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Ernest G. Lorenzen

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## THE NEGOTIORUM GESTIO IN ROMAN AND MODERN CIVIL LAW

ERNEST G. LORENZEN\*

In Anglo-American law, a person intervening in the affairs of another will be responsible to the other party for any damage done in consequence of such intermeddling, but will derive no rights as a result thereof. Only when the intervention in another's affairs is dutiful, as Woodward calls it,<sup>1</sup> that is, is required by a sense of duty, though not by law, will the intervener be entitled to compensation if he has conferred a benefit for which the recipient ought to pay.

Quite a different attitude with reference to the intervention in other's affairs, without mandate, is maintained by the civil law. Its doctrine of *negotiorum gestio* goes back in origin, it appears, to the praetorian edict in Rome, which regulated the rights of parties who had carried on litigation on behalf of absent friends.<sup>2</sup> In the course of time the rights and duties created by this edict were extended to other kinds of intervention in the affairs of others.<sup>3</sup> Justinian says concerning the purpose of *negotiorum gestio* in Institutes 3, 27, 1:

"Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected; and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing."

As a result of the *negotiorum gestio*, the principal would have a direct action, the *actio negotiorum gestorum directa*, by means of which he could enforce whatever claims he might have against the

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\*Professor of Law, Yale University School of Law.

<sup>1</sup>WOODWARD, QUASI-CONTRACTS (1913) 309.

<sup>2</sup>WLASSAK, ZUR GESCHICHTE DER NEGOTIORUM GESTIO (1879) 197-198.

<sup>3</sup>*Ibid.*

agent on account of the management of his affairs. The agent would have the contrary action, the *actio negotiorum gestorum contraria*, by means of which he could enforce his claims against the principal.

The term *negotiorum gestio* is used sometimes in a narrower sense and sometimes in a wider sense.<sup>4</sup> In the narrower sense it refers to that kind of voluntary management of another's affairs as would entitle the agent to recover his expenses. When the requirements for the *negotiorum gestio* in the narrower sense do not exist, the principal may be able to hold the agent as a *negotiorum gestor*, but the latter can proceed against the principal, if at all, only in accordance with the quasi-contractual principles relating to the recovery of unjustified benefits.<sup>5</sup>

The requirements of the *negotiorum gestio* in the narrower sense in Roman Law are the following:

1. The agent must have carried on another's (the principal's) business in the interest of the principal.

The "business" carried on might be an act of any kind. It might consist of the doing of some physical act, such as repairing a house,<sup>6</sup> providing support<sup>7</sup> or medicine,<sup>8</sup> or it might take the form of a juristic act, such as becoming surety for another,<sup>9</sup> paying his debts,<sup>10</sup> etc.

The business carried on must have been "another's." If the voluntary agent by mistake carried on his own affairs, believing they were another's, he would have, of course, no claim as *negotiorum gestor* against the other.<sup>11</sup> If the business carried on concerned both the agent and a third party, he could recover from the third party only if he could have protected his own interests without the other.<sup>12</sup> As a co-owner of property making repairs on the common property could not satisfy this requirement, he would have no action against his co-owner as *negotiorum gestor* for the recovery of the latter's share of the expense.<sup>13</sup>

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<sup>4</sup>Called in Germany frequently respectively "echte" and "unechte" *negotiorum gestio*. 2 PLANCK, COMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (4th ed. 1925) 1229.

<sup>5</sup>BUCKLAND, TEXTBOOK OF ROMAN LAW (1921) 534.

<sup>6</sup>Digest 3, 5, 10, 1. <sup>7</sup>Digest 3, 5, 34. <sup>8</sup>Digest 3, 5, 10, 1. <sup>9</sup>Digest 3, 5, 31, pr.

<sup>10</sup>For example, where the principal's debt becomes due during his absence and his credit would be injured if it was not paid. See Digest 3, 5, 39. In our law there would be no recovery in the absence of ratification.

<sup>11</sup>Digest 3, 5, 6, 4. <sup>12</sup>BUCKLAND, TEXTBOOK OF ROMAN LAW (1921) 533-534.

<sup>13</sup>He would have to bring the action based on co-ownership, the *actio communi dividundo*. Digest 10, 3, 6, 2.

The business must have been carried on *in the interest* of the other. In Roman Law a voluntary agent could recover his expenses only if he acted in the interest of the principal. If the agent acted solely in his own interest, he could not recover as *negotiorum gestor* but he might have an action (*condictio*) against the principal to the extent that the latter was unjustly enriched at his expense. Says Julian in Digest 3, 5, 6, 3: "We may add that if a man has managed my affair with no thought of me, but for the sake of gain for himself, then, as we are told by Labeo, he managed his own affair rather than mine. . . . Should he himself have gone to any expense in connection with my affairs, he will have a right of action against me, not to the extent to which he is out of pocket, seeing that he meddled in my business without authority, but to the extent to which I am enriched."<sup>14</sup>

However, if A was in possession of B's property, believing in good faith that it was his, and made improvements thereon, he would have a lien on such property as long as he retained possession, but he would have no independent action against B for the recovery of the expense after he lost possession.<sup>15</sup>

For the recovery of his expenses it was not necessary that the voluntary agent should have had in mind the particular principal in whose interest the business was actually carried on. If the agent thought he was acting in behalf of Titius, whereas the business actually belonged to Sempronius, the agent's action would lie against Sempronius.<sup>16</sup>

2. The business must have been done "voluntarily" by the agent. It must not have been done by virtue of a mandate from the principal, nor in consequence of some other legal duty which he might owe to the principal. At one time in the development of Roman Law, the *actio negotiorum gestorum*, introduced by the praetor, was allowed whenever one party acted in the interest of another. By the time of Ulpian, however, some of these groups of cases had developed into independent legal institutions, such as mandate and guardianship, which gave rise to special remedies.<sup>17</sup> Thereafter the term *negotiorum gestio* was confined to those situations where a person acted in behalf of another without any contractual or other legal duty. As a mandate could be given tacitly, troublesome questions might arise in determin-

<sup>14</sup>See also the German Civil Code, § 687, par. 1.

<sup>15</sup>Digest 12, 6, 33; 6, 1, 48; 10, 3, 14, 1; BUCKLAND, *loc. cit. supra* note 5. As regards Anglo-American Civil Law, see WOODWARD, *op. cit. supra* note 1, 299-304.

<sup>16</sup>Digest 3, 5, 6, 8; 3, 5, 5, 1. This is true also in modern civil law.

<sup>17</sup>WLASSAK, *loc. cit. supra* note 2.

ing whether a person acted as *negotiorum gestor* or as a mandatary under a tacit mandate.

A person who believes that he has authority to act as a mandatary, but in fact is not authorized, either because no mandate was given him, or because it was void, or because the act in question was beyond his authority, may be a *negotiorum gestor*, and able to recover as such.<sup>18</sup> In the same manner, a guardian acting on behalf of a ward after the guardianship has terminated may be a *negotiorum gestor*.<sup>19</sup>

The mandate must be from the principal, in order to prevent the mandatary or agent from being at the same time a *negotiorum gestor*. If the agent acted under a mandate from a third person, his rights and duties arising between himself and such principal would be enforced according to the rules governing mandate. But if in the execution of such mandate, the agent intended to act not only in behalf of the mandator, but also in behalf of X, he might be a *negotiorum gestor* with respect to the latter.

Whether a subsequent ratification of the *gestor's* acts should be regarded as tantamount to a previous authorization, so as to preclude any action based upon *negotiorum gestio*, has given rise to much discussion. The Roman texts on the subject are contradictory. Ulpian appears to say that ratification always converts the *negotiorum gestio* into mandate, so that the action should be on the mandate.<sup>20</sup> Scaevola, on the other hand, would allow the *gestor* to sue with the *actio negotiorum gestorum*.<sup>21</sup> According to Buckland, the *gestor* might treat it as a mandate, but it does not become mandate *ipso facto*, so that it was not affected by the death of the principal.<sup>22</sup>

3. The act must have been done by the agent with the expectation of reimbursement for his expenses.

<sup>18</sup>Digest 3, 5, 5, pr. So in modern civil law. 2 WINDSCHEID-KIPP, *LEHRBUCH DES PANDEKTENRECHTS* (9th ed. 1906) 924-925; 7 BAUDRY-LACANTINERIE & BARDE, *TRAITÉ DE DROIT CIVIL, DES OBLIGATIONS*, vol. 3, pt. 2 (1905) 1047; 31 DEMOLOMBE, *COURS DE CODE NAPOLÉON* (1882) 70; 7 LAROMBIÈRE, *OBLIGATIONS* (1885) 406; 20 LAURENT, *DROIT CIVIL* (1876) 348; 4 PACIFICI-MAZZONI, *ISTITUZIONI DI DIRITTO CIVILE ITALIANO* (1920) 200. Anglo-American law is *contra*. MECHEM, *AGENCY* (2d ed. 1914) 1199-1201.

<sup>19</sup>2 PLANCK, *op. cit. supra* note 4, at 1216; K. v. L, Decision of Imperial Court, Jan. 26, 1910, *Juristische Wochenschrift*, 1910, 233.

<sup>20</sup>Digest 50, 17, 60. <sup>21</sup>Digest 3, 5, 9.

<sup>22</sup>BUCKLAND, *loc. cit. supra* note 5. In some of the modern codes there is an express provision that the ratification by the principal relates back to the commencement of the transaction and produces all the effects of a mandate. According to this view, the action subsequent to the ratification will be on the

There were a number of Roman texts in which the agent is denied the *actio negotiorum gestiorum contraria* for reimbursement because it appeared that he did the act with no expectation of reimbursement, either because he acted from a spirit of liberality, or in order to fulfil a family obligation. In Digest 3, 5, 27, 1, Modestinus says: "Where Titus maintained his sister's daughter out of natural affection, I gave it as my opinion that this afforded no ground of action against her."<sup>23</sup> In Code 2, 18, 12, it is stated that a son, whether emancipated or not, paying his father's debt, cannot recover the sum from his father, if he paid it *donandi causa*.

4. The agent could not recover his expenses if his intervention was contrary to the express will of the principal.

The principal might not want the act to be done at all, or he might object to have it done by the particular agent. In these cases, it seems the agent could not recover the expense incurred. Some of the Roman jurists said that the agent could have an action against the principal to the extent that the expenditure had actually enriched him.<sup>24</sup> Others held that a person intervening in the affairs of another against this other's express will must be deemed to have acted *donandi causa*.

Says Ulpian in Digest 3, 5, 8, 3: "Julianus discusses this case. There are two partners of whom one forbids me to carry on the management, and the other does not forbid me; shall I have a right of action on *negotia gesta* against the one who did not forbid me? . . . Accordingly I hold that the proper view is that of Julianus, that there will still be a good action on *negotia gesta* against the one who did not forbid, it being always understood that the one who forbade is not to incur loss to the slightest degree either through his partner or directly."

Says Paulus in Digest 17, 1, 40: "If I have become surety for you in your presence and against your will, I have no action

mandate, and not an action on *negotia gesta*. Brazil, Civil Code, art. 1343; Portugal, Civil Code, art. 1726; Spain, Civil Code, art. 1892; Switzerland, Code of Obligations, art. 424. For a general discussion of the question, see 5 GIORGI, *TEORIA DELLE OBBLIGAZIONI* (7th ed. 1909), 64 *et seq.*; PACCHIONI, *LA GESTIONE DEGLI AFFARI ALTRUI* (2d ed.), 255 *et seq.*; 31 DEMOLOMBE, *op. cit. supra* note 18, at 180 *et seq.*

<sup>23</sup>In modern law also no recovery can be had if the act was done in a spirit of liberality. German Civil Code, § 685, par. 1; Argentine Civil Code, art. 2302; BAUDRY-LACANTINERIE & BARDE, *op. cit. supra* note 18, at 1047; PACCHIONI, *op. cit. supra* note 22, at 535 *et seq.*

<sup>24</sup>"Any one who pays on another's behalf discharges the debt, even where the other refuses to consent or is unaware of the payment." Gaius, Digest 3, 5, 39.

against you, either on mandate or negotia gesta. Some believe, however, that a useful action should be allowed. I cannot agree with this, however, and Pomponius agrees with this."

Justinian settled the dispute existing between the jurists, in Code 2, 18, 24, by accepting Julian's view, so far as the act was done after written notice, or notification before witnesses, of the prohibition to the agent. He allowed him to recover, however, for useful expenditures which had been made prior to such notification.

No recovery could be had, either, to the extent that the amount spent by the agent was in excess of the principal's expressed wishes. In Digest 3, 5, 31, 4 Papinian says: "A testator desired that certain freedmen should be paid a specified sum with a view to the expense of erecting a monument; if any outlay is made beyond this amount, it cannot be lawfully claimed from the heir in an action on negotia gesta, nor yet on the ground of fideicommissum, as a limit to the outlay was laid down by the testator's expressed intention."

Where the agent acted against the express prohibition by the principal, he was liable to such principal in the direct action.<sup>25</sup>

To the rule that the expenses could not be recovered in Roman law, if the act was expressly prohibited by the principal, there were two exceptions, recognized on grounds of social policy. The first exception has reference to the payment of reasonable funeral expenses by the proper party which could be recovered notwithstanding a prohibition on the part of the heir. The action, however, was not the *actio negotiorum gestorum*, but a special action known as the *actio funeraria*.<sup>26</sup> The second exception existed in favor of a tenant who repaired a road in front of his house, where the landlord failed to do so. Such tenant appears to have been privileged to deduct the expense from the amount of the rent, notwithstanding a prohibition on the part of the landlord.<sup>27</sup>

An agent, unable to recover his expenses as *negotiorum gestor*, might be able to recover in quasi-contracts to the extent that the principal was enriched.<sup>28</sup>

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<sup>25</sup>BUCKLAND, *loc. cit. supra* note 5.

<sup>26</sup>Digest II, 7, 14, 13. That the *actio funeraria* was granted on more liberal terms than the *actio negotiorum gestorum* appears also from the fact that it would lie where the agent by mistake regarded himself as heir and thus thought that he was carrying on his own affair. Digest II, 17, 32, pr.; II, 7, 14, 11. But it is stated by Ulpian in the text last referred to that Trebatius and Proculus applied the ordinary rule governing *negotiorum gestio* and thus denied the *actio funeraria*.

<sup>27</sup>Digest 43, 10, 3; cf. WOODWARD, *op. cit. supra* note 1, at 334.

<sup>28</sup>SOHM, INSTITUTIONEM DES RÖMISCHEN RECHTS (17th ed. 1924) 445 n.

5. The act done must have been advantageous to the principal, or would have been to the principal's advantage, if successful.

In order to recover for his expenses the act done must have been advantageous to the principal, from the standpoint of the time of the agent's act. The mere fact that it failed to result in ultimate benefit to the principal would not deprive the agent of his right to reimbursement for his expenses, provided he had used proper diligence in the performance of the act. This circumstance marks the difference between the rights of a *negotiorum gestor* in Roman Law and those of a party whose recovery is based upon principles of unjust enrichment.<sup>29</sup>

The act must have been beneficial to the principal at the outset from an objective point of view. The agent's belief that it would be advantageous would not be sufficient.<sup>30</sup>

An agent might increase the value of a thing belonging to the principal from an objective point of view, and yet by so doing confer no advantage upon the principal within the meaning of the law of *negotiorum gestio*. This would be the case where the agent repairs property belonging to the principal which the latter had abandoned on account of the cost incident to the repairs. Under those circumstances, the agent could not recover the expense incurred.<sup>31</sup>

If the agent spent more than he ought to, he can recover from the principal only the amount that was reasonably necessary.<sup>32</sup> If he expended money for acts that were altogether unnecessary, he could recover nothing.<sup>33</sup> In determining whether the act done or the outlay incurred was reasonable, the principal's point of view, tastes, etc. were to be consulted.<sup>34</sup>

6. The circumstances under which the intervention took place must have been such that the intervention was reasonable.

A person has a right to control his own affairs, and is not obliged to have a transaction thrust upon him by an outsider. Hence his power to prohibit such intervention. Even in the absence of an express prohibition, the agent could recover his expenses only if his act was a reasonable act of intervention. From the Roman texts it would seem to appear that as a rule an agent could recover his outlay only if the principal was not in a position to look after the affair himself, and failure to attend to the matter would result in prejudice to him. Hence the emphasis placed upon the absence of

<sup>29</sup>See Digest 3, 5, 10, 1; 3, 5, 22.

<sup>30</sup>Digest 3, 5, 10, i. f.

<sup>31</sup>Digest 3, 5, 10, 1.

<sup>32</sup>Digest 3, 5, 25.

<sup>33</sup>Digest 3, 5, 27.

<sup>34</sup>Digest 15, 3, 3, 3, Sohm says that the outlay must have been "for the benefit and according to the views of the principal." SOHM, *loc. cit. supra* note 28.



the principal. Physical absence, however, was not indispensable, inability to look after his affairs being sufficient.<sup>35</sup> Recovery might be had, of course, in accordance with the principles of unjust enrichment.<sup>36</sup>

If the foregoing requisites did not exist in Roman Law, the agent could recover his expense only if the principal approved the transaction.

It should be noted that in Roman law recovery could be had only for the outlay, not compensation for services rendered. *Negotiorum gestio* was looked upon as a sort of voluntary mandate, and mandate being necessarily gratuitous in Roman law, it was natural that the *negotiorum gestor* should be deemed to have rendered the services gratuitously.

A *negotiorum gestor* in the narrower sense owes the following duties in Roman law.

1. The agent must complete the work he has undertaken in behalf of the principal and is not relieved from such duty by the principal's death.<sup>37</sup>

2. He must account for his management and turn over to the principal everything that came into his hands as such manager.<sup>38</sup>

3. He must pay for any loss which the principal suffered in consequence of the agent's lack of due care.<sup>39</sup> If the agent intervened to avert imminent danger, he is responsible only for gross negligence.<sup>40</sup> On the other hand, if he undertook things which the principal was not in the habit of doing, he will be responsible even for accidental

<sup>35</sup>3 VANGEROW, *LEHRBUCH DER PANDEKTEN* (7th ed. 1869) 507. Although the act was not a reasonable one, the agent could be held by the principal in the direct action. BUCKLAND, *loc. cit. supra* note 5.

<sup>36</sup>2 BRINZ, *LEHRBUCH DER PANDEKTEN* (2d ed. 1879) 645.

<sup>37</sup>Digest 3, 5, 21, 2. In the modern law also the agent must continue the affair undertaken by him, even after the death of the principal, until the principal or the heirs can take charge of the situation. France, Civil Code, art. 1373; Italy, Civil Code, art. 1142; Holland, Civil Code, art. 1391; Brazil, Civil Code, art. 1335; Argentina, Civil Code, art. 2290; Chile, Civil Code, art. 2289; Japan, Civil Code, art. 700. At least if damages would otherwise arise. 2 PLANCK, *op. cit. supra* note 4, at 1218. H. v. K., Decision of Imperial Court, May 10, 1906, *Juristische Wochenschrift*, 1906, 420.

<sup>38</sup>Digest 3, 5, 2; 3, 5, 23. PACCHIONI, *op. cit. supra* note 27, at 506-518. So in modern law. Japan, Civil Code, art. 646; 2 WINDSCHEID-KIPP., *op. cit. supra* note 18, at 916; 3 DEMOGUE, *TRAITÉ DES OBLIGATIONS* (1923), 73-74.

<sup>39</sup>Digest 3, 5, 11. In all cases of responsibility the agent may set off any profit resulting from the administration. BUCKLAND, *op. cit. supra* note 5, at 535.

<sup>40</sup>Digest 3, 5, 3, 9.

loss.<sup>41</sup> If a ward acted as *negotiorum gestor* without the concurrence of his guardian, he could be held only for the actual enrichment existing at the time of the suit.<sup>42</sup>

4. Under the law of some modern countries, the agent is under duty to notify the principal as soon as possible that he is undertaking the management of his affairs and to await the principal's decision, unless there is danger in delay.<sup>43</sup>

If the intervention is not proper, the agent will be responsible to the principal for the resulting damages.

The *negotiorum gestio* imposes upon the principal the following duties in Roman law:

1. To assume the obligations which the agent has entered into in the principal's behalf.<sup>44</sup>
2. To indemnify the agent for any expense incurred in the administration of the affair.<sup>45</sup>

If the agent was *negotiorum gestor* in the wider sense, he could recover against the principal, if at all, only in accordance with the principles relating to unjust enrichment.<sup>46</sup>

The principal's ratification of the voluntary agent's act would make him liable as mandator, and as such he was under a duty to pay the agent's expenses incurred in the management of the affair.<sup>47</sup>

The modern continental and Latin-American law has retained the institution of *negotiorum gestio*, but its development in the different countries has not been identical. Attention may be called to the law of the following countries:

*Austria.* In the absence of ratification, the agent can recover his expenses only if he undertook the management to avert imminent

<sup>41</sup>Digest 3, 5, 11. The modern codes take a similar point of view. German Civil Code, § 680; Swiss Code of Obligations, art. 420; Brazilian Civil Code, art. 1332; Chilean Civil Code, art. 2288.

<sup>42</sup>Digest 3, 5, 37. So in modern civil law. German Civil Code, § 682; Swiss Code of Obligations, art. 421; BAUDRY-LACANTINERIE & BARDE, *op. cit. supra* note 18, at 1048; 5 GIORGI, *op. cit. supra* note 22, at 41.

<sup>43</sup>Germany, Civil Code, § 681; Brazil Civil Code, art. 1334; Japan, Civil Code, art. 699.

<sup>44</sup>BUCKLAND, *MANUAL OF ROMAN PRIVATE LAW*, 312. So in modern civil law. France, Civil Code, art. 1375; Italy, Civil Code, art. 1144; Switzerland, Code of Obligations, art. 422; Spain, Civil Code, art. 1893.

<sup>45</sup>The obligations will attach, although the principal was a minor. 1 SÖRGEL, *BÜRGERLICHES GESETZBUCH* (1926) 873; BAUDRY-LACANTINERIE & BARDE, *op. cit. supra* note 18, at 1048; 3 DEMOGUE, *op. cit. supra* note 38, at 53; 5 GIORGI, *op. cit. supra* note 22, at 39.

<sup>46</sup>SOHM, *loc. cit. supra* note 28; Germany, Civil Code, §§ 684, 687.

<sup>47</sup>*Supra* p. 192.

damage to the principal. (*negotiorum gestio necessaria*).<sup>48</sup> In this case there is deemed to be a reasonable presumption that the principal would have approved the management, if the circumstances had been known to him. The danger which the agent intended to avert must have been real from an objective point of view,<sup>49</sup> and it is not sufficient that the agent in good faith regarded it as such. Recovery can be had only for the necessary and proper expenses, that is, for those expenses without which the threatening danger could not have been averted.<sup>50</sup> Under the above conditions, the agent is entitled to reimbursement of his expenses, even if he did not attain his object and the transaction terminated disadvantageously to the principal, provided always that he used due diligence.<sup>51</sup>

A distinction is made between the *negotiorum gestorum necessaria* and the *negotiorum gestorum utilis*.<sup>52</sup> The latter exists where the transaction is undertaken, not for the purpose of avoiding a loss to the principal, but in order to confer an advantage upon him. In this case recovery is allowed on principles of unjust enrichment, to the extent that the principal is still enriched at the time of the suit in consequence of the agent's management. The basis of liability in this case is thus unjust enrichment and not *negotiorum gestio*.<sup>53</sup>

If the undertaking by the agent was not necessary and did not result in positive benefit to the principal, the agent has no claim for reimbursement, but is responsible to the principal for any damage caused.<sup>54</sup>

The above rules are modified where the principal has prohibited the management of the affair. In such a case, provided the prohibition is a valid one, the expenses can not be recovered, although the affair was a necessary one.<sup>55</sup> Nor can recovery be had by the agent to the extent of the principal's actual enrichment.<sup>56</sup> This rule of the Roman law has been modified, however, to the extent that the agent is entitled to the benefit so far as it can be taken *in natura*.<sup>57</sup>

*Germany.* The provisions of the German law relating to *negotiorum gestio* in general are found in sections 677 to 687 of the German Civil Code, which read as follows:

<sup>48</sup>Austria, Civil Code, § 1036.

<sup>49</sup>2 STUBENRAUCH, COMMENTAR ZUM ÖSTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH (6th ed. 1894), 228, n. 4.

<sup>50</sup>*Ibid.* 229. <sup>51</sup>*Ibid.* 228-229. <sup>52</sup>Austria, Civil Code, § 1038.

<sup>53</sup>2 STUBENRAUCH, *op. cit. supra* note 49, at 229.

<sup>54</sup>2 STUBENRAUCH, *op. cit. supra* note 49, at 229-230.

<sup>55</sup>Austria, Civil Code, § 1040.

<sup>56</sup>*Ibid.*; 2 STUBENRAUCH, *op. cit. supra* note 49, at 231.

<sup>57</sup>*Supra* note 55.

"Sec. 677. A person who takes charge of an affair for another without having received a mandate from him or being otherwise entitled to do so in respect of him, shall manage the affair in such manner as the interest of the principal requires, having regard to his actual or presumptive wishes.

Sec. 678. If the undertaking of the management of the affair is opposed to the actual or presumptive wishes of the principal, and if the agent must have recognised this, he is bound to compensate the principal for any damage arising from his management of the affair, even if no fault is otherwise imputable to him.

Sec. 679. The fact that the management of the affair is opposed to the wishes of the principal is not taken into consideration if, without the management of the affair, a duty of the principal the fulfilment of which is of public interest or a statutory duty to furnish maintenance to others by the principal would not be fulfilled in due time.

Sec. 680. If the management of the affair has for its object the averting of an imminent danger which threatens the principal, the agent is responsible only for wilful default and gross negligence.

Sec. 681. The agent shall notify to the principal, as soon as practicable, the undertaking of the management of the affair, and await his decision, unless there is danger in delay. For the rest the provisions of 666 to 668 applicable to mandatary apply *mutatis mutandis* to the obligations of the agent.

Sec. 682. If the agent is incapable of disposing, or limited in disposing capacity, he is responsible only under the provisions relating to compensation for unlawful acts, and to the return of unjustified benefits.

Sec. 683. If the undertaking of the management of the affair is in accordance with the interest and the actual or presumptive wishes of the principal, the agent may demand reimbursement of his outlay as a mandatary. In the cases provided for by 679 this claim belongs to the agent even if the undertaking of the management of the affair is opposed to the wishes of the principal.

Sec. 684. If the conditions of 683 do not exist, the principal is bound to return to the agent all that he acquires through the management of the affair under the provisions relating to the return of unjustified benefits. If the principal ratifies the management of the affair, the claim specified in 683 belongs to the agent.

Sec. 685. The agent does not have any claim if he had not the intention to demand reimbursement from the principal.

If parents or grandparents furnish maintenance to their descendants, or vice versa, it is to be presumed, in case of doubt, that there is no intention to demand reimbursement from the recipient.

Sec. 686. If the agent is under a mistake as to the identity of the principal, the actual principal acquires the rights and obligations arising from the management of the affair.

Sec. 687. The provisions of 677 to 686 do not apply, if a person takes charge of the affair of another in the belief that it is his own.

If a person treats the affair of another as his own, although knowing that he is not entitled to do so, the principal may enforce the claims based on 677,678,681,682. If he does enforce them, he is liable to the agent as provided for in 684, sentence 1."

*France.* The French Code provisions relating to *negotiorum gestio* in general are scanty and may be found in Articles 1372-1375, which read as follows:<sup>58</sup>

"Art. 1372. When a person voluntarily manages another's business, whether the owner knows of such management or whether he does not, the person who manages such business contracts the tacit agreement to continue the management which he has commenced and to carry it on until the owner is in a position to look after the business himself. He must also take charge of everything connected therewith.

He submits to all the obligations which would result from an express power of attorney which the owner might have given him.

Art. 1373. He is obliged to continue his management, even if the owner dies before the business is ended, up to the time the heir has been able to assume the management thereof.

Art. 1374. He is obliged to devote to the management of the business all the care of a prudent owner.

Nevertheless, the circumstances which have led him to take charge of the business may authorize the judge to diminish the damages which might result from the laches or negligences of the manager.

Art. 1375. An owner whose business has been properly managed must fulfil the agreements which the manager has entered into in his name; he must hold him harmless for all the personal agreements which he has assumed and repay to him all the useful or necessary expenses which he has incurred."

*Portugal.* If the principal ratifies the agent's act and wishes to appropriate the advantages resulting from the management, he must reimburse him for his necessary expenses and indemnify him for all damage resulting to the agent from the management.<sup>59</sup> If the principal has not ratified the agent's act, but if the object of the agent's intervention was to avert an imminent and manifest danger to the principal, he must pay the agent for all expenses incurred for this purpose.<sup>60</sup> If the principal has not ratified the act and the intervention was not undertaken to avert an imminent and manifest danger to the principal, the agent is under a duty to restore matters

<sup>58</sup>To the same effect. Italy, Civil Code, arts. 1141-1144.

<sup>59</sup>Portugal, Civil Code, art. 1724.

<sup>60</sup>*Ibid.* 1725.

to their original state at his own expense and to pay to the principal any damage which may have resulted from such intervention.<sup>61</sup> If they cannot be restored to their former condition and the profits exceed the loss, the principal may take both.<sup>62</sup> If the profits do not exceed the losses, the principal may turn over the entire affair to the agent and demand damages for his intervention.<sup>63</sup> If the principal knew of the agent's intervention and allowed him to finish it without opposition, he will be deemed to have assented thereto, but is obligated to the agent only if actual benefit accrued to the principal from the management.<sup>64</sup> Although the agent intervened against the principal's opposition, if he wishes to take advantage of the management, he must pay the agent his necessary expenses and indemnify him for all the damage resulting to him from such management.<sup>65</sup>

*Argentina.* The Argentine Code provides that the principal is liable as a mandator if the affair has been usefully managed, although the advantage has later disappeared.<sup>66</sup> In this case the principal must pay the agent's expenses and indemnify him against any personal obligations which he has incurred.<sup>67</sup> There is an express provision in the Code that the principal is not bound to pay for the agent's services.<sup>68</sup> If the affair was not undertaken usefully, or if its usefulness was uncertain at the time it was undertaken, the principal is liable, in the absence of ratification, only to the extent of his actual enrichment.<sup>69</sup> Although the affair was undertaken usefully, the principal is, in the absence of ratification, liable only to the extent of his actual enrichment if, (1) the agent believed that it was his own affair; (2) the affair was a common one, but the agent acted solely in his own interest; (3) the principal is a minor or otherwise incapable, and his legal representative did not ratify the transaction; (4) if the agent undertook the management out of gratitude as a remuneratory service.<sup>70</sup> Unless the agent had a legitimate interest in intervening in the principal's affairs, he cannot recover his expenses for any act done against the principal's express prohibition.<sup>71</sup>

*Brazil.* Where the affair has been usefully administered, the principal must perform the obligations contracted in his name and reimburse the agent for all his necessary or useful expenses.<sup>72</sup> The same is true where the object of the intervener's act was to prevent some imminent danger to the principal or where the intervention

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<sup>61</sup>*Ibid.* 1727. <sup>62</sup>*Ibid.* 1728. <sup>63</sup>*Ibid.* 1729. <sup>64</sup>*Ibid.* 1730. <sup>65</sup>*Ibid.* 1731.

<sup>66</sup>Argentina, Civil Code, art. 2297. <sup>67</sup>*Ibid.* 2298. <sup>68</sup>*Ibid.* 2300.

<sup>69</sup>*Ibid.* 2301. <sup>70</sup>*Ibid.* 2302. <sup>71</sup>*Ibid.* 2303. <sup>72</sup>Brazil, Civil Code, art. 1339.

resulted in benefit to the owner. In the cases just mentioned the amount of recovery cannot exceed, however, the benefits conferred.<sup>73</sup> Even where the agent engaged in risky operations, the principal must pay his necessary expenses and indemnify him against damages incurred, if he wishes to take advantage of the management of the affair.<sup>74</sup> Although the principal disapproves the agent's act, as contrary to his interests, the agent can recover to the extent of the actual benefits conferred upon the principal.<sup>75</sup>

*Chile.* If the affair has been well administered, the principal is under a duty to fulfil the obligations which the agent has contracted in the course of the management of the principal's affairs and reimburse him for the useful or necessary expenses.<sup>76</sup> The principal is under no duty to compensate the agent for his services.<sup>77</sup> If the affair has been administered badly, the agent is responsible for the damages caused.<sup>78</sup> If the agent administered the principal's affairs against the latter's express prohibition, the agent has no claim against the principal, unless the administration was actually useful to the principal and the benefits still exist at the time of the suit.<sup>79</sup> An agent administering the principal's business in the belief that it was his own, has a right to be reimbursed to the extent that the principal has been enriched and is still enriched at the time of the suit.<sup>80</sup>

From the foregoing account it is apparent that a voluntary agent may recover under some circumstances the expenses which he has incurred, although no actual benefit but loss has resulted to the principal from the intervention, and that under other circumstances he may recover to the extent of the benefits conferred. We cannot stop to inquire in what respects the civil law differs from Anglo-American law in allowing in cases of this sort recovery on the ground of unjust enrichment. It has been pointed out that a dispute existed among the Roman jurists concerning the question whether recovery in quasi-contracts should be allowed on the ground of unjust enrichment where the act was done by the agent against the principal's prohibition, and that according to the prevailing view, the agent was deemed to have donated such benefit to the principal.<sup>81</sup> In modern times a contrary conclusion has been reached in continental countries on the ground that the intention to make a gift cannot be presumed, so that the agent may recover, notwithstanding the fact that the act was prohibited directly by the principal. The rule that

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<sup>73</sup>*Ibid.* 1340. <sup>74</sup>*Ibid.* 1338, single paragraph. <sup>75</sup>*Ibid.* 1344.

<sup>76</sup>Chile, Civil Code, art. 2290. <sup>77</sup>*Ibid.* 2290. <sup>78</sup>*Ibid.* 2290.

<sup>79</sup>*Ibid.* 2291. <sup>80</sup>*Ibid.* 2292. <sup>81</sup>*Supra* p. 195.

a person should not be allowed to make another his debtor against the latter's will, except where some special public interest intervenes, appears to be ignored.<sup>82</sup>

According to Roman and modern civil law, the voluntary agent is said, in the absence of ratification by the principal, to be entitled to no compensation for his services. In some codes this is stated in express terms.<sup>83</sup> In view of the fact that a mandate in Roman law was necessarily gratuitous, it was natural that the involuntary agent should be denied all compensation for his services. Although in modern civil law the mandate is not necessarily gratuitous, the involuntary agent is still denied compensation for his services in behalf of the principal, in order that intervention in the affairs of others might not be encouraged. Contrary to Roman law, it is recognized, however, that where the *negotiorum gestor* renders professional or technical services in the ordinary line of his profession or trade, he should be entitled to compensation.<sup>84</sup>

What are the conditions in modern law under which, in the absence of ratification, the voluntary agent is entitled to his expenses?

In some countries, like Austria, the agent can recover his expenses only if intervention was in fact necessary to avert imminent damage from the principal.<sup>85</sup> In others, and more generally, intervention need not be necessary, the agent being entitled to his expenses, as in Roman law, if he undertook the affair "usefully"<sup>86</sup> at the time of

<sup>82</sup>There is sometimes an express provision to this effect in the codes, e. g. Chile, Civil Code, art. 2291. See also Germany, Civil Code, § 684; 2 PLANCK, *op. cit. supra* note 4, at 1226. Cf., however, Austria, Civil Code, § 1040.

<sup>83</sup>Argentina, Civil Code, art. 2300; Holland, Civil Code, art. 1394; Chile, Civil Code, art. 2290.

<sup>84</sup>3 DEMOGUE, *op. cit. supra* note 38, at 77-8; 2 PLANCK, *op. cit. supra* note 4, at 1225; 1 ENNECCERUS, LEHRBUCH DES BÜRGERLICHEN RECHTS (8th ed., 1922) vol. 1, pt. 2, p. 486, n.; Pacchioni would allow the agent compensation if the *negotiorum gestio* refers to commercial transactions. *Op. cit. supra* note 38, at 527. Kohler would deny compensation in general because of the complicated facts under which the *negotiorum gestio* arises, but would allow it where life is saved, property is found, professional services are rendered, or where the agent has suffered personal injuries as a result of the *negotiorum gestio*. 25 JHERING'S JAHRBÜCHER FÜR DIE DOGMATIK, 138-140.

<sup>85</sup>See also Portugal, Civil Code, arts. 1725, 1727, 1731.

<sup>86</sup>France, Civil Code, art. 1375 (if well administered); Italy, Civil Code, art. 1144 (if well administered); Holland, Civil Code, art. 1393 (for necessary and useful expenses); Switzerland, Code of Obligations, art. 422 (if intervention according to interest of principal, for all expenses that are necessary, or useful and reasonable); Argentina, Civil Code, art. 2297 (if useful); Brazil, Civil Code, art. 1339 (if usefully administered); Chile, Civil Code, art. 2290 (if well administered); Japan, Civil Code, art. 702; par. 1 (for beneficial expenses).



the intervention, although owing to unfortunate circumstances no advantage accrued therefrom to the principal in the end. According to the German Code, the agent can demand reimbursement as a mandatary, if the undertaking of the management of the affair was in accordance with the interests and the actual or presumed wishes of the principal.<sup>87</sup> Under the German Code the agent must show, (1) that the management of the affairs of another was objectively in the interest of the principal, and (2) that it accorded with the actual or presumed wishes of the principal. If the intervention is not in the interest of the principal from an objective point of view, that is, judged by the views of ordinary men, the agent is not entitled to his expenses, although he was not in a position to ascertain what the intention of the principal was. In order to protect the principal, however, against unwelcome meddling in his affairs, for he may not want the act to be done at all, or may not want to have it done in the particular manner, or by the particular agent, or at the particular time, it was felt that that intervention should correspond also to the principal's expressed or implied will. A transaction might be objectively in the interest of the principal and yet be opposed to his will. On the other hand, if it appears that the intervention conforms to the principal's real will, there will be a conclusive presumption that it corresponds likewise with his interest. If the principal had no knowledge of the facts, so that he could have no real will in the matter, the presumed will of the principal will have to be ascertained by the court. In determining such will all the surrounding circumstances are to be considered without reference to the fact whether they were known to the agent.<sup>88</sup>

On grounds of social policy the German law overrides the principal's will, however, in two classes of cases. First, where, without the management of the affair, a duty of the principal, the fulfillment of which is of public interest, would not be fulfilled in time; second, where a statutory duty to furnish maintenance to others by the principal would not be fulfilled in time. The first exception to the

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<sup>87</sup>Germany, Civil Code, § 683.

<sup>88</sup>2 DERNBURG, DAS BÜRGERLICHE RECHT (1906) 432-433; ENNECCERUS, *op. cit. supra* note 84, vol. 1, pt. 2, p. 486; 2 PLANCK, *op. cit. supra* note 4, at 1224-1225; 1 SOERGEL, BÜRGERLICHES GESETZBUCH (3d ed. 1926) 873; STAUDINGER-ENGELMANN, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (7-8th ed. 1912) vol. 2, pt. 2, pp. 1306-1308. Some authors hold that the interest is to be determined with reference to the subjective views of the principal. ENDEMANN, LEHRBUCH DE BÜRGERLICHEN RECHTS (9th ed. 1903) vol. 1, p. 1118, note 3. ERNST, *Das Interesse und der Wille des Geschäftsherrn* in § 683 BGB, 96 ARCHIV. FÜR DIE CIVILISTISCHE PRAXIS (1905) 440, 501-505.

general rule that the agent cannot recover his expenses against the expressed will of the principal is stated in such general terms that it might be given a most extensive meaning. The text does not speak of *public* duty but of a duty of the principal, the fulfillment of which is of public interest. It might be contended, therefore, that the prompt discharge of any private obligation would be of general public interest, and thus authorize intervention against the will of the party obligated. But this is not the meaning of this section.<sup>89</sup> The application of the section is not limited, on the other hand, it seems, to the discharge of *public* duties. The essential thing appears to be that the prompt discharge of the obligation, whether public or private, shall be of public interest.<sup>90</sup> In the case of private obligations, this will be true only under very exceptional circumstances, as for example, in the case of the burial of the dead.<sup>91</sup> It has been contended that the discharge of *public* duties is always of public interest;<sup>92</sup> but this is denied by leading writers who claim that even in the case of obligations of the public law the special condition must exist that the fulfillment of the particular obligation is of public interest.<sup>93</sup>

The opposing will of the principal is disregarded in the second place, if without the intervention by the agent, a statutory duty of the principal to furnish maintenance to others would not be fulfilled in time. In this case it is not necessary to prove that the fulfillment of the duty was in the public interest, for the existence of such interest is conclusively presumed.<sup>94</sup>

The *negotiorum gestio* implies that the agent acted in behalf of another. In France there has been a tendency to hold that there can be no *negotiorum gestio* without an "intention" on the part of the agent to carry on *another's* business.<sup>95</sup> This appears to have been

<sup>89</sup>2 PLANCK, *op. cit. supra* note 4, at 1220.

<sup>90</sup>*Ibid.*

<sup>91</sup>*Ibid.*

<sup>92</sup>ISAY, DIE GESCHÄFTSFÜHRUNG NACH DEM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH, 138.

<sup>93</sup>According to these writers the payment of another's tax against his will is permissible only if there is a special public interest. 2 DERNBURG, *op. cit. supra* note 88, at 434 n.; 2 PLANCK, *op. cit. supra* note 4, at 1220. *Contra*: ISAY, *loc. cit. supra* note 92. In our own law the actual and prompt performance of another's obligation must be of grave public concern. WOODWARD, *op. cit. supra* note 1, at 311.

<sup>94</sup>If the duty to support rests upon contract it must be proved that the fulfillment of the duty is in the public interest. 2 PLANCK, *op. cit. supra* note 4, at 1220. *Cf.* WOODWARD, *op. cit. supra* note 1, at 333-334.

<sup>95</sup>According to many writers there is no *negotiorum gestio* in the absence of an intention to carry on another's affairs. BAUDRY-LACANTINERIE & BARDE, *op. cit. supra* note 18, at 1045; 31 DEMOLOMBE, *op. cit. supra* note 18, at 71-72;

the law in France until 1872 when the Court of Cassation rendered a decision<sup>96</sup> which, in the opinion of some writers, did away with the necessity of the agent's *intention* to carry on *another's* affair and to allow him the recovery of his expenses, if he actually carried on another's affair. In a recent decision,<sup>97</sup> however, the same court used language which appears to support once more the intention theory. The Court of Cassation in this opinion interprets the word "voluntarily" in Article 1372 of the French Code as "intentionally", and relies upon the Roman tradition. Picard<sup>98</sup> contends that this later decision of the Court of Cassation does not in reality support the intention theory, but holds merely that the *negotiorum gestio* implies "an interference without a purely egotistical thought." According to this writer, there is a *negotiorum gestio* according to French law, if the following conditions exist:<sup>99</sup> (1) The intervention must not have proceeded from a purely egotistical thought; (2) The intervention must not conflict with the legitimate opposition of the principal; (3) The intervention must have been useful to the principal. The courts, according to Picard, no longer inquire into the intention of the *gestor*, but into his act, which they appreciate in a spirit of liberality. If the act is profitable to another, they presume that the *gestor* did not intend to serve his own ends exclusively. All that is required is that the *gestor* be conscious that he is rendering

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20 LAURENT, *op. cit. supra* note 18, at 353-354. See also 5 GIORGI, *op. cit. supra* note 22, at 56. *Contra*: 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL (1915) 712; DEMOGUE, *op. cit. supra* note 38, at 32. See also PACCHIONI, *op. cit. supra* note 22, at 179-183.

<sup>96</sup>Letellier v. Derode, Cassation (Req.), June 18, 1872, Dalloz, 1872, 1, 471. The facts of this case were as follows: Letellier, who was a merchant in Paris, bought on Aug. 24, 1870, of Derode, a merchant in Havre, 25,000 bushels of American wheat. The purchaser paid 50,000 francs on account, but was unable to accept further delivery of the wheat owing to the siege of Paris. Letellier having left Havre without giving instructions concerning the wheat, Derode obtained an order from the court authorizing him to store the wheat at Letellier's expense and another order subsequently authorizing him to sell it. In a suit by Letellier to have the original contract rescinded the Court of Cassation held that in asking for the sale of the wheat Derode had acted as *negotiorum gestor* in the interest of Letellier, the owner of the wheat, and in his own interest. It says: "Whereas the reciprocal obligations arising from the quasi-contract of *negotiorum gestio* result from the fact of the carrying on of the affair and the law, and not from the intention of the parties; and whereas it is of little consequence that the *gestor* meant to act both in his personal interest and that of a third person, if in fact the third party was interested in the *negotiorum gestio* and was benefitted by it; etc."

<sup>97</sup>Benoit v. Biollay, Cassation (Civ.) June 23, 1919, Sirey, 1921, 1, 12.

<sup>98</sup>Picard, *Revue Trimestrielle*, 1922, p. 21. <sup>99</sup>*Ibid.* 23.

useful service to another. If he is conscious of this fact, the intervention is not egotistical, although he was pursuing his own interests at the same time or believed that he was under a contractual duty. Whether an intervention is egotistical or altruistic will depend, therefore, according to Picard's formula, upon the utility and necessity of the intervention.<sup>100</sup>

In Germany it is held that the agent must act with a consciousness and will that the affair, in which he intervenes, is "foreign" to him.<sup>101</sup> The fact that the agent has a personal interest in carrying on another's affairs does not prevent its being a case of *negotiorum gestio*, for the performance of the agent's personal obligation may involve at the same time the management of another's affair.<sup>102</sup> It is not essential that at the time of acting, the agent had a particular principal in mind. The will to act for whom it may concern suffices.<sup>103</sup> A person may be a *negotiorum gestor*, therefore, for a corporation or a partnership to be formed.<sup>104</sup> If a person treats another's business as his own, either because he mistakenly thinks it is his own, or because he wishes to make it his own, although he knows that it is objectively another's, he cannot recover as a *negotiorum gestor*, but may be held as such.<sup>105</sup> Where a person acts in behalf of another in execution of a mandate from a third party, or by reason of some public or private relationship which obligates him to act, he will ordinarily not be *negotiorum gestor*, as the intention to act in behalf of another will be lacking. A mandatary, for example, intends to act as such in behalf of his mandator, and not as *negotiorum gestor*. An official acting within his official duties generally does not intend to act in addition as a private *negotiorum gestor*. It is possible, however, that under particular circumstances, such a person intends to act as *negotiorum gestor* for another, for example, if there should be a doubt in his mind concerning the validity of the mandate or such other relationship.<sup>106</sup> When a person transacts at the same

<sup>100</sup>*Ibid.* 32.

<sup>101</sup>SÖRGEL, *op. cit. supra* note 88, at 868; 2 PLANCK, *op. cit. supra* note 4, at 1214 ("if the agent had the intention of carrying on another's affair").

<sup>102</sup>Decision of Imperial Court, June 19, 1913, *Das Recht*, 1913, No. 2407; 2 PLANCK, *op. cit. supra* note 4, at 1215; SÖRGEL, *loc. cit. supra* note 101.

<sup>103</sup>Decision of the court of Stuttgart, Jan. 15, 1909, *Das Recht*, 1909, No. 661; 2 PLANCK, *op. cit. supra* note 4, at 1215.

<sup>104</sup>Decisions of the Imperial Court, Oct. 30, 1886, 42 *Seuffert's Archiv*, 160; June 19, 1913, *Leipziger Zeitschrift*, 1913, 853.

<sup>105</sup>This is expressed in § 687, par. 1. The agent will be liable in tort if his intervention was based upon fault and damage to the principal resulted. 2 PLANCK, *op. cit. supra* note 4, at 1230.

<sup>106</sup>2 PLANCK, *op. cit. supra* note 4, at 1215.

time his own business and that of another, either as co-owner or partner, the rule governing co-ownership or partnership will control.<sup>107</sup>

The traditional rule has been that the agent intervening in the affairs of another could recover only his outlay, and not compensation for services rendered. In modern times, however, compensation has been allowed where the agent rendered professional services.<sup>108</sup>

The *negotiorum gestio* of the Roman and modern civil law is an institution midway between mandate and quasi-contracts. In some countries, like Germany, it seems to approach more closely to mandate, whereas in others, France for example, it is identified more fully with quasi-contracts. The boundaries of the *negotiorum gestio* are everywhere ill-defined. The codes generally give no definition, and leave the working out of the concept to the courts and writers. Although a vast literature has accumulated on this subject and a large body of decisions exist, it is not possible, in the nature of things, to state in precise but general terms what is meant by carrying on another's affair within the meaning of the doctrine of *negotiorum gestio*. The formulas suggested have been many, but little helpful in the solution of concrete problems. Assuming the conditions of *negotiorum gestio* within the meaning of the term in a particular country to be present, the agent can recover his outlay to the extent that the principal has been enriched. Such recovery seems to be allowed, although the intervention was against the direct prohibition of the principal. If the conditions are present which have been called in this article *negotiorum gestio* in the narrower sense, the agent can recover his outlay as such, provided it was necessary or proper, without reference to the fact whether it resulted in benefit or loss to the principal. This is the feature of the *negotiorum gestio* which is its most distinctive characteristic and stands out in striking contrast with Anglo-American law.

The above represent some of the technical rules that have been developed in connection with the subject of *negotiorum gestio*. These convey, however, only a very inadequate idea of the importance and function of the *negotiorum gestio* in the modern civil law. These can be appreciated only through a study of its relation to the general system of law of which it forms a part. The *negotiorum gestio* has been found to be a very flexible and useful tool for the promotion

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<sup>107</sup>*Ibid.*; cf. WOODWARD, *op. cit. supra* note 1, at 330-333.

<sup>108</sup>So already in Germany before the adoption of the present Civil Code. 2 WINDSCHEID-KIPP, *op. cit. supra* note 18, at 923-924.

of the ends of justice; it has enabled quasi-contractual recovery in countries in which the law of quasi-contracts was not fully developed,<sup>109</sup> and it has been the means of affording relief in all countries of the civil law in situations where special rules of Equity and especially those relating to constructive trusts would be invoked in Anglo-American law.

The provisions referred to above relate to *negotiorum gestio* in general. In addition to these there are to be found special regulations involving an application of the doctrine to particular situations.<sup>110</sup> These cannot be considered in this place.

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<sup>109</sup>The subject of unjust enrichment was studied for a long time in France as an instance of *negotiorum gestio*. 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (8th ed. 1921) 760.

<sup>110</sup>For example, in §§ 965 *et seq.* of the German Civil Code, concerning the rights and duties of finders; in §§ 740 *et seq.* of the German Commercial Code, concerning maritime salvage, and in § 89 of the German Code of Civil Procedure, concerning *negotiorum gestio* in the matter of judicial proceedings.