

J. J. Bray*

POSSIBLE GUIDANCE FROM ROMAN LAW

The problems dealt with by Roman law during the various stages of its history up to the codification of Justinian are not, of course, identical with the problems dealt with by the present law of South Australia. Still there is a large area in common. The surprising thing is how often similar results are obtained by the use of very different legal conceptions and techniques. My object in this article is not to compare the two systems as a whole or to embark on a profound juristic analysis of the similarities and differences between them but to deal with certain specific topics under the various heads of law which were dealt with by the Romans in a manner different from ours and a manner at which it might be profitable to take a look. I am not, of course, debating the general merits of the two systems, nor is it relevant to point to other topics where Roman law might well have taken some hints from the common law if this had been chronologically possible.

I shall take the Roman law as it existed under Justinian as the standard of comparison, though not without occasional glances at the subsequent history of Roman law during the millennium and a half which has elapsed since his death and during which Roman law became in a sense the common law of Western Europe. In doing so it is inevitable that I shall overgeneralize and ignore qualifications and exceptions which it would be necessary to mention if a complete picture of the Roman law solutions were to be presented. It is not, however, my purpose to expound Roman law but only to draw attention to different methods of approach.

There have, of course, been continuous, if often unacknowledged, borrowings from Roman law during the whole history of the common law. The contrast between the two systems is by no means as sharp as it was, say, as recently as 1800. There was in that year in England, to take only a few examples from the field of family law, no divorce except by private Act of Parliament, no adoption, no legitimation, unlimited freedom of testation, a different system of succession on intestacy for real and personal property, involving in the case of real property the right of primogeniture, the inability of married women to contract and, by virtue of the doctrine of the unity of the spouses, the acquisition by the husband at common law of all the wife's property, whether owned at the time of marriage or subsequently acquired. In all these respects the rules of Roman law were very different and whether consciously or unconsciously the law has now been altered in all common law countries so as to come much closer to the Roman rules. In other branches of the law, however, there has been no equivalent rapprochement and there are differences in the treatment of some of the topics just mentioned.

* This article was written by Dr. Bray before his appointment as Chief Justice of the Supreme Court of South Australia.

I propose to adopt the Roman classification of private law and deal with certain matters under each head. First, however, I point out a contrast in general methodology. The traditional classification of Roman private law into the law of persons, the law of things and the law of actions, the classification of the law of things into the law of property, the law of succession and the law of obligations, the classification of the law of obligations into the law of contract, quasi-contract, delict and quasi-delict, fall considerably short of scientific perfection. The Roman lawyers did make an attempt however to map out the field of the ordinary civil law in a logical and consistent manner. So far as I can see we have never made the attempt at all. The general digests like *Halsbury*, the *English and Empire Digest* and the *Australian Digest* despair of any more logical classification than the alphabetic. You start with "Action" and you finish with "Work". The result is that it is very much easier in Roman law to fit your problem into the appropriate pigeonhole and to know where to begin any search.

This however is a general juristic matter. I return now to the various heads of law.

Much of the area covered by the Roman law of persons has no contemporary equivalent. Still the relationships of husband and wife, and parent and child, are fairly enduring. In late Roman law, apart from certain ill-advised and short-lived special legislation by Justinian on the topic of divorce which I ignore, marriage was essentially a relationship of consent. It could be contracted by mutual consent without formalities and it could be dissolved by mutual consent without formalities. Indeed it could be dissolved unilaterally by either party without any court proceedings, though with consequential effects on the property of the spouses. Broadly the scheme was that the spouse who dissolved a marriage unilaterally without just cause and the spouse who was divorced unilaterally for just cause suffered certain unfavourable property readjustments for the benefit of the other spouse or the children of the marriage. Roman law took the view that the economic burden of supporting the matrimonial life of the children should not fall exclusively on the husband. It was customary and eventually obligatory on the wife's relations to provide her with a dowry equivalent to their means. The husband normally had the administration of the dowry during the marriage but the capital was preserved intact and had to be restored to the wife or her estate, or under special circumstances to the donor, in the event of the termination of the marriage, whether by death or divorce, subject to the adjustments previously mentioned. Whether the chivalrous principle of our law that the primary responsibility for the upkeep of the matrimonial home and the support of the children rests on the husband irrespective of the wife's means is to be preferred is a matter on which opinions may legitimately differ. It was, of course, fair enough in the days when the husband got all the wife's property anyhow, unless she was protected by a marriage settlement. Whether it remains equally fair since the Married Women's Property Act is another question.

Legitimation and adoption, as I have said, were Roman conceptions, originally foreign to the common law, but now imported by statute. However, the only form of legitimation known to us is legitimation *per subsequens matrimonium*. Late Roman law had this but its shortcoming is that it makes legitimation only possible during the lifetime of both parents. Roman law supple-

mented it with legitimation, after appropriate enquiry, by imperial rescript, which in modern Roman law systems means legitimation by some State Department. Are there any real reasons why the father should not be able in some cases at least to legitimate his child notwithstanding the death of the mother or vice versa? This type of legitimation of course only makes the child legitimate with respect to one parent, but I understand (though I have not checked this) that in some European countries this principle is carried further and that a child born to a woman engaged to be married can in some circumstances be legitimated with respect to both its parents notwithstanding the death of the father before the marriage ceremony. This may go too far and any such system needs obvious safeguards against fraud and imposition, but subject to this there would seem no reason why one of the parents should not be able to relieve the child of the stigma of illegitimacy and the possible detrimental consequences from the point of view of inheritance and death duty, notwithstanding that the co-operation of the other parent is unobtainable through death or otherwise. There is no reason in the nature of things why legitimation must take effect with regard to both parents or not at all. There is nothing juristically impossible in the conception that a child can be legitimated with respect to one parent only.

The Roman law gave the father extensive powers over the property of the child, powers which were gradually attenuated but even in the later stages still involved a usufruct or life interest of the father in most of the property of the child apart from his earnings. Modern Roman law systems cut this down to the right to the income from the child's property during his minority. Moreover in Roman law any defect in the capacity of a person under disability such as a minor to deal with his property or enter into contracts was cured by the consent of his guardian, the guardian of course being liable for negligence. An alienation of property or a contract which would not otherwise be valid as against the person under disability becomes so if effected with the consent of the guardian. In some cases, for example a very young child or an imbecile, the person under disability cannot act at all and here where action is allowed it must be the action of the guardian alone. With us, guardianship relates to the person rather than to the property of the person under disability and it is of course true that most infants who have property at all have the equitable estate only, the legal estate being vested in trustees who have statutory powers to use the property for the infant's benefit. It still happens, however, occasionally that an infant has the legal title to property and in such cases it is extraordinarily difficult to deal with that property or apply the income from it towards the maintenance and education of the infant. There is power under sections 244 and 245 of the Real Property Act for the guardian of an infant or lunatic to deal with land under that Act, and for the Court to appoint a guardian where necessary. Apparently there is no such power with regard to land under the general law (see *Halsbury*¹ where the learned authors say: "Apart from statutory authority the real estate of an infant cannot be bound by contract or settled or alienated by its parent or guardian", or even, apparently, by the Court). There is no equivalent in South Australia to the provisions of the English statutes which in effect convert the infant's interest in land conveyed to him into an equitable interest, the transferor becoming a

1. *Halsbury's Laws of England* (3rd ed., 1952), Vol. xxi, 161.

quasi-trustee². The Court has apparently certain inherent powers to deal with the interest of an infant in personal estate but the exact extent of this is uncertain³.

The whole question of guardianship is very scantily dealt with by English law. Roman law to a certain extent assimilates the position of various types of guardian and has some types unknown to our law, particularly the guardianship of prodigals. A prodigal is a person who is wasting his substance and who is interdicted by the court from disposing of his property or entering into contracts without the consent of his curator. There is no way in our law, apart from the institution of a spendthrift trust, of preventing anyone from disposing of his assets for the purpose of riotous living to the prejudice of his family. Indeed our law apparently considers the status of prodigality as so repugnant to its fundamental principles that it will not even recognize the rights of a guardian of a prodigal duly appointed under a foreign system of law⁴.

There is another interesting contrast with regard to contracts made by persons under disability, particularly infants. Under our law, though an infant can escape liability for the future under invalid contracts made by him, he cannot recover what he has paid under the contract unless there has been a total failure of consideration⁵. Roman law adopted a more graduated approach. The infant could take the benefit of, without being bound by, a contract entered into by him without the consent of his tutor or curator and could recover what he had paid under such a contract except to the extent to which he would otherwise be unjustly enriched. This ties up with the whole question of unjust enrichment which will be discussed later but a very different result would have been produced in a case like *Valentini v. Canali*⁶ where the infant had paid a considerable amount under the contract and got some small benefit under it, though not a benefit at all commensurate with the amount paid. By the common law he could recover no part of the money he had paid though he was relieved from obligation for the future. In Roman law he would have been able to recover what he had paid less a proper allowance for the benefit he had obtained.

The ages of majority were different in Roman law from those of our law. They were fourteen in the case of a male and twelve in the case of a female for certain purposes, twenty-five for other purposes. The Emperor could, however, anticipate majority in an appropriate case and grant to a male of twenty or a female of eighteen the rights of full age, *venia aetatis*. It has been suggested that it would be useful if there were some power in the Court or in some government department to give similar relief in our law, so as to enable, for example, a young man something short of twenty-one to carry on his deceased father's business.

The Roman law of corporations was, of course, very different from ours.

2. *Id.* at 151.

3. *Id.* at 161.

4. *In re Selot's Trust* [1902] 1 Ch. 488.

5. *Valentini v. Canali* (1890) 24 Q.B.D. 166; *Steinberg v. Scala (Leeds) Ltd.* [1923] 2 Ch. 452.

6. *Supra* n. 5.

The corporations known to Roman law were municipalities and guilds or friendly societies. There was no equivalent of the limited company, though limitation of liability could be achieved by other means, such as the carrying on of a business through the medium of a slave to whom a definite amount of capital had been entrusted, which it is not pertinent to discuss here. However, in late Roman law signs can be observed of the development of a different type of juristic person, the type which in later European law, particularly in German law, developed into the personified fund. Under this system a charitable fund becomes a legal person entitled to hold property and to sue and be sued in its own name. It can of course only act through agents but it owns its own property. No machinery of trustees or incorporation of a number of persons is necessary. Such a system had certain advantages over our system in the days before legislation equivalent to our Associations Incorporation Act but the use of that statute obviates many practical inconveniences which would otherwise exist. There are still difficulties under our system, however, in dealing with money which has been collected for some charitable or similar purpose without the employment of the statutory machinery mentioned.

Turning now to the law of property one of the most striking differences between the two systems is that the fundamental division of property in common law into real and personal property does not exist in Roman law to anything like the same extent. There was, of course, never any feudal system in Rome and hence there was never any system of tenures, estates, entails or primogeniture and there was nothing at all corresponding to the complex set of concepts and rules which once formed the most engrossing topic of the common law and whose legacy still remains to perplex the law in a variety of contexts. Land, of course, of its nature demands special treatment in certain areas, but there is really nothing in the nature of things juristically to necessitate one set of rules for the sale of land and another set of rules for the sale of goods, one set of rules for the hire of land (in other words the law of landlord and tenant) and another set of rules for the hire of goods, or, I might add, one set of rules dealing with succession to land and another set of rules dealing with succession to personal property, a state of affairs which formerly existed in the common law and whose influence is not entirely extinct. In Roman law there is one law of sale and one law of hire though there may be special rules under each head dealing with land. The feudal system, of course, existed in Europe as well as in England, but as a result of political and social changes from the French Revolution onwards its influence has been far more completely eradicated than it has with us. The law of real property is by common consent of generations of undergraduates the most difficult part of English law and the gain in simplicity to Roman law by reason of the absence of most of its complicating factors is enormous.

Two important conceptions in Roman law which affect property, contract and delict are *dolus* and *culpa*. *Culpa* is roughly equivalent to our negligence. *Dolus* is a word of many meanings. In its narrowest meaning it is something like our fraud, that is, deception to the damage of another. In a wider sense it means any form of dishonesty causing damage, even without the element of deceit, and in a wider sense still it means any intentional and unjustified infliction of harm. In the sense of deceit it is in some respects wider and in other respects narrower than our fraud, but one important aspect where it differs

from our law is this, that it includes non-disclosure of relevant facts. In Roman law, as with us, it is impossible to contract out of the liability for fraud, but the inclusion of non-disclosure as a species of *dolus* means that exempting clauses in contracts cannot relieve a party from liability which is justly his to the same extent as it can with us. A good example is the decision of the House of Lords in *Ward v. Hobbs*⁷. There the vendor sold typhoid-infected pigs. He knew of the infection and kept silent about it without making any positive representations. The contract contained a clause saying that the pigs were sold with all faults and without any warranty. The House of Lords decided in favour of the vendor. The result would have been different in Roman law. The non-disclosure of the disease would have amounted to *dolus* and no condition of the contract could have excluded liability.

Negligence in Roman law, as with us, is a concept of great importance both with regard to the law of contract and the law of tort, though in Roman law it receives considerably more relative prominence with regard to contract than it does with us, possibly because the Romans appear to have been more in the habit of leaving the obligations of the parties under various types of contract to the implied rules of law annexed to such contracts. The standard of care in Roman law was for most purposes roughly the same as ours, namely the care normally exercised by the good father of the family, or, as we would say, the ordinary reasonable and prudent man. This is the ordinary Roman standard of care in cases of tort. However the Romans also had two other standards applied in certain special circumstances in relation to contract. One is *culpa lata* or gross negligence, defined somewhat naively as "not to understand what everyone understands", which is almost a contradiction in terms. The consequences of this are treated as equivalent to the consequences of *dolus* or wilful wrong-doing. Thus in circumstances where a party is only liable for intentional acts and not for acts of negligence judged by ordinary standards he is nevertheless liable for gross negligence. The other special standard is a subjective one. Instead of the party being held to the objective standard of diligence, that is the care which would be exercised in the circumstances by the ordinary reasonable man, he is liable only for such care as he customarily exercises in his own affairs. The late Roman law thought that in certain types of contract a party had no right (in the absence of course of express agreement) to expect the other party to display greater care in the situation in question than he normally displayed with regard to his own affairs. Partnership is an example of this. The reason given is that a man selects his partner and presumably knows him and has no right to expect the partner to display more care about the partnership business than he does about his own. The utility of these special standards of care is arguable, but they have not been without their influence on the common law. The conception of gross negligence has found its way into the criminal law⁸ and the subjective standard has left its mark on the law of bailment, which, indeed, we have largely borrowed from Roman law via the famous decision of Lord Holt in *Coggs v. Bernard*⁹ though not without its content undergoing some curious changes in the process.

I seem to have got ahead of myself in dealing with fraud and negligence at

7. [1878] 4 A.C. 13.

8. *R. v. Bateman* [1925] All E.R. 45.

9. (1703) 2 Ld. Raym. 909.

this stage but this anticipation is more apparent than real, due to the generalized nature of the concepts of *dolus* and *culpa* in Roman law. I return to the law of property strictly so called. In Roman law title was acquired by delivery, subject in some cases to additional requirements depending on the type of transaction. Delivery, however, only transfers such title as the transferor has. Broadly speaking, Roman law was without the relief afforded by our system in commercial transactions by such provisions as section 25 of the Sale of Goods Act and section 4 of the Mercantile Law Act. The maxim *nemo dat quod non habet* admits of few, if any, exceptions. However, the inconveniences of such a rule were considerably mitigated by a system of acquisitive prescription. Broadly speaking, and subject to certain exceptions, title is acquired by uninterrupted possession, originating in good faith and arising out of some recognised legal transaction, for a sufficient period of time, longer in the case of land than in the case of movable property. Our law suffers from the want of such a system, though something like it exists in the case of pre-Torrens system land¹⁰, and there is now a means of obtaining title to land under the Real Property Act by long possession, though this is not good against the true owner, no matter how long the period of adverse possession, if he intervenes before the Registrar-General has issued a new certificate. Even with regard to land not under the Torrens System, however, the two laws do not produce the same result and there is no analogy in the case of personal property at all. This is because our law has always concentrated on extinctive rather than acquisitive prescription, on extinguishing the remedy after the lapse of the necessary period of time (and in the case of pre-Torrens system land extinguishing the right too) but without positively creating a new root of title in the possessor. If A's bicycle is in B's adverse possession for more than six years A will probably have lost his action of conversion or detinue. However, if A sees the bicycle in the street, no matter how long after the expiration of the six-year period, he is presumably at liberty to pick it up and ride away on it, since all that the Statute of Limitations has done is to deprive him of his right of action without positively creating any title in B. In Roman law if B had originally acquired possession in good faith arising out of some legally recognized transaction, and if the bicycle were not stolen property, which is subject to special rules, he would have acquired a positive title after the lapse of the necessary period of time.

One result of the development of this system of acquisitive prescription, or *usucapio* to give it its technical name, is that the Roman law has been led to pay considerable attention to the question of possession and to develop a coherent body of law relating to it, part of which indeed we have borrowed, as for example the celebrated analysis into the *corpus* and *animus* of possession. The most fervent admirer of the common law can hardly deny that its rules relating to possession are discredibly confused. The word seems to have different meanings for the purposes of different branches of the law.

Roman law also devoted considerable attention to various subsidiary methods of acquiring ownership, not perhaps very common in practice, but occasionally arising and necessary to be considered for the purpose of building up a logical system of law. I refer to such matters as *occupatio*, or the taking possession of

10. Limitation of Actions Act 1936-1959 (S.A.), s.28.

that which has no owner, for example, fish; *accessio*, or the merging of one thing in another so that the owner of the principal thing becomes the owner of the accessory thing, subject in a proper case to rights to compensation, as where a building is erected on land or a button sewn on a garment; and *specificatio*, where a new product is made out of an old one, as when A turns B's grapes into wine or carves a statue out of B's marble. As a matter of fact Bracton borrowed the Roman rules with regard to many of these matters and more or less Roman principles are in fact laid down in books like *Halsbury*¹¹. These rules however have not been followed in practice¹². If A gets possession of a car under a hire purchase agreement from B and fits on to the car tyres or other parts belonging to C does the ownership of the tyres or other parts pass to B? To questions of this kind it cannot be said that the courts have yet worked out definite answers. Roman law did work out answers to the various problems that arose out of the case of building materials. Three possible parties can be imagined: the owner of the land, the owner of the materials and the builder. It is conceivable that A could build a house with B's materials on C's land. The Roman solutions to these matters are not entirely satisfactory. Presumably in our law C, as the owner of the land, would become the owner of the house, B would be left with some sort of claim for damages for conversion against A and A, even though he built in good faith under the mistaken belief that the land was his, would in the absence of fraud have no remedy at all.

The Roman law of servitudes is developed in detail and there has been some borrowing by us. Roman law acknowledged a rather wider list of easements than ours, such as for example the right to a view, and easements could be acquired by user for the necessary period of time and lost by corresponding non-user. It is rather startling to the English lawyer to find a life estate regarded as a servitude. Yet from the point of view of juristic simplicity and elegance this way of looking at things has much to commend it. As I have said Roman law knew nothing of the doctrine of estates in land. The conception of ownership was clearcut and sharply distinguished from possession, far more so than it is with us. However in Rome as elsewhere testators and settlors often desired to create life estates in favour of widows and others. The usufruct is the right to enjoy and take the income from the property of another during life or for a lesser period. It is a true right *in rem* but it is regarded not as a separate estate but as a burden on the ownership like a right-of-way.

I turn to the law of succession. Possibly the most striking contrast is the unlimited freedom of testation allowed to the English testator until recent times. In late Roman law certain earlier rules survived providing that certain relations had to be expressly disinherited if the will were to stand. This may be the origin of the popular belief that you have to cut your son off with a shilling. These rules were purely formal and could be avoided by appropriate draftsmanship. Far more important, however, was a set of rules which has entered into the enduring structure of modern European law, providing that certain relations have to be left a certain proportion of the share which they would have got on intestacy unless statutory grounds of deprivation exist or

11. See, for example, *op. cit. supra* n.1, vol. xxix, 377-378.

12. Cf. *Bergougnan v. British Motors* (1930) 30 S.R. (N.S.W.) 61; *Lewis v. Andrews & Rowley Pty. Ltd.* [1956] S.R. (N.S.W.) 439; *Rendell v. Associated Finance* [1957] V.R. 604.

unless they have already received appropriate benefactions in other ways. If these rules are broken the will will fail in whole or in part with varying consequences into which it is not necessary to enter. The result is that in modern European systems every testator knows that, unless the statutory grounds for disinheritance exist or unless he has provided for the favoured relations in some other way during his life, he is only free to dispose of a certain proportion of his estate away from them. They are entitled to their legitim, to use the phraseology of the Scots law. The relations favoured by the Roman law are descendants of the testator and, in the event of there being no descendants, his ascendants. Some later systems admitted the surviving spouse into the protected class but in Roman law, true to the doctrine of the separation of the property of the spouses, the husband was, generally speaking, under no obligation to provide for the wife or the wife for the husband. A married daughter on the other hand was treated in the same way as a son or an unmarried daughter.

The evils which this system was designed to remedy, for long left unredressed by the common law, have now been met by statutes in various jurisdictions such as our Testators Family Maintenance Act. This system however works differently. In the first place the basic criterion is need, not relationship. Secondly the quantum of the right of the disinherited relation is entirely in the discretion of the Court. A surviving spouse or child with adequate means can be passed over entirely, no matter how unjustly, and the amount which the unjustly disinherited relation without adequate means will get from the court is largely a matter for speculation. There is of course much to be said for each system but ours has the grave disadvantage that it is impossible for the testator to plan with any degree of assurance. Those who want their legal advisers to tell them what is the minimum amount which they have to leave to their relations to comply with the requirements of the law and ensure that their dispositions will remain unchanged are forced to remain content with a Delphic answer.

English law has adopted many Roman rules with regard to the interpretation of wills and the law relating to legacies. Nevertheless the results of the two systems are not always the same. The only specific topic I propose to mention is that of conditions. Roman law seems to have devoted more attention than our law to the topic of conditions, both in wills and contracts, and worked out in considerable detail a body of rules on the topic. It took a clear line with regard to illegal or impossible conditions attached to testamentary gifts. In such cases the condition is disregarded and taken as *pro non scripto* and the gift stands absolutely. In our law the position varies according to whether the condition is precedent or subsequent and whether the gift is of real or personal property¹³. In some cases the gift stands though the condition is void as in Roman law. In other cases the gift fails with the condition. There seems no reason at all for these distinctions except a historical one. A praiseworthy and unique attempt has been made by the South Australian legislature to deal with this situation¹⁴. The legislation, however, is incomplete. It only deals with illegal conditions, presumably leaving conditions void on other grounds to be dealt with under the pre-existing law.

13. *Halsbury's Laws of England* (3rd ed., 1952), xxxix, 916.

14. See Law of Property Act 1936-1960 (S.A.) s.23.

I come now to contract. The Roman law of contract, or rather of contracts, had serious deficiencies, even in its final stages though these deficiencies were more important theoretically than practically. In practice most contracts which would be enforceable in English law would be enforceable also in Roman law or *vice versa* though the fields do not completely overlap. As a matter of fact most common commercial contracts such as sale, hire and the like were more easily enforceable in Roman law because of the lack of any equivalent to the Statute of Frauds or section 4 of the Sale of Goods Act. Roman law knew nothing of the English doctrine of consideration and this preserved it from some of the oddities of the common law. In particular there was no question of the inefficacy of an agreement to pay a lesser sum or the actual payment of a lesser sum in satisfaction of a greater, nor was it necessary in paying ten *aurei* in agreed satisfaction of a debt of fifteen *aurei* to add a canary or a bottle of wine or a bill of exchange. Certainly in Roman law a bare agreement needed something else, a *causa*, to make it legally enforceable. In the case of some contracts and those the most common, such as sale, hire and partnership, the mere consensus alone was a sufficient *causa* without more. In other cases something more was needed, such as a formal promise given in response to a formal question or performance of the agreement on one side by delivery of property or something else. Modern European systems still tend to require a *causa*, although this seems to have now evolved itself to the stage where it means nothing more than a serious and deliberate intention to enter into a legally binding obligation. The difference between the two systems is illustrated by a decision of the Privy Council in an appeal from Ceylon, where of course Roman-Dutch law operates¹⁵. There are, of course, advantages in requiring a form of some kind as tending to concentrate the attention of the parties on the fact that they are altering their legal position, and the common law, in choosing the element of bargain rather than the element of promise as the test of enforceability in the absence of a deed under seal, at least showed an earthy sense of commercial reality. Nevertheless the doctrine of consideration does occasionally lead to injustices and to the violation with impunity of undertakings deliberately entered into. It has survived the denunciations of law lords¹⁶ and the report of a Law Revision Committee, but it is surely over-ripe for execution.

The Romans were much more generous in allowing mistake as a ground of contractual avoidance. This was developed mainly in the law of sale and it is not certain how far the texts should be applied outside it. In particular it allowed the buyer to avoid the contract where he was mistaken as to some essential or important characteristic of the thing sold, even apparently if the seller had not contributed to the mistake. This is called by the commentators *error in substantia*. There is disagreement as to the test of substantiality necessary to constitute *error in substantia*. The texts refer to such matters as buying a gilt article under the belief that it is solid gold and the like. The maxim *caveat emptor*, though couched in the Latin language, is most definitely not a maxim of Roman law where *caveat vendor* would be more appropriate. There seemed to be a feeling, possibly justified, amongst legislators and jurists that the dealers in the Roman markets were mostly rogues and that the customer had to be

15. *Jayawickreme v. Amarasuriya* [1918] A.C. 869.

16. See *Dunlop v. Selfridge* [1915] A.C. 847 at 855, per Lord Dunedin.

protected against them. Such a feeling is probably not justified under modern conditions and it may well be that Roman law bent over too far in its anxiety to protect the buyer. And as I have said it is doubtful how far this doctrine of *error in substantia* was extended from the buyer to the seller and outside the contract of sale. Still it is arguable that our doctrine of mistake is confused, uncertain and over-narrow. The topic could certainly benefit from investigation and reformulation¹⁷.

In its final stages Roman law allowed third parties to sue under contracts in a number of cases where this would probably be impossible under our law, as, for example, where A lends something to or deposits something with B on terms that it is ultimately to be handed over to C. It is surely highly desirable that some means should be devised to overcome the dilemma that, when A makes a contract with B that B should do something in favour of C and B defaults, then C cannot sue because he is not a party to the contract and A can recover no more than nominal damages because he has not suffered any damage. Both English law and Roman law have various expedients to overcome this situation, in neither case completely covering the field, but modern European systems display greater latitude than ours in allowing C to sue and this is surely the right solution, at least in the absence of any contrary arrangement between A and B¹⁸.

Roman law developed the law relating to specific contracts rather more fully than the law relating to contracts generally. I have already mentioned the law of sale incidentally in several connections. Some mention should be made of the law of hire, which, as I have said, in Roman law included the law of landlord and tenant. This means that the general principle that the owner is held to warrant the suitability of the thing hired for the purpose for which it is hired extends to land and houses as well as to chattels. It would appear not to be so in our law, apart from statute, except in the case of furnished houses¹⁹. It is only for historical reasons that this distinction exists. The Roman tenant apart from certain special leases in perpetuity or for long periods did not acquire any right *in rem* but merely a right *in personam*. On the other hand the law showed a greater tenderness to him than does the common law. It is curious that equity never felt impelled to extend to the tenant any protection similar to that which it granted to the mortgagor. In Roman law if the thing ceases to exist during the term through no fault of the hirer he is released from any further obligation to pay rent. This means, for example, that the tenant of a house which is burnt down or destroyed without his fault does not have to pay any more rent until it is restored. Similarly an agricultural tenant is entitled to remission of rent if the crops fail due to some cause outside his control though he may be under a liability to make up the deficiency in subsequent years of fertility. Of course the parties can contract out of these implied terms (except, as I have previously remarked, the liability for *dolus* which includes non-disclosure on the part of the owner of defects known to him). This is the reason given by the English courts for refusing to

17. Cf. *Ingram v. Little* [1961] 1 Q.B. 31, particularly at 73-74 per Devlin L.J. (as he then was).

18. See for a discussion of this question the judgment of the High Court in *Coulls v. Bagot's Executor & Trustee Co. Ltd. and others.* (1967) 40 A.L.J.R. 471.

19. *Halsbury's Laws of England* (3rd ed., 1952), vol. xxiii, 574, 577.

relieve a tenant in such circumstances, namely that it is his own fault in not providing in the lease for the event of accidental destruction²⁰.

The Roman law of quasi-contract was developed earlier and in many respects more fully than in our law. A quasi-contract which has no parallel in our law is *negotiorum gestio*. The general principle is that if A interferes in the affairs of B without his authority but also without any express prohibition, and if the intervention is a reasonable thing in B's interest in the circumstances and is done with the intention not of bestowing a gift but of claiming reimbursement, then the intervener, though of course liable for negligence, is nevertheless entitled to reimbursement of expenses and indemnification against liabilities incurred in the process. There is no parallel in our law to this institution. If A takes in and feeds B's lost dog he cannot claim the price of the dog food²¹. If A pays the premium of B's insurance policy without B's knowledge in order to keep it alive he has no right to reimbursement. "Liabilities," Bowen L.J. said "are not to be forced on people behind their backs"²² Indeed it would seem in our law that, apart from statute, if A after being injured in an accident is found lying unconscious by the roadside, neither the passer-by who summons the ambulance nor the ambulance which takes him to the hospital nor the hospital which accepts him nor the surgeon who performs the operation have any claim to reimbursement from him. Our law apparently considers that to the Good Samaritan virtue should be its own reward.

The doctrine of unjust enrichment had a wider application in Roman law than with us and its application under later European systems may well be wider still. The difficulties pointed out in cases like *Sinclair v. Brougham*²³ are not felt in Roman law because in its developed stages quasi-contract is recognized as something entirely distinct from contract. Hence the law is not worried by finding itself unable to feign or imply a contract in law where no contract in fact would be enforceable because of some defect in the capacity of one of the parties. Speaking with the authority of one trained in a quasi-Roman system, Lord Dunedin pointed out the contrast in telling terms in *Sinclair v. Brougham*²⁴. Quasi-contractual liability in Roman law never depended on the fiction of an implied contract. In another way the various actions which Roman law gave in cases of unjust enrichment permitted of a more equitable adjustment of the rights of the parties. I have already referred to this in connection with infants' contracts. I refer to it again in connection with frustrated contracts. The doctrine which for so long held the field in our law that frustration only released the parties *in futuro* but did not enable money paid before frustration to be recovered never obtained in Roman law. Nor did the converse doctrine, now established by the House of Lords, apply either, that the money paid can be recovered back *in toto* where there has been a total failure of consideration to the payer irrespective of any expenses or detriment that might have been incurred by the payee²⁵. Both these solutions

20. *Paradine v. Jane* (1647) Style 47. See also *Redmond v. Dainton* [1920] 2 K.B. 256; *Pelepah Valley (Johore) Rubber Estates Ltd. v. Sungei Besi Mines Ltd.* (1944) 170 L.T. 338.

21. *Binstead v. Buck* (1777) 2 Black. W. 1117.

22. *Falcke v. Scottish Imperial Insurance Co.* (1887) 34 Ch.D. 234.

23. [1914] A.C. 398.

24. *Id.* at 434-435.

25. *Fibrosa Spolka v. Fairbairn Lawson* [1943] A.C. 32.

are too absolute. There should be an enquiry into the extent to which the payee would be unjustly enriched if he were permitted to retain the whole of the money and a consequential order for repayment. Something like this would have happened in Roman law and something like this now happens in England owing to the provisions of the Law Reform (Frustrated Contracts) Act 1943, which has no South Australian counterpart. Once again the Scots Law Lords were able to make a convincing display to their English colleagues of the ethical superiority of their system in *Cantiare San Rocco v. Clyde Shipbuilding & Engineering Co.*²⁶. The force of Lord Shaw's rhetoric is not diminished by the fact that he may possibly have somewhat overstated the generality of the provisions of Roman law itself as opposed to its subsequent development in Scotland²⁷.

Finally with regard to the law of delict I desire to mention three topics. Firstly delictual liability in Roman law is based on fault, on intentional or negligent wrongdoing. Hence there is a clear rule that those who are not capable of wrongdoing by reason of infancy (of course infancy of tender years only) or lunacy are not delictually liable. Our law has wavered much about this and there may well be different rules about different torts. I am not here debating which is preferable as a fundamental rule or delictual liability, the principle that liability should depend on fault or the principle that liability should depend simply on the causing of harm without justification, but it is desirable that the position in our law should be clarified.

Both in Roman law and in our law until very recent times delictual liability for negligence was restricted very largely to the causing of physical harm of some sort to person or property as opposed to the causing of financial harm by negligent speech or writing without any physical damage to anything. Roman law managed to get on without one complication which has caused endless trouble in our law. In Roman law a man was liable if he fell short of the standard of care normally exercised by the good father of a family and if as a result damage was caused to the person or property of the plaintiff. There was no necessity to prove a duty to take care owed to the plaintiff as opposed to a general falling short of the standard of the ordinary reasonable man. The situation could never arise in Roman law where owing to the defendant's negligence damage is caused to both A and B and A can recover where B cannot, because the defendant owed a duty to take care to A and not to B. It may be in both systems that the defendant can escape because his negligence is not the real cause of B's damage but that is a different matter. It is ironic that this doctrine of the duty to take care to the plaintiff seems to have been finally established in a Scots case—*Bourhill v. Young*²⁸. The learned Lords treated Scots law as the same as English law on this topic. Another illustration can be given of the same or at least an allied topic. There is a case in the Roman texts where A lit a fire lawfully on his own property and asked B to watch it while he, A, went away temporarily. B neglected to watch it and it spread to C's property and damaged it. B was held liable for the

26. [1924] A.C. 226. See per Lord Dunedin at 247-249, per Lord Shaw at 257-261.

27. See Buckland & McNair: *Roman Law and Common Law* (1st ed., 1936), 182-183.

28. [1943] A.C. 92.

damage. Probably he would not have been in our law because he would not have been under any duty of care, either to A or to C, though presumably an ordinary and reasonable prudent man having once undertaken such a task would not have relinquished it without notice.

Finally there is one respect in which the Roman law of delict seems definitely superior. The Roman law evolved a generalized remedy for invasions of the personality, the delict of *iniuria*. Probably in our law there is in this field only a series of specific torts, assault, false imprisonment, defamation and the like and the area outside those specific torts is not covered at all. Roman law like ours began with the specific wrongs but generalized from them. The gist of the delict is a wilful unjustified insult or injury to the feelings of the plaintiff, whether by hitting him, defaming him or in any other way. The intention to insult is of the essence of the action. In our law if A writes B an insulting letter and seals it up in an envelope and drops it in B's letter box B has no remedy. There has been no publication and there has not even been a breach of the Post and Telegraph Act because the letter has not even been sent through the post. In Roman law this would be *iniuria*. Truth was, of course, a defence in Roman law as in our law because a truthful accusation is not an unjustified one but, as I have said, the delict extends far outside the specific contexts of assault or defamation. It covers violations of the right to privacy which is probably not protected at all in our law in the absence of some incidental specific tort. To follow a girl down the street may be an *iniuria* in Roman law if the circumstances are such as to lead to the inference that the defendant is suggesting that she is likely to be receptive to his advances. The case of the Balham dentist referred to in *Kenny's Select Cases on Torts*²⁹ would have led to a successful action for *iniuria* in Roman law. In that case, it will be remembered, the plaintiff was a dentist whose surgery was visible from the garden of the defendants next door and the defendants installed large mirrors in their garden which reflected the execution being performed in the surgery to the edification and entertainment of their guests. It appears in *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor & Others*³⁰ (despite the comments in the dissenting judgments of Rich J.³¹ and Evatt J.³²) that there could be no remedy in English law: not defamation because nothing defamatory was said or written, not assault because there was no contact between the defendants and the plaintiff, not nuisance because nothing escaped from the property of the defendants on to the property of the plaintiff. Rather the defendants trapped the reflections that escaped from the property of the plaintiff but the plaintiff had no proprietary right in such reflections. Clearly this would have been an *iniuria*. The intention to insult would be irresistibly inferred from the circumstances and there was no legal justification possible. It is surely preferable that there should be some general principle under which acts of this nature can be comprehensively dealt with instead of leaving them without remedy unless they can be fitted into one of a limited number of pigeonholes constructed between the fourteenth and eighteenth centuries.

29. 3rd ed., (1950), 367.

30. (1937) 58 C.L.R. 479.

31. *Id.* at 504-505.

32. *Id.* at 520-531.