1. When you see a fellow-countryman's sheep or ox straying, do not ignore it but take it back to him. 2. If the owner is not a near neighbour and you do not know who he is, take the animal into your own house and keep it with you until he claims it, and then give it back to him. 3. Do the same with his ass or his cloak or anything else that your fellow-countryman has lost, if you find it. You may not ignore it. 4. When you see your fellow-countryman's ass or ox lying on the road, do not ignore it; you must help him to lift it to its feet again.

[Deuteronomy, ch. 22.]

In dem times dey wan'n't no town, an' not much money. What folks dey wuz, hatter git 'long by swappin' an' traffickin'. How dey done it, I'll never tell you, but do it dey did, an' it seem like dey wuz in about ez happy ez folks is deze days.

Well, dish yer Mr Man what I'm a-tellin' you 'bout, he had a truck patch, an' a roas'in-year patch, an' a goober patch. He grow'd wheat an' barley, an' likewise rye, an' kiss de gals an' make um cry. An' on top er dat, he had a whole yard full er chicken's, ... 

[From 'Brother Rabbit and the Chickens' in Joel Chandler Harris, Told by Uncle Remus, New Stories of the Old Plantation]

The first quotation set out above is to remind us that though Deuteronomy imposes a positive obligation to assist another when occasion arises without his requesting aid, such an obligation to protect another's property did not exist in Roman law, nor does it exist in modern civil law or common law systems. Roman law did give an action, the actio negotiorum gestorum, where someone, reasonably, performed another’s business without authority. For instance, the gestor who thereby suffered loss could claim for it up to the amount he benefitted the other at the time of his acting. Such an action (except for the doctrine of quantum meruit) is still unknown to English law. Uncle Remus reminds us of the social importance of barter in societies where money is scarce. But Roman law never really developed a full contract of barter. Permutatio, which emerged four centuries at the earliest after the contract of sale, emptio venditio, significantly is classified with the inominate contracts. It does not rate a discussion in the elementary student textbooks, the Institutes of Gaius or of Justinian.

Law is very much an artificial creation in the sense that its divisions into contract or tort, property or obligation, sale and hire, and so on, are the invention of legislators, jurists or judges, rather than belonging to the nature of things. A legal institution is a social institution surrounded by legal rules and looked at from a legal point of view. But which social institutions are provided with legal
rules and the nature of these rules are matters determined by the legal elite. This paper will examine the fabric from which law is made to demonstrate the artificiality of law, and the distorted mirror effect it gives to social relationships. For specificity, one branch of law, contracts, will be chosen and one system, Roman law. But, I dare to hope, this one example illuminates others.

I

To set the scene, to show the issues which may arise in life, I wish to work from a concrete instance in a small, isolated community where money exists but is scarce, where many people are generalists (in the sense that in their work they may undertake very different tasks), though others are specialists. The example is real, accurate in its details set in the rather remote parish of Kilfinan, in Highland Argyll in Scotland in 1987. I am not suggesting contemporary Argyll is like ancient Rome — only that mutatis mutandis, human situations in the one today can help us envisage situations in the other in the past.

The example. Benny is a typical generalist. He runs a few sheep, collects and sells firewood, does house repairs, has a small market garden, and is employed at lambing and calving time by bigger farmers. A rather wealthy farmer, X, who is expanding, buys a farmhouse, removes from it a new door which cost £680, and builds in a porch. Benny sees the door lying in a barn, asks X what he wants for it and is told £500. Benny replies that is ridiculous, he will never again release X’s sheep caught in fences, and so on. X says: ‘Don’t be like that. £50.’ Benny agrees. Benny is not buying the door without purpose. He takes it to a friend’s house and together they install it. The friend, Dougie, gives Benny the £50. No more money is offered or expected. Dougie is rather better off than Benny. He has more than enough land, and allows Benny to run his sheep there along with his own. He lambs and shears them along with his own and even takes them to market. This represents more work for Dougie, but, in the context, not so very much more. In return, Benny works with Dougie on the sheep when four hands are better than two, and, when needed, will work for a whole day or more with Dougie even on things other than sheep.

II

The question to be answered is, can law, and, in particular, Roman law, do justice to such a state of affairs? The answer is that law operates only in a way that gives a distorted image of what is going on. And yet, the factual situation has nothing out of the usual, nothing extraordinary, in it.

III

What, in terms of law, is going on between Benny and X? There is no obvious valuation to be placed on the door. The population is not huge, the number of people who might want it is small. But X puts a money price on it. His immediate