3.27.5 (vol 5 p 242); idem, Dictata ad inst 3.28.5; idem, Thes sel 505; Van der Linden, Koopmans handboek 1.15.15.1 (p 169).

476 Voet, Comm ad pand 3.5.11: Sed cum iniquum videtur alterum cum alterius jactura locupletiorum fieri, magis illud hodie videtur admittendum, ut eatenus saltem repetitio concedatur, quatenus inde dominus locupletior factus est: exemplo eius, qui cum malae fidei possessor esset, impensas fecit, ut alibi dicetur; Groenewegen, De leg abrog ad C 2.18(19).24: ... ideo ei, qui nolente et specialiter prohibente domino rerum, administratione

se immiscuit, pro expensis necessariis et utilibus ad exemplum malae fidei possessoris ... et praedonis ... Hodie negotiorum gestorum actionem competere censeo. Cf Voet, Compend jur ad D 3.5.6 and 8; idem, Beginselen des rechts 3.28.7 (as opposed to 3.30.4); Groenewegen, De leg abrog ad C 3.32.5 and ad Inst 2.1.30; Busius, Comm in pand 3.5.31; Bronchorst, Enant 4.39; Christinaeus, Decisiones 2.113.6 and 2.112.11; Zypaeus, Notitia juris belgici, 9 de poenis; Aanhangzel sv negotiorum gestio; Garsias, De expensis et meliorationibus commentarius. See further Van Zyl, Saakwaarneming 96-97.

477 2 Menzies (1833) 185.

478 3 SC (1881) 89 at 102 (per De Villiers C J).

479 19 SC (1901) 380 at 392 (per Buchanan A C J).

480 Cf Pretorius v Van Zyl 1927 OPD 226 at 229-230; Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968(1) SA 571(A) at 580D-E.

481 1968(3) SA 433(T).

482 At 438A (per De Kock J).

483 This apparent reluctance to grant the *gestor* an action under these circumstances likewise appears from a number of South African authorities. See Wessels, *Contract* 3562-3567; John, *Onregverdige Verryking* 74; De Vos, *Verrykingsaanspreeklikheid* 79-80; D J Joubert, *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 128. Rubin, *Unauthorised Administration* 30-33, says at 30: "It is surely quite illogical to allow a *gestor* who has acted *domino prohibente* to bring the action, when the essence of the *utiliter coeptum* is that the *gestor* has acted as the *dominus* would himself have done. It may even be argued, with some force, that a *gestor* who undertakes an administration which, he knows, has been prohibited by the *dominus*, must be taken to have done so without intending to place the *dominus* under any obligation to him." At 33 he suggests: " It seems to me ... that our courts cannot do justice either to the *gestor* or to the *dominus prohibens* by applying the principle of enrichment without some qualification. In order to do justice to both, our courts should have regard to two distinct considerations, (a) whether the *dominus* has, in fact, been enriched by the *gestio* at the *gestor*'s expense, and (b) whether it was, in all the circumstances, reasonable for the *gestor* to ignore the prohibition of the *dominus*." De Vos, *Verrykingsaanspreeklikheid* 191, supports this suggestion.

484 1979(2) SA 383(C), discussed by J E Scholtens in Annual Survey (1979) 175-177; C Nathan, "Reimbursement for the payment of another's debt" in BML 9 (1979) 14-16.

485 At 392 D-H (per Van Zijl J P).

486 See chapter 2.4 above.

487 See further Van Zyl, Saakwaarneming 150-152; De Villiers and Macintosh, The Law of Agency in South Africa (1981) 274-275.

488 See chapters 5.3 and 5.4 above.

489 See the authorities cited in nn 399-403, 408-411, 413-416, 418-422, 447-449, 454-455 and 457 above. See in general on the relationship between negotiorum gestio and possession Van Zyl, Saakwaarneming 159-162; idem, "Die Saakwaarnemingsaksie as Besitsremedie" in THRHR 34(1971) 331-349.

490 See Bellingham and Another v Bloommetjie 1874 Buch 36; Rubin v Botha 1911 AD 568; Fletcher and Fletcher v Bulawayo Waterworks Co Ltd; Bulawayo Waterworks Co Ltd v Fletcher and Fletcher 1915 AD 636; Lechoana v Cloete

<u>and Others</u> 1925 AD 536. The possessor or occupier is not entitled to compensation for <u>impensae voluptuariae</u>. See in general on the rights to compensation of possessors, occupiers and other categories of persons holding the property of another C G van der Merwe, <u>Sakereg</u> (1979) 96-106; J G Lotz, "Enrichment" in LAWSA 9 (1979) par 83-97 (pp 58-65). Both these authors point out that our courts apparently refuse an action for compensation to the <u>mala fide</u> occupier and both criticise this view-point as being illogical and indefensible, insofar as the principle of unjustified enrichment should clearly be applicable in this case (see Van der Merwe, op cit 105; Lotz, op cit 62 (par 91). It is submitted that this criticism is totally justified: there can, in principle, be no difference between the <u>bona fide</u> and <u>mala fide</u> occupier when it is settled law that there is no difference between the <u>bona fide</u> and <u>mala fide</u> possessor in respect of their rights to be reimbursed for necessary and useful expenses.

491 The <u>locus classicus</u> on this subject is <u>United Building Society v Smookler's Trustees and Golombick's Trustee</u> 1906 TS 623. At 633 the Court states that the <u>mala fide</u> possessor has no right of retention. Lotz, op cit 61 (par 87), however, points out that even the <u>mala fide</u> possessor has a lien where the owner was aware of the possessor's activities and failed to protest. See

further <u>Gillingham v Harris and Morgan</u> 1905 TS 94; <u>Savory v Baldochi</u> 1907 TS 523; <u>Ford v Reed Bros</u> 1922 TPD 266; <u>Anderson & Co v Pienaar & Co</u> 1922 TPD 435 at 438-439; <u>Holmes Garage Ltd v Levin</u> 1924 GWLD 58; <u>Colonial Cabinet Manufacturing Co v Wiid</u> 1927 CPD 198 at 200-201; <u>Land Bank v Mans</u> 1933 CPD 16 at 24-25; <u>Ploughall (Edms) Bpk v Rae</u> 1971(1) SA 887(T); <u>Howes & Clover (Pty) Ltd v Ruskin and Others</u> 1978(1) SA 99(W); <u>Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk</u> 1979(4) SA 467(T); <u>D Glaser & Sons (Pty) Ltd v The Master and Another N O</u> 1979(4) SA 780(C); <u>Soane v Lyle N O</u> 1980(3) SA 183(D). Cf <u>Killian v Reilly</u> 18 CTR (1908) 159. See also W de Vos, " Retensieregte weens Verryking" in THRHR 33 (1970) 357-368.

492 <u>B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk</u> 1979(1) SA 391(A). The action is usually referred to as being directed at <u>quantum meruit</u>. See further <u>Hauman v Nortje</u> 1914 AD 293; <u>Breslin v Hichens</u> 1914 AD 312; <u>Van Rensburg v Straughan</u> 1914 AD 317; <u>Spencer v Gostelow</u> 1920 AD 617; A J Kerr, "Breaches of Building Contract: is the Action one on Contract or for a Quantum Meruit?" in SALJ 86 (1969) 396 sqq; Lotz, op cit 65-66 (par 98-101).

493 <u>De Beers Consolidated Mines v London and South African Exploration Company</u> 10 SC (1893) 359 at 369; <u>Wipplinger</u>

v Wax 1933 EDL 60. Cf Colonial Government v Smith and Company 18 SC (1901) 380; Rademeyer and Others v Rademeyer and Others 1968(3) SA 1(C) at 8H-9A and 10G.

494 1966(3) SA 96(A) at 120F (per Rumpff J A).

495 See also 133E-G of the report, where reference is made to Grotius, Inleidinge 3.1.15.

496 1968(3) SA 563(T) at 575A-G.

497 1931 GWLD 86 at 100.

498 See also Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970(3) SA 264(A); Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968(1) SA 571(A); C Nathan, "Enrichment Liability and the Ius Retentionis" in THRHR 37(1974) 101-106; W de Vos, "No Enrichment Action for Improvements to Movables?" in THRHR 37(1974) 308-314.

499 See Van Rensburg v Straughan 1914 AD 317; New Club Garage v Milborrow and Son 1931 GWLD 86 at 99; Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360; Frame v Palmer 1950(3) SA 340(C); Knoll v S A Flooring Industries Ltd 1951(1) SA 404(T); Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970(3) SA 264(A);

Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd 1979(1) SA 570(R). But see Vadas (Pty) Ltd v Philp 1940 CPD 267 and Gouws v Jester Pools (Pty) Ltd 1968(3) SA 563(T). In the latter case (at 574F) the Court accepted the so-called "at-the-expense-of" requirement for an action based on unjustified enrichment (as advocated by De Vos, Verrykingsaanspreeklikheid 296-308) and rejected the claim of the builder of a swimming pool who had contracted with B but enriched C, the owner of the property on which the pool had been built. This decision appears to be in conflict with that in Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons, supra. See further the discussion of negotiorum gestio and "indirect enrichment" in chapter 5.7 below.

500 See chapter 5.4 above.

501 A M Honoré, "Third Party Enrichment" in AJ (1960) 236-253 at 253. He is supported by J E Scholtens in a number of contributions, such as "Enrichment at Whose Expense?" in SALJ 85(1968) 371-379 and in Annual Survey (1968) 150-152. See also C P Joubert's review of De Vos, Verrykingsaanspreeklikheid, in SALJ 76 (1959) 471-476 at 475-476: in his discussion of the "tussenpersoon" or "tussenvermoë" he likewise rejects the "ten koste van" ("at the expense of") requirement. See further L Getz, "Contracts for the Benefit of Third Parties" in AJ (1962) 38 sqq; J P Dawson, "Indirect Enrichment"

in Festschrift Rheinstein 2 (1969) 789 sqq; Van Zyl, Saakwaarneming 163-169; idem, "Verryking-saakwaarneming - 'Ten koste van'" in THRHR 34 (1971) 199-202.

502 W de Vos, Verrykingsaanspreeklikheid 296-308; idem, "Ongeregverdigde Verryking 'ten koste van' Iemand"in Butt SAL Rev 4 (1957) 36-55 (cf Verrykingsaanspreeklikheid 193 and 226); idem, "Enrichment at Whose Expense? A Reply" in SALJ 86 (1969) 227-230; idem, "Aspekte van Verrykingsaanspreeklikheid" in AJ (1970) 231-243, esp at 236-241; idem, "Retensieregte weens Verryking" in THRHR 33 (1970) 357-368.

503 See notes 452 and 458 above.

504 See the authorities cited in n 461 above.

505 1931 GWLD 86.

506 At 99-100 (per Hutton J).

507 Cf Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360 at 376; Frame v Palmer 1950(3) SA 340(C) (discussed by J E Scholtens, "Unjust Enrichment" in SALJ 67 (1950) 329-331 and in Annual Survey (1950) 129-131); L Ferera (Private) Ltd v Vos N O and Others 1953 (3) SA 450(A) at 465D-G.

508 1951(1) SA 404(T) (discussed by J E Scholtens,

"Negotiorum Gestio and Unjust Enrichment" in SALJ 68 (1951) 134-137 and in Annual Survey (1950) 130-131).

509 At 408A-C (quoted in n 72 above) the Court (per De Villiers J) criticises the judgement in the Williams' Estate-case and suggests that, although the principles of negotiorum gestio could have been applied in that case, the "equitable doctrine of unjust enrichment" was "wide enough to cover the facts" in such case.

510 1968(3) SA 563(T).

511 At 569 H (per Jansen J A).

512 See also the criticism of J E Scholtens, "Enrichment at Whose Expense?" in SALJ 85 (1968) 371-379 and in Annual Survey (1968) 150-152. W de Vos, "Enrichment at Whose Expense? A Reply" in SALJ 86 (1969) 227-230, in line with his approach to the so-called "at the expense of" requirement for a claim based on unjustified enrichment, supports the decision. Cf Vadas (Pty) Ltd v Philp 1940 CPD 267, in which an action is, in similar circumstances, refused.

513 1970(3) SA 264(A).

514 At 273H-274A (per Botha A J): "Hierdie stelling (ie

the "at the expense of" requirement) is nie onaanvegbaar nie ... maar dit is nie nodig om nou daarop met betrekking tot 'n verrykingsaksie in te gaan nie, aangesien ons nie hier met so 'n aksie te doen het nie, maar wel met 'n beweerde retensiereg wat bloot as verweer teen die eienaar se rei vindicatio opgewerp word. Dat verryking van die eienaar ten koste van die besitter, wat die noodsaaklike of nuttige uitgawes aangegaan het, 'n vereiste vir die totstandkoming van so 'n retensiereg is, moet toegegee word. Dit is byna vanselfsprekend dat verryking van die eienaar deur die besteding van nuttige of noodsaaklike uitgawes aan die saak, ten koste is van die persoon wat die uitgawes aangegaan het, en na my oordeel is dit, met betrekking altans tot die bestaan al dan nie van so 'n retensiereg, nie ter sake nie dat die uitgawes aangegaan is ingevolge 'n geldige kontrak met 'n derde teen vergoeding." See the criticism of this case by W de Vos, "Retensiereg weens Verryking" in THRHR 33 (1970) 357-368, replied to by Van Zyl, "Verryking - Saakwaarneming - 'ten koste van'" in THRHR 34 (1971) 199-202.

515 See n 502 above.

516 It may, in the alternative, be argued that, even if the granting of an enrichment action under these circumstances should be in conflict with the paritas cre-

ditorum rule, there would be ample justification for considering this an exception to such rule, as De Vos himself suggests in his article "Aspekte van Verrykingsaanspreeklikheid" in AJ (1970) 231-243 at 241: "Ons sou moet aanvaar dat daar belangrike uitsonderings op die reël van *paritas creditorum* bestaan." If the intermediary should himself be insolvent, it is submitted that A should have a choice between entering the *concursus creditorum* by contractually suing B's insolvent estate, or suing C directly on the basis of unjustified enrichment. Insofar as B and C are two different persons, the question of parity of creditors will not come to the fore in such a case. This situation must be distinguished from that where A is indeed able to sue B and gain full satisfaction for his claim: insofar as C will likewise be liable to B in terms of their contractual relationship, there will clearly not be room for an enrichment action since C cannot be unjustifiably enriched if he still has to make payment to B. To this extent, as mentioned above, the extended *actio negotiorum gestorum* has a subsidiary function.

517 See in general the authorities cited in notes 5, 6 and 7 above. The results of the comparative survey will be dealt with in chapter 7 below. In view of the difficulty of gaining access to the socialistic legal systems, none of these systems have been included in the present

comparative survey. In Van Zyl, Saakwaarneming 142-145, the Hungarian law relating to the actio negotiorum gestorum as an enrichment action is dealt with, with particular reference to sections 485-487 of the civil code known as A Magyar Népköztarsaság Polgári Törrénkonyve (translated into English by P Lamberg and B Csánk as the Civil Code of the Hungarian People's Republic and into French by P Sebestyén as Code Civil de la République Populaire Hongroise). See in general on Hungarian private law and its Romanistic tendencies A Almási, Ungarisches Privatrecht 2 (1923); Zivilgesetzbuch der ungarischen Volksrepublik (1960); F Mádl (ed), Das ungarische Zivilgesetzbuch in fünf Studien (1963); G Bónis, Einflüsse des römischen Rechts in Ungarn (1964) (also in IRMAE 5,10). An interesting comparative survey of socialistic civil law appears in V Petev, Sozialistisches Zivilrecht (1975) and Y Eminescu T Popescu, Les codes civils des pays socialistes (1980). On East-German (DDR) civil law see H Roggemann (ed), Zivilgesetzbuch und Zivilprozessordnung der DDR mit Nebengesetzen (1976) and G Brunner (ed), Zivilrecht der Deutschen Demokratischen Republik (1977). See in general on the socialistic family of law Van Zyl, Beginsels van Regsvergelyking (1981) 212-240 (with reference to the USSR, Hungary and Jugoslavia). At 241-278 the Nordic (Scandinavian), Far-Eastern and traditional legal systems are dealt with in general. For present

purposes the comparison with these systems is not practicable.

518 The <u>quasi-contracts</u> are defined in sec 1371 as follows: Art. 1371. Les quasi-contracts sont les faits purement volontaires de l'homme, dont il résulte un engagement quelconque envers un tiers, et quelquefois un engagement réciproque des deux parties. ("Quasi-contracts are purely voluntary acts of a person, which result in some or other relationship towards a third party and sometimes in a reciprocal relationship between two parties"). <u>Solutio indebiti</u> is in fact the only enrichment action dealt with in the <u>Code civil</u> (sec 1376-1381), but in practice the <u>actio de in rem verso</u> has evolved as a general enrichment action. See in general F Grauer, <u>Die ungerechtfertigter Bereicherung im französischen Privatrecht</u> (1930) 31 sqq; M H Bregstein, <u>Ongegronde vermogensvermeerdering</u> (1927)23 sqq; H C Gutteridge, R J A David, "The Doctrine of Unjustified Enrichment" in CLJ 5(1933-1935) 204-229; J P Dawson, "Negotiorum Gestio: The Altruistic Intermeddler" in Harvard Law Review 74 (1960-1961) 819-865, 1073-1129; B Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law" in Tulane Law Review 36 (1962) 605-646, 37 (1962-1963) 49-66 (on Louisiana law see also chapter 6.9 below); D König, <u>Der Bereicherungsanspruch gegen den Drittempfänger einer Vertragsleistung nach französischem</u>

Recht (1967); A M Biegman-Hartogh, Ongegronde Verrijking (1971) 88-105; De Vos, Verrykingsaanspreeklikheid 128-130; Van Zyl, Saakwaarneming 100-108. On French law in general see Van Zyl, Beginsels van Regsvergelyking (1981) 74-105.

519 Cf sections 697-702 of the Civil Code of Japan and sections 104-115 of the Draft Civil Code of Quebec. On the relevant law of Quebec see G S Challies, The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec (1940); J-G Castel, The Civil Law System of the Province of Quebec (1962) 381-400. The Japanese code and the law of Quebec on the subject of negotiorum gestio follow French law closely. Cf the Civil code of Louisiana, dealt with in chapter 6.9 below.

520 See in general C B M Toullier, Le droit civil français 11 (1824) 24 sqq; F Laurent, Principes de droit civil français 20 (1878) 352 sqq; C Demolombe, Traité des engagements qui se forment sans convention 8 (1882) 44 sqq; V Marcadé, Explication théorique et pratique du Code Civil 5 (1889) 280 sqq; G Baudry-Lacantinerie, L Barde, Théorique et pratique de droit civil 15 (1908) 450 sqq; M Planiol, Traité élémentaire de droit civil 2 (1909) 725 sqq; R Demogue, Traité des obligations en général 3 (1923) 21 sqq; L Josserand, Cours de droit civil positif français 2: Théorie générale des obli-

gations (1930) 135 sqq and 690 sqq; R Savatier, Cours de droit civil 2 (1949) 100 sqq; Aubry et Rau, Droit civil français (1951) 359-372; Ch Beudant, Cours de droit civil français 9 bis (1952) 313 sqq; M Planiol, G Ripert, Traité pratique de droit civil français 7: obligations (1954) 1-23; F Goré, "Le fondement de la gestion d'affaires autonome et générale d'obligations" in Recueil Dalloz (1953) 39 sqq; G Ripert, J Boulanger, Traité de droit civil 2 (1957) 468 sqq; A Colin, H Capitant, Traité de droit civil 2 (1959) 726-735; J M Solís, "Management of the Affairs of Another" in Tulane Law Review 36 (1961-1962) 108-129; G Marty, P Raynaud, Droit civil 2.1: les obligations (1962) 299-308; H et L Mazeaud, J Mazeaud, Leçons de droit civil 2 (1966) 639-652; J Carbonnier, Droit civil 4: les obligations (1976) 451-460. Cf Rubin, Unauthorised Administration 80-82.

521 See n 20 in chapter 1.1 above.

522 See Aubry-Rau, op cit 361: Il y a gestion d'affaires lorsqu'une personne capable de contracter entrepend volontairement sans mandat exprès ou tacite la gestion d'une affaire d'autrui. Cf Mazeaud-Mazeaud, op cit 641 (par 669): La gestion d'affaires est le fait d'une personne, le gérant ou 'negotiorum gestor', qui sans en avoir été chargée, s'occupe des affaires d'une autre personne, le géré ou maître de l'affaire.

523 See Carbonnier, op cit 452: Il y a gestion d'affaires ... toutes les fois qu'une personne (gérant d'affaires) accomplit un acte dans l'intérêt et pour le compte d'un tiers (maître de l'affaire, 'géré'), sans avoir reçu mandat de celui-ci. Cf Marty-Raynaud, op cit 302-303 (par 339).

524 See Mazeaud-Mazeaud op cit 641-642 (par 672) and 648-649 (par 691); Aubry-Rau, op cit 365 and 371; Marty-Raynaud, op cit 308 (par 346); Planiol-Ripert, op cit 5-6 (par 722), 9 (par 726) and 20-22(par 733); Colin-Capitant, op cit 735 (par 1295); Carbonnier, op cit 454-455.

525 The distinction is also made between actes juridiques and actes (or faits) materiels. See in general Carbonnier, op cit 453; Mazeaud-Mazeaud, op cit 643-644 (par 678-680); Aubry-Rau, op cit 363-364; Colin-Capitant, op cit 730-731 (par 1286); Planiol-Ripert, op cit 9-10; Marty-Raynaud 304 (par 340).

526 Mazeaud-Mazeaud, op cit 643 (par 677); Aubry-Rau, op cit 362-363.

527 Aubry-Rau, op cit 364-365; Colin-Capitant, op cit 729-730 (par 1285); Mazeaud-Mazeaud, op cit 642 (par 675).

528 Toullier, op cit 24 sqq.

529 Planiol-Ripert, op cit 4, make this clear from their definition of negotiorum gestio: Il y a gestion d'affaires quand une personne entreprend, spontanément et sans en être chargée, des actes utiles à une autre avec l'intention d'agir pour le compte d'autrui. Cf Marty-Raynaud op cit 304-305 (par 341: l'intention de gérer l'affaire d'autrui); Mazeaud-Mazeaud, op cit 642 (par 675) (they relate the animus-requirement to the volontairement of sec 1372 CC); Colin-Capitant, op cit 729 (par 1284); Carbonnier, op cit 453-454; Van Zyl, Saakwaarneming 102-103.

530 Planiol-Ripert, op cit 16 (par 731); Marty-Raynaud, op cit 307 (par 345).

531 Planiol-Ripert, op cit 17 (par 731) says, in this regard, that account should be taken of what the gestor could and should have known about the intentions and habits of the dominus. See also Marty-Raynaud, op cit 303 (par 340): il suffit que l'intervention du gérant soit utilement entreprise et conçue. Cette utilité ... doit être appreciée du moment où la gestion est entreprise. Cf idem, op cit 307 (par 345); Aubry-Rau, op cit 365-366, who emphasise the necessity of the intervention; Carbonnier, op cit 455. Colin-Capitant, op cit 731-732 (par 1288), point out that where the

gestio consists of a number of acts, the utility of the *gestio* is not established with reference to each separate act, but with reference to the *gestio* as a whole. Cf idem, op cit 734-735 (par 1295). Mazeaud-Mazeaud, op cit 644-645 (par 683-684), require, besides the *utilité* of the *gestio*, that it should not "exceed the limits of the act of administration" (*l'acte de gestion ne doit pas dépasser les limites de l'acte d'administration*), in the sense that the *gestor* should not go further than is necessary in managing the particular affair. This does not appear to be a requirement other than *utiliter coeptum*.

532 See in general on this obligation Mazeaud-Mazeaud, op cit 646-647 (par 687); Colin-Capitant, op cit 734 (par 1293); Aubry-Rau, op cit 367; Carbonnier, op cit 455; Marty-Raynaud, op cit 306 (par 344). Planiol-Ripert, op cit 15 (par 730) point out that the *gestor* is not responsible for non-continuation of the *gestio* if he has been prevented by *vis maior* (*force majeure*) from continuing therewith or if the continuation would cause the *gestor* himself considerable prejudice. This relates to the liability of the *gestor* in general - see below.

533 Planiol-Ripert, op cit 16 (par 730); Marty-Raynaud, op cit 307 (par 344); Aubry-Rau, op cit 367; Carbonnier, op cit 455; Colin-Capitant, op cit 734 (par 1293); Mazeaud-

Mazeaud, op cit 647 (par 687).

534 Art 1993. <u>Tout mandataire est tenu de rendre compte de sa gestion, et de faire raison au mandant de tout ce qu'il a reçu en vertu de sa procuration, quand même ce qu'il aurait reçu n'eut point été dû au mandant.</u>

535 See chapter 3.4 above. See further on the liability of the <u>gestor</u> in French law Mazeaud-Mazeaud, op cit 647 (par 687); Colin-Capitant, op cit 734 (par 1293); Aubry-Rau, op cit 367; Marty-Raynaud, op cit 306 (par 344); Planiol-Ripert, op cit 15-16 (par 730); Carbonnier, op cit 454.

536 Mazeaud-Mazeaud, op cit 648 (par 689), give the example of the father of a child who is treated in a clinic: if the director of the clinic should require the services of a specialist to assist in treating the child, the father is obligated towards the specialist directly for payment of his fees, so that the clinic in fact acted merely as an intermediary or agent in concluding an agreement between father and specialist.

537 Art. 2000. <u>Le mandant doit aussi indemniser le mandataire des pertes que celui-ci a essuyées à l'occasion de sa gestion, sans imprudence qui lui soit imputable.</u>

Art. 2001. <u>L'intérêt des avances faites par le mandataire lui est dû par le mandant, à dater du jour des avances constatées</u>.

538 See Marty-Raynaud, op cit 307 (par 345); Planiol-Ripert, op cit 17 (par 731), who point out that the professional should not have had an *intention libérale* (and hence have had the intention to claim reimbursement of expenses or of a fee).

539 Planiol-Ripert, op cit 18 (par 731). The action against the *dominus* prescribes after the lapse of thirty years.

540 See chapter 4 above and see in general on the French law relating to the rights of the *gestor* Aubry-Rau, op cit 368-370; Planiol-Ripert, op cit 16-18 (par 731); Colin-Capitant, op cit 734-735 (par 1294-1296); Marty-Raynaud, op cit 307-308 (par 345); Mazeaud-Mazeaud, op cit 648 (par 688-690); Carbonnier, op cit 455-456.

541 See Aubry-Rau, op cit 364; Planiol-Ripert, op cit 12-14 (par 729); Colin-Capitant, op cit 729 (par 1284) and 732-733 (par 1289); Marty-Raynaud, op cit 304-305 (par 341-342); Mazeaud-Mazeaud, op cit 642 (par 673) and 643 (par 676); Carbonnier, op cit 454; Van Zyl, *Saakwaarneming* 103-106.

542 Colin-Capitant, op cit 731 (par 1287). See further Aubry-Rau, op cit 365; Planiol-Ripert, op cit 9 (par 726); Marty-Raynaud, op cit 303 (par 340); Mazeaud-Mazeaud, op cit 642 (par 674); Carbonnier, op cit 454.

543 See Demolombe, op cit 83 sqq; Marcadé, op cit 282; Baudry-Lacantinerie, op cit 453 sq; Demogue, op cit 40 sqq; Aubry-Rau, op cit 365 n. 15; Planiol-Ripert, op cit 9 (par 726) n (1); Van Zyl, _Saakwaarneming_ 106-107.

544 See chapter 5.7 above.

545 Aubry-Rau, op cit 371-372; Planiol-Ripert, op cit 18-20 (par 732). Cf Colin-Capitant, op cit 730 (par 1285); Mazeaud-Mazeaud, op cit 646 (par 686); Van Zyl, _Saakwaarneming_ 107-108

546 See sec 1 of the _Ontwerp Joannes van der Linden_ of 1807/1808, secs 3488 and 3504 of the _Ontwerp Burgerlijk Wetboek_ of 1816 and sec 2977 of the _Ontwerp Burgerlijk Wetboek_ of 1820, referred to in Van Zyl, _Saakwaarneming_ 109-112. The draft of 1816 was also known as the _Ontwerp Kemper_. From 1809 to 1811 the _Wetboek Napoleon_ applied in the Netherlands, before it was superseded by the _Code civil_ as such until 1838, when the BW came

into operation. In 1830 a Burgerlijk Wetboek was promulgated for the kingdoms of Belgium and the Netherlands but, because of the breakaway in 1830, this code never came into operation. See in general on the early codes E van Dievoet, Het burgerlijk recht in België en in Nederland van 1800 tot 1940: de rechtsbronnen (1943); FFX Cerutti, "Het ontwerp burgerlijk wetboek van Joannes van der Linden (1807)" in Opstellen Hermesdorf (1965) 39 sqq; Bronnen van de Nederlandse codificatie sinds 1798, vol 1 (1968). On negotiorum gestio in general after the introduction of the BW, see J van Gigch, Dissertatio de negotiis gestis (1851); G Diephuis, Het Nederlandsche burgerlijk recht 11 (1888) 19 sqq; Tj Dijkstra, Iets over zaakwaarneming (1892); C W Opzoomer, Het Burgerlijk Wetboek verklaard 5/6 (1897) 193 sqq; H van Goudoever, Bijdragen tot de leer der zaakwaarneming (1905) (reviewed by M Polak in RM 26 (1907) 324-330 and G van Slooten in Themis 67 (1906) 635-646; N K F Land, W H de S Lohman, Verklaring van het Burgerlijk Wetboek 4 (1906) 277 sqq; G Verburg, De vrijwillige zaakwaarneming (1949) (reviewed by Kamphuisen in R M Themis (1954) 268 sqq); J Ph Suijling, Inleiding tot het burgerlijk recht 2 (1936) 301 sqq; S van Brakel, Leerboek van het Nederlandse verbintenissenrecht 1 (1948) 564 sqq; H F A Völlmar, Nederlands burgerlijk recht 3: verbintenissenrecht en bewijsrecht (1952) 281 sqq; L C Hofman, H Drion, K Wiersma, Het Nederlands verbintenissenrecht: de algemene leer der verbintenissen 2

(1959) 1 sqq; A Pitlo, Het verbintenissenrecht naar het Nederlands Burgerlijk Wetboek (1964) 202 sqq; N E Algra, Inleiding tot het Nederlands privaatrecht (1969) 241-243; D C Fokkema, J M J Chorus, E H Hondius, E Ch Lisser (edd), Introduction to Dutch Law for Foreign Lawyers (1978) 142-143 (par 22); C Asser, L E H Rutten, Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht 4.3: Verbintenissenrecht: de verbintenis uit de wet (1979) 1-16. Cf W de Gelder, De zaakwaarnemer, wet en regt (1853) (reviewed by A de Pinto in Themis 14 (1883) 555-582). See in general on the law of the Netherlands in comparative perspective Van Zyl, Beginsels van Regsvergelyking (1981) 105-119.

547 On the relevant portion of the draft code see the Toelichting (3e gedeelte, boek 6) (1961), which explains and motivates the formulation in the NBW. See also H Cohen Jehoram, "De zaakwaarneming in het Ontwerp Nieuw BW" in WPNR 1968 no 5014 sq.

548 Negotiorum gestio is defined in sec 6.4.1.1 NBW as follows: "Art. 6.4.1.1. Zaakwaarneming is het zich opzettelijk en op redelijke grond inlaten met de behartiging van eens anders belang, zonder de bevoegdheid daartoe aan een rechtshandeling of een elders in de wet geregelde rechtsverhouding te ontlenen." For present purposes

472/...

the NBW does not warrant further discussion, but see Van Zyl, *Saakwaarneming* 120-121.

549 Asser-Rutten, op cit 3. Cf Hofman-Drion-Wiersma, op cit 3; Pitlo, op cit 202; Algra, op cit 24; Biegman-Hartogh, op cit 95. *Zaakwaarneming* is discussed by the authorities as *verbintenissen uit de wet*, as opposed to obligations arising from consensual contracts.

550 The *animus*-requirement appears clearly from the word *opzettelijk* in sec 6.4.1.1 NBW (see n 548 above).

551 HR 16.1.1891 W 5984, dealt with in Van Zyl, *Saakwaarneming* 113-114.

552 Asser-Rutten, op cit 7, refer to this as the requirement *dat willens en wetens de belangen van een ander zijn behartigd*. They criticise the approach of the *Hoge Raad* in infering this requirement from the word *vrijwillig* of sec 1390 BW (cf the interpretation of *volontairement* in sec 1372 CC). Pitlo, op cit 203, suggests that it is not necessary that the *gestio* be undertaken *uit naasten liefde, want ook hier blijft het motief buiten beschouwing*. The motive of the *gestor* is thus immaterial, as appears from the *Hoge Raad* decision (HR 24.1.1902, W 7714)that the person who extinguishes a fire in his neighbour's house in order to

save his own, is in fact a *gestor* in the ordinary sense. The correctness of this decision is doubtful, since the *gestor* could not, under such circumstances, have had the *animus negotia aliena gerendi*. There should, however, be no objection to granting him an extended *actio negotiorum gestorum* on the ground of unjustified enrichment. Cf Asser-Rutten, op cit 4: *Of de gestor werd bewogen door menslievendheid, door eigenbelang, door baat- of eerzucht of door een ander drijfveer, zal in het algemeen van geen belang zijn*.

553 Asser-Rutten, op cit 4-5: *Het waarnemen van eens anders zaak betekent het behartigen van iemands belangen voor diens rekening en risico*.

554 Asser-Rutten, op cit 4-6. At 5-6 they point out that it is doubtful whether the *gestio* may include becoming involved in litigation for the benefit of the *dominus*. Cf Pitlo, op cit 202-203; Algra, op cit 241-242; Biegman-Hartogh, op cit 88. The *Hoge Raad* has decided clearly that *negotiorum gestio* is present only when a person, without authority, manages the affairs of another with the intention of serving such other person's interests. See HR 28.1.1919 (N J 1919 p 353) and HR 27.3.1924 (NJ 1924 p 656).

555 Pitlo, op cit 203; Asser-Rutten, op cit 6-7 and 10.

At 7 they point out that giving assistance to a person whose life is in danger is a legal obligation and not a deed of _negotiorum gestio_. Equity requires, however, that even the life-saver should be compensated for his services. Cf Biegman-Hartogh, op cit 88-91 (with reference also to German and French law); Algra, op cit 242: _Van zaakwaarneming kan slechts worden gesproken, wanneer het handelen door de zaakwaarnemer géén uitvloeisel was van een contractuele of wettelijke verplichting_.

556 This coincides with the _bien administrée_ of sec 1375 CC.

557 Asser-Rutten, op cit 8: _Het stellen van deze eis lijkt nodig, teneinde een te grote bemoeizucht en een zich indringen in de zaken van een ander te weren_. Cf Biegman-Hartogh, op cit 91-94.

558 Asser-Rutten, loc cit.

559 At 9 Asser-Rutten say that the judge should decide _in concreto_ whether this requirement has been complied with and also whether it is in conflict with the _boni mores_ or with _maatschappelijk betamende zorgvuldigheid_. Cf Pitlo, op cit 204-205: _Of een zaakwaarneming behoorlijk is geweest, moet men afmeten naar de omstan-_

475/...

digheden waaronder zij is ondernomen. In sec 6.4.1.1 NBW (quoted in n 548 above), the utiliter requirement is likewise described as op redelijke grond. Sec 6.4.1.5 NBW states, however, that gestio undertaken without such "reasonable ground" can be ratified by the dominus.

560 Pitlo, op cit 203, with reference to HR 2.5.1935, NJ 1935 p 1461.

561 See Pitlo, op cit 205; Asser-Rutten, op cit 15. Cf sec 6.4.1.3 NBW as amended.

562 See Asser-Rutten, op cit 12-14; Pitlo, op cit 204; Algra, op cit 243. Asser-Rutten, op cit 13, describes the gestor's standard of liability thus: De zaakwaarnemer sal de belangen van de dominus moeten behartigen met de zorg die naar verkeersopvatting van een nauwgezet zaakwaarnemer kan worden verwacht, waarbij rekening moet worden gehouden met de omstandigheden van het geval. Of aan deze maatstaf is voldaan zal de rechter in elk geval afzonderlijk moeten beoordelen. This diligence of the gestor requires that he should inform the dominus as soon as possible about the gestio, so that the latter may take the necessary steps himself. The authors cite no authority for this facet of the gestor's liability, however, and it does not appear justified by the relevant sections of the BW. Cf sec 6.4.1.2

NBW, which stipulates that the gestor should exercise de nodige zorg. The said sec similarly provides that the gestor should continue the gestio as far as may reasonably be expected of him.

563 Sec 1839 BW. De lasthebber is verpligt rekenschap te geven van hetgeen hij verrigt heeft, en aan den lastgever verantwoording te doen van al hetgeen hij uit krachte van zijne volmacht ontvangen heeft, al ware het ook dat het ontvangene niet aan den lastgever mogt zijn verschuldigd geweest. This coincides exactly with sec 1993 CC quoted in n 534 above. See further Asser-Rutten, op cit 14 and 16; Pitlo, op cit 204; Algra, op cit 243.

564 See in general on the duties of the dominus arising from the rights of the gestor Asser-Rutten, op cit 14-16, who point out that, on the basis of sec 1393 BW, the gestor should also be allowed to claim lost interest. Cf Pitlo, op cit 205.

565 Pitlo, loc cit, with reference to HR 10.12.1948, NJ 1949 p 122. See also Asser-Rutten, op cit 15, who refer to sec 1849 BW as the ratio for the said decision of the Hoge Raad. In accordance with sec 1390

BW, the said sec 1849 BW should indeed be applicable to the *gestor*. It reads thus: *De lasthebber heeft het regt om hetgeen hij van den lastgever in handen heeft zoo lang terug te houden, tot dat hem alles betaald is hetwelk hij ten gevolge der lasgeving te vorderen heeft.*

566 HR 30.1.1959, NJ 1959 no 548, p 1140. This case was confirmed by the HR on 18.4.1969, NJ 1969 no 336.

567 Art. 6.4.3.1: *Hij die ongerechtvaardigd is verrijkt ten koste van een ander, is verplicht, voor zover dit redelijk is diens schade te vergoeden tot het bedrag van zijn verrijking. Voor zover de verrijking is verminderd in de periode gedurende welke de verrijkte redelijkerwijze met een verplichting tot vergoeding van de schade geen rekening behoefde te houden, wordt zij niet medegerekend.*

568 See in general on unjustified enrichment in Dutch law C J Pekelharing, *Terugvordering van vermogensvermeerdering zonder oorzaak naar Nederlandsch recht* (1897); W T van der Leij, *Ongerechtvaardigde verrijking; vergelijking van het nieuwere Duitsche met het Nederlandsche burgerlijk recht* (1910); M H Bregstein, *Ongegronde vermogensvermeerdering* (1927); G E Langemeijer "Prognostica over ongerechtvaardigde verrijking" in *Opstellen Beek-*

huis (1969) 155 sqq; A M Biegman-Hartogh, Ongegronde verrijking (1971); De Vos, Verrykingsaanspreeklikheid 130-135; Van Zyl, Saakwaarneming 109-121. On the historical background, and more particularly on the Roman origins of negotiorum gestio in the law of the Netherlands, see R Feenstra, Romeinsrechtelijke grondslagen van het Nederlands privaatrecht (1980) 165-173 (par 276-290), where negotiorum gestio and the various condictiones are dealt with as actions arising from unjustified enrichment.

569 Biegman-Hartogh, op cit 88-105 at 105: Lijdt de would-be gestor zelf schade, dan is dit jammer voor hem; hij heeft zijn schade aan zichzelf te wijten en behoort deze m.i. niet op een ander te kunnen verhalen. Cf idem, op cit 94; Algra, op cit 242.

570 See chapters 5.3, 5.4 and 5.5 above.

571 Asser-Rutten, op cit 10. The example they give is where the dominus is intent on suicide and the gestor is justified in ignoring his prohibition to give assistance. It is also clear that the dominus must be of sound mind: should he not be, his prohibition may also be ignored.

572 Pitlo, op cit 203: Men kan volkomen juist handelen

door een eigenwys mens tegen zichzelf te beschermen en hem zaken uit handen te nemen, die hij minder goed kan beoordelen. Maar wij moeten uit respect door de medemens oppassen, dat wij ons niet uit eigengereidheid aan hem opdringen.

573 G Verburg, De vrijwillige zaakwaarneming (1949) 82 sqq; Bregstein, op cit 266 and 286 n 3; Hofman-Drion-Wiersma, op cit 11 sq.

574 H van Goudoever, Bijdragen tot de leer der zaakwaarneming (1905) xxxvi sq. Cf Van der Leij, op cit 163. See further J van Gigch, Dissertatio de negotiis gestis (1851) 15-16; L J H Bouman, "Burgerlyk regt en regtsvordering. Heeft de negotiorum gestor eene regtsvordering om alle nuttige en noodzakelijke uitgaven te vergoeden, tegen dengene, wiens zaken hij tegen diens verbod heeft waargenomen?" in Themis 19 (1858) 20-32; H W M van Helten, "Zaakwaarneming tegen den wil van den belanghebbende" in RM 27 (1908) 569-590. He refers, at 571, to a number of decisions in which the action was not given, but suggests, at 589-590, that sec 1393 BW should be amplified by the insertion of a second clause which should read as follows: Indien de waarneming geschiedde in strijd met den wil van den belanghebbende en zulks den waarnemer bekend was of moest wezen, geldt de bepaling van het eerste lid slechts voor de gevallen, dat zonder de waarneming eene op den

<u>belanghebbende rustende verplichting niet behoorlijk zou zijn vervuld, dat het verbod van den belanghebbende in strijd was met de goede zeden of dat de belanghebbende volgens de wet onbekwaam was om zijne zaken te behartigen.</u> See also Van Zyl, <u>Saakwaarneming</u> 116-117.

575 See Verburg, op cit 55; Bregstein, op cit 280 sqq; Pitlo, op cit 203: <u>Terwijl een actie uit zaakwaarneming hier niet ter sprake komt, is het niet ondenkbaar, dat mij hier een actie uit ongerechtvaardigde verrijking ... ten dienste staat.</u> Cf Van Zyl, <u>Saakwaarneming</u> 115; Biegman-Hartogh, op cit 95-105.

576 Asser-Rutten, op cit 11. See also J C van Oven, "Pleegkind, zaakwaarneming en condictie" in NJB 13 (1938) 4-11; idem, "Aannemen van kinderen" in NJB 13 (1938) 43-44; idem, "Handelingen door den pupil zonder bijstand van den voogd verricht" in THRHR 3 (1939) 87 sqq.

577 HR 28.1. 1926, NJ 1926 p 581; HR 19.2.1931, NJ 1931 p 1501.

578 See Verburg, op cit 115 sq, 131 and 137; Bregstein, op cit 217 sq (criticised by De Vos, <u>Verrykingsaanspreeklikheid</u> 132-135); Van Zyl, <u>Saakwaarneming</u> 117-119; Biegman-Hartogh, op cit 101-102. Cf H C F Schoordijk,

Beschouwingen over drie-partijen-verhoudingen van obligatoire aard (1958); Pitlo, op cit 11-12.

579 Prior to the BGB, the most important codification in Germany was the Prussian Allgemeines Landrecht für die preussischen Staaten (ALR) of 1794, which remained in force in a large part of Germany until 1900, when it was replaced by the BGB. See in regard to the Prussian law of this period C G Suarez, Amtliche Vorträge bei der Schlussrevision des Allgemeinen Landrechts (1833) and H Dernburg, Lehrbuch des preussischen Privatrechts (1875-1880). The BGB was preceded by a draft and motivation, known as the Entwurf eines bürgerliches Gesetzbüches für das deutsche Reich (1888) and Motive zu den Entwurfe eines bürgerlichen Gesetzbuches für das deutsche Reich (1888), vol 2 of which deals with the law relating to obligations (Recht der Schuldverhältnissen). See in general on German law E J Cohn, Manual of German Law 1: General Introduction; Civil Law (1968); Van Zyl, Beginsels van Regsvergelyking (1981) 131-148.

580 See in general on negotiorum gestio (including its relationship with unjustified enrichment) in German law O Gierke, Deutsches Privatrecht 3 (1917) 989 sqq (par 216); L Ennecerus, H Lehmann, Lehrbuch des bürgerlichen Rechts 2 (1958) 697 sqq; Das Bürgerliche Gesetzbuch (BGB-RGRK) (1959) 705-724; J Esser, Schuldrecht: All-

gemeiner und besonderer Teil (1960) 752 sqq; Th Soergel, W Siebert, *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 2: *Einzelne Schuldverhältnisse* (1962) 673 sqq; W Erman, *Handkommentar zum bürgerlichen Gesetzbuch* 1 (1967) 1455 sqq; *Bürgerliches Gesetzbuch* (ed O Mühle) 3: *Schuldrecht* 2 (1969) 386-408; K Larenz, *Lehrbuch des Schuldrechts* 2: *Besonderer Teil* (1972) 267-279 (par 57); W Fikentscher, *Schuldrecht* (1976) 495-512 (par 83); Palandt, *Bürgerliches Gesetzbuch* (1975) 647-653 (par 677-687); G K Schmelzeisen, *Bürgerliches Recht* (1975) 189-194 (par 47); J von Staudinger, *Kommentar zur Bürgerlichen Gesetzbuch* 2: *Recht der Schuldverhältnisse* (1980) 116-185. See further Wächter, "Beiträge zur Lehre von der negotiorum gestio" in Arch civ Prax 20 (1837) 337-361; E Chambon, *Die negotiorum gestio. Eine civilistische Abhandlung* (1848); E Rühstrat, "Beiträge zur Lehre von der negotiorum gestio" in Arch civ Prax 32 (1849) 173-199; 33 (1850) 25-42, 213-241; 34 (1851) 59-84; H Dankwardt, *Die negotiorum gestio* (1855); F O Köllner, *Die Grundzüge der obligatio negotiorum gestio* (1856); Korte, "Geschäftsführung ohne Auftrag und nützliche Verwendung" in Beiträge zur Erläuterung des preussischen Rechts durch Theorie und Praxis 1 (1857) 365 sqq; E Zimmermann, *Aechte und unächte negotiorum gestio* (1872); E von Monroy, *Die vollmachtlose Ausübung fremder Vermögensrechte* (1878);

A Sturm, *Das negotium utiliter gestum* (1878); M Wlassak, *Zur Geschichte der negotiorum gestio* (1879); E Rühstrat, "Ueber die Klagen auf Erstattung von Impensen und über generelle negotiorum gestio" in Arch civ Prax 64 (1881) 110-150; J Kohler, "Die Menschenhilfe im Privatrecht" in Jher Jahrb 25 (1887) 1 sqq; A von Tuhr, *Actio de in rem verso. Zugleich ein Beitrag zur Lehre von der Geschäftsführung* (1895); W T van der Leij, *Ongerechtvaardigde verrijking; vergelijking van het nieuwere Duitsche met het Nederlandsche burgerlijk recht* (1910); E Swoboda, *Bereicherung, Geschäftsführung ohne Auftrag, versio in rem nach österreichischem Recht mit Ausblicken in das deutsche Recht* (1919); W Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (1934); A Ehrhardt, "Zum objektiven Tatbestand der negotiorum gestio" in Freiburger rechtsgeschichtlicher Abhandlungen 5 (1935) 1 sqq; W Spies, *Geschäftsführung ohne Auftrag bei gleichzeitiger Wahrnehmung eigener oder dritter Interessen unter besonderer Berücksichtigung des Falles, dass der gestor kraft privaten oder öffentlichen Rechts zur Geschäftsbesorgung verpflichtet ist* (1949); E von Caemmer, "Bereicherung und unerlaubte Handlung" in *Festschrift Rabel* 1 (1953) 33 sqq; K Bertzel, "Der Notgeschäftsführer als Repräsentant des Geschäftsherrn" in Arch civ Prax 158 (1959-1960) 107-150; J P Dawson, "Negotiorum Gestio: The Altruistic Intermeddler" in Harvard Law Review 74 (1960-1961) 819-865, 1073-1129; B Nicholas, "Unjustified Enrichment

in the Civil Law and Louisiana Law" in Tulane Law Review 36 (1962) 605-646, 37 (1962-1963) 49-66; B Kupisch, Die Versionsklage (1965) 114 sqq; D König, Der Bereicherungsanspruch gegen den Drittempfänger oder Vertragsleistung nach französischem Recht (1967) (with numerous references to German law); R Schmitt, Die Subsidiarität der Bereicherungsansprüche (1969); K L Batsch, "Aufwendungsersatzanspruch und Schadenersatzpflicht des Geschäftsführers im Falle berechtigter und unberechtigter Geschäftsführung ohne Auftrag" in Arch civ Prax 171 (1971) 218-233; K Genius, "Risikohaftung des Geschäftsherrn" in Arch civ Prax 173 (1973) 481-526; Ch Wollschläger, Die Geschäftsführung ohne Auftrag. Theorie und Rechtsprechung (1967); W Schubert, "Der Tatbestand der Geschäftsführung ohne Auftrag" in Arch civ Prax 178 (1978) 425-455; H Honsell, "Die Risikohaftung des Geschäftsherrn" in Festgabe Von Lübtow (1980) 485-500; M Wolff, "Zur Anwendung der Geschäftsführung ohne Auftrag neben Leistungsbeziehungen" in Festschrift Mühl (1981) 703-720. Cf Rubin, Unauthorised Administration 83-87; De Vos, Verrykingsaanspreeklikheid 109-123; Van Zyl, Saakwaarneming 124-131.

581 Cf Larenz, op cit 269 and 277. Fikentscher, op cit 502-511, again distinguishes between echte Geschäftsführung ohne Auftrag (Fremdgeschäftsführung mit Fremdgeschaftsführungswillen) and Fremdgeschäftsführung mit Eigengeschäftsführungswillen. The former is subdivided

into <u>berechtigte Geschäftsführung ohne Auftrag</u> and <u>unberechtigte Geschäftsführung ohne Auftrag</u>, whereas the latter appears in the forms of <u>vermeintliche Geschäftsführung ohne Auftrag</u> and <u>unechte Geschäftsführung ohne Auftrag</u>. Von Staudinger, op cit, distinguishes between <u>berechtigte</u> and <u>unberechtigte Geschäftsführung ohne Auftrag</u> on the one hand and <u>irrtümliche</u> and <u>böswillige Eigengeschäftsführung</u> on the other. For present purposes these dogmatic distinctions are of no particular importance.

582 Von Staudinger, op cit 127. The examples given by Fikentscher, op cit 496, are: payment of another's debt (eg taxes), treatment by a medical doctor of an unconscious patient, extinguishing a fire in a neighbour's house (even where the main purpose of the <u>gestor</u> is to protect his own house), feeding and caring for stray pets, renewing a neighbour's fire insurance or storing the goods of another in times of emergency. The motive of the <u>gestor</u> may vary from altruism, based on friendship, piety, pity or humanitarianism, to his own selfish needs or desires. The motive does not, however, necessarily relate to the intention of the <u>gestor</u>.

583 Larenz, op cit 269; Palandt, op cit 648 (ad sec 677 n 2(e)). The <u>gestor</u> must not be under any duty to render service or services which form the subject-matter

486/...

of the <u>gestio</u>, such as would be the case where the <u>gestor</u> is obliged to do so by virtue of his relationship with the <u>dominus</u> (employer-employee, father-child in respect of maintenance and the like) or in terms of a court order. The mistaken belief that he is obliged to carry out the <u>gestio</u> does not affect the <u>gestor</u>'s rights, as is the case where the <u>gestor</u> is mistaken as to the identity of the <u>dominus</u> (sec 686 BGB).

584 Von Staudinger, op cit 134: <u>Die Übernahme des Geschäftsführung ist die Kundgabe des Willens, mit der Geschäftsbesorgung zu beginnen</u>.

585 Idem, op cit 137: <u>Es genügt, dass das Geschäft nützlich begonnen (utiliter coeptum) ist. Es kommt nicht darauf an, ob der durch die Übernahme der Geschäftsführung beabsichtigte Erfolg eingetreten ist oder nicht, ob also die Geschäftsführung in ihrem Ergebnis für den Geschäftsherrn erfolgreich gewesen ist</u>.

586 Idem, op cit 136-137: <u>Der Begriff des mutmasslichen Willens ist im objektiven Sinne zu verstehen. Der präsumtive (hypothetische), nicht der vom Geschäftsführer vorausgesetzte putative Wille ist massgebend ... Es ist daher objektiv festzustellen, ob der Geschäftsherr bei Berücksichtigung aller Umstände und seiner besonderen</u>

Lage, insbesondere auch nach seinen Vermögensverhältnissen, die Geschäftsführung gewollt haben würde. Dabei kann der Richter zunächst von dem vernünftigen Willen eines normalen Rechtsgenossen in der Lage des Geschäftsherrn ausgehen. Entspricht die Übernahme der Geschäftsführung dem Interesse des Geschäftsherrn, ist sie also für ihn objektiv zweckmässig und nützlich, so wird sie regelmässig auch dem mutmasslichen Willen entsprechen, wenn nicht ausnahmsweise Anhaltspunkte für einen entgegenstehenden Willen des Geschäftsherrn vorliegen. Der mutmassliche Wille ist also in der Regel der dem wohlverstandenen Interesse des Geschäftsherrn entsprechende Wille. Cf Larenz, op cit 273, who suggests that subjective aspects may be taken into account, eg where the dominus had previously expressed his views on the subject. The presumed will is then established unter Beachtung auch der dafür massgeblichen subjektiven Momente.

587 Von Staudinger, op cit 136: Der Wille des Geschäftsherrn geht dem Interesse vor. Rubin, Unauthorised Administration 85-86 wrongly suggests the reverse. The example he gives relates to a case where the expressed wishes of the dominus may, in terms of section 679 BGB, be ignored.

588 See chapter 2.3 above. On the German requirement in regard to the intention of the gestor see Enneccerus-

Lehmann, op cit 698 sqq; Soergel-Siebert, op cit 673 and 684; Erman, op cit 1455; Spies, op cit 8 sqq and 15 sqq; Von Caemmerer, op cit 362 n 114 and 374 n 162; Palandt, op cit 648 (par 677 n 2(b)): Nötig ist das Bewusstsein, für einen anderen zu handeln und ein daraufgerichteter Wille (the so-called Geschäftsführungsabsicht); Larenz, op cit 269 (the gestio must be bewusst and gewillt); Fikentscher, op cit 502: Der Geschäftsführer muss wissen, dass er ein fremdes Geschäft besorgt ... und muss die Fremdgeschäftsführung wollen ...; Von Staudinger, op cit 128 (mit dem Willen ... die Interessen eines anderen wahrzunehmen) and 130-132. The latter points out that the gestor's awareness that he is managing the affairs of another (Geschäftsführungsbewusstsein) is normally presumed, as is also the intention to manage the affairs of another as those of another, if the gestio is prompted by a spontaneous desire to assist another. The intention is then equated with the intention to claim compensation for the gestio (animus recipiendi) and is a reflection of the intention to execute socially acceptable acts of altruism: Sie begnügt sich also insoweit mit dem Geschäftsführungsbewusstsein, das überdies vermutet wird ... Der Wille das fremde Geschäft als fremdes zu besorgen wird auch dann vermutet, wenn es sich um spontane Akte der Menschenhilfe handelt ... Den Geschäftsführungswillen setzte das RG ... mit der Absicht gleich, sich beim Schädiger zu erholen (animus

recipiendi) ... Für den Geschäftsführungswillen kann daher auch nicht das blosse Bewusstsein genügen, ein fremdes Geschäft als fremdes zu führen. Der für eine berechtigte Geschäftsführung ohne Auftrag erforderliche Geschäftsführungswille ist viel mehr nur dann gegeben, wenn jemand in fremdnützziger Absicht für einen anderen handelt. Ob das der Fall ist, entscheidet sich nach dem sozialen Sinn der Tätigkeit.

589 Von Staudinger, op cit 171 (ad sec 685 n II.2): Der Beweis für den Verzichtswillen des Geschäftsführers obliegt ... dem Geschäftsherrn. Cf Palandt, op cit 652 (ad sec 685 n) who refers in this regard to the Schenkungsabsicht.

590 Fikentscher, op cit 504: Hier muss es genügen, wenn der Geschäftsführer objektiv interessemässig handelt. In solchen Eilfällen, kann dem Geschäftsführer nicht zugemutet werden, das je besondere Interesse des Geschäftsherrn zu erforschen. Cf Palandt, op cit 649 (ad sec 677 n 4(e)).

591 Larenz, op cit 276; Fikentscher, op cit 504; Von Staudinger, op cit 138 (par 35) and 143-144 (ad sec 677 n II.2(a)).

592 Von Staudinger, op cit 159 (ad sec 681 n III.7) suggests that this is eine etwaige ausnahmsweise Fortführungs-

verpflichtung das Geschäftsführers ... als Notbesorgungspflicht.

593 Palandt, op cit 649 (ad sec 677 n 4(f)) refers in this regard to sec 673 BGB which deals with the death of the mandatary: the mandate terminates on the death of the mandatary, but the heirs have the duty to inform the mandator without delay and, if any danger should result from the delay, they must continue with the execution of the mandate until the mandator is able to make other arrangements. In the meantime the mandate is considered to continue. It would appear that sec 672 BGB, which deals on the same basis with the death of the mandator, should, mutatis mutandis, apply to the death of the dominus.

594 666. Der Beauftragte ist verpflichtet, dem Auftraggeber die erforderlichen Nachrichten zu geben, auf Verlangen über den Stand des Geschäfts auskunft zu erteilen und nach der Ausführung des Auftrags Rechenschaft abzulegen. 667. Der Beauftragte ist verpflichtet, dem Auftraggeber alles, was er zur Ausführung des Auftrags erhält und was er aus der Geschäftsbesorgung erlangt, herauszugeben. 668. Verwendet der Beauftragte Geld für sich, das er dem Auftraggeber herauszugeben oder für ihn zu verwenden hat, so ist er verpflichtet, es von der Zeit der Verwendung an zu verzinsen. See further Von Staudinger, op cit 159 (ad

sec 681 n II,2-4).

595 276. (1) Der Schuldner hat, sofern nicht ein anderes bestimmt ist, Vorsatz und Fahrlassigkeit zu vertreten. Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt ausser acht lässt. Die Vorschriften der §§ 827, 828 finden Anwendung. (2) Die Haftung wegen Vorsatzes kann dem Schuldner nicht im voraus erlassen werden. It is clear from this that the gestor is liable for dolus and culpa levissima (culpa levis in abstracto). Sec 277 BGB provides for Sorgfalt in eigenen Angelegenheiten, which is the diligentia quam suis rebus of the ius commune and gives rise to culpa levis in concreto. Secs 827 and 828 BGB, referred to in sec 276(1) quoted above, refer to the exclusion or diminution of liability under certain circumstances.

596 In terms of sec 284 read with sec 848 BGB. See further Van Staudinger, op cit 145 (ad sec 678 n I.1) who refers to the Risiko des Fehlschlags which falls upon the gestor im Rahmen der adäquaten Kausalität when the gestor is unberechtigt and had the duty to undertake (Übernehmen) the gestio.

597 Fikentscher, op cit 504: Die Gefahr muss nicht objek-

tiv gegeben sein, es genugt, wenn der Geschäftsführer dies irrtümlich schuldloss (also nach sorgfältiger Prüfung der Situation) annimmt. Cf Von Staudinger, op cit 155 (ad sec 680 n II); Larenz, op cit 275.

598 This appears from sec 670 BGB, regarding the right of the mandatary to be reimbursed for expenses: Macht der Beauftragte zum Zwecke der Ausführung des Auftrags Aufwendungen, die er den Umständen nach für erforderlich halten darf, so ist der Auftraggeber zum Ersatze verpflichtet. It would appear from this provision that the gestor has no claim for merely useful expenses and certainly not for luxury-expenses.

599 Fikentscher, op cit 505.

600 Von Staudinger, op cit 163 (ad sec 683 n II.2a). This appears to stand in contrast to the position in French and Dutch law: sec 1375 CC and sec 1393 BW respectively require the dominus to fulfil the obligations arising from agreements conducted in the name of the dominus and to indemnify the gestor in respect of obligations that the gestor has personally contracted.

601 Fikentscher, op 505; Larenz, op cit 277; Von Staudinger, op cit 164 (ad sec 683 n II.5c).

602 Lorenz, op cit 277; Fikentscher, op cit 505; Palandt,

op cit 651 (ad sec 683 n 4); Von Staudinger, op cit 164 (ad sec 683 n II.2a).

603 This right arises from the provisions of secs 273 and 274 BGB. See Von Staudinger, op cit 165 (ad sec 683 n II.7e) and 168 (ad sec 684 n I.5).

604 The duty of the dominus may emanate from public or private law and is limited to a legal duty - a moral duty is not sufficient, as Palandt, op cit 650 (ad sec 679 n 2), suggests. See Fikentscher, op cit 503; Larenz, op cit 274: eine lediglich moralische Pflicht, z.B. der Dankbarkeit oder der Pietät, genügt ... nicht. Cf Von Staudinger, op cit 149 (ad sec 679 n II.1a).

605 See chapters 5.5 and 2.4 above. See further on sec 684 BGB and the so-called unberechtigte Geschäftsführung Soergel-Siebert, op cit 677 sqq; Esser, op cit 757 sq. Larenz, op cit 277-278, points out that such a gestio is wrongful and exposes the gestor to a delictual action for damages. For the rest he is liable for all forms of damages, including those caused by wilful intent, negligence in whatever form, and casus fortuitus (Zufall). Cf Fikentscher, op cit 507; Von Staudinger, op cit 166-167 (ad sec 684 n I.1).

606 This form of gestio is variously termed unechte Geschäftsführung (Larenz, op cit 278; Fikentscher, op cit

278), _unerlaubte Eigengeschäftsführung_ (Palandt, op cit 654 ad sec 687 n 2) or _böswillige Eigengeschäftsführung_ (Von Staudinger, op cit 178 ad sec 687 n III). Larenz, loc cit, points out that such _gestio_ is wrongful and may cause the _gestor_ to be delictually liable for damages. See further Ennecerus-Lehmann, op cit 697 sqq; Erman, op cit 1455 sqq; Soergel-Siebert, op cit 686; Van Zyl, _Saakwaarneming_ 128-129. The enrichment action which is granted in these cases is the general enrichment action of sec 812 BGB, which reads: (1) _Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt. (2) Als Leistung gilt auch die durch Vertrag erfolgte Anerkennung des Bestehens oder des Nichtbestehens eines Schuldverhältnisses._ Unjustified enrichment (_ungerechtfertigte Bereicherung_) is dealt with in secs 812-822 BGB. See De Vos, _Verrykingsaanspreeklikheid_ 108-123. The existence of a general enrichment action diminishes the need to recognise the extended _actio negotiorum gestorum_ in German law.

607 See chapter 5.4 above.

608 This appears from the use of terms such as _irrtümliche_

Eigengeschäftsführung (Palandt, op cit 652 and sec 687 n 1; Von Staudinger, op cit 176 n II) and vermeintliche Geschäftsführung ohne Auftrag (Fikentscher, op cit 508) to describe this form of gestio.

609 See Ennecerus-Lehmann, op cit 697 sq; Erman, op cit 1459 sq; Larenz, op cit 279; Fikentscher, op cit 508; Palandt, op cit 652 (ad sec 687 n 1); Von Staudinger, op cit 176-178 (ad sec 687 n II).

610 Von Staudinger, op cit 162 (ad sec 682 n II.5). Cf Das Bürgerliche Gesetzbuch (RGRK) 715 and sec 682 n 1; Van Zyl, Saakwaarneming 129.

611 See the discussion in chapter 5.7 above and see further Van Zyl, Saakwaarneming 129-131, where the relevant authorities are dealt with.

612 In contrast with the old Codice civile of 1865, which was virtually a translation of the French Code civil of 1804, the Codice civile of 1942, although still exuding the French legal aura, was influenced by the German BGB and the Swiss Zivilgesetzbuch (ZGB). See in general on Italian law Van Zyl, Beginsels van Regsvergelyking (1981) 119-131, and on the old code of 1865 see G Sicoré, Il codice civile italiano e la giurisprudenza della corti di cassazione e d'appello del regno dal 1866 a tutto il 1873 (1874). The relevant portion of the old code in

regard to _negotiorum gestio_ and its relation with unjustified enrichment is dealt with by Van Zyl, _Saakwaarneming_ 121-122.

613 See in general on _negotiorum gestio_ in Italian law Cogliolo, _Trattato teorico pratico dell'amministrazione degli affari altrui_ (1890); S Riccobono, "La gestione degli affari altrui e l'azione di arricchimento nel diritto moderno" in Rivista del diritto commerciale 15 (1917) 369 sqq; idem, "Dal diritto romano classico al diritto moderno" in Annali Palermo 3/4 (1917) 244 sqq, 529 sqq; C Ferrini, "La 'negotiorum gestio' a favore di un incapace" in _Opere Ferrini_ 3 (1929) 235-241; De Lucca, _Teoria del quasi-contratto_ (1929); G Pacchioni, _Della gestione degli affari altrui secondo il diritto romano civile e commerciale_ (1935); Scaduto-Cascia, "Gestione d'affari altrui" in _Nuovo digesto italiano_ 6 (1938) 235 sqq; Auricchio, "Contributo alla teoria della gestione rappresentativa" in _Studi Urbinati_ (1956-1957); S Solazzi, "Sulla gestione per conto d'altrui" in _Scritti Solazzi_ 2 (1957) 527 sqq; De Semo, _La gestione di affari altrui_ (1958); A Scialoja, G Branca, _Commentario del Codice Civile_, 4: _delle obligazioni, art 1992-2059_ (1960) (esp 2028-2032); B Biondi, "Gestione di affari altrui" in _Novissimo digesto italiano_ 7 (1961) 810 sqq; S Ferrari, _Gestione d'affari altrui e rappresentanza_ (1962); M Rotondi, _Istituzioni di diritto privato_ (1965) 414-423; De Semo, "Gestione

di affari altrui (diritto vigente)" in _Novissimo digesto italiano_ 7 (1965) 812 sqq; A Trabucchi, _Istituzioni di diritto civile_ (1968) 731-739; G Nicosia, "Gestione di affari altrui" in _Enciclopedia del diritto_ (1969) 628 sqq; S Ferrari, "Gestione di affari altrui" in _Enciclopedia del diritto_ 18 (1969) 644 sqq; Van Zyl, _Saakwaarneming_ 121-124.

614 In the old _Codice civile_ of 1865 _negotiorum gestio_ was dealt with as a _quasi contratto_, in the Roman legal tradition. See Rotondi, op cit 414-415; Trabucchi, op cit 731 n 1.

615 Trabucchi, op cit 731: _A nessuno è lecito ingerirsi nell' altrui sfera d'interessi: nemo debet se immiscere rei ad se non pertinenti_ - an Italian expression of the well-known Roman _dictum_ of D 50.17.36. He points out (at 731-732) that, during the turbulent times surrounding the Second World War, when people were frequently compelled to be away from their affairs, the usefulness of _negotiorum gestio_ was realised, on the same grounds that prompted Ulpian to say (in D 3.5.1): _hoc edictum necessarium est, quoniam magna utilitas absentium versatur_.

616 Rotondi, op cit 416.

617 Rotondi, loc cit: _il fatto della gestione_.

618 Trabucchi, op cit 731: _deve trattarsi di un'attività lecita_.

619 This is the meaning of _senza esservi obligato_ in sec 2028. Rotondi, op cit 416, puts it that there should be _la mancanza di una investitura a gerire un affare, derivante dalla volontà dell' interessato o dalla legge_.

620 Sec 1141 of the _Codice civile_ of 1865 used the word _volontariemente_, a translation of _volontairement_ of sec 1372 of the French _Code civil_, which is likewise reflected in the _vrijwillig_ of the Dutch BW (sec 1390). Rotondi, op cit 416 describes this requirement as _l'intenzione di gerire un affare altrui_ (_animus aliena negotia gerendi_) whereas Trabucchi, op cit 732 expresses it thus: _il gestore deve avere coscienza che si tratta di affare altrui_ (_animus aliena negotia gerendi_). See further Scialoja-Branca, op cit 210, 216 sqq and 220; Biondi, in _Novissimo digesto italiano_ 7 p 812 sq.

621 Trabucchi, loc cit, says that _scientemente_ implies _con la coscienza e la volontà di agire per altri_.

622 Rotondi, op cit 417, is patently wrong where he suggests that the _dominus_ is liable towards the _gestor_

only insofar as the *gestio* has had a "useful result" (*egli cioè è tenuto entro i limiti in cui la gestione sia risultata utile*).

623 Trabucchi, op cit 732, with reference to the Roman examples of the sick slave which is tended, yet dies, or the burning house which the *gestor* attempts to save, but fails (D 3.5.9.1), expresses his view in the following manner: *La gestione, dice l'art. 2031, dev'essere utilmente iniziata; non conta se per circostanze sopravvenute la gestione si mostrerà più dannosa che utile al dominus, sul quale, in sostanza, ricade il rischio dell'affare condotto per suo conto. Come dicono le fonti, avendo io fatto mettere dei puntelli a un edificio cadente, o avendo fatto curare un servo ammalato, conseguirò i diritti propri alla gestione anche se un incendio avrà poi distrutto l'edificio o se il servo ugualmente morirà. L'utilità iniziale non basta esista nell'intenzione del gestore; è vero che non si deve aver riguardo all'utilità del risultato, ma almeno agli inizi si deve obiettivamente prevedere che il dominus avrebbe pregiudizio non solo per l'omissione, ma anche per il semplice rinvio dell'attività di cui si tratta.*

426 This is strongly reminiscent of secs 1372 and 1373 of the French *Code civil*.

625 Sec 1713 provides in this regard: *Il mandatario deve*

rendere al mandante il conto del suo operato e rimettergli tutto ciò che ha ricevuto a causa del mandato.

626 This appears from sec 1710 in regard to the liability of the mandatary, namely la diligenza del buon padre di famiglia. See also Rotondi, op cit 416: l'obbligo di gerire l'affare assunto con la diligenza normale (secondo il paradigma tradizionale del bonus paterfamilias).

627 Rotondi, loc cit, suggests that this arises from the "equitable temperament" (equitativo temperamento) of the law, which grants the court this kind of power.

628 Trabucchi, op cit 732-733, refers to the case where the gestor incurs obligations in his own name as gestione semplice, as opposed to the gestione rappresentativa which occurs when the gestor acts in the name of the dominus.

629 See Van Zyl, Saakwaarneming 121-124.

630 See Scialoja-Branca, op cit (referred to in n 613 above) at p 214 sq: Solo chi ha gerito l'affare nell'interesse altrui compie gestione d'affari in senso tecnico e puo giovarsi dell'azione relativa. A chi invece ha gerito un affare altrui nell'interesse proprio puo com-

petere soltanto l'azione di indebito arricchimento è non l'actio negotiorum gestorum contraria, se l'affare si è risolto anche a vantaggio del dominus negotii. See also Biondi, "Gestione di affari altrui" in Novissimo digesto italiano 7 p 819.

631 The latter case is specifically mentioned in sec 2032 with regard to ratification but nothing is said of the enrichment possibilities. See further Scialoja-Branca, op cit 256 and Biondi, op cit 828.

632 Scialoja-Branca, op cit 250. Biondi, op cit 820 refers to the enrichment action in this case as an azione de in rem verso secondo i principi generali - an extremely French-sounding general action!

633 See C Ferrini, "La 'negotiorum gestio' a favore di un incapace" in Opere Ferrini 3 (1929) 235-241; Scialoja-Branca, op cit 231. On the possibility of an enrichment action in the case of "indirect enrichment", see S Riccobono, "Dal diritto romano classico al diritto moderno" in Annali Palermo 3/4 (1917) 584 sqq (with reference to sec 1144 of the old Codice civile.)

634 2041. (Azione generale di arriccimento). - Chi, senza una giusta causa, si è arricchito a danno di un' altra persona è tenuto, nei limiti dell' arricchimento, a indennizzare quest' ultima della correlativa diminuzione

patrimoniale. Qualora l'arricchimento abbia per oggetto una cosa determinata, colui che l'ha ricevuta ĕ tenuto a restituirla in natura, se sussiste al tempo della demanda. Sec 2042 stipulates that the general enrichment action is of a subsidiary nature, and may not be employed where another action is available. See in general on unjustified enrichment in Italian law Burzio, "Il campo di applicazione dell'actio de in rem verso nel diritto civile italiano" in Giurisprudenza italiana 4 (1897) 110 sqq; G Andreoli, La ripetizione dell'indebito (1939); P Trimarchi, L'arricchimento senza causa (1962) Barbiera, L'ingiustificato arricchimento (1964); M Rotondi, Istituzioni di diritto privato (1965) 420-422 (par 216); A Trabucchi, Istituzioni di diritto civile (1968) 734-735 (par 301); idem, "Arricchimento senza causa" in Enciclopedia del diritto (1969) sv arricchimento.

635 The Obligationenrecht was originally promulgated in 1881 but was thereafter revised, appearing again in 1911 as the Revidierte Obligationenrecht (OR) ("Revised Law of Obligations") and coming into operation on 1st January 1912, together with the Zivilgesetzbuch (ZGB). See in general on the law of Switserland Van Zyl, Beginsels van Regsvergelyking (1981) 159-168.

636 See in general A von Tuhr, Actio de in rem verso. Zugleich ein Beitrag zur Lehre von der Geschäftsführung

(1895); G Bermann, Die Geschäftsführung ohne Auftrag nach schweizerischem Recht (1896); H Oser, Das Obligationenrecht (Kommentar zum schweizerischen Zivilgesetzbuch)(1915) 757 sqq; H A Hagenbüchli, Die Ansprüche des Geschäftsführers ohne Auftrag und ihre Voraussetzungen (1926); K Aeby, Die Geschäftsführung ohne Auftrag nach schweizerischem Recht (1928); M Briner, Der Tatbestand der sog. unechten Geschäftsführung ohne Auftrag nach schweizerischem Recht (1928); H Kreis Art 423 OR: Geschäftsführung im Interesse des Geschäftsführers (1928); A Reichel, "Geschäftsführung ohne Auftrag und Vertretung ohne Vertretungsmacht" in SJZ 26 (1930) 198 sqq; R Suter, Echte und unechte Geschäftsführung ohne Auftrag nach schweizerischem Obligationenrecht (1933); Th Guhl, Das schweizerische Obligationenrecht (1933) 83 sqq and 209 sqq; R Moser, Die Herausgabe des widerrechtlich erzielten Gewinnes insbesondere unter dem Gesichtspunkt der eigennützigen Geschäftsführung ohne Auftrag, Art 423 OR (1940); A Janner, Wandlungen der Bereicherungslehre im schweizerischen Recht (1943); H P Friedrich, "Die Voraussetzungen der unechten Geschäftsführung ohne Auftrag (art 423 OR) insbesondere bei Annahme einer für ein andern bestimmten Leistung" in ZSR 64 (1945) 9 sqq; H Oser, W Schönenberger, Kommentar zum Obligationenrecht (1945) 1544 sqq; J Droin, La représentation indirecte en droit suisse (1956); J Hofstetter, "Gewinnherausgabe und Aufwendungsersatz des unechten Geschäftsführers ohne Auftrag" in ZBJV 100

(1964) 221 sqq; M P Amrein, Die Gewinnherausgabe als Rechtsfortwirkung. Ein Beitrag zur Lehre von der unechten (eigennützigen) Geschäftsführung ohne Auftrag (1967); Van Zyl, Saakwaarneming 137-142; De Vos, Verrykingsaanspreeklikheid 123-128; A von Tuhr, A Siegwart, Allgemeiner Teil des schweizerischen Obligationenrechts (1974) 429 sqq; F Vischer, Obligationenrecht: Besondere Vertragsverhältnisse 7.2 (1979) 174-217 (par 32-34). At 177 Vischer describes the distinction between the two forms of gestio as follows: In subjektiver Hinsicht unterscheidet das Gesetz die Geschäftsführung im Interesse des Geschäftsherrn (kurz die fremdnützige, altruistische Geschäftsführung) von derjenigen im Interesse des Geschäftsführers (kurz die eigennützige, egoistische 'Geschäftsführung', besser die Geschäftsanmassung).

637 Moser, op cit 78: Die Grundlagen, sowohl des schweizerischen, wie des ausländischen Rechts der Geschäftsführung ohne Auftrag finden sich nun im römischen Recht. Wie kaum ein Rechtsinstitut hat sich dasjenige der auftraglosen Geschäftsführung 'einem verirrten Schiffen auf dem Ozean vergleichbar', beinahe unverändert durch die Jahrhunderte hindurch in die moderne Kodifikationen hinübergerettet und die diesbezüglichen Probleme finden sich fast alle schon in den römischen Rechtsquellen erörtert.

638 The sources of obligations are dealt with in the first title of the OR (_die Entstehung der Obligationen_), namely contract (_die Entstehung durch Vertrag_), wrongful actions (_die Entstehung durch unerlaubte Handlungen_) and unjustified enrichment (_die Entstehung aus ungerechtfertigte Bereicherung_).

639 Vischer, op cit 199: _Jede auf Befriedigung eines menschlichen Bedürfnisses gerichtete Tätigkeit fällt darunter ... Neben Tathandlungen kommen auch Rechtshandlungen in Betracht_. At 190-191 he refers to the finding of lost goods, the saving of lives and goods at sea or in the air and the unauthorised actions of partners and similar persons as exceptional cases of _negotiorum gestio_.

640 Vischer, op cit 199-201, distinguishes between _objektiv fremde_ and _subjektiv fremde Geschäfte._ See also idem, op cit 204.

641 See Oser-Schönenberger, op cit ad sec 424 OR, n 1; Vischer, op cit 191-196 and 201, where he points out that the _gestor_ may not, as in the other legal systems dealt with above, act in the execution of any legal duty resting upon him. In 1971 the Swiss _Bundesgericht_ held (BGE 97 II (1971) 266) that a purely moral duty owed to the _dominus_ (_Verpflichtung gegenüber dem Geschäftsherrn lediglich moralischer Art_) did not exclude

negotiorum gestio.

642 BGE 75 II (1949) 226; BGE 99 II (1973) 134. See also Oser, op cit 757 sq; Oser-Schönenberger, op cit 1544 sq; Moser, op cit 91 sqq; Friedrich, op cit 14,20,42 sqq and 55. Cf Guhl, op cit 209 sq. Moser, op cit 218 sqq, suggests that the only case where the subjective disposition of the _gestor_ is of any substantial importance, is where the _gestor_ _bona fide_ manages the affairs of another in the mistaken belief that they are his own. This seems to be an over-simplification which cannot reflect the practical importance of the _gestor_'s subjective intention.

643 Vischer, op cit 202: _Bei der unechten Geschäftsführung fehlt der Wille, die Geschäfte als fremde zu bezorgen ... Bei der echte Geschaftsführung hingegen ist der Wille, für einen anderen tätig zu werden, unerlässlich._

644 Vischer, op cit 202-203: _Wer in einer Notlage spontan reagiert, hat nicht den deutlichen Entschluss gefasst, fremde Geschäfte zu besorgen. Er will instinktiv ein Unglück vermeiden. Es lässt sich hinterher nicht ausmachen, ob er dabei den Schutz eigener oder fremder Interessen im Sinne gehabt hat. Sind durch die Schadensabwehr wirklich fremde Angelegenheiten besorgt worden, so ist der Geschäftsführungswille ohne weiteres zu vermuten._

645 As decided by the <u>Bundesgerichtshof</u> in BGE 55 II (1929) 264 and BGE 83 II (1957) 533.

646 Vischer, op cit 203-204.

647 Vischer, op cit 204.

648 See Vischer, op cit 206, who refers to D 3.5.9.1 in support of this proposition.

649 Vischer, op cit 203, with reference to BGE 61 II (1935) 37 and BGE 95 II (1969) 103.

650 BGE 86 II (1960) 25.

651 Vischer, op cit 204: <u>sorgfältig und vollständig auszuführen</u>.

652 Sec 400 OR: <u>Der Beauftragte ist schuldig, auf Verlangen jederzeit über seine Geschäftsführung Rechenschaft abzulegen und alles, was ihm infolge derselben aus irgende einem Grunde zugekommen ist, zu erstatten. Gelder, mit deren Ablieferung er sich im Rückstande befindet, hat er zu verzinsen</u>. See further Vischer, op cit 205.

653 Vischer, loc cit suggests that the <u>gestor</u> is, like the mandatary, obliged to act in good faith, particularly with reference to the application of discretion and remaining silent when the circumstances demand it. The second sentence of sec 398 OR, in regard to the mandatary, appears to support this submission: <u>Er haftet dem Auftraggeber für getreue und sorgfältige Ausführung des ihm übertragenen Geschäftes</u>.

654 Vischer, op cit 206, suggests that this is a fortunate provision, when all the various circumstances and situations which may arise, are borne in mind.

655 Sec 418 o OR.

656 See chapter 5.2 above and, further, Oser, op cit 759. Sec 421 OR should be read subject to secs 18 and 19 ZGB.

657 See Friedrich, op cit 15 and 51 sqq; Guhl, op cit 210; Oser-Schönenberger, op cit 1545 and 1556 sqq; Oser, op cit 757 sqq; Vischer, op cit 209-217. At 207-208 he refers to cases where the <u>gestio</u> has been executed in error or under similar circumstances as <u>irreguläre altruistische Geschäftsführung</u>.

658 The general enrichment action appears from sec 62 OR:

Wer in ungerechtfertigter Weise aus dem Vermögen eines andern bereichert worden ist, hat die Bereicherung zurückzuerstatten. Insbesondere tritt diese Verbindlichkeit dann ein, wenn jemand ohne jeden gültigen Grund oder aus einem nicht verwirklichten oder nachträglich weggefallenen Grund eine Zuwendung erhalten hat. On the independent development of the action arising from unechte negotiorum gestio see especially Moser, op cit 19, 55, 72 sq and 110 sqq; Von Tuhr-Siegwart, op cit 434 sq; Vischer, op cit 183.

659 See Janner, op cit 70: Eine Bereicherung ohne oder gegen den Willen des Entreicherten ist von diesen aus gesehen stets ungerechtfertigt, denn es kan niemandem zugemutet werden, sich gegen seinen Willen zugunsten eines Dritten zu entreichern. See further Oser, op cit 756; Oser-Schönenberger 1546.

660 See Friedrich, op cit 47; Vischer, op cit 186-187 and 212-214.

661 Oser, op cit 756, suggests that it is immaterial.

662 Von Tuhr, op cit 293 sqq; Moser, op cit 176; Vischer, op cit 182-183. Cf Von Tuhr-Siegwart, 429 sqq.

663 BGE 86 II (1960) 25.

664 See on the history of this code, and in general on Austrian law, Van Zyl, Beginsels van Regsvergelyking (1981) 148-158.

665 The approach in the Civil Code of the Hungarian People's Republic of 1959 (sections 484-487) is far more positive and flexible. See Van Zyl, Saakwaarneming 142-145.

666 There is no general enrichment action in Austrian law, but recognition is given to a number of particular enrichment actions, apart from the Verwendungsklage of secs 1041-1044, such as the condictio indebiti resulting from payment of a debt not owing (Zahlung einer Nichtschuld) in secs 1431-1437, sec 1435 (Wegfall des Grundes) which is, in effect, the equivalent of a condictio sine causa. Cf also secs 331, 336, 418, 420 and 1447 ABGB. See further in general on negotiorum gestio and unjustified enrichment in Austrian law F von Zeiller, Commentar über das allgemeine bürgerliche Gesetzbuch (1813) 329 sqq; M Wellspacher, Versio in rem (1900); J von Schey, "Die rechtliche Natur der Geschäftsführung ohne Auftrag nach dem österreichischen ABGB" in Festschrift Zitelmann (1913) 1 sqq; E Swoboda, Bereicherung, Geschäftsführung ohne Auftrag, versio in rem nach österreichischem Recht mit Ausblicken in das deutsche Recht (1919); idem, Das allgemeine bürgerliche Gesetzbuch im Lichte der Lehren Kants (1926) 214 sqq; idem, Bevollmächtigungsvertrag und

Auftrag, Geschäftsführung ohne Auftrag, versio in rem (1932); A Ehrenzweig, System des österreichischen allgemeines Privatrechts 2.1: Das Recht der Schuldverhältnissen (1928) 715 sqq; W Wilburg, Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht (1934); H Klang, Kommentar zum allgemeinen bürgerlichen Gesetzbuch 2 (1934) 865 sqq; K Wolff, Grundriss des österreichischen bürgerlichen Rechts (1946) 216 sqq; F Gschnitzer, Schuldrecht: Besonderer Teil und Schadenersatz, (1963) 96 sqq and 105 sqq; B Kupisch, Die Versionsklage (1965) 27-30, 54-91, 98-113, 124-126 (esp 27-30); Van Zyl, Saakwaarneming 131-137; H Koziol, R Welser, Grundriss des bürgerlichen Rechts 1: allgemeiner Teil und Schuldrecht (1973) 321-323.

667 Koziol-Welser, op cit 321. Gschnitzer, op cit 105, describes it as erlaubte Geschäftsführung ohne Auftrag, genauer gesagt ohne Ermächtigung. See also Ehrenzweig, op cit 715; Klang, 890 sqq.

668 A special case of negotiorum gestio is that of the finder of lost goods (redlicher Finder) dealt with in secs 388-394 ABGB. Sec 391 ABGB entitles the finder to a fee - an exception to the usual rule. See Gschnitzer, op cit 106 who points out that the gestio may not relate partly to the affairs of another and partly to those of

the *gestor*. In cases of *gemeinsame Interesse* the provisions of sec 1043 ABGB (derived from the *lex Rhodia de jactu*) are applicable. See further Koziol-Welser, loc cit.

669 Koziol-Welser, op cit 322-323. They refer also to related forms of *negotiorum gestio* (*angewandte Geschäftsführung*) which are special kinds of *gestio* specifically dealt with elsewhere in the ABGB - see eg secs 336, 388-394, 517 ABGB. On the question of express or tacit ratification of the *gestio*, see Gschnitzer, op cit 106.

670 Swoboda, *Bereicherung* 72 sq; Von Schey, op cit 6 and 24 sq; Ehrenzweig, op cit 715; Klang, op cit 865 and 867; Gschnitzer, op cit 96 sq and 107; Koziol-Welser, op cit 321: *Wesentlich ist aber stets, dass der Geschäftsführer ein fremdes Geschäft führen will, also die Absicht hat, im Interesse eines anderen, des Geschäftsherrn, zu handeln ... Auf seiner Seite genügt der natürliche Wille, für einen anderen tätig zu werden (animus rem alteri gerendi)*. Cf Van Zyl, *Saakwaarneming* 133-134.

671 Koziol-Welser, op cit 323: *Klar und überwiegend ist der Vorteil nur dann, wenn eine objektive Wertvermehrung eingetreten ist, die auch dem Willen des Geschäftsherrn entspricht (subjektiver Vorteil); eine rein objektive Vermehrung des Vermögens reicht nicht aus*. Cf Gschnitzer, op cit 105.

672 Gschnitzer, loc cit. Koziol-Welser, op cit 322, define <u>Notfall</u> as the situation which arises when it is not possible to obtain the consent of the <u>dominus</u> in time.

673 Koziol-Welser, op cit 323, state that this is not necessary in the case of an urgent <u>gestio</u> (<u>notwendige Geschäftsführung</u>) in terms of sec 1312 ABGB.

674 This appears to be a reference to sec 1012 ABGB with regard to the mandatary's duty to account. Koziol-Welser, loc cit, include the duty, <u>jeden erlangten Vorteil herauszugeben</u>, in the general duty of the <u>gestor</u> to account.

675 1312. <u>Wer in einem Notfalle jemandem einen Dienst geleistet hat, dem wird der Schade, welchen er nicht verhütet hat, nicht zugerechnet; es wäre denn, dass er einen andern, der noch mehr geleistet haben würde, durch seine Schuld daran verhindert hätte. Aber auch in diesem Falle kann er den sicher verschafften Nutzen gegen den verursachten Schaden in Rechnung bringen.</u>

676 Gschnitzer, op cit 106. Koziol-Welser, op cit 322, suggest that the professional man who has rendered professional services in the form of a <u>gestio</u> should be allowed to claim remuneration.

677 Koziol-Welser, loc cit, consider this situation as

problematisch in the case of the selfless altruist who has suffered damages in a genuine gestio situation.

678 Gschnitzer, op cit 107. Klang, op cit 908, describes the link thus: Die rechtlichen Erscheinungen der Bereicherung, Geschäftsführung ohne Auftrag und der versio in rem sind immer eines der dunkelsten Gebiete für die Rechtswissenschaft gewesen. Das wird um so leichter erklärlich, weil diese drei Rechtsinstitute bei fortschreitender Entwicklung jedes einzelnen unter ihnen das naturgemässe Bestreben haben, sich gegenseitig das Geltungsgebiet streitig zu machen. Man kann dem Gedanken der Bereicherung eine überragende Bedeutung einräumen, die es mit sich bringt, dass die Ansprüche eines Geschäftsführers ohne Auftrag und jene aus der Verwendung einer Sache zum Nutzen eines andern sich nur aus Unterarten des Gemeinsamen Grundgedankens darstellen. Die weitere Fortbildung führt dann folgerichtig zum restlosen aufgehen des einen Rechtsinstitutes in dem anderen. See also Wellspacher, op cit 69; Wilburg, op cit 24 sq and 58 sq; Kupisch, op cit 24 sqq (esp 27-30), 40 sqq and 96.

679 See Gschnitzer, op cit 107 sqq. Von Schey, op cit 14, is of the opinion that this is a general enrichment action.

680 Kupisch, op cit 107 sqq.

681 See chapter 5 above.

682 See Van Zyl, Saakwaarneming 134-137. At 137 it is pointed out that the Austrian Oberste Gerichtshof in 1955 rejected an action in a case of "indirect enrichment" - another retrogressive step?

683 T B Smith, Scotland. The Development of its Laws and Constitution (1962) 632. See further P Stein, "Roman law in Scotland" in IRMAE 5.13b (1968); W M Gordon, "Scots Law and Roman Law" in Codicillus 13.2 (1971) 16-19; A Watson, "Roman Systematics in Scotland" in Legal Transplants (1974) 36-43; idem, "The Reception of Roman Law in Scotland", op cit 44-56. See in general on the law of Scotland, D M Walker, The Scottish Legal System. An Introduction to the Study of Scots Law (1981). Cf Van Zyl, Beginsels van Regsvergelyking (1981) 280-284.

684 Erskine, An Institute of the Law of Scotland (1871) 3.3.51, classifies negotiorum gestio as a quasi contract, which is formed ex re: "These are constituted, not by explicit consent, as proper contracts are, but ex re; that is, merely by one of the parties doing such deeds as in their nature infer an obligation upon him in favour of the other party, or upon that other party, though he be perhaps ignorant of it, in favour of the first". Stair, The Institutions of the Law of Scotland

(1693) deals with the _obligatio negotiorum gestorum_ under the general title (1.8) of "Recompense or Remuneration." Smith, op cit 623, describes it as a quasi-contract arising from an obligation _ex lege_, whereas D M Walker, _The Law of Contracts and related obligations in Scotland_ (1979) deals with it under the general heading of "obligations arising from unjust enrichment." The majority of modern writers, however, classify it with the institution of restitution, recompense, salvage and general average, to which "common property" and the "obligation to aliment relatives" is sometimes added. See in general on _negotiorum gestio_ in Scotland T B Smith, op cit 631-632; D M Walker, _The Law of Civil Remedies in Scotland_ (1974) 291-292; idem, _Principles of Scottish Private Law_ (1975) 1015-1016; idem, _The Law of Contracts and related obligations in Scotland_ (1979) 547-548 (par 35-12); W M Gloag, R C Henderson, _Introduction to the Law of Scotland_ (1980) 149. Cf E A Marshall, _General Principles of Scots Law_ (1978) 372-373; Rubin, _Unauthorised Administration_ 56-58 and 88.

685 Gloag and Henderson, op cit 149. Cf Smith, op cit 631: "'_Negotiorum gestio_' is the management of affairs of one who is absent or incapacitated from attending to his affairs, spontaneously undertaken without his

knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference."

686 Walker, <u>Civil Remedies</u> 291; idem, <u>Scottish Private Law</u> 1015; idem, Contracts 547.

687 See Stair, <u>The Institutions of the Law of Scotland</u> 1.8.3; Erskine, <u>An Institute of the Law of Scotland</u> 3.3.52.

688 Stair, loc cit.

689 Stair, loc cit. Cf G Bell, <u>Principles of the Law of Scotland</u> par 540.

690 Stair, loc cit: "But the obligement to the negotiators is greater; for if they do that which is necessary or profitable for carrying on our affairs, though by some accident that affair may perish or miscarry, and we no richer, but, it may be, poorer, yet we are obliged ..." (and he then refers to D 3.5.10.1). Cf Erskine, loc cit: "(A)nd if these disbursements appear rational, it makes no difference, though the subject on which they have been made should by misfortune have afterwards perished ..." Smith, op cit 632, misinterprets Stair where he qualifies this statement by saying that

it applies only where the gestor "acted in emergency." See further Paterson v Greig (1862) 24 D 1370 at 1381.

691 Erskine, op cit 3.3.53: "If, on the other hand, his motives appear selfish and interested, or if he act contrary to the express will of the owner, or if he has involved him in a new negotiation, in which he never dealt formerly, he is answerable even for casual misfortunes; and is not entitled to the recovery of any disbursements except in so far as the owner has been a gainer by them ..." (the full dictum is quoted later in the text). See also Stair, loc cit: "And, lastly, though these deeds may be done without knowledge or consent, yet they may not be contrary to our will and command; for such obtruders can expect no recompence ... though, if no positive law hinder, we may be liable even to such in quantum facti sumus locupletiores." Cf Wallace v Braid (1900) 2 F 754; Johnston v M Annandale (1726) Mor 9281.

692 Stair, loc cit: "(A)nd these deeds must be done without command or commission, otherwise they come in the nature of the contract of mandate or commission; yea what is done in our presence, with our knowledge, in our affairs, is repute as with our tacit consent and commission, nam qui tacet, consentire videtur." Stair misinterprets D 3.5.11, however, by saying that "a ne-

gotiator cannot begin any new business, but only carry on that which is begun." This is only a factor to be considered in determining the reasonableness of the gestio, namely whether such gestio had regard to an affair or affairs which the dominus himself was not in the habit of managing. Smith, op cit 632, is likewise wrong, it is respectfully submitted, where he says that the basis of negotiorum gestio is an "implied mandate." The very essence of negotiorum gestio is that it should be conducted without a mandate, express or tacit.

693 Stair, loc cit; Erskine, op cit 3.3.52.

694 Smith's Reps v E Winton (1714) Mor 9275; Kolbin & Son v Kinnear and United Shipping Co 1931 SC (HL) 128; 1930 SC 724; SMT Sales and Service Co v Motor and General Finance Co 1954 SLT (Sh Ct) 107.

695 Maule or Ker v Graham (1757) Mor 3529; 2 Pat 13; Fernie v Robertson (1871) 9 M 437; Dunbar v Wilson and Dunlop's Trustee (1887) 15 R 210.

696 Bannatine's Trustee v Cunninghame (1872) 10 M 319.

697 Gemell v Annandale (1899) 36 SLR 658.

698 <u>Kolbin and Sons v Kinnear and United Shipping Co</u> 1931 SC (HL) 128; 1930 SC 724.

699 <u>Paterson v Greig</u> (1862) 24D 1370; <u>Fulton v Fulton</u> (1864) 2 M 893.

700 Stair, op cit 1.8.2.

701 Stair, op cit 1.8.4-5: the <u>dominus</u> has the direct action, whereby he "craveth accompt and restitution of the negotiator". The <u>gestor</u> "may be made also to follow forth his negotiation, according to the precept, <u>susceptum perfice manus</u>" (a reference to D 3.5.6.12 and 21.2). See also Erskine, op cit 3.3.52: "The <u>negotiorum gestor</u> is accountable to the owner for all the sums of money and subjects belonging to him, with which he has intermeddled during his management, with all the fruits and profits of them, even for the interest of the money ... if the owner was a money-lender."

702 Bell, op cit par 541.

703 Walker, <u>Civil Remedies</u> 291-292.

704 Erskine, op cit 3.3.53 (approved in <u>Bannatine's Trustees v Cunninghame</u> (1872) 10 M 319 at 325-326). See also

n 691 above in regard to the enrichment aspects of this *dictum*.

705 Cf Bell, loc cit; Stair, op cit 1.8.5: "The negotiator is holden not only to answer for fraud, but *pro culpa levi*, for his fault, though light; yea, if any other negotiator offered, whom he excluded, for the lightest fault." The reference here is to the case where someone else may have been able to execute the *gestio* more proficiently, but was prevented from doing so by the *gestor*. See *Fulton v Fulton* (1864) 2 M 893 at 902 (*per* Lord Neaves): "The ground on which *negotiorum gestores* are liable is that such parties by obtruding themselves into an office or management have a tendency to keep out others with a better legal title and who might manage better."

706 1931 SC &HL) 128; 1930 SC 724.

707 1930 SC 724 at 731 (*per* Lord Flemming).

708 1931 SC (HL) 128 at 139. See also *Fulton v Fulton* (1864) 2 M 893 at 901 (*per* Lord Neaves): "The liability of a *negotiorum gestor* is different in different circumstances." Cf *Maule or Ker v Graham* (1757) Mor 3529; 2 Pat 13.

709 Stair, op cit 1.8.3-4; Erskine, op cit 3.3.52 (who criticises Stair for suggesting that the gestor should be compensated for his "loss by pains or attendance.")

710 Erskine, loc cit; Walker, Principles of Scottish Private Law (1975) 1016.

711 See chapter 5.7 above and cf chapter 6.1-6.6 in fin resp.

712 Fernie v Robertson (1871) 9 M 437; Dunbar v Wilson and Dunlop's Trustee (1887) 15 R 210. See further Walker, loc cit; idem, Civil Remedies 291; Gloag and Henderson, op cit 149.

713 Smith, op cit 632. One of the institutions with which negotiorum gestio has been compared is that of "agency of necessity," which deals, inter alia, with the case where a person, who has been entrusted with goods, may, if the circumstances should necessitate it and the necessary authority cannot be timeously obtained, dispose of the goods and claim expenses, subject to his delivery of the proceeds of the said disposal. See Walker, Civil Remedies 292. "Agency of necessity" is a typically English legal institution, and Scots law would be well advised to revise its approach thereto and classify it, without qualification, as a form of negotiorum gestio, lest the "Common Law Cuckoo" should feel constrained to deliver itself of yet another hybrid

egg. See T B Smith, "The Common Law Cuckoo: Problems of 'Mixed' Legal Systems with Special Reference to Restrictive Interpretations in the Scots Law of Obligations" in Smith, Studies Critical and Comparative (1962) 89-97. On agency of necessity in English law, see chapter 6.8 below.

714 See W B Williston, "Negotiorum Gestio" in SALJ 62 (1945) 17-24; R Wellmann, Der Aufwendungsersatz des Geschäftsführers ohne Auftrag in der Rechtsprechung der anglo-amerikanischen Gerichte (1959). J P Dawson, "Negotiorum Gestio: The Altruistic Intermeddler" in Harvard Law Review 74 (1960-1961) 819-865, 1073-1129; R Powell, The Law of Agency (1961) 416-425; S J Stoljar, The Law of Quasi-Contract (1964) 188-194; P B H Birks, "Negotiorum Gestio and the Common Law" in CLP 24 (1971) 110-132; M L Marasinghe, "The Place of Negotiorum Gestio in English Law" in Ottawa Law Review 8 (1976) 573-587; J D McCamus, "Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution" in Ottawa Law Review 11 (1979) 297-336; A K Blommaert, "Negotiorum gestio and the life-rescuer" in TSAR (1981.2) 123-135. Cf Wessels, Contract par 3554 Rubin, Unauthorised Administration 88-92. See in general on English law Ph S Jones, Introduction to English Law (1972); R J Walker, M G Walker, The English Legal

System (1972); K Smith, K J Keenan, English Law (1973); A K R Kiralfy, The English Legal System (1973); Van Zyl, Beginsels van Regsvergelyking (1981) 170-196.

715 See in general on agency of necessity G W Keeton, D Lloyd, The United Kingdom. The Development of its Laws and Constitutions (1955) 250; R Powell, The Law of Agency (1961) 410-432; G H L Fridman, The Law of Agency (1971) 70-85 and 115-116; Halsbury's Laws of England 1 (1973) 432-434 (par 724); Anson's Law of Contract (1975) 581-583; Cheshire and Fifoot's Law of Contract (1976) 463; Bowstead on Agency (1976) 63-68; Chitty on Contracts (1977) 11-12 (par 2024) and 898 (par 1878); R Goff, G Jones, The Law of Restitution (1978) 264-267; G H Treitel, The Law of Contract (1979) 543-546; J D McCamus, op cit 303-310.

716 (1914) AC 398; 111 LTR 1 (HL).

717 At 414 (per Lord Haldane): "So far as proceedings in personam are concerned, the common law of England really recognizes (unlike the Roman Law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law." Cf Morgan v Ashcroft (1937) 3 All ER 92; (1938) 1 KB 49.

718 See in general on quasi-contract and "unjust enrichment" in English law H C Gutteridge, R J A David, "The Doctrine of Unjustified Enrichment" in CLJ 5 (1933-1935) 204-229. At 223-224 it is said: "(A)lthough English law sometimes allows a right of recovery to the impoverished party, it has steadily refused to recognise any general obligation to restore a profit which is in the nature of an unjustified enrichment." See further R M Jackson, The History of Quasi-Contract in English Law (1936); W S Holdsworth, "Unjustifiable Enrichment" in LQR 55 (1939) 37-53; A T Denning, "Quantum Meruit: The Case of Craven-Ellis v Canons Ltd" in LQR 55 (1939) 54-65; P H Winfield, "Quasi-Contract arising from Compulsion" in SALJ 62 (1945) 25-46; idem, The Law of Quasi-Contracts (1952); S J Stoljar, The Law of Quasi-Contract (1964); P Birks, "Restitution for Services" in CLP 27 (1974) 13-36; Halsbury's Laws of England 9(1974) 434-479 (par 630-750). Anson's Law of Contract (1975) 617-652; M L Marasinghe, op cit, passim; Cheshire and Fifoot's Law of Contract (1976) 631-663; Chitty on Contracts (1977) 843-913 (par 1781-1901) (under the title "Restitution"); R Goff, G Jones, The Law of Restitution (1978) 3-45; G H Treitel, The Law of Contract (1979) 437-438. Cf A J Kerr, The Law of Agency (1979) 65-68; De Vos, Verrykingsaanspreeklikheid 136-137. With reference to Berg v Sadler and Moore (1937) 2 KB 158 and Morgan v Ashcroft (1937) 3 All ER 92; (1938) 1 KB 49,

CK Allen, "Fraud, Quasi-Contract and False Pretences" in LQR 54 (1938) 201-219 sees the _aequum et bonum_ as a prerequisite for an action based on "unjust enrichment" (at 206): "But this much we can say - that in all the circumstances to which the remedy has, up to the present time, been applied, the element of _aequum et bonum_ is not only present but essential. Conversely, when the remedy has been refused, usually (though, of course, not invariably, since there may be many subsidiary issues in a claim of this kind) the reason has been that restitution was not incontestably in accordance with _aequum et bonum_. Similarly, we would submit that although it is impossible to say that in every case where there has been a real or supposed unjust enrichment, an action lies in quasi-contract (_negotiorum gestio_ is the most obvious exception in English law); yet in all the recognized forms or 'heads' where quasi-contract does lie, a principle which may be fairly described as unjust enrichment is clearly discernible." See also the decisions in _Craven-Ellis v Canons Ltd_ (1936) 2 KB 403; (1936) 2 All ER 1066; _Brooks Wharf v Goodman Bros_ (1936) 3 All ER 696; (1937) 1 KB 534; _Boardman v Phipps_ (1967) 2 AC 46. Cf _Exall v Partridge_ (1799) 8 TR 308; _Five Steel Barges_ (1890) 15 PD 14; _Sumpter v Hedges_ (1898) 1 QB 673; _Macclesfield Corporation v Great Central Railway_ (1911) 2 KB 528; _Donogue v Stevenson_ (1932) AC 562; _Re Cleadon Trust Ltd_ (1939)

ChD 286; (1938) 4 All ER 518; Fibrosa v Fairbairn (1943) AC 32; Candler v Crane, Christmas (1951) 2 KB 164; (1951) 1 All ER 426; Hedley v Heller (1964) AC 465.

719 (1886) 34 Ch D 234.

720 At 248-249 (per Bowen L J). See also Macclesfield Corporation v Great Central Railway (1911) 2 KB 528. See the criticism of the Falcke-case by P B H Birks, "Negotiorum Gestio and the Common Law" in CLP 24 (1971) 110-132. At 112 he says: "The strength of Bowen L.J.'s general principle derives largely from its tone of sturdy individualism, which places a value on the self sufficiency of common law man and on the unencumbered freedom of his will. The problems of uninvited intervention, it seems to say, actually, ought not to be bothered with, because infringement of the will is intrinsically evil. As a justification, this is quite spurious. Where other difficulties are fewer the common law does not hesitate to impose liabilities behind men's backs - which is merely emotive language for against their will. The obligation to repay money paid by mistake is involuntary, imposed on the recipient whether he wills it or not. The language of individualism clearly conceals special difficulties, which are partly general, being inherent in uninvited intervention, and partly peculiar to the common law, being the accidental product

528/...

of its history."

721 Marasinghe, op cit 574-575. At 575-578 he discusses the development of the constructive trust in American law, which trust has become "remedial" rather than "institutional", and concludes (at 578): "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 the several remedies directed against unjust enrichment."

722 (1788) 1 HBl 90 at 93.

723 (1829) 3 Y & J 28 at 34 (_per_ Baron Garrow).

724 (1812) 3 Camp 298 at 299 (_per_ Lord Ellenborough).

725 (1850) 12 Beav 558.

726 At 561 (_per_ Lord Langdale).

727 (1851) 10 CB 776 at 779.

728 (1862) 12 CB (NS) 344 at 348 (_per_ Willes J).

729 Marasinghe, op cit 581. See also Davey v Cornwallis (1931) 2 DLR 80; McDougall and Brown v Brechen (1943) OWN 705. Cf Rees v Hughes (1946) KB 517 (CA).

730 (1616) 3 Bulst 269.

731 At 270 (per Montague C J).

732 (1776) 2 Black W 1117.

733 (1793) 2 HBl 254.

734 At 259 (per Lord Eyre).

735 (1950) 1 KB 252; (1949) All ER 609 (CA).

736 Marasinghe, op cit 583: "(W)hat 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."

737 (1874) LR 9 Ex 132.

738 At 136 (per Chief Baron Kelly).

739 (1949) 1 KB 295; (1948) 2 All ER 983 (KB).

740 At 299 (<u>per</u> Lynskey J).

741 (1846) 9 Beav 211.

742 At 230-231. Cf <u>Schneider v Eisovich</u> (1960) 2 QB 430; (1960) 1 All ER 169 (QB 1959).

743 See the authorities cited in n 715 above. Powell, <u>The Law of Agency</u> (1961) 416-425, discusses <u>negotiorum gestio</u> under the general heading of "agency of necessity" and suggests that the following cases may indeed all be considered as English forms of "<u>negotiorum gestio</u>": (1) salvage; (2) acceptance of a bill of exchange for honour; (3) performance of another's duty (such as payment of funeral expenses - the cases dealt with above); (4) land carriers; (5) consignees of goods; (6) other bailees; (7) finders of lost or straying property; (8) other voluntary services.

744 Marasinghe, op cit 573.

745 Bowstead on <u>Agency</u> (1976) 63, significantly defines agency of necessity without reference to the prior relationship of the parties: "Agency of necessity arises by operation of law in certain cases where a person is faced with an emergency in which the property or in-

terests of another are in imminent jeopardy and it becomes necessary, in order to preserve the property or interests, to act for that person without authority."

746 See the authorities cited in n 71 above.

747 James Phelps & Co v Hill (1891) 1 QB 605 at 610 (per Lindley L J).

748 The Argos (1873) LR 5 PC 134. Cf Notara v Henderson (1872) LR 7 QB 225; Hingston v Vent (1876) 1 QBD 367.

749 Hawtayne v Bourne (1841) 7 M & W 595 at 599-600; Gwilliam v Twist (1895) 2 QB 84 at 87.

750 See Goff and Jones, The Law of Restitution (1978) 264-265.

751 (1924) 1 KB 566.

752 See also Jebara v Ottoman Bank (1927) 2 KB 254; Poland v John Parr & Sons (1927) 1 KB 236; Sachs v Miklos (1948) 1 All ER 68; (1948) 2 KB 23. Cf Cornwall v Wilson (1750) 1 Ves 509; Kemp v Pryor (1802) 7 Ves 240; The Cynthia (1852) 20 LT (OS) 54.

753 Goff and Jones, op cit 266; Powell, op cit 429-431; Anson's Law of Contract (1975) 581-583.

754 See Fridman, The Law of Agency (1971) 79: "From all this, it is suggested, the safest conclusion to reach is that such instances of agency of necessity as are recognised by English law are curious anomalies, exceptions to the dislike of English law of the Roman doctrine of negotiorum gestio, and having no common feature such as would enable the courts to speak in general terms of the 'nature' or legal character of agency of necessity."

755 See Goff and Jones, op cit 279: "It is still open to the English courts to extend the principle of necessitous intervention. It is to be hoped that they will do so and that they will generalise the nascent English development into a coherent and rational doctrine."

756 Stoljar, op cit 192.

757 Marasinghe, op cit 586-587. Cf Williston, "Negotiorum Gestio" in SALJ 62 (1945) 17-24 at 24: "(W)hile 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 to do so."

758 Powell, op cit 431-432.

759 See in general on American law S I Sherman, M D West, American Law. An Introductory Survey of Some Principles (1971); M Rheinstein, "United Staes of America" in International Encyclopedia of Comparative law 1 (U 131-163) (1973); E A Farnsworth, An Introduction to the Legal System of the United States (1975); Van Zyl, Beginsels van Regsvergelyking (1981) 196-211. On the Law of Louisiana see H F Jolowicz, "The Civil Law in Louisiana" in CLP 7 (1954) 1-15; L Oppenheim, "Common Law and Civil Law Influences in the Private Law of Louisiana" in SALJ 81 (1964) 163-172; Van Zyl, op cit 101-102.

760 J P Dawson, "Negotiorum Gestio: The Altruistic Intermeddler" in Harvard Law Review 74 (1960-1961) 817-865 and 1073-1129 at 817. See further on this concept, insofar as it exists in American law, albeit in various forms and under different names, W B Williston, "Negotiorum Gestio" in SALJ 62(1945) 17-24; R Wellmann, Der Aufwendungsersatz des Geschäftsführers ohne Auftrag in der Rechtsprechung der anglo-amerikanischen Gerichte

(1959); R Powell, The Law of Agency (1961) 410-432; J M Solís, "Management of the Affairs of Another" in Tulane Law Review 36 (1961-1962) 108-129; B Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law" in Tulane Law Review 36 (1962) 605-646; 37 (1962-1963) 49-66; J D McCamus, "Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution" in Ottawa Law Review 11 (1979) 297-336; A K Blommaert, "Negotiorum gestio and the life-rescuer" in TSAR (1981.2) 123-135; A J Kerr, The Law of Agency (1979) 65-68.

761 McCamus, op cit 297.

762 See in general the Restatement of the Law of Restitution (1937).

763 Restatement of the Law of Restitution ad s 2 (comment a).

764 See chapter 6.8 above.

765 Restatement of Agency (1958) sec 47.

766 Idem, loc cit, comment b.

767 McCamus, op cit 307-308.

768 Restatement of Agency ad sec 14 I.

769 (1932) 40 Man R 247; (1932) 2 DLR 787 (CA).

770 At 249 (*per* Robertson J A).

771 McCamus, op cit 311-312: "Success in the rescue effort is not a condition of recovering presumably for the reason that the defendant would, if rational, have wished that the attempt be made and would have authorised the expenditure involved." Cf *Cotnam v Wisdom* (1907) 83 Ark 601, 104 SW 164; W B Williston, "Negotiorum Gestio" in SALJ 62 (1945) 17-24 at 21-22. Cf A K Blommaert, "Negotiorum gestio and the life-rescuer" in TSAR (1981.2) 123-135.

772 McCamus, op cit 312-314.

773 *Restatement of the Law of Restitution* sec 117(1).

774 *Preston v Neale* (1858) 78 Mass (12 Gray) 222; *Moline, Milburn & Stoddard Co v Neville* (1897) 52 Neb 574, 72 NW 854.

775 *Amory v Flyn* (1813) 10 Johns 102, 6 Am Dec 316 (NY); *Chase v Corcoran* (1871) 106 Mass 286. See also *Berry v Barbour* (1954) 137 Okla 280, 279 P 2d 335.

776 McCamus, op cit 316-320. At 320-322 he discusses the

case of payment of another's debt in an attempt to preserve the debtor's commercial credit.

777 See chapter 6.8 above.

778 McCamus, op cit 322-330.

779 (1925) 113 Ohio St 177 (at 184), 148 NE 682 (at 684).

780 See J P Dawson, "Negotiorum Gestio: The Altruistic Intermeddler" in Harvard Law Review 74 (1960-1961) 819-865 and 1073-1129 at 1127-1129; McCamus, op cit 335-336.

781 McCamus, loc cit; Corbin on _Contracts_ 1A (1963) par 234 (p 360-361 - in regard to "unrequested beneficial performance" as a quasi-contractual _causa_ akin to _negotiorum gestio_); Williston, _A Treatise on the Law of Contracts_ 2 (1959) par 270A (treating of "agency of necessity" between husband and wife); Reuschlein and Gregory, _Handbook on the Law of Agency and Partnership_ (1979) 27-28 (on the agency relation and remedial action); M L Marasinghe, "The Place of Negotiorum Gestio in English Law" in Ottawa Law Review 8 (1976) 573-587 at 576-578 (on the remedial attitude adopted by American law towards the constructive trust).

782 See chapter 6.1 above.

783 (1957) 97 So 2d 435, 439 n 9 (La App 1957).

784 See chapter 5.3 above. Cf Police Jury v Hampton 5 Mart 389 (La 1827); Weber v Coussy 12 La Ann 534 (1857).

785 See in general on negotiorum gestio in Louisiana J M Solís, "Management of the Affairs of Another" in Tulane Law Review 36 (1961-1962) 108-129. This is a useful contribution, although inaccuracies do occur, as in regard to the utiliter coeptum requirement which the author interprets as "benefit derived from the management of affairs" (p 118), an interpretation which is somewhat suggestive of the so-called "benefit-theory" as applied in certain South African decisions. See chapter 2.4 and the text relating to notes 181-184 above.

786 See chapter 6.3 above.

787 See chapter 6.5 above.

788 See chapters 6.8 and 6.9 above.

789 See chapter 2.4 and the discussion of the utiliter requirement in chapter 6 above.

790 See chapter 5 above.

791 See chapters 6.5 and 6.3 above.

792 See chapter 5.7 above.

793 1968(3) SA 563(T).

794 1970(3) SA 264(A).

795 See chapters 6.1, 6.2, 6.3, 6.5 and 6.7 respectively in fin above.

796 Rubin, Unauthorised Administration 25 and 94.

797 See chapter 2.4 above.

798 Rubin, Unauthorised Administration 33 and 94.

799 See chapter 5.5 above.

800 Rubin, Unauthorised Administration 42 and 94.

801 See chapter 2.3 above.

802 See chapter 5 above.

803 See chapter 3.4 above.

804 Rubin, _Unauthorised Administration_ 59.

805 See chapter 4.3 above.

806 See sec 1375 CC (chapter 6.1 above), sec 1393 BW (chapter 6.2 above) and sec 2031 _Codice civile_ (chapter 6.4 above).

807 See chapter 4.4 above. French law grants the _gestor_ a lien (_droit de rétention_ - see chapter 6.1 above), as does Dutch law (_retentierecht_ - see chapter 6.2 above) and German law (_Zürückbehaltungsrecht_ - see chapter 6.3 above). Swiss and Austrian law (chapters 6.5 and 6.6 above) do not, however, provide for a lien in favour of the _gestor_.

808 See chapter 6.7 above.

809 See chapter 6.8 above. In Italian law it would appear that the question of a lien has likewise not yet been considered, while American law will probably follow the English precedents insofar as they may be applicable.

810 See chapter 4.5 above.

ABBREVIATIONS

The following abbreviations occur from time to time in the footnotes and elsewhere. Where they refer to a text-book or similar publication, the explanation is limited to the name of the author and the main title of the book or publication, while further bibliographical detail is furnished in the Bibliography. In the case of an article appearing in a journal or similar publication, only the essential details thereof are furnished. Abbreviations of journals and similar publications are explained with reference to the place of publication. Abbreviations of law reports and general Latin terms or expressions are the usual and have not been incorporated in the following list.

ABGB - Allgemeines Bürgerliches Gesetzbuch (Austria)

AHDE - Anuario de historia del derecho español (Madrid)

AJ - Acta Juridica (previously Butterworths South African Law Review) (Cape Town)

ALR - Allgemeines Landrecht für die Preussischen Staaten (Prussia)

Am JCL - American Journal of Comparative Law; A Quarterly (California)

Am JLH - The American Journal of Legal History (Philadelphia)

Annali Catania - Annali del seminario giuridico dell'università di Catania (Naples up to 1950; Milano from 1951)

Annali Palermo - Annali del seminario giuridico della università di Palermo (Palermo)

Annual Survey - Annual Survey of South African Law (Cape Town)

Arch civ Prax - Archiv für die civilistische Praxis (Tübingen)

Arch giur - Archivio giuridico (Bologna: as from 1898 known as "Archivio giuridico 'Filippo Serafini'")

Asser-Rutten 4.3 - Asser C, Rutten L E H, Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 4.3: Verbintenissenrecht: de verbintenis uit de wet (5e druk, bewerkt door Mr L E H Rutten) (1979)

Atti Bologna - Atti del congresso internazionale di diritto romano (Bologna e Roma 17-27 April 1933; 2 vols; Bologna, Pavia 1934-1935)

Atti Roma - Atti del congresso internazionale di diritto romano (Bologna e Roma 17-27 April 1933; 2 vols; Roma, Pavia 1934-1935)

Atti Torino - Atti della reale accademia delle scienze di Torino (Torino)

BGB - Bürgerliches Gesetzbuch (Federal Republic of Germany)

BIDR - Bulletino dell'Istituto di diritto romano (Rome; as from 1935 known as "Bulletino dell' Istituto di diritto romano 'Vittoria Scialoja'")

BML - Businessman's Law (Cape Town/Johannesburg)

Butt SAL Rev - Butterworths South African Law Review (Durban, 1954-1957; as from 1958 known as "Acta Juridica")

BW - Burgerlijk Wetboek (Netherlands)

CC - Code Civil (France)

CILSA - The Comparative and International Law Journal of

Southern Africa (Pretoria)

CJC - Corpus Iuris Civilis

CLJ - The Cambridge Law Journal (London)

CLP - Current Legal Problems (London)

Cod civ - Codice civile (Italy)

Conferenze romanistiche - Conferenze romanistiche (università degli studi di Trieste. Facoltà di giurisprudenza. Istituto di diritto romano e di storia del diritto) (2 vols), Milano 1960-1967

Coniectanea neerlandica - J E Spruit (ed), Coniectanea neerlandica iuris romani. Inleidende opstellen over romeins recht, Zwolle 1974

D - Dalloz, recueil périodique et critique mensuel (Paris)

De Vos, Verrykingsaanspreeklikheid - W de Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg (2nd ed, 1971)

ED - Enciclopedia del diritto (Milano)

Eos - Eos, Commentarii societatis philologae Polonorum, (of which vol 48 (1956) fasc 3 appeared as Symbolae Raphael Taubenschlag dedicatae 3, Varsaviae 1957) (Warsaw)

Festgabe Von Lübtow (1970) - Sein und Werden im Recht. Festgabe für Ulrich von Lübtow zum 70. Geburtstag am 21. August 1970 (herausgegeben von W G Becker und L Schnorr von Carolsfeld) Berlin 1970

Festgabe Von Lübtow (1980) - De iustitia et iure. Festgabe für Ulrich von Lübtow zum 80. Geburtstag (herausgegeben

von M Harder und G Thielmann), Berlin 1980

Festschrift Bekker - Aus römischem und bürgerlichem Recht; Ernst Immanuel Bekker zum 16. August 1907, Weimar 1907

Festschrift Felgenträger - Festschrift für Wilhelm Felgenträger, Göttingen 1969

Festschrift Koschaker - Festschrift Paul Koschaker (3 vols), Weimar 1939

Festschrift Mühl - Festschrift für Otto Mühl zum 70. Geburtstag 10. Oktober 1981 (herausgegeben von J Damrau, A Kraft, W Fürst), Stuttgart/Berlin/Köln/Mainz 1981

Festschrift Niedermeyer - Festschrift für Hans Niedermeyer, Göttingen 1953

Festschrift Rabel - Festschrift für Ernst Rabel (2 vols), Tübingen 1954

Festschrift Rheinstein - Ius privatum gentium. Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969. Band 1: Rechtsmetodik und internationales Recht, Tübingen 1969

Festschrift Von Hippel - Festschrift für Fritz von Hippel (1967)

Festschrift Wenger - Festschrift für Leopold Wenger zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern) (2 vols), München 1944-1945

Festschrift Zitelmann - Festschrift für Ernst Zitelmann zu seinem 60. Geburtstag überreicht von Verehrern und Schülern, München/Leipzig 1913

Freiburger rechtsgeschichtlicher Abhandlungen - Freiburger

rechtsgeschichtlicher Abhandlungen (Romanistische Studien von A Ehrhardt, W Felgenträger, F Wieacher), (Freiburg im Breisgau)

Grandes figures et grandes oeuvres juridiques - Grandes figures et grandes oeuvres juridiques (mémoires publiés par la faculté du droit de Genève, 6), Genève 1948

Harvard Law Review - (Cambridge, Mass)

HR - Hoge Raad (Netherlands)

Index - Index, Quaderni camerti di studi romanistichi - International Survey of Roman Law (Naples)

IRMAE - Ius Romanum Medii Aevi (auspice collegio antiqui iuris studiis provehendis Société d'histoire des droits de l'antiquité), (Milan)

Iura - Iura, Rivista internazionale di diritto romano e antico (Naples)

Ius commune - Ius commune. Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte, Frankfurt am Main (Frankfurt am Main)

Ius et lex - Ius et lex. Festgabe zum 70. Geburtstag vom Max Gutzwiller, Basel 1959

Jher Jahrb - Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts (Jena)

John, Onregverdige Verryking - D G John, n Oorsig van Onreg-

verdige Verryking as Gedingsoorsaak in die Suid-Afrikaanse Reg (1951)

JRS - Journal of Roman Studies (London)

Juridical Review - The Juridical Review (New Series as from 1956) (Edinburgh)

JZ - Juristen-Zeitung (Tübingen)

Labeo - Labeo, Rassegna di diritto romano (Naples)

Law: A Century of Progress - Law: A Century of Progress 1835-1935 (Contributions in Celebration of the 100 th anniversary of the Founding of the School of Law of New York University) (3 vols), London/Oxford 1937

LAWSA - The Law of South Africa (Durban)

Legal Transplants - See Watson A

LQR - The Law Quarterly Review (London)

Mélanges Cornil - Mélanges de droit romain dédiés à Georges Cornil (2 vols), Paris 1926

Mitteis, Die Rechtsidee in der Geschichte - Mitteis, H, Die Rechtsidee in der Geschichte. Gesammelte Abhandlungen und Vorträge, Weimar 1957

NJB - Nederlandsch Juristenblad. Weekblad behoorende bij de Nederlandsche Jurisprudentie (Zwolle)

Noviss Dig Ital - Novissimo digesto Italiano (Torino)

Opere Ferrini - Opere di Contardo Ferrini (5 vols),Milano 1929-1930

Opstellen Beekhuis - Op de grenzen van komend recht. Opstellen aangeboden aan prof Mr J H Beekhuis, Zwolle/Deventer 1969

Opstellen Hermesdorf - Opstellen over recht en rechtsgeschiedenis aangeboden aan prof Mr B H D Hermesdorf, Deventer 1965

Opstellen Verdam - Uit het recht; rechtsgeleerde opstellen aangeboden aan Mr P J Verdam, Deventer 1971

OR - Revidierte Obligationenrecht (Switzerland)

Pacchioni, Della gestione - G Pacchioni, Della gestione degli affari altrui secondo il diritto romano civile e commerciale (1935)

Pauw, Obs tum nov - W Pauw, Observationes tumultuariae novae vol 1 (1964), vol 2 (1967) (Haarlem)

Pothier, Appendice - R J Pothier, Appendice du quasi-contrat negotiorum gestorum, in Oeuvres complètes de Pothier: Traités des contrats de dépot, de mandat, de nantissement, d'assurance, de prêt et du jeu (1844) 198-238

Pringsheim, Gesammelte Abhandlungen: Pringsheim F, Gesammelte Abhandlungen (2 vols), Heidelberg 1961

Rabel, Gesammelte Aufsätze - E Rabel, Gesammelte Aufsätze (4 vols), Tübingen 1971

Rabels Zeitschrift - Rabels Zeitschrift für ausländisches und internationales Privatrecht (Berlin)

Recueil Dalloz - Recueil Dalloz de doctrine de jurisprudence

et de législation (Paris)

RH - Revue historique de droit français et étranger (4th series, Paris)

Riv dir comm - Rivista del diritto commerciale

Riv It - Rivista Italiana par le scienze giuridiche (Rome and, after 1946, Milan)

RM - Rechtsgeleerd magazijn. Tijdschrift voor binnen- en buitenlandsche rechtsstudie (Haarlem 1882-1938; thereafter published as "Rechtsgeleerd Magazijn Themis" - RMT)

RMT - Rechtsgeleerd Magazijn Themis. Tijdschrift voor Publiek- en Privaatrecht (Zwolle/Haarlem)

Rotondi, Inchieste - M Rotondi, Inchieste di diritto comparato 2, Padova/NewYork 1973

Rubin, Unauthorised Administration - L Rubin, Unauthorised Administration (Negotiorum Gestio) in South Africa (1958)

S - Sirey, Recueil général des lois et des arrêts (Paris)

SALJ - South African Law Journal (Cape Town) (before 1901 known as the "Cape Law Journal")

Scritti Chironi - Scritti giuridici dedicati ed offerti a Giampietro Chironi, Milano/Torino/Roma 1915

Scritti Ferrini - Scritti in onore di Contardo Ferrini pubblicati in occasione della sua beatificazione (4 vols), Milano 1947-1949

Scritti Segré - Segré G, Scritti vari di diritto romano, Torino 1952

Scritti Solazzi - S Solazzi, Scritti di diritto romano (6 vols, Napoli 1955-1972)

SDHI - Studia et documenta historiae et iuris (Rome)

Seiler, Negotiorum gestio - H H Seiler, Der Tatbestand der negotiorum gestio im römischen Recht (1968)

SJZ - Schweizerische Juristenzeitung (Zürich)

Strahan - W Strahan's translation of J Domat, Les loix civiles dans leur ordre naturel,as "The Civil Law in its Natural Order" (Boston 1861)

Studi Albertario - E Albertario, Studi di diritto romano (6 vols), Milano 1933-1953

Studi Betti - Studi in onore di Emilio Betti (4 vols), Milano 1962

Studi Bonfante - Studi in onore di Pietro Bonfante nel XL anno d'insegnamento (4 vols), Milano 1930

Studi Koschaker - L'Europa e il diritto romano. Studi in memoria di Paola Koschaker (2 vols), Milano 1954

Studi Riccobono - Studi in onore di Salvatore Riccobono (4 vols), Palermo 1936

Studi Scialoja - V Scialoja, Studi giuridici (3 vols), Roma 1932-1934

Studi Volterra - Studi in onore di Edoardo Volterra (6 vols), Milano 1971

Studien Kaser - Studien im römischen Recht, Max Kaser zum 65. Geburtstag gewidmet von seinen Hamburger Schülern, Berlin 1973

Studien zur europäischen Rechtsgeschichte - Wilhelm W (ed),

Studien zur europäischen Rechtsgeschichte. Helmut Coing zum 28.2.1972 von seinen Schülern und Mitarbeitern, Frankfurt am Main 1972

Symbolae David - Symbolae iuridicae et historicae Martino David dedicatae. Tomus I: Ius Romanum, Leiden 1968

Symbolae Taubenschlag - See Eos

Themis - Themis, Regtskundig Tijdschrift ('s-Gravenhage) (also known as "Themis, Verzameling van bijdragen tot de kennis van het publiek- en privaatrecht"; after 1938 it was published as "Rechtsgeleerd Magazijn Themis")

THRHR - Tydskrif vir Hedendaagse Romeins-Hollandse Reg - Journal of Contemporary Roman-Dutch Law (Durban/Pretoria)

TR - Tijdschrift voor rechtsgeschiedenis - Revue d'histoire du droit (Groningen/Bruxelles/La Haye)

TSAR - Tydskrif vir die Suid-Afrikaanse Reg - Journal of South African Law (Cape Town/Wynberg/Johannesburg)

Tulane Law Review - Tulane Law Review (New Orleans, La)

Van Bijnkershoek, Obs tum - C van Bijnkershoek, Observationes tumultuariae (1926-1962)

Van Zyl, Saakwaarneming - D H van Zyl, Die Saakwaarnemingsaksie as Verrykingsaksie in die Suid-Afrikaanse Reg. 'n Regshistoriese en Regsvergelykende Ondersoek (1970)

W - Weekblad van het recht ('s-Gravenhage)

Watson, Legal Transplants - A Watson, Legal Transplants, An Approach to Comparative Law, Edinburgh 1974

Wessels, Contract - J W Wessels, The Law of Contract in South Africa (1951)

WPNR - Weekblad voor privaatrecht, notarisambt en registratie ('s-Gravenhage)

ZBJV - Zeitschrift des bernischen Juristenvereins (Bern)

ZGB - Zivilgesetzbuch (Switzerland)

ZSR - Zeitschrift für Schweizerisches Recht (Basel)

ZSS - Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) (Weimar)

TABLE OF CASES

The following table of case includes references to South African, Scottish, English and United States law reports but excludes references to European cases mentioned in chapters 6.1 to 6.6. Full details of the latter appear in the relevant foot-notes.

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Abroms, v Minister of Railways & Harbours 1917 WLD 51

African Universal Stores v Dean 1926 CPD 390

Ambrose v Kerrison (1851) 10 CB 776; 138 ER 307

Amod Salie v Ragoon 1903 TS 100

Amory v Flyn (1813) 10 Johns 102, 6 Am Dec 316 (NY)

Anderson & Co v Pienaar & Co 1922 TPD 435

Argos, The (1873) LR 5 PC 134

ASA Investments v Smit 1980(1) SA 897(C)

Associated Boating Companies v Baardsen. In re The "Lief" 12 SC (1895) 330

Bannatine's Trustees v Cunninghame (1872) 10 M 319

Behr v Minister of Health 1961(1) SA 629(SR)

Bellingham and Another v Bloommetjie 1874 Buch 36

Berg v Sadler and Moore (1937) 2 KB 158; 106 LJKB 593

Bernstein v Tayler 5 HCG (1888) 258

Berry v Barbour (1954) 137 Okla 280, 279 P 2d 335

Bing and Lauer v Van der Heever 1922 TPD 279

Binstead v Buck 2 Black W 1117; 96 ER 660 (KB 1776)

BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms)

Bpk 1979(1) SA 391(A)

Boardman v Phipps (1967) 2 AC 46

Bonthuys v Preiss 1933 OPD 59

Boyce N O v Bloem & Others 1960(3) SA 855(T)

Bradshaw v Beard (1862) 12 CB (NS) 344; 142 ER 1175

Breslin v Hichens 1914 AD 312

Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 (3) SA 264(A)

Brooks Wharf v Goodman Bros (1936) 3 All ER 696; (1937) 1KB535

Candler v Crane, Christmas (1951) 2KB 164; (1951) 1 All ER 426

Chaimowitz v Balgowan Trading Co 1927 NPD 36

Chase v Corcoran (1871) 106 Mass 286

Cleadon Trust Ltd, Re (1939) 1 ChD 286; (1938) 4 All ER 518

Coetzee v Higgins 5 EDC (1887) 352

Colonial Cabinet Manufacturing Co v Wiid 1927 CPD 198

Colonial Government v Smith & Co 18 SC (1901) 380

Cornwall v Wilson (1750) 1 Ves 509

Cotnam v Wisdom (1907) 83 Ark 601; 104 SW 164

Craven-Ellis v Canons Ltd (1936) 2 KB 403; (1936) 2 All ER 1066

Crookes N O and Another v Watson and Others 1956(1) SA 277(A)

The Cynthia (1852) 20 LT (OS) 54

Davey v Cornwallis (1931) 2 DLR 80

De Beers Consolidated Mines v London and South African Exploration Company 10 SC (1893) 359

De Hart v De Jongh 1903 TS 260

Dold & Stone, Ex parte 1922 EDL 211

Donoghue v Stevenson (1932) AC 562

Dunbar v Wilson and Dunlop's Trustee (1887) 15 R 210

Ebden, In re 1 Roscoe (1864) 161

Edelstein v Edelstein N O & Another 1952(3) SA 1(A)

Exall v Partridge (1799) 8 TR 308

Excell v Douglas 1924 CPD 472

Falcke v Scottish Imperial Insurance Co (1886) 34 Ch D 234; 56 LTR 220

L Ferera (Private) Ltd v Vos N O & Others 1953(3) SA 450(A)

Fernie v Robertson (1871) 9 M 437

Fibrosa v Fairbairn (1943) AC 32

Fine and Gluckman v Heynecke 1915 TPD 211

Five Steel Barges (1890) 15 PD 14

Fletcher and Fletcher v Bulawayo Waterworks Co Ltd; Bulawayo Waterworks Co Ltd v Fletcher and Fletcher 1915 AD 636

Forster v Becker 1914 EDL 193

Frame v Palmer 1950(3) SA 340(C)

Fulton v Fulton (1864) 2 M 893

Gammon v McClure 1925 CPD 137

Gemmel v Annandale (1899) 36 SLR 658

Gerber v Wolson 1955(1) SA 158(A)

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