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CHAPTER 1

Obligatio

I. THE CONCEPT AND ITS HISTORICAL DEVELOPMENT

1. Obligare—obligatio—obligation

"Nam fundi et aedes obligatae sunt ob Amoris praedium" said Astaphium ancilla in Plautus' play *Truculentus* (at 214), thus providing us with the oldest source in which the word "obligare" is used. The substantive "obligatio" can be traced back to Cicero.[1] As to the literal meaning of the term, its root "lig-" indicates that something or somebody is bound;[2] just as we are all "bound back" (to God) by virtue of our "re-ligio". This idea is still clearly reflected in the famous definition which Justinian advanced in his *Institutes*, where he introduced the subject of the law of obligations: "obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura."[3] Today the technical term "obligation" is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance. The party "bound" to make performance is called the debtor (debitor, from debere), whilst at the other end of the obligation we find the "creditor", who has put his confidence in this specific debtor and relies (credere) on the debtor's will and capacity to perform. As far as the Roman terminology is concerned, "obligatio" could denote the vinculum iuris looked at from either end; it could refer to the creditor's right as well as to the debtor's duty. This obviously makes it somewhat difficult to render the Roman idea in English, for the English term "obligation" is merely oriented towards the person bound, not towards the person entitled. With the words "my obligations" I can refer only to my duties, not to my rights.[4]

2. Delictual liability: from revenge to compensation

The carving out of the concept of an "obligatio" and the development of a law of obligations was one of the great contributions of classical Roman jurisprudence to the science of law. Fritz Schulz refers to it as

[1] *Epistulae ad M. Brutum* 1, 18, 3: see Schulz, *CRL*, pp. 455 sqq.
[2] The same connotation is inherent in the Dutch (and Afrikaans) word for obligation: "ver*bin*tenis".
[3] Inst. III, 13 pr. On the origin of this definition cf., most recently, Bernardo Albanese, "Papiniano e la definizione di 'obligatio' in J. 3, 13, pr.", (1984) 50 *SDHI* 166 sqq. According to him, it is attributable to Papinian.
[4] See, for example, Peter Birks, "Obligations: One Tier or Two?", in: *Studies in Justinian's Institutes in memory of J.A.C. Thomas* (1983), pp. 19 sq.

"[a] unique achievement in the history of human civilisation".[5] Indeed, the concept of "obligatio" is a very advanced and refined one which was not part of the primitive thinking patterns of archaic Roman law (let alone any other legal system), but which stood at the end of a long evolution.[6] Like Greek or Germanic law, Roman law in its early stages can be conceived of, by and large, as the law of the family units[7] which constituted the ancient rural community. Family relationships, succession and property: these were the main areas with which the law had to concern itself—all of them as part and parcel of a broadly conceived family law and under the umbrella of the extensive powers of that almost absolute monarch of each familia, the paterfamilias. However, already at an early stage it was recognized that certain situations did not fit into the internal power structure of the familia: situations where, for instance, a person in one familia was allowed to exercise a legal power over a paterfamilias of another familia. The purpose of exercising this power was not to incorporate this other person into the family unit but to expiate a wrong which might have been inflicted and for which the other party was "liable". Thus, the early roots of liability in private law lie in what we today call delict. At a time when State authority was still too weak to enforce law and order, and either to administer criminal sanctions or to develop a system according to which a wronged party could be compensated, the individual had to take the law into his own hands. Whoever had committed a wrongful act against the body or property of another person was exposed to the vengeance of the victim of this wrong. The wronged party gained a right of seizure over the body of the wrongdoer, in order to execute his vengeance.

Initially this execution took the harshest possible form, namely the infliction of death. It is obvious that for the community at large such a state of affairs in which its members were allowed to kill each other was hardly satisfactory. Soon, therefore, we find the State interfering. On the one hand, seizure of the wrongdoer was tied to formal proceedings under State supervision (manus iniectio); on the other, the powers of the victim were reduced. In the case of membrum ruptum, the lex talionis[8] took the place of killing: if the wrongdoer had broken the

[5] *CRL*, p. 463; cf. also Kaser, *RPr* I, pp. 478 sq. (law of obligations is the area of the law where pre-classical and classical jurisprudence have accomplished their most valuable and lasting creative achievements).

[6] See, especially, Kaser, *Altrömisches ius*, pp. 179 sqq.; idem, *RPr* I, pp. 146 sqq.; Emilio Betti, *La struttura dell' obbligazione romana e il problema della sua genesi* (1955); Okko Behrends, *Der Zwölftafelprozess—Zur Geschichte des römischen Obligationenrechts* (1974), pp. 33 sqq. and passim; Mario Talamanca, "Obbligazioni", in: *ED*, vol. 29 (1979), pp. 1 sqq.; Wieacker, *RR*, pp. 256 sqq. Due to a lack of definite historical sources, many details of the development (as, for example, the question of the historical priority of delict or contract) are disputed.

[7] As to the term "familia", see Ulp. D. 50, 16, 195, 1–5.

[8] With regard to the lex talionis certain texts from the Old Testament spring to mind, especially Exodus 21, 23–25: ". . .if any harm follows, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe. . . ." For comment, see, most recently, Mervyn Tower, "Popular misconceptions: A

victim's limb, the victim was allowed only to break the wrongdoer's limb in return—to let him inflict a graver injury than he had received himself now seemed to be excessive satisfaction. However, taliation (even though historically introduced as a means of mitigation) was still a relatively crude way of dealing with the consequences of wrongful acts. Therefore, already at a time before the XII Tables were drafted, the victim's right to vengeance was made redeemable: at first he was allowed, later expected, and finally indirectly forced, to accept a composition consisting of a sum of money (earlier on, probably cattle)[9] which either the wrongdoer himself or somebody else—usually a relative—might offer[10] in order to make the victim abstain from taking vengeance.[11] This was a development which the State tried to support by standardizing the amount of the composition for various delicts. At that stage, liability for delict began to be seen increasingly in financial rather than retaliatory terms.[12] Still, however, the law focused on the aspect of liability: the wrongdoer had the option of "buying-off" the right of vengeance, but if he was not able to do that and if nobody else was willing to redeem him either, manus iniectio was granted, i.e. the victim was now allowed to exercise his power of seizure. If the worst came to the worst, the wrongdoer was liable to be sold into slavery (trans Tiberim) or even to be cut into pieces.[13]

Note on the Lex Talionis", (1984) 80/81 *Law and Justice* 25 sqq. Exodus 21, too, represents a comparatively refined stage of the legal development. Cf. still the song of Lamech (son of Methusalem and father of Noah) in Genesis 4, 23 and 24: "Hear my voice, ye wives of Lamech, hearken unto my speech: for I have slain a man to my wounding, and a young man to my hurt. If Cain shall be avenged sevenfold, truly Lamech seventy and sevenfold."

[9] The word "pecunia" is derived from pecus. For further discussion of the origin of money in Rome and of the etymology of pecunia and pecus, see Wieacker, *RR*, pp. 238 sqq. (239).

[10] Provisions such as § 267 I BGB ("If a debtor does not have to perform in person, a third party may also make performance. The approval of the debtor is not necessary") go back to this privilege that a debtor, liable for execution on his person, could be redeemed by third parties.

[11] This account largely represents the prevailing opinion: the development of delictual liability is seen as an evolution from revenge (but cf. also Herman van den Brink, *The Charme of Legal History*, 1974, pp. 51 sqq.; Wieacker, *RR*, pp. 286 sq.) to compensation. Cf. already Jhering, *Geist* I, pp. 118 sqq.; today: Kaser, op. cit. For a different view based mainly on comparative evidence derived from primitive societies, see Geoffrey MacCormack, "Revenge and Compensation in Early Law", (1973) 21 *The American Journal of Comparative Law* 69 sqq.

[12] That liability, at that stage, had become redeemable by payment of a sum of money, seems to have been the historical reason for a basic feature of the Roman law of civil procedure: omnis condemnatio pecuniaria. See Paul Koschaker, (1916) 37 *ZSS* 355 sqq.; Kaser, *RZ*, p. 287.

[13] For details, see the XII Tables; especially Tables 3, 1: "Post deinde manus iniectio esto. In ius ducito", 3, 2: "Ni iudicatum facit aut quis endo eo in iure vindicit, secum ducito. Vincito aut nervo aut compedibus XV pondo ne maiore aut si volet minore vindicito" and 3, 6: "Tertiis nundinis partis secanto. Si plus minusve secuerunt, se fraude esto." These and other provisions seem fairly harsh to us, but it was the aim of the XII Tables to protect the debtor against arbitrary cruelty on the part of the creditor. Thus the weight of the chains, with which the debtor was kept imprisoned in the house of the creditor, was not to exceed 15 pounds. There are provisions as to how the debtor was to be fed. He had to remain imprisoned for 60 days, then the creditor had to bring him to three successive market-days

3. The origin of contractual liability

The Romans soon discovered that such a redeemable, pledge-like power of seizure was a convenient means of exerting pressure on the other person. They saw no reason why this pressure should be applied only to enforce payment of a monetary composition in the case of delict and not to enforce other performances as well. Thus, if one party wanted to obligate another to make a specific performance, he would ask the latter to subject himself to this power of seizure in case he failed to perform. This he did by entering into a transaction with the other party; the object of this transaction was to create the same type of liability by artificial means (i.e. by asking the other party to subject himself to it voluntarily) which arose "ex lege" in case of delict. One of the oldest of these transactions was the highly controversial nexum:[14] by way of an act per aes et libram the debtor would settle his condition as nexus ("entangled"), that is, he was liable to the creditor if he did not redeem himself by timeously paying back a specific sum he had received.[15] The primary economic purpose of nexum was to ensure repayment of a loan.[16] By the time of classical law it had already

(all this in order still to make redemption possible). It never seems to have happened in practice that a debtor was ultimately killed (thrown down from the Tarpeian rock) or (in the case of several co-creditors) cut into pieces (this probably referred only to his corpse); cf., for example, Cassius Dio, *Historia Romana* IV, 17, 8). Nevertheless, the old story of the creditor demanding his pound of flesh from the debtor's body (immortalized by Shakespeare in his *Merchant of Venice*) appears to have its origin in the "partes secanto" of the XII Tables. Usually, the unredeemed debtor had to work off his debt in the service of the creditor. On all this, see Behrends, op. cit., note 6, pp. 113 sqq. (he argues, however, contrary to established doctrine, that the creditor acquired the same kind of power over his debtor that a paterfamilias had over his dependants; but see Franz Horak, "Kreditvertrag und Kreditprozess in den Zwölftafeln", (1976) 93 *ZSS* 261 sqq., 278 sqq.); cf. also Carlo Augusto Cannata, "Tertiis nundinis partis secanto", in: *Studi in onore di Arnaldo Biscardi*, vol. IV (1983), pp. 59 sqq. For a comparative analysis of concept and development of (delictual) liability in ancient societies cf. Josef Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (2nd ed., 1919), pp. 50 sqq.

[14] Buckland/Stein, pp. 429 sqq.; Francis de Zulueta, "The Recent Controversy about Nexum", (1913) 29 *LQR* 137 sqq.; Jolowicz/Nicholas, pp. 164 sqq.; Kaser, *Altrömisches ius*, pp. 119 sqq., 138 sqq., 233 sqq.; idem, *RPr* I, pp. 166 sq.; Liebs, *RR*, pp. 229 sqq.; Ulrich von Lübtow, "Zum Nexumproblem", (1950) 67 *ZSS* 112 sqq.; Maine, pp. 185 sqq.; Talamanca, *ED*, vol. 29, pp. 4 sqq.; Herman van den Brink, *Ius fasque* (1968), pp. 158 sqq.; Wieacker, *RR*, pp. 336, 582. Recently, the existence of a specific nexum transaction has been denied by Okko Behrends, "Das nexum im Manzipationsrecht oder die Ungeschichtlichkeit des Libraldarlehens", (1974) 21 *RIDA* 137 sqq. That the Germanic tribes knew institutions similar to nexum is testified by Tacitus, *Germania* XXIV, 2. As to the history of the penal bond in the English common law ("a sophisticated form of self-pledge"), see Simpson, *History*, pp. 88 sqq., 123 sqq.

[15] Even if he paid what he owed, a formal counteract per aes et libram was necessary to discharge him. Otherwise the debtor would have remained obligatus. This solutio per aes et libram survived in classical law as a means of releasing the debtor from his debt; cf. infra p. 756.

[16] For a comparative analysis of loan transactions in primitive legal systems, see Obrad Stanojevic, "Observations sur le prêt dans les droits primitifs", in: *Studi in onore di Edoardo Volterra*, vol. III (1971), pp. 429 sqq.

disappeared[17] and its function had been taken over by the informal contract of mutuum.

It is obvious that nexum and certain similar formal transactions of the ancient Roman law are the historical roots of what were later to be classified as contractual obligations. Yet at this early stage we can hardly speak of a law of obligations because the most important constituent element of the concept of an obligation was still missing: the wrongdoer/promisor did not "owe" the payment of a composition or whatever he had promised; such payment/performance was just a means of warding off the impending execution on his person. The law initially concerned itself only with the question of liability.[18] Quite soon, however, this stage of the development was left behind. It gradually came to be recognized that the debtor was under a duty to make performance and that the other party had a corresponding right to claim such performance. Thus, obligatio in classical Roman law implied both "duty" and "liability": a relation existed in terms of which the debtor ought to (i.e. was "bound" to) perform whatever he had promised to perform (or, in the case of delict, to compensate the victim); only if he failed to comply with this duty did he become liable in the sense that his body and/or property were exposed to execution.

Yet, even at a mature stage, the Roman concept of obligatio always retained certain archaic features.[19] The very word "obligatio" always reminded the Roman lawyer of the fact that, in former times, the person who was to be liable, that is, over whose body the creditor acquired the pledge-like power of seizure, was physically laid in bonds; and, even though this piece of symbolism was soon abandoned and the idea came to prevail that the debtor could be legally bound even if his body was not physically put into chains, the concept of an obligation, in the minds of laymen as well as lawyers, seems to have retained the connotation of some sort of invisible rope around the neck of the debtor, tying a specific debtor to a particular creditor. The obligation thus gave rise to an intensely personal relationship: when one considers that the law was originally concerned, not with the duty aspect of obligation, but with personal liability of the strictest kind,[20] there is, at

[17] Plebeian nexi had to suffer considerable hardship from their patrician creditors (cf. e.g. Livius, *Ab urbe condita*, Liber II, XXIII, 1 and 6); thus, nexum was probably prohibited in the course of the 4th century as a result of the class struggles.

[18] As to the famous conceptual difference between "*Schuld*" and "*Haftung*" (duty and liability), see Alois Brinz, "Der Begriff der obligatio", (1874) 1 *GrünhZ* 11 sqq.; De Zulueta, *Gaius* II, pp. 144 sq.; Jolowicz/Nicholas, pp. 160 sqq.; Rabel, *Grundzüge*, pp. 89 sq.; Talamanca, *ED*, vol. 29, pp. 20 sqq.; as far as Germanic legal history is concerned, cf. e.g. Otto von Gierke, *Deutsches Privatrecht*, vol. III (1917), pp. 8 sqq. For a general evaluation, see Bernhard Diestelkamp, "Die Lehre von Schuld und Haftung", in: Helmut Coing, Walter Wilhelm (eds.), *Wissenschaft und Kodifikation im 19. Jahrhundert*, vol. VI (1982), pp. 21 sqq.

[19] "The image of a vinculum iuris colours and pervades every part of the Roman law of Contract and Delict": Maine, p. 190.

[20] At this early stage of the development, both delictual and contractual obligations died with the person liable; he had been the hostage, and when he died, there was nothing that

least historically, nothing strange in this idea of "privity" of obligation. The practical consequences that were to flow from this will be discussed in Chapter 2 of this work. Further terminological evidence for the development sketched above is provided by the word used in classical law to indicate fulfilment of an obligation: the term "solvere" (= to loosen) refers back to the stage where payment was a means of securing release from power of seizure, that is, of loosening the (not merely metaphorical) bond around the debtor's body.[21]

4. Dare facere praestare oportere

The essential element of an obligation in developed Roman law, therefore, was the fact that the debtor was directly bound to make performance. The performance which was owed could take the form of dare facere praestare—"[o]bligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum":[22] dare referring mainly to the transfer of quiritary ownership,[23] facere comprising all kinds of acts (including a dare) as well as omissions, and praestare vaguely implying a guarantee for a certain result.[24] As one can see, these terms overlap; they date back to a time when one was not too particular about clear-cut conceptual analysis. They had been taken over from the procedural formulae as terms of substantive law to describe the possible content of an obligation;[25] since Roman law was an actional law, it mattered little whether an agreement was to be regarded as binding if no suitable procedural formula was available to enforce it: only where there was a remedy was there a right ("ubi remedium, ibi ius"). This remedy, in the case of obligations, was always an actio in personam: the plaintiff was not asserting a relationship between a person and a thing (in the sense that he could bring his remedy against whoever was, by some act, denying the

could devolve on the heirs. Delictual obligations in Roman law always remained passively intransmissible: the request for expiation could be directed only against the person who had committed the wrong. The liability of heirs under transactions entered into by the deceased, on the other hand, was already recognized by the XII Tables. See Max Kaser, "Die altrömische Erbenhaftung", (1952) 1 *AHDO-RIDA* 507 sqq.; Voci, *DER*, vol. I, pp. 45 sqq. For medieval English law and its rule of "actio personalis moritur cum persona", see Simpson, *History*, pp. 41 sq., 558 sqq. The situation changed only with the rise of assumpsit.

[21] See, for example, Liebs, *RR*, pp. 231 sq. On solutio, see generally D. 46, 3 and Buckland/Stein, pp. 564 sq.; Kaser, *RPr* I, pp. 635 sqq. The old and original meaning of solutio is still reflected in what Gaius tells us about the form of release per aes et libram. "Me eo nomine a te solvo libroque" were the words, which had to be used by the person to be released: Gai. III, 174.

[22] This is Paulus' famous definition of an obligation, contained in D. 44, 7, 3 pr.; on which, see, for example, Talamanca, *ED*, vol. 29, pp. 28 sqq.

[23] Gai. IV, 4.

[24] Sturm, *Stipulatio Aquiliana*, pp. 111 sqq. The term derives from "praesstare" (to stand in as a hostage) and had been carried over from the days when the person liable was bound as a hostage.

[25] See Gai. IV, 2.

plaintiff's alleged right to the object in question—that was the crucial point in an actio in rem), but rather a relationship between two persons; the plaintiff set out to sue the particular defendant because he, personally, was under a duty towards him, and not because (for instance) he happened to be in possession of some of the plaintiff's property. If one translates this into the language of substantive law, one can say that the law of obligations is concerned with rights in personam, whilst rights in rem are the subject matter of the law of property.[26] This is what Paulus emphasized in the fragment quoted at the beginning of this paragraph.

5. Unenforceable obligations ("obligationes naturales")

It has just been pointed out that obligations were enforceable by means of actiones civiles (or honorariae). There were some situations, however, where the creditor had no way of compelling his debtor to comply with what he had undertaken to do. I am referring here to what has been known as "obligationes naturales"[27] since the time of classical law: obligations contracted by slaves, children and women in power and debts owed to such persons, to mention the original examples. Sensu stricto, they are not obligations because they lack enforceability: persons in power could normally not be parties to a lawsuit; and where they could (sons in power in the position of a defendant), the other party could not proceed to execution under the judgment. On the other hand, we are not dealing with a case of invalidity: obligationes naturales were not legally irrelevant, but had certain secondary effects of an obligation. For instance, there was no reason why anything which had been performed in fulfilment of such a debt should be allowed to be claimed back:[28] the receiver had not been enriched without legal ground because what was owed was, after all, a debitum (even though the claim was not enforceable). Furthermore, a naturalis obligatio could be the object of a novation,[29] it could be used for a set-off against a claim of the debtor[30] and, to

[26] For a clear analysis of this fundamental distinction, see Nicholas, *Introduction*, pp. 99 sqq.

[27] Cf. Buckland/Stein, pp. 552 sq.; Pierre Cornioley, *Naturalis obligatio* (1964); Kaser, *RPr* I, pp. 480 sqq.; Enrico Moscati, "Obbligazioni naturali", in: *ED*, vol. 29 (1979), pp. 353 sqq.; Gaetano Scherillo, "Le obbligazioni naturali", (1968) 175 *Archivo giuridico* 516 sqq.; J.A.C. Thomas, "Naturalis obligatio pupilli", in: *Sein und Werden im Recht, Festgabe für Ulrich von Lübtow* (1970), pp. 457 sqq.; Paul van Warmelo, "Naturalis obligatio", in: *Huldigingsbundel Pont* (1970), pp. 410 sqq.; Windscheid/Kipp, § 287 sqq. "Naturalis" obligatio in this context, therefore, means as much as "non-genuine" obligation. Cf. Iul. D. 46, 1, 16, 4 "per abusionem".

[28] Cf. Iul. D. 46, 1, 16, 4; Ulp. D. 44, 7, 10.

[29] Ulp. D. 46, 2, 1 pr., 1.

[30] Ulp. D. 16, 2, 6 (but see Buckland/Stein, p. 552); *Fensham v. Jacobson* 1951 (2) SA 136 (T) at 137H–138F.

secure its fulfilment, a pledge could be given or a surety provided.[31]

In modern legal systems, too, the situation occurs that the law recognizes some effects of certain transactions, without, however, being disposed to assist the "creditor" in enforcing his right.[32] In South African law, the term "naturalis obligatio" is still used in these instances,[33] but the concept is known in substance even where, as in the German Civil Code, it has been abolished in name. Yet, the type of transaction falling into this category has changed drastically. In the place of relationships affected by the paternal power over one of the parties we now find, to take the main examples in German law, the promise of a fee to a marriage broker[34] and gaming and betting.[35] These are transactions which the legislator has disapproved of—for reasons which, incidentally, seem to be a little outdated in the one case[36] and somewhat paternalistic in the other.[37] A situation similar in its practical result, but different as far as the legal construction is concerned, occurs where the period of prescription for a claim has expired. Here the creditor is entitled to claim (i.e. his right remains enforceable), but the debtor may refuse performance. Yet, once performance has been rendered, it may not be reclaimed.[38] German commentators generally do not fail to observe that this case cannot be brought under the concept

[31] Cf. e.g. Gai. III, 119 a; William Burge, *Commentaries on the Law of Suretyship* (1849), p. 7.

[32] See Mario Rotondi, "Alcune considerazioni sul concetto di obbligazione naturale e sulla sua evoluzione", (1977) 75 *Rivista del diritto commerciale* 213 sqq.

[33] Cf. especially the comprehensive analysis by Wessels, *Contract*, vol. I, pp. 386 sqq.

[34] § 656 BGB.

[35] §§ 762 sqq. BGB. For South African law, cf. *Fensham v. Jacobson* 1951 (2) SA 136 (T) and *Gibson v. Van der Walt* 1952 (1) SA 262 (A). Cf. also Pothier, *Traité du jeu*, n. 58; § 1271 ABGB, art. 514 II OR. On gaming in Rome and on the reaction of the Roman authorities, cf. Marek Kurylowicz, "Die Glücksspiele und das römische Recht", in: *Studi in onore di Cesare Sanfilippo*, vol. IV (1983), pp. 267 sqq.

[36] 656 BGB has been severely criticized as being discriminatory and infringing the basic rights of the German "*Grundgesetz*"; it has been said to be pushing a trade with a legitimate social function into the twilight of doubtful seriosity and thus impeding, rather than facilitating, judicial control of real abuses. The courts are now increasingly faced with difficult problems arising from situations where the fee paid to a marriage broker has been pre-financed by the broker's bank. Also, a flourishing business of escort agencies has sprung up in recent years to accommodate the increasing number of "singles". Into which contractual category do the various partnership service transactions fall? And is § 656 BGB applicable in all these cases? On these questions, see Peter Gilles, "Partnerschaftsservice statt Ehemakelei", 1983 *Neue Juristische Wochenschrift* 362 sqq.

[37] Is it really acceptable to maintain that the law has to prevent people from ruining themselves by indulging in gaming and betting? A more pragmatic approach as to why gaming and betting contracts should be unenforceable is advanced in judicial pronouncements such as *Graham v. Pollok* (1848) 10 D 646 at 648 ("However laudable the sport may be, we have far more serious matters to attend to") or *Christison v. McBride* (1881) 9 R 34 ("The Queen's Court does not exist for settling disputes as to who drew the winning number in a lottery") (both Scottish cases).

[38] § 222 BGB; cf. also *Pentecost & Co. v. Cape Meat Supply Co.* 1933 CPD 472 and now ss 10, 17 of the South African Prescription Act 68/1969. For further discussion and comparative material, see Karl Spiro, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen*, vol. I (1975), § 244.

of an obligatio naturalis.[39] The Romans, on the other hand, had no objection to extending the term to cases (as, for example, that of the senatus consultum Macedonianum) where an exceptio could be raised to bar the claim.[40] That goes to show that historically here, as in many other areas, we are not dealing with a clearly definable terminus technicus: the classical Roman lawyers did not think in terms of neat and logical conceptual categories.[41] Apart from that, the Corpus Juris Civilis also contains texts of post-classical origin which are based on another understanding of the notion of an obligatio naturalis. They refer to merely moral or ethical and, in this sense, "natural" duties:[42] where, for instance, a freedman has rendered certain services to his patronus which were not, in fact, legally owed ("condicere eum non posse, quamvis putans se obligatum solvit . . .: natura enim operas patrono libertus debet"),[43] or where someone has returned somebody else's present.[44] Furthermore, to add to the confusion, Paulus sometimes spoke of naturales obligationes in a totally different sense; he used the term to refer to those (enforceable!) obligations which were not peculiar to the Roman ius civile (like the formal stipulatio) but based on the naturalis ratio and which were part, as such, of the ius

[39] See e.g. Staudinger/H. Dilcher (1979), § 222, n. 3.

[40] Paul. D. 14, 6, 10. Another interesting case, where Roman lawyers used the term "naturalis obligatio", concerned the actio de peculio. If the paterfamilias granted a peculium to his son in power or slave, he was liable for all commercial debts incurred by that person in power. This liability was "dumtaxat de peculio", limited by the amount of the peculium at the moment of condemnation. As far as the computation of the value of the peculium was concerned, whatever the paterfamilias "owed" to the peculium was added, whatever "claims" he had against the peculium were deducted from it. Of course, any transactions between two members of the same familia could never give rise to an "obligation". Yet they were not a legal non-entity, because in the context of the calculation of the peculium they were taken into consideration. In the course of time, quite a few other cases of "naturales obligationes" were added: obligations incurred by a ward without auctoritas tutoris (Paul. D. 12, 6, 13, 1), obligations extinguished due to capitis deminutio (Ulp. D. 4, 5, 2, 2) or litis contestatio (Ulp. D. 46, 1, 8, 3) etc.

[41] "It would be wholly incorrect to say that there were no general concepts in the Roman law of the time of Justinian and before; on the contrary, Roman jurists eagerly discussed situations in which a contract would be void because of 'mistake', situations in which the enforcement of an informal obligation was required by 'good faith', and various other types of situations in which legal results involved a reference to concepts. . . . However, these concepts were not treated as ideas which pervaded the rules and determined their applicability. They were not considered philosophically. The concepts of Roman law, like its numerous legal rules, were tied to specific types of situations. Roman law consisted of an intrinsic network of rules; yet these were not presented as an intellectual system but rather as an elaborate mosaic of practical solutions to specific legal questions. Thus one may say that, although there were concepts in Roman law, there was no concept of a concept" (Berman, *Law and Revolution*, pp. 149 sq.).

[42] Cf. e.g. Cornioley, op. cit., note 27, pp. 256 sqq.; Van Warmelo, *Huldigingsbundel Pont*, pp. 419 sqq.

[43] D. 12, 6, 26, 12. For all details, see Wolfgang Waldstein, *Operae libertorum* (1986) (on Ulp. D. 12, 6, 26, 12 cf. pp. 363 sqq.).

[44] D. 5, 3, 25, 11.

gentium common to all peoples (as, for instance, the consensual contracts).[45]

Under these circumstances one can well understand that lawyers of later centuries, who were trying to analyse the concept of natural obligations on the basis of the Roman sources, sometimes tended to despair: "Sunt hac in re multae leges quae pugnant invicem, et est summus labor in eis adducendis in concordiam; fuit mihi olim maximus et diu in desperatione fui", as the humanist Cuiacius confessed.[46] By his time, however, the discussion had become largely theoretical. Many of the classical Roman examples had become obsolete. Where an attempt was made to define a naturalis obligatio in the spirit of the Corpus Juris Civilis, if somewhat vaguely, as "quae solo nititur aequitatis naturalis vinculo,"[47] the question immediately arose under which circumstances such an equitable or moral obligation was to be recognized. But since this was dependent on each individual's sense of tact, morality and piety, general rules could hardly be established.[48] If, furthermore, on the evidence of some centuries of discussion,[49] one accepts that great caution is necessary not to generalize consequences and effects of natural obligations as far as accessory rights, compensation, etc. are concerned, the question may well be asked whether modern legislators have not been wise to abandon a makeshift term[50] with such a notorious potential for confusion.[51]

II. DIVISIO OBLIGATIONUM

1. The contract—delict dichotomy

In the course of our discussion of the origins of liability we have been referring to contractual and delictual obligations. This is the summa divisio obligationum, which Gaius—probably putting the old Aristotelian distinction between voluntary and involuntary transactions to

[45] Cf. e.g. Paul. D. 50, 17, 84, 1; 45, 1, 126, 2.

[46] Cf. Van Warmelo, *Huldigingsbundel Pont*, p. 433, n. 1.

[47] Cf. e.g. Voet, *Commentarius ad Pandectas*, Lib. XLIV, Tit. VI, III.

[48] Cf. therefore Wessels, *Contract*, vol. I, p. 394: "Our law does not favour the extension of the scope of the natural obligation, and therefore mere debts of honour and promises pietatis causa are not to be regarded as giving rise to natural obligations." Would gaming, betting or marriage broking fall into this class of cases?

[49] For an outline of the historical development, see J.E. Scholtens, *De Geschiedenis der natuurlijke Verbintenis sinds het Romeinsche Recht* (1931); Van Warmelo, *Huldigingsbundel Pont*, pp. 421 sqq., Rotondi, (1977) 75 *Rivista del diritto commerciale* 213 sqq.; cf. also Savigny, *Obligationenrecht*, vol. I, §§ 5 sqq.; Windscheid/Kipp, § 287 sqq.

[50] Hausmaninger/Selb, p. 250.

[51] On a similar note, Van Warmelo, *Huldigingsbundel Pont* (for modern South African law), concludes by saying: "Hierdie reëlings sal en moet gehandhaaf word, maar om hulle (nou en dan) as natuurlike verbintenisse te noem lei tot niks en skep eerder onduidelikheid en onsekerheid."

systematical use[52]—introduced in his *Institutes*.[53] It has remained fundamental ever since and is a reflection of the fact that different rules are needed to govern the voluntary transfer of resources between two members of the legal community on the one hand, and possible collisions between their private spheres on the other;[54] the one body of rules being concerned with the fulfilment of expectations engendered by a binding promise, the other with the protection of the status quo against wrongful harm.[55] However, the borderline between contract and delict is by no means as clear as might be imagined. That it has been considerably blurred becomes apparent when one compares how different modern legal systems have tried to cope with the demands for extension of liability, arising as a result of the complexities of the technological age.[56] The protection of the consumer against defective products by means of a claim against the manufacturer is a matter for the law of torts in English law,[57] whilst the French courts have been prepared to grant him a direct contractual claim.[58] In the case of negligent statements, the German courts operate with contractual liability (even though in some cases the fictitious nature of the contractual construction can hardly be concealed: the defendant is liable, not because he wants to be bound, but because he is—under certain circumstances—*supposed* to be liable);[59] the House of Lords, by contrast, in the celebrated case of *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*,[60] based the action on tort. In addition, Rudolf von Jhering's famous "discovery"[61] of culpa in

[52] See A.M. Honoré, *Gaius* (1962), pp. 97 sqq. (100); Witold Wolodkiewicz, "Le fonti delle obbligazioni nelle istituzioni di Gaio e nelle res cottidianae", (1970) 24 *Rivista italiana per le scienze giuridiche* 138 sqq.

[53] Gai. III, 88: "Nunc transeamus ad obligationes. quarum summa divisio in duas species diducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto."

[54] See, for example, Arthur van Mehren, "A General View of Contract", in: *International Encyclopedia of Comparative Law*, VII, 1, nn. 1 sqq.; Charles Fried, *Contract as Promise* (1981), p. 4 and passim.

[55] A.S. Burrows, "Contract, Tort and Restitution. A Satisfactory Division or Not?", (1983) 99 *LQR* 217 sqq.; cf. also Fried, op. cit., note 54, pp. 2 sq.: "The law of property defines the boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. Contract law ratifies and enforces our joint ventures beyond those boundaries."

[56] B.S. Markesinis, "The Not So Dissimilar Tort and Delict", (1977) 93 *LQR* 78 sqq.

[57] See especially the two famous cases of *MacPherson v. Buick Motor Co.* (1916) 217 NY 382, 111 NE 1050 and *Donoghue v. Stevenson* [1932] AC 562 (HL); Friedrich Kessler, "Products Liability", (1966/67) 76 *Yale LJ* 887 sqq.; R.W.M. Dias/B.S. Markesinis, *The English Law of Torts: A Comparative Introduction* (1976), pp. 61 sqq.

[58] See, for example, H. Mazeaud, "La responsabilité civile du vendeur fabricant", (1955) 53 *Revue trimestrielle de droit civil* 611 sqq.

[59] See Werner Lorenz, "Das Problem der Haftung für primäre Vermögensschäden bei der Erteilung einer unrichtigen Auskunft", in: *Festschrift für Larenz* (1973), pp. 575 sqq.

[60] [1964] AC 465 (HL). For the broader context of this discussion, see Atiyah, *Rise and Fall*, pp. 771 sqq.

[61] Hans Dölle, *Juristische Entdeckungen, Verhandlungen des 42. Deutschen Juristentages*, vol. II (1959), pp. B 1 sqq.

contrahendo,[62] applied by him to a fairly restricted number of situations,[63] has been used (or abused?) by the German courts to make large inroads into the law of delict;[64] thus, they have granted a contractual action for damages where a prospective purchaser, while inspecting some carpets in a store, was hit by a linoleum carpet which had been negligently handled by an employee of that store,[65] or even where the daughter of a prospective customer slipped on a lettuce leaf while entering the store with her mother.[66] As a result, it has been said that "the distinction between contract and tort is rapidly breaking down",[67] and in England as well as America the "death of contract" has been proclaimed.[68]

[62] Rudolf von Jhering, "Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen", (1861) 4 *JhJb* 1 sqq.

[63] Erich Schanze, "Culpa in contrahendo bei Jhering", (1978) 7 *Ius Commune* 326 sqq.

[64] For an overview of the development in German law, see Peter Gottwald, "Die Haftung für culpa in contrahendo", 1982 *Juristische Schulung* 877 sqq.; Dieter Medicus, *Verschulden bei Vertragsverhandlungen, Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (1981), pp. 479 sqq. For a comparative analysis, see Friedrich Kessler/Edith Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study", (1964) 77 *Harvard LR* 401 sqq.

[65] The famous linoleum carpet case: RGZ 78, 239 sqq.

[66] The vegetable leaf case: BGHZ 66, 51 sqq., in which culpa in contrahendo and the contract with protective function in favour of a third party were combined.

[67] Markesinis, (1977) 93 *LQR* 122; cf. also J.C. Smith, "Economic Loss and the Common Law Marriage of Contracts and Torts", (1984) 18 *University of British Columbia LR* 95 sqq.

[68] See Grant Gilmore's elegant series of lectures "The Death of Contract" (1974). The modern English law of contract grew up around the action of assumpsit. Historically, this action was an offspring of the action of trespass on the case (that is, of the law of torts): see Simpson, *History*, pp. 199 sqq. According to Gilmore, contract is today being reabsorbed into the mainstream of tort, the residual category of civil liability (pp. 87 sqq.). For the rise (especially during the age of individualism since the latter half of the 18th century) and the modern decline of contract (since about 1870) in England, see the fascinating analysis by Atiyah, *Rise and Fall*, esp. pp. 345 sqq., 388 sqq., 398 sqq., 681 sqq., 716 sqq. Atiyah argues that in the English common law benefit and reliance (as opposed, especially, to mere promise) were the traditional key concepts of liability. Accordingly, there was no inherent difference between contractual and delictual obligations. It was only with "the settling of classical contract theory" (developed during the age of freedom of contract, stimulated by and intimately linked to the rise of individualism, *laissez faire* and the free market ideology, legal formalism, positivism and principle orientation), that a firmer line between contractual and non-contractual duties came to be established: due, mainly, to the creation (or formulation) of general rules governing contractual relationships, with clearly defined abstract concepts and based on the will theory, by doctrinal writers (starting with the treatises by Pollock and Anson) since the 1870s. These writers drew heavily on Roman law and on modern continental lawyers such as Pothier or Savigny. Their works "continued to exercise a dominating influence on English contractual thought through the next hundred years, and indeed, may be said to still rule us from their graves" (p. 682; cf. also F.H. Lawson, "Doctrinal Writing: A Foreign Element in English Law?", in: *Ius Privatum Gentium, Festschrift für Max Rheinstein*, vol. I (1969), pp. 191 sqq. and A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature", (1981) 48 *University of Chicago* LR 632 sqq.). In Atiyah's view, this later idea "that tort liabilities are wholly different from contractual liabilities because the latter arise from consensual obligations is not soundly based, either in logic or in history" (p. 505). He argues that with the decline of contract a resurgence of benefit-based and reliance-based liabilities is taking place today. Thus, in his opinion, the time "is plainly ripe for a new theoretical structure for

Yet one must not overlook the fact that these developments, in so far as they appear to be illegitimate extensions of either of these regimes, have their origin in certain doctrinal idiosyncrasies that have prevented a (systematically) more adequate approach. Certain deficiencies in the law of delict (particularly the absence of strict vicarious liability)[69] which the courts were not able and Parliament was too weak to overcome have led to the German courts achieving by means of the law of contract what other jurisdictions have managed to resolve in the area of torts. If, on the other hand, English judges have tended to expand the common law of torts,[70] they were forced to do so because of the limitations of their law of contract, especially the one imposed by the doctrine of consideration. "If it were possible in English law," as Lord Devlin has put it in the *Hedley Byrne* case,[71] "to construct a contract without consideration, . . . the question would be, not whether on the facts of the case there was a special relationship [sc: giving rise to a duty of care], but whether on the facts of the case there was a contract." Of course, there are borderline cases which present genuine delictual as well as contractual aspects. The contract/delict dichotomy can, therefore, hardly be carried through with dogmatic rigidity. That does not detract from the fact that contract is still alive and well today and that, in all likelihood, contract and delict will, and should, remain distinct bodies of law.[72] As Arthur van Mehren has pointed out, the rise of insurance has probably even sharpened the differences between the two regimes.[73]

contract . . . (and for the) redrawing of conceptual categories of the law" (pp. 778, 779). Cf. also Gerhard Kegel, "Verwirkung, Vertrag und Vertrauen", in: *Festschrift für Klemens Pleyer* (1986), pp. 528 sqq. and, for German law, Eduard Picker, "Vertragliche und deliktische Schadenshaftung", 1987 *Juristenzeitung* 1041 sqq. (also advocating abolition of the dichotomy of contractual and delictual liability for damages; according to Picker, liability for damages always arises ex lege and it is only the duty to render performance that is based on private autonomy, i.e. contract).

[69] § 831 BGB allows the "person who employs another to do any work" to escape liability for damage done by his employee, by proving that he has exercised the necessary care in the selection of the employee and that, where he had to supply equipment or to supervise the work, he has also exercised ordinary care as regards such supply or supervision. For a comparative analysis of this rather unfortunate rule, see Zweigert/Kötz/Weir, pp. 294 sqq.; cf. also infra pp. 1125 sq.

[70] Cf. recently A.J.E. Jaffey, "Contract in tort's clothing", (1985) 5 *Legal Studies* 77 sqq., who concludes his analysis of the case law with the comment: "By all means let the relevant rules of contract be reformed. But to use tort at random to evade them leads to confusion, uncertainty and inconsistency in the law" (p. 103).

[71] [1964] AC 465 (HL) at 525–6.

[72] In this vein, against the "Death of Contract" school see, for example, A.S. Burrows, (1983) 99 *LQR* 217 sqq., 255 sqq., 263 sqq.; Fried, op. cit., note 54, pp. 1 sqq.; Smith, (1984) 18 *University of British Columbia LR* 108 sqq., 125.

[73] Op. cit., note 54, n. 2. Owing to the availability of insurance, the tortfeasor who is liable in delict today typically does not ultimately have to bear the loss. Delictual rules, therefore, have to take into account the fact that in all likelihood losses will not be borne by individuals but will be shifted to groups. Contractual relations involve different kinds of risk; here, typically, the individual parties will bear the loss assigned to them.

2. From twofold to fourfold subdivision

The distinction between contractual and delictual obligations does, of course, not represent an exhaustive basis for the systematic analysis (a divisio in the technical sense) of the law of obligations. That would not have been disputed even by Gaius. In actual fact, the "summa divisio" in III, 88 of his *Institutes* seems to have been established mainly for didactical purposes, in order to provide the law student with a broad outline of the material covered; systematic completeness does not appear to have been intended.[74] Only a few lines later Gaius discusses a case of unjustified enrichment and makes it quite plain that the obligation to render restitution cannot be regarded as a contractual one.[75] Of course, it is not of a delictual nature either. In his amended and revised version of the *Institutes*, probably published posthumously under the somewhat peculiar title of *Res cottidianae sive aurea*, Gaius added a third category in order to accommodate these and other cases: "Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris."[76] But this lumping together of everything which did not really fit under either delict or contract into a hotchpotch of "various causes" could not, of course, appeal to the more systematically oriented minds of the East-Roman school jurists. Thus, by the time the official Justinianic textbook was compiled, this residual category had been subdivided on the model of the contract/delict dichotomy, and as a result a fourfold scheme had been arrived at: ". . .divisio [obligationum] in quattuor species diducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio."[77]

As far as systematic exposition and classification of topics are concerned, Justinian took great delight in the number four: not only does he present four sources of obligations, he also gives a fourfold subdivision of contractual obligations; then, there are four kinds of contracts re, four cases of contracts verbis and four instances of contracts consensu; furthermore, four delicts and four quasi-delicts are

[74] Max Kaser, "Divisio obligationum", in: *Studies Thomas*, p. 85; contra: Arnaldo Biscardi, "Some Critical Remarks on the Roman Law of Obligations", (1977) 12 *The Irish Jurist* 372 sqq., according to whom Gaius saw the delict/contract dichotomy as exhaustive. Cf. also Thomas, *TRL*, p. 2.

[75] Gai. III, 91.

[76] Gai. D. 44, 7, 1 pr.; cf. Wolodkiewicz, (1970) 24 *Rivista italiana per le scienze giuridiche* 78 sqq.

[77] Inst. III, 13, 2. For details of the development of the divisio obligationum from Gaius' two- and threefold down to Justinian's fourfold division, see Kaser, *Studies Thomas*, pp. 73 sqq.; Theo Mayer-Maly, "Divisio obligationum", (1967) 2 *The Irish Jurist* 375 sqq. (in English); Giuseppe Grosso, *Il sistema romano dei contratti* (3rd ed., 1963), passim; Talamanca, *ED*, vol. 29, pp. 38 sqq. Cf. also Diosdy, pp. 112 sqq., who has recently advanced the supposition that the trichotomy of the sources of obligations, as laid down in D. 44, 7, 1 pr., never existed in Roman law.

mentioned.[78] This method of arranging and systematizing the law was neither accidental[79] nor merely adopted for the sake of (a somewhat artificial) symmetry of exposition: like most people in the ancient world, he was influenced by the symbolism of numbers. The number four has always had a special significance, usually relating—in contrast to the sacred number three[80]—to the more external or secular structure of the world.[81] (Of course, the addition of four and three equals the mystical number seven,[82] multiplication of them the holy number twelve.)[83]

3. Quasi-contractual and quasi-delictual obligations

But what did the two residual categories consist of? Under the heading of "obligationes quasi ex contractu" we find, most importantly, indebitum solutum; furthermore, negotium gestum, tutela, communio and legatum per damnationem[84] (i.e. obligations arising from unjustified enrichment, from (unauthorized) management of (another's)

[78] Cf. the (too severely) critical analysis by H. Goudy, "Artificiality in Roman Juristic Classifications", in: *Studi giuridici in onore di Carlo Fadda*, vol. V (1906), pp. 209 ff. (214 sqq.).

[79] That Justinian was very conscious of the role of symbolic numbers in the arrangement of the Corpus Juris Civilis appears from § 1 of his Constitutio Tanta.

[80] Some examples from the Bible: Three is the number of the Holy Trinity, three angels visited Abraham, for three days Christ was buried, three times Christ asked his Father that the cup might pass, three times Peter renounced Christ, three times Christ showed himself to his disciples after his resurrection. In our modern, heathen, usage, man no longer piously accepts the harmonic structure of the world (as expressed in perfect numbers), but still clings to the somewhat superstitious aura attaching to the "lucky three". For the symbolic influence of the number three in Roman law, see H. Goudy, *Trichotomy in Roman Law* (1910).

[81] For example the four cardinal points of the compass, the four seasons, the four elements, the four temperaments, the four ground colours of the rainbow, the four years between two intercalary days, the sequence of the four empires according to St. Hieronymus, underlying the doctrine of translatio imperii. For further discussion, see Desmond Varley, *Seven, The Number of Creation* (1976), pp. 43 sqq.

[82] As to the importance for the Greeks of the number seven, cf., for example, Wilhelm H. Roscher, *Die Hebdomadenlehren der griechischen Philosophen und Ärzte* (1906); *RE*, vol. XIV, col. 2579; Joachim Ritter, *Historisches Wörterbuch der Philosophie*, vol. III (1974), pp. 1022 sq.; for the Romans, cf., for example, Aulus Gellius, *Noctes Atticae*, Lib. III, 10; cf. also the comparative material in the annotations by Fritz Weiss, in: Aulus Gellius, *Die Attischen Nächte*, vol. I (1875), pp. 193 sqq.; Varley, op. cit., note 81, pp. 19 sqq. and passim. The book of Revelation contains no fewer than 54 instances of Sevens.

[83] Goudy, *Trichotomy*, p. 5, asks rhetorically: "What literary . . . author nowadays, in dividing his treatise into parts, books, etc., or dividing his subject-matter into heads and categories or genera and species, would attach any special importance to what the number of these might be?" However, one can point to Thomas Mann, whose entire work (esp. the *Magic Mountain*, *Joseph and his Brothers* and *Doctor Faustus*) is profoundly influenced by the symbolism of numbers. Cf., for example, the brilliant essay by the American Germanist, Oskar Seidlin, "Das hohe Spiel der Zahlen", in: O. Seidlin, *Klassische und moderne Klassiker* (1972), pp. 103 sqq.; for the English version, see (1971) 86 *Publications of the Modern Language Association* 924 sqq.

[84] A legatum per damnationem gave rise to a personal claim of the legatee against the heir. We are not concerned here with the other important type of legacy, the legatum per vindicationem. Here the legatee acquired ownership of the object left to him immediately at the death of the de cuius, and as a result he could avail himself of the rei vindicatio. A third type of legacy, the legatum sinendi modo, was of little practical relevance in classical times.

affairs, from the tutor's conduct of his ward's affairs, from the relationship between co-owners and from specific instructions contained in a will).[85] The four cases of quasi-delictual liability, on the other hand,[86] referred to the judge who, through breach of his official duties, caused damage to another person (iudex qui litem suam fecit; literally "the judge who makes the trial his"),[87] to anybody from whose dwelling something was thrown down or poured onto the street so as to injure another person (deiectum vel effusum),[88] or from whose building objects placed, or suspended, on an eave or projecting roof fell down and endangered the traffic (positum vel suspensum),[89] and to sea carriers, innkeepers and stablekeepers, whose employees had stolen or damaged the property of one of their customers (furtum vel damnum in navi aut caupone aut stabulo).[90] To find a common denominator for what has been lumped together here, is not at all easy. In the case of quasi-contractual obligations it was probably the fact that—just as in contractual situations—some kind of negotium had taken place. Thus, the actions granted to enforce quasi-contractual obligations were all very closely modelled on specific contractual actions.[91]

As far as the "obligationes quasi ex delicto" are concerned, Buckland has ventured the proposition[92] that they were based on the idea of vicarious liability. But that does not explain the iudex qui litem suam

[85] Inst. III, 27.

[86] Inst. IV, 5.

[87] That can mean either that the judge now has to step into the role of the defendant and, in that sense, brings a suit on himself, or that the judge has become (emotionally) so entangled in the case that he lacks the necessary impartiality (he treats the case as if it were his own). On this topic, see Kelly, *Roman Litigation*, pp. 102 sqq.; further David Pugsley, "Litem suam facere", (1969) 4 *The Irish Jurist* 351 sqq. (with parallels in English law); D.N. MacCormick, "Iudex Qui Litem Suam Fecit", 1977 *Acta Juridica* 149 sqq.; Geoffrey MacCormack, "The Liability of the Judge in the Republic and Principate", in: *ANRW*, vol. II, 14 (1982), pp. 5, 9 sq., 16 sqq.; Álvaro D'Ors, "'Litem suam facere'", (1982) 48 *SDHI* 368 sqq.; P.B.H. Birks, "A New Argument for a Narrow View of litem suam facere", (1984) 52 *TR* 373 sqq.

[88] Cf. D. 9, 3; Inst. IV, 5, 1; Gai. D. 44, 7, 5, 5; further, for example, Wittmann, *Körperverletzung*, pp. 62 sqq.; Giannetto Longo, "I quasi-delicta—actio de effusis et deiectis—actio de positis ac suspensis" in: *Studi in onore di Cesare Sanfilippo*, vol. IV (1983), pp. 428 sqq.; Enrique Lozano y Corbi, "Popularidad y regimen de legitimacion en la 'actio de effusis et deiectis'", in: *Studi in onore di Arnaldo Biscardi*, vol. V (1984), pp. 311 sqq.

[89] Cf., for example, Alan Watson, "Liability in the Actio de Positis ac Suspensis", in: *Mélanges Philippe Meylan*, vol. I (1963), pp. 379 sqq.; William M. Gordon, "The Actio de Posito Reconsidered", in: *Studies Thomas* (1983), pp. 45 sqq.; Longo, *Studi Sanfilippo*, vol. IV, pp. 428 sqq.

[90] Cf., for example, Wolodkiewicz, (1970) 24 *Rivista italiana per le scienze giuridiche* 210 sqq.

[91] The connection between negotiorum gestio and tutela, on the one hand, and mandatum (mandate) on the other, is obvious. In the case of indebitum solutum, the condictio (i.e. the action applicable for the recovery of a loan-mutuum) was granted. On the historical relationship between the claims for unjustified enrichment (the law of condictiones) and the old procedural remedy of condictio, see infra, pp. 835 sqq. Communio resembled societas (partnership), and in the case of legatum per damnationem the actio ex testamento was granted, which was closely related to the actio ex stipulatu.

[92] Buckland/McNair, pp. 395 sqq.

fecit. A striking feature of at least the three last-mentioned quasi-delicts is, however, that liability was imposed regardless of fault: where the contents of a chamber-pot were emptied on the head of whoever just happened to pass by,[93] where a flower-box embellishing the eaves was blown down onto the street, or where the trusting traveller was stripped of his belongings by the chambermaid, the person in charge of the place where the disaster had occurred was liable irrespective of whether he had been negligent or not.[94] True: Justinian, who generally liked to stress and strengthen subjective elements in the law and who, more particularly, carved out "culpa" as the cornerstone for delictual liability, tried to rationalize the cases of quasi-delict on this basis and therefore implanted culpa elements in this (as in other) area(s): nautae, stabularii and caupones were held liable, because they were presumed to have been negligent in the choice and supervision of their employees (culpa in eligendo),[95] and in the case of deiectum vel effusum, too, negligence on the part of the person in charge was presumed ("culpa enim penes eum est").[96] Classical lawyers, on the other hand, generally emphasizing more objective criteria of liability, did not have any difficulty in taking these situations for what they were: namely, cases of strict liability. Inhabitatores, stabularii, etc. were held to be responsible because they were in charge of the place where or from where the injurious act occurred. In other words, they were in control of a potential source of danger to other people's lives, health and property. If this aspect was originally the connecting link between three out of the four quasi-delicts, it may possibly also have applied to the fourth one: for the liability of the judge in classical law was not

[93] As there was no refuse collection in Rome, it seems that one usually got rid of one's garbage by throwing it out of the window. Furthermore, many people apparently found it amusing to throw things down on passers-by. As the Roman streets were narrow and the houses fairly tall (five to six storeys were by no means uncommon), one can understand Juvenal's caustic warning that it would be frivolous to walk to a supper invitation without having made one's last will first. On all this cf. Juvenal, *Satura* III, 268 sqq.; Carcopino, pp. 57 sqq.; cf. also the eloquent and comprehensive note by Johannes van der Linden, printed in translation by Percival Gane, *The Selective Voet*, vol. II (1955), pp. 596 sqq.

[94] Whether there was strict liability in the case of positum aut suspensum, is, however, questionable. It depends on the interpretation of Ulp. D. 9, 3, 5, 10. Perhaps this case was classified as a quasi-delict because it was so closely related to the actio de deiectis vel effusis and because there did not have to be an injury for liability to arise. The habitator was therefore liable for the danger he had created. Strict liability is also disputed as far as the iudex qui litem suam fecit is concerned: see Peter Birks, "The Problem of Quasi-Delict", (1969) 22 *Current Legal Problems* 172 sqq.; idem, (1984) 52 *TR* 373 sqq. Birks himself argues that the key to quasi-delict "may lie in [the] possibility of liability without misfeasance from which flows the need for the assumption of a special position" ((1969) 22 *Current Legal Problems* 174). One of the decisive questions is how to interpret texts such as Gai. IV, 52, where no reference to the judge's state of mind is made. Did a presumption of dolus operate in these cases? Contra, inter alios, A.M. Honoré, *Gaius* (1962), p. 102.

[95] Cf. Inst. IV, 5, 3. As to the concept of culpa in eligendo, cf. Geoffrey MacCormack, "Culpa in eligendo", (1971) 18 *RIDA* 525 sqq. (here specifically pp. 547 sqq.).

[96] Ulp. D. 9, 3, 1, 4; for the liability of the iudex ("licet per imprudentiam"), Gai. D. 44, 7, 5, 4.

dependent either on whether he had negligently (or possibly even intentionally) given the wrong judgment. Thus, one can argue that here, as well, the person held liable was the one who was in control of, or supposed to be in control of, the vagaries and risks connected with a lawsuit.[97]

4. The reception of Justinian's scheme

(a) General observations

Justinian's fourfold scheme was received in Europe together with the substantive Roman law; it has provided, historically, the most influential model for structuring the law of obligations.[98] Throughout the centuries systematic treatises have been based on it: from Donellus' *Commentarii de Jure Civili* and Georg Adam Struve's *Jurisprudentia Romano-Germanica Forensis* to Thibaut's *System des Pandektenrechts*, to mention three important works from the times of humanism, usus modernus pandectarum and pandectism.[99] It has also been given legislative endorsement, for instance in the French Civil Code, which states in art. 1370 IV, at the outset of its fourth title ("*Des engagements qui se forment sans convention*") and after having dealt with contractual obligations in the previous title, "*les engagements qui naissent d'un fait personnel à celui qui se trouve obligé, résultent ou des quasi-contrats, ou des délits ou quasi-délits*". In the course of time, however, and especially since Roman law was no longer unquestioningly accepted as ratio scripta, criticism was levelled against this system. The most radical attempt to move away from it was undertaken by the natural lawyers. They attempted to develop a functional scheme, classifying the obligations according to content and effect[100] rather than emphasizing the various ways in which obligations originate. This way of looking at the law of obligations has become widely accepted as far as

[97] Cf. Hochstein, *Obligationes*, pp. 26 sqq.; Peter Stein, "The Nature of Quasi-Delictual Obligations in Roman Law", (1958) 5 *RIDA* 563 sqq. Cf. also Thomas, *TRL*, p. 377 ("a kind of insurance for the victim of harm, dictated by public policy"); D'Ors, (1982) 48 *SDHI* 368 sqq. (objective liability); MacCormick, 1977 *Acta Juridica* 149 sqq. But see Witold Wolodkiewicz, "Sulla cosidetta responsabilità dei 'quasi delitti' nel diritto romano ed il suo influsso sulla responsibilità civile moderna", in: *La formazione storica*, vol. III, pp. 1277 sqq. (no common denominator for the quasi-delicts); Longo, *Studi Sanfilippo*, vol. IV, pp. 401 sqq.

[98] For details, see Hans Hermann Seiler, *Die Systematik der einzelnen Schuldverhältnisse in der neueren Privatrechtsgeschichte* (Diss. Münster, 1957), pp. 15 sqq.; as far as 19th-century codifications are concerned, cf. also Carlo Augusto Cannata, "Sulla classificazione delle fonti delle obbligazioni dal 1804 ai nostri giorni", in: *La formazione storica*, vol. III, pp. 1177 sqq.

[99] Cf. also Windscheid/Kipp, § 362, n. 1, albeit in very cautious terms: ". . . *in letzter Linie Sache des Taktes*" (in the last resort a matter of tact).

[100] See Pufendorf, *De jure naturae et gentium*, esp. Lib. V, but also already Hugo Grotius, *De jure belli ac pacis*, esp. Lib. II, Cap. XII, 1 sq. Cf. also the system of the *Preussisches Allgemeines Landrecht* (Prussian General Land Law), which does not have a title on obligations or even on contracts, but deals with the individual obligations in the context and from the point of view of their function for acquisition, loss and transfer of ownership.

arrangement and classification of the specific contracts is concerned,[101] but has otherwise remained a short-lived episode. Most expositors contented themselves with rather adapting and adjusting the Justinianic system. Some of them advocated a return to Gaius' threefold scheme.[102] Others even moved back to the original subdivision between contract and delict.[103] Some added a fifth (or a third) category ("obligationes ex lege")[104] in order to accommodate, for instance, the actio ad exhibendum (available to force the defendant to produce in court a thing which he had in his possession or detention), which had always fallen between the four stools of Justinian's scheme. Yet others used this category of obligationes ex lege[105] to throw together whatever could not be accommodated in either the contractual or delictual niche.[106]

(b) The distinction between delict and quasi-delict

Generally speaking, it appears that the two quasi-categories were regarded as the major source of uneasiness and dissatisfaction. As far as the distinction between delict and quasi-delict is concerned, Justinian himself had already largely removed its raison d'être by tampering with the quasi-delicts under the auspices of a generalized fault requirement. If liability for delict, as well as for quasi-delict, is based on fault, one can, of course, try to distinguish between different types of fault. Thus we find the theory that delict is characterized by the fault of the tortfeasor himself, quasi-delict by culpa imputativa.[107] Others confined liability for delict to the infliction of intentional harm and regarded negligence, culpa propria, as the distinctive characteristic of quasi-delicts (". . .delictum est vel verum, vel quasi delictum. Illud ex dolo, hoc ex culpa committitur").[108] But these propositions are unsatisfac-

[101] Cf., for example, Mühlenbruch, *Doctrina Pandectarum*, Lib. III, II (Singulae obligationum species); Windscheid/Kipp, IV. Buch, Zweites Kapitel.

[102] E.g. Antonius Merenda, *Controversiarum iuris libri* XXIV, Tom. III (Bruxellis, 1746), nn. 2, 11 sqq. ("distingui non possunt obligationes quasi ex contractu orientes ab iis, quae nascuntur quasi ex maleficio").

[103] Cf. Brinz, *Pandekten*, § 94 (*Geschäftsforderungen und Strafforderungen*); further Seiler, op. cit., note 98, pp. 94 sqq.

[104] Windscheid/Kipp, IV. Buch, Zweites Kapitel III; Vangerow, *Pandekten*, 5. Buch, 4.–6. Kapitel; cf. also art. 1370 II c.c.

[105] Dating back to Mod. D. 44, 7, 52 pr., 5. On this text and on the concept of obligationes ex lege generally, see Theo Mayer-Maly, "Das Gesetz als Entstehungsgrund von Obligationen", (1965) 12 *RIDA* 437 sqq.; idem, (1967) 2 *The Irish Jurist* 380.

[106] Mayer-Maly, (1965) 12 *RIDA* 449; cf. also art. 1173 codice civile.

[107] Struve, *Syntagma*, Exerc. VIII, Lib. IV, Tit. IX, CXIII ("[Q]uasi delict[um] . . . consistit in aliqua culpa, ut ita loquar, imputativa, hoc est quae alicui ex alieno facto eorum, quos quis adhibet, imputatur."); Samuel Stryk, *Tractatus de actionibus forensibus* (Wittembergae, 1708), Sectio I, X, § LV.

[108] Johann Gottlieb Heineccius, *Recitationes in elementa iuris civilis secundum ordinem Institutionum* (Vratislawiae, 1773), Lib. IV, Tit. V, § MXXXII. Further e.g. Pothier, *Traité des obligations*, n. 116: "*On appelle délit le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort une autre. Le quasi-délit est le fait par lequel une personne, sans malignité, mais par une imprudence qui n'est pas excusable, cause quelque tort une autre.*"

tory. The former cannot accommodate the iudex qui litem suam fecit, the latter, especially if it is carried through even in cases of liability under the lex Aquilia, leads to a restructuring that looks, at first glance, as dramatic as it is irrelevant in its practical effect; for wherever negligent and intentional causation of harm are put on an equal footing—as, typically, in artt. 1382, 1383 of the code civil—a classification of delicts based on the culpa/dolus dichotomy does not serve a structurally useful purpose. It is not surprising, therefore, that the distinction between *délit* and *quasi-délit* is without practical relevance in French law,[109] and that, generally, in the course of the 19th century, both categories were merged into one.[110] The unfortunate consequence of this age-old misinterpretation of the true basis of the law of quasi-delict, and of its final amalgamation with the law of delict, was the fact that strict liability did not fit into the system any longer. Both the traditional instances of no-fault liability and the ones that gradually emerged during the age of industrialization were therefore regarded as corpus alienum—as some sort of doctrinal waif without a legitimate place in the system of private law.[111]

(c) The distinction between contract and quasi-contract

The quasi-contracts did not have a much smoother passage through the history of private law. Neither the haphazard composition of this category nor the perceived lack of a positive common criterion distinguishing it from contract, delict and quasi-delict could appeal to systematically minded jurists. Attempts were therefore made, particularly during the 19th century, to tag the various quasi-contracts to those (proper) contracts with which they appeared to be most closely related, and in this way to amalgamate the two categories.[112] This approach, however, was bound to lead to insurmountable difficulties in the case of unjustified enrichment; for whilst the contract of loan for consumption and the claims for unjustified enrichment grew historically from the same root, the two institutions no longer had much in common once the condictio as the procedural remedy applicable to

[109] The cases of strict liability laid down in artt. 1384–1386 do not fall under "*quasi-délit*" but are generally referred to by the term "*responsabilité*". On the origin of these provisions, see, most recently, Watson, *Failures*, pp. 1 sqq.

[110] On the history of quasi-delicts generally, see Hochstein, *Obligationes*, pp. 34 sqq.; cf. also Wolodkiewicz, in: *La formazione storica*, vol. III, pp. 1288 sqq.

[111] Cf. in this context the observation already made by Lorenz von Stein, *Zur Eisenbahnrechts-Bildung* (1872), p. 15: "*Deutschland ist geradezu unerschöpflich in Abhandlungen über Ulpian und Papinian, aber vom Eisenbahnrecht weiss es so gut als nichts*" (Germany is just about inexhaustible in treatises on Ulpian and Papinian, but of railway law it knows little more than nothing). On the treatment of non-contractual liability for damages without fault by the natural lawyers and in the codifications influenced by them, see Hans-Peter Benöhr, "Ausservertragliche Schadensersatzpflicht ohne Verschulden? Die Argumente der Naturrechtslehren und -kodifikationen", (1976) 93 *ZSS* 208 sqq.

[112] Cf., for example, Arndts, *Pandekten*, § 242 and passim; Puchta, *Pandekten*, 6. Buch, 2. Kapitel; Vangerow, *Pandekten*, 5. Buch, 4. Kapitel.

both of them had been abandoned.[113] As a result, the Swiss codification[114] confined the third category (besides contract and delict) to unjustified enrichment as the "most relevant"[115] quasi-contract. However, it is hardly justifiable to attach so much more weight and significance to the law of unjustified enrichment than to negotiorum gestio.[116]

5. The attitude adopted by the BGB

At the time of codification in Germany, the category of quasi-contracts had become more or less decomposed and was as discredited as the quasi-delicts. The fathers of the BGB in the end abandoned any attempt to systematize the law of obligations and simply placed 25 different types of obligations side by side: ranging from sale and exchange (title 1) to production of things (the old actio ad exhibendum, title 23), unjustified enrichment (title 24) and delict (title 25).[117] Such an attitude (one can only call it a capitulation) does not sufficiently appreciate the fact that the endeavours to find a satisfactory divisio obligationum are not an idle glass-bead game, but serve to find a rational justification and basis for imposing and recognizing obligations.[118] Like any system, it should be designed to demonstrate "veritat[es] inter se connexa[e]".[119] Interestingly, though, a revival of the dogmatic categories of quasi-contract and quasi-delict has recently been suggested.[120] This specific suggestion forms part of a strong move to overcome, once again, the crude bipartite division into contract/quasi-contract and delict/quasi-delict to which Justinian's scheme was reduced in the

[113] But see, for example, Vangerow, *Pandekten*, §§ 623 sqq.; Puchta, *Pandekten*, §§ 304 sqq., who still puts loan and unjustified enrichment on a par.

[114] *Schweizerisches Obligationenrecht* (1911), artt. 62 sqq.

[115] Andreas von Tuhr, *Allgemeiner Teil des schweizerischen Obligationenrechts, 1. Halbband* (1924), p. 39.

[116] The Italian codice civile (1942) subdivides the law of obligations into specific contracts, unilateral promises, negotiable instruments, negotiorum gestio, unjustified enrichment and delicts. South African law, incidentally, treats quasi-contracts without much kindness. They are dealt with neither in textbooks on contract nor in those on delict. Even in a textbook on the law of obligations (Lee and Honoré (2nd ed, 1978, by Newman and McQuoid-Mason)), the quasi-contracts are not mentioned. In other works (such as Hosten/Edwards/Nathan/Bosman, *Introduction to South African Law and Legal Theory* (1980), pp. 506 sqq.), enrichment appears as a brief appendix to the law of delict, negotiorum gestio, in turn, as an appendix to enrichment. There is only one major monograph each on enrichment and negotiorum gestio. On "quasi-contract" in the French Civil Code, cf., for example, Carlo Augusto Cannata, "Das faktische Vertragsverhältnis oder die ewige Wiederkunft des Gleichen", (1987) 53 *SDHI* 310 sqq.

[117] On the history of the BGB in this respect, see Seiler, op. cit., note 98, pp. 72 sqq.

[118] Theo Mayer-Maly, "Vertrag und Einigung", in: *Festschrift für H.C. Nipperdey*, vol. I (1965), p. 522. Cf. also Seiler, op. cit., note 98, pp. 112 sqq.; Helmut Coing, "Bemerkungen zum überkommenen Zivilrechtssystem", in: *Vom deutschen zum europäischen Recht, Festschrift für Hans Dölle*, vol. I (1963), p. 25.

[119] Christian Wolff, *Institutiones juris naturae et gentium*, § 62.

[120] Hochstein, *Obligationes*, pp. 11 sqq., 150 sq.; Heinz Hübner, "Zurechnung statt Fiktion einer Willenserklärung", in: *Festschrift für H.C. Nipperdey*, vol. I (1965), pp. 397 sqq.; Mayer-Maly, (1965) 12 *RIDA* 450 sq.

course of the 19th century.[121] For, on the one hand, strict liability can no longer be regarded as an anomaly only to be dealt with in special, somewhat haphazard, statutes; it has to be accepted as an integral part of a modern law of loss allocation, and that is, as a second track of liability besides delict.[122] On the other hand, the need for a quasi-contractual liability based on justifiable reliance has become increasingly apparent: a new and independent line of liability that can be regarded neither as contractual (because it presupposes no valid contract but merely a special relationship based on business contact) nor as delictual (because of the increased intensity of duties owed to the other party, going beyond what is owed to everybody in the course of daily life).[123]

6. "De facto" contracts and implied promises

Establishing either an unstructured numerus clausus of obligations or sticking to an exclusive contract/delict dichotomy entails a specific danger: the temptation to pervert the law of contract in order to accommodate cases that do not happily fit into the established categories. Thus, for instance, German courts and writers have construed "de facto" contracts where there is no legally relevant contractual agreement between the parties: in cases where, for instance, a person uses a parking bay whilst not being prepared (as he specifically declares) to pay the appropriate parking fee.[124] This danger is much more obvious, however, if one looks at the history, in English law, of what we would call enrichment liability. "[B]roadly speaking", as Viscount Haldane LC put it in his speech in *Sinclair v. Brougham*,[125] "so far as proceedings in personam are concerned, the common law of England really recognizes (unlike Roman law) only actions of two classes, those founded on contract and those founded on tort." Thus, in the old common law, governed by specific forms of actions, the remedy of indebitatus assumpsit had to be used—on the basis of an implied promise—where it was felt that an obligation should be imposed.

[121] Seiler, op. cit., note 98, pp. 95 sq. and passim.

[122] Josef Esser, "Die Zweispurigkeit unseres Haftpflichtrechts", 1953 *Juristenzeitung* 129 sqq.; Hein Kötz, "Gefährdungshaftung", in: *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. II (1981), pp. 1779 sqq.; in English, for example, Lawson/Markesinis, pp. 142 sqq., and Zweigert/Kötz/Weir, pp. 309 sqq. with many references.

[123] Cf. esp. Claus-Wilhelm Canaris, "Schutzgesetze—Verkehrspflichten—Schutzpflichten", in: *II. Festschrift für Karl Larenz* (1983), pp. 27 sqq. (pp. 85 sqq.: "*Die Haftung für 'Schutzpflichtverletzungen' als 'dritte Spur' zwischen Delikts- und Vertragshaftung*") with many other references.

[124] Cf. BGHZ 21, 319 sqq.; Günter Haupt, *Über faktische Vertragsverhältnisse* (1941); Karl Larenz, *Allgemeiner Teil des Bürgerlichen Rechts* (6th ed., 1983), pp. 525 sqq., criticized, in the present context, by Mayer-Maly, *Festschrift Nipperdey*, vol. I, pp. 514 sqq.; idem, (1967) 2 *The Irish Jurist* 376 sqq.; cf. also Eugen Dietrich Graue, "Vertragsschluss durch Konsens?" in: *Rechtsgeltung und Konsens* (1976), pp. 105 sqq., 112 sqq. For a rather unconventional historical evaluation of this trend, cf. Cannata, (1987) 53 *SDHI* 297 sqq.

[125] [1914] AC 398 (HL) at 415.

> "The basic reason for the development of implied assumpsit was the desire to use a convenient form of action to remedy certain duties or obligations recognized either directly by law or by common sense or justice. For example, the law said that debts should be paid, but if the action of assumpsit was to be used to ensure that this was done there had to be a promise; if in fact there had been no promise in reality then the solution (if one wanted to permit assumpsit) was to engage in some deeming."[126]

Liability was imposed where it was felt that payment ought to be made: not only where the implication of a promise was a genuine inference from the acts or words of the parties, but also where the implication was purely fictional.[127] This somewhat artificial judicial construction was bound to lead to conceptual confusion; the problem of how and under which circumstances unjust benefits have to be skimmed off and (re-)transferred became contaminated by contractual doctrine.[128] In the course of the second half of the 18th century and during the 19th, the civilian notion of quasi-contract was imported into English jurisprudence,[129] and the distinction between contract and quasi-contract gradually replaced the old English categories of express and

[126] Simpson, *History*, pp. 489 sq.; cf. also Goff and Jones, *Restitution*, pp. 5 sqq.

[127] Continental writers, too, have sometimes argued that the obligations quasi ex contractu are based on a consensus fictivus or praesumptus: see, for example, Van Leeuwen, *Censura Forensis*, Pars I, Lib. IV, Cap. XXV; Voet, *Commentarius ad Pandectas*, Lib. XLIV, Tit. VII, v. ("Quasi contractus sunt praesumtae conventiones, ex quibus mediante facto valida nascitur obligatio"). But see the critical analyses by Vinnius, *Institutiones*, Lib. III, Tit. XXVIII pr., n. 3 sq. and Pothier, *Traité des obligations*, nn. 113, 117; they derive the quasi-contracts from aequitas (utilitas). On Vinnius' view and the response it drew (on the Continent as well as in England), see Peter Birks, "English and Roman Learning in *Moses v. Macfarlan*", (1984) 37 *Current Legal Problems* 11 sqq. Cf. further Cannata, (1987) 53 *SDHI* 306 sqq. For a more detailed analysis of civilian opinion on the dogmatic foundation of quasi-contractual liability, see now Peter Birks/Grant McLeod, "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century Before Blackstone", (1986) 6 *Oxford Journal of Legal Studies* 46 sqq., 55 sqq.

[128] Cf. Birks, (1969) 22 *Current Legal Problems* 165. A very different perspective on these developments is adopted by Atiyah, *Rise and Fall*, pp. 181 sqq., 480 sqq. According to him, the close affinity between contract and quasi-contract is confusing only to the modern lawyer, and on the basis of the will theory of contract. Eighteenth-century lawyers, on the other hand, were concerned primarily about the recompense of benefits; whether a man promised to make a recompense or failed to promise when he plainly ought to make a recompense was a secondary matter.

[129] Cf., for example, John Austin, *Lectures on Jurisprudence* (5th ed., 1911), pp. 911 sqq., 984 sq.; Maine, pp. 201 sq.; Birks, (1984) 37 *Current Legal Problems* 9 sqq. According to Birks, it was Lord Mansfield (*Moses v. Macfarlan* (1760) 2 Burr 1005) who introduced the notion of quasi-contract into the English common law. "It is as certain as anything can be", writes Birks, "that no Roman lawyer ever intended quasi ex contractu to suggest the shadow of a contract . . . [But] it is likely that [Lord Mansfield] . . . under[stood] it as 'sort-of-contract' because that interpretation was already current among contemporary civilians" (p. 10). This is the "dark side" of the famous decision in *Moses v. Macfarlan* (on its "bright side", see infra p. 894). Whatever Lord Mansfield's reasons for appealing to Roman law in order to explain the non-contractual range of indebitus assumpsit (on which cf. infra pp. 892 sq.) may have been, it was the kind of appeal which "beckons to disaster" (p. 5). With *Moses v. Macfarlan* contractual doctrine started to overshadow and to deform the English law of restitution. Via Blackstone's *Commentaries on the Law of England* (Book III, Chapter 9) the "anti-rational" (p. 23) fiction became firmly ingrained in the English common law. Cf. further Birks/McLeod, (1986) 6 *Oxford Journal of Legal Studies* 46 sqq., 77 sqq.

implied contracts.[130] To quote the words of Lord Wright in the famous *Fibrosa* case:[131] "The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort." The concept of implied contract, "[t]hese fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared",[132] has been abandoned as a misleading anachronism, and "restitution" is rapidly establishing itself as an independent, "quasi-contractual" branch of the law of obligations.[133]

III. THE PLACE OF OBLIGATIONS WITHIN THE SYSTEM OF PRIVATE LAW

Practical lawyers are not usually overconcerned with bringing the law into a neat systematical order so that it appears as a logically consistent whole of legal rules and institutions. For the writer of a textbook, especially if it is an elementary one, this is, however, essential; after all, he has to prevent his student readers from getting lost in a totally indigestible mass of casuistry. Thus, significantly, it was Gaius who started subdividing the law of obligations in a rational manner. Other classical jurists, if they made any attempt at all,[134] merely enumerated various ways in which obligations could arise. A similar attitude was displayed by them towards the whole of Roman private law: it was also not perceived to constitute an organized system.[135] Abstract conceptualization was not taken beyond the various legal institutions which made up Roman private law, and in Quintus Mucius' and Sabinus' compilations—the latter was based on the former and provided, in turn, the cornerstone for the restatement of the interpretation of civil law in the great commentaries by Paulus and Ulpianus and Pomponius—these institutions were arranged in a "convenient leisurely fashion",[136] dictated by associative thinking rather than methodical reflection. Quintus Mucius' *Ius Civile* has been said to have laid "the foundation not merely of Roman but European

[130] For a comparison between quasi-contract in Roman and English law, see Buckland/McNair, pp. 329 sqq.

[131] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32 (HL) at 62.

[132] Per Lord Atkin, *United Australia Ltd. v. Barclay's Bank Ltd.* [1941] AC 1 (HL) at 29.

[133] Cf., for example, A.S. Burrows, "Contract, Tort and Restitution. A Satisfactory Division Or Not?", (1983) 99 *LQR* 217 sqq.; for further discussion, see infra pp. 893 sqq.

[134] Cf. Mod. D. 44, 7, 52 pr.: "Obligamur aut re aut verbis aut simul utroque aut consensu aut lege aut iure honorario aut necessitate aut ex peccato." On obligari lege, cf. Theo Mayer-Maly, (1965) 12 *RIDA* 437 sqq.; on obligari necessitate, cf. Theo Mayer-Maly, (1966) 83 *ZSS* 47 sqq.

[135] Just as in modern English law, where private law is not seen as a system either.

[136] Cf. Schulz, *Principles*, p. 57; on the approach of the Roman lawyers towards abstraction (and systematization) generally, cf. already pp. 40 sqq. and idem, *RLS*, p. 257.

jurisprudence"[137] and his main achievement, in the words of Pomponius, was: "ius civile primus constituit generatim in libros decem et octo redigendo."[138] But, however progressive his scheme was by comparative standards, it displays no interest in a logical structuring of the legal material.[139]

1. Gaius: personae, res, actiones

Again, the first attempt in that direction came from Gaius, the outsider. Looking at the civil law as a whole and trying to identify the constituent elements of which it was formed, he superimposed upon the traditional contents of the civil law (that is, on the material dealt with by Mucius and Sabinus, which in turn was mainly that covered by the XII Tables) a subdivision into persons and things; and as he added a book dealing with actions, he arrived at a tripartite subdivision: "Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones."[140] This is the famous institutional system, the fons et origo of all attempts in later times to structure the subject matter of private law. We cannot here examine critically all its details and implications: ius personarum, for instance, was neither—as one might think—the law of rights and duties of persons in specific, exceptional positions (as, for example, children or slaves) nor family law, but dealt substantially with questions of status.[141] In the present context we have to confine our attention to one specific, rather interesting feature: unlike in modern legal systems, the law of obligations does not appear as a distinct entity. This is due to the fact that "res", the law of things, was not only concerned with real rights but was conceived of as the law of the patrimony in a broad sense.[142] Thus, the second part of Gaius' *Institutes* deals with the law of things in a narrower sense, with succession and with obligations.[143]

This arrangement, leading to a second tripartite subdivision, is somewhat strange in that Gaius seems to have mixed two different

[137] Schulz, *RLS*, p. 94. Cf. also, for example, Frier, *Roman Jurists*, p. 171: "Quintus Mucius is the father of Roman legal science and of the Western legal tradition. He is the inventor of the legal profession"; generally on Quintus Mucius, see Richard A. Bauman, *Lawyers in Roman Republican Politics* (1983), pp. 340 sqq.; Wieacker, *RR*, pp. 549 sqq., 595 sqq. 630 sq.

[138] D. 1, 2, 2, 41. For details, see Alan Watson, *Law Making in the Later Roman Republic* (1974), pp. 143 sqq., 179 sqq.

[139] Cf. Peter Stein, "The Development of the Institutional System", in: *Studies Thomas*, pp. 151 sqq.; cf. further Frier, *Roman Jurists*, pp. 155 sqq.; Wieacker, *RR*, pp. 597 sqq.

[140] Gai. I, 8; cf. especially Stein, *Studies Thomas*, pp. 154 sqq.; Jolowicz, *Roman Foundations*, pp. 61 sqq.; Buckland/Stein, pp. 56 sqq. Thus, Gaius was moving from "divisio" (i.e. dividing the material merely into categories) to "partitio" (breaking it down into its constituent elements). Cf. generally Dieter Nörr, *Divisio und Partitio* (1972).

[141] Cf., for example, De Zulueta, *Gaius* II, pp. 23 sq.; Jolowicz, *Roman Foundations*, pp. 63 sqq.

[142] Cf. Hans Kreller, "Res als Zentralbegriff des Institutionensystems", (1948) 66 *ZSS* 572 sqq.

[143] "A decidedly heterogeneous assemblage": Schulz, *RLS*, p. 160.

criteria as the basis for his scheme. On the one hand, he adopts a distinction between corporeal and incorporeal things, incorporeal being "[res] quae tangi non possunt, qualia sunt ea quae iure consistunt, sicut hereditas, . . . obligationes quoquo modo contractae".[144] But he does not really carry it through, for in the first subdivision—which, incidentally, does not bear a Latin name—Gaius not only deals with corporeal objects but also with usufructs and praedial servitudes. It is, therefore, not only in the second and third subdivision that he discusses incorporeal objects. On the other hand, Gaius distinguishes between acquisition of single objects and acquisition per universitatem; indeed, he introduces the discussion of his second subdivision with the words: "Hactenus tantisper admonuisse sufficit quemadmodum singulae res nobis adquirantur. . . . videamus itaque nunc quibus modis per universitatum res nobis adquirantur."[145] This criterion, however, is not without problems either; for whilst the second subsection does, in fact, deal with certain forms of universal succession other than by way of inheritance,[146] an exposition of the law of succession is quite clearly its main concern—so much so, that a discussion of the law of legacies is included even though, as Gaius himself acknowledges, "quo et ipso singulas res adquirimus".[147] Moreover, the arrangement of subject matter according to whether individual objects are acquired or whether universal succession takes place cannot account for the fact that the law of obligations is introduced into the scheme as a third category, i.e. after universal succession—which, after all, affects the rights and duties created by an obligation in the same way as real rights—has already been dealt with. Gaius himself, incidentally, does not even attempt to demonstrate the logic of his system; he simply presses on with the words: "Nunc transeamus ad obligationes."[148] (As Fritz Schulz has remarked with mild irony: "*il y a beaucoup de 'puis' dans cette histoire.*")[149]

2. Justinian's *Institutiones* and the relation between actions and obligations

All in all, despite the fact that the institutional system involved considerable conceptual progress (especially in distinguishing corporeal and incorporeal objects, classifying obligations as incorporeal objects and bringing together the various hitherto scattered contracts and delicts and linking them as sources of obligations),[150] it is no

[144] Gai. II, 14. One would expect ownership, like any other right, to be a res incorporalis. By a strange sort of logical leap, however, dominium was treated as a res corporalis and thus identified with its object. On the res corporalis/incorporalis distinction in modern law, see Kreller, (1948) 66 *ZSS* 592 sqq.

[145] Gai. II, 97.

[146] Gai. III, 82 sqq.

[147] Gai. II, 97.

[148] Gai. III, 88.

[149] *Principles*, p. 56.

[150] Stein, *Studies Thomas*, p. 154.

exaggeration to say that the tripartite division into personae, res, actiones, "which has probably left its mark on every existing code and every general legal textbook,[151] has never been quite easy to understand".[152] That was already true of the compilers of the Corpus Juris Civilis. Whilst both Digest and Code, in their sections dealing with private law, generally follow the sequence of the praetorian Edict—which in turn had been built up from a procedural point of view and did not pretend to structure the substantive law according to rational principles—in Justinian's introductory textbook the scheme developed by Gaius was taken over. Like Gaius, the authors of the *Institutes* dealt with personae, res, actiones in four books—and thus arrived not only at a seemingly more balanced structure but also at a numerically desirable combination of three in four; unlike Gaius, however, they no longer saw the basic trichotomy as a simple framework within which the established legal institutions could be conveniently discussed, but rather understood it as providing a structure for the who (persons), the what (objects) and the how (actions) in the law.[153]

Yet the third of these subdivisions had become somewhat messy. For neither did Justinian's compilers wish to indulge in legal history and give an account of the actions of classical law (or perhaps even, as Gaius had still done, of the ancient legis actiones); after all, the formulary system had by then been superseded by the procedure per libellum. Nor did they regard the *Institutes* as the appropriate place to discuss the law of procedure as such. In classical law, when the question whether a person had an action determined whether he had a right in substantive law, the institutional treatment of actions had been absolutely essential, for substantive law could hardly be understood without it. Now, a uniform procedure had been developed which served to enforce all kinds of claims and[154] its technical details no longer constrained and determined the development of substantive law. Thus, the Byzantine lawyers were moving towards the separation of substantive private law

[151] Not only, incidentally, on the Continent, but also in Scotland, namely on Lord Stair's influential *Institutions of the Law of Scotland* (1681) (see D.M. Walker, "The Structure and Arrangement of the Institutions", in: Stair, *Tercentenary Studies* (1981), pp. 100 sqq.); and even in England. Sir Matthew Hale, who for the first time attempted to tidy up and systematize the whole of the English common law (until then a casuistic jumble, as is well reflected in Sir Edward Coke's writings) based his scheme on Justinian's Institutes. Hale's *Analysis of the Laws of England* (1713), was then in turn adopted by Blackstone (himself essentially a civilian and an academic) in his famous *Commentaries on the Laws of England* (1765–69). See Simpson, (1981) 48 *University of Chicago LR* 632 sqq.; Peter Stein, *Roman Law and English Jurisprudence Yesterday and Today* (Inaugural Lecture, Cambridge, 1969), pp. 7 sqq.; F.H. Lawson, "Institutes", in: *Festschrift für Imre Zajtay* (1982), pp. 339 sqq. More specifically on the role of Sir Matthew Hale in the development of English jurisprudence, and on the influence of civilian methodology on his thinking, see Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons* (London, 1988), pp. 264 sqq.

[152] Jolowicz, *Roman Foundations*, p. 62.

[153] Cf. Stein, *Studies Thomas*, pp. 159 sqq.

[154] For details, see especially Kaser, *RZ*, pp. 410 sqq.

and the law of civil procedure, which has, over the centuries, become a well-established feature of the civilian systems. Under the heading of "actiones" in Book Four they did not give an account of how legal proceedings had to be instituted or continued but only discussed different types of actions (such as actiones in rem, in personam, noxales, perpetuae and temporales), transmissibility of actions, and similar matters. Significantly, however, they included the discussion of parts of the law of obligations in this same Book Four, and they did this not just in order to accommodate an overspill from Book Three, and to arrive at a more balanced arrangement of the material over the four books, but because of the inner relationship which the East-Roman school had come to see between the two topics.[155] Thus, for them, it seemed to be at least as apposite to take obligations, in their traditional place, to constitute an introduction to actions, as it had been for Gaius to deal with the law of obligations at the end of his subsection on things. For, with the demise of the formulary system, the classical actiones had not completely disappeared. Justinian, always eager to hark back to the achievements of classical jurisprudence—or at least to pretend to do so—had retained the names of the old actions and even introduced some new ones. However, an action was now something entirely different to what it had been in classical law.[156] Since it was no longer tied to the procedural formula, "actio" had by now become a term of substantive law, indicating the right to demand some performance from another party. But that was basically what obligations were all about. The various kinds of obligations could, therefore, be regarded as causae actionum or, as one of the compilers of the Institutes, the Constantinopolean professor Theophilus put it, as the "mothers" of actions.[157] If there was a contract of sale, such a contract gave rise to certain duties. In the case of breach of one of these duties, the other party could sue; however, the action would not, strictly speaking, be an action for breach of contract,[158] but the action on sale, i.e. the actio empti or venditi. The essential content of an obligation was thus that it entitled the creditor to bring an action.[159]

[155] See the analysis by Stein, *Studies Thomas*, pp. 160 sqq. On obligatio and actio in classical law, cf. Emilio Betti, *La struttura dell' obbligazione romana* (2nd ed., 1955); Honsell/Mayer-Maly/Selb, pp. 218 sqq.

[156] On actions in post-classical law, Kaser, *RPr* II, pp. 65 sqq.; *RZ*, pp. 467 sqq.; cf. also Jolowicz, *Roman Foundations*, pp. 75 sqq.

[157] Theophilus, *Paraphrasis institutionum*, Lib. III, Tit. XIII: " μήτερες γὰρ τῶν ἀγωγῶν αἱ ἐνοχαί."

[158] This is the difference to English law; cf. Buckland, "Cause of action: English and Roman", (1943) 1 *Seminar* 4 sqq.

[159] If the action had been brought, that is, if litis contestatio had taken place, no other action could be brought under the same contract: the barring effect of litis contestatio.

3. From Justinian's scheme to the "*Pandektensystem*"

The opinion that actions and obligations really belong together was widely accepted in the Middle Ages;[160] further support for it was found in two titles of the Corpus Iuris, D. 44, 7 and C. 4, 10, which are both headed "De obligationibus et actionibus". Savigny still discussed it fairly extensively,[161] even though in the wake of humanistic jurisprudence its weakness had already been exposed:

> "Hoc autem falsam esse, vel ex uno hoc apparet, quod ista consideratione non magis obligatio ad actiones pertinet, quam dominium, quam ceterum in rem jura, quam ipsum jus personae: quippe quae et ipsa singula suas actiones habent, et pariunt."[162]

Of course, it was not only the appropriate position of the law of obligations which was a matter for dispute. In the 16th century both the lawyers of the humanist persuasion and, quite independently of them, the Spanish scholastics of the school of Salamanca had begun to move away in their expositions of the law from the so-called "legal order" (or rather, disorder), i.e. the sequence of topics as dictated by the Digest.[163] Until the 19th century, private lawyers were to battle continuously with the difficulties of systematization,[164] generally on the basis of Justinian's *Institutes* which had received increased attention.[165] If, for instance, one looks at the great codifications produced around the turn of the 18th century, one still finds a tripartite division in both the code civil and the ABGB. But whilst the ABGB followed the system of Gaius fairly closely, turning the third book into some sort of general part dealing with provisions common to the law of persons (Book One) and things (Book Two), the code civil devoted its third book to "*des differentes manières dont on acquiert la propriété*", (including, inter alia, succession, obligations and matrimo-

[160] Cf. Jolowicz, *Roman Foundations*, pp. 62 sqq.; for the usus modernus, Coing, p. 393; questions of the law of obligations were still occasionally treated as part of the law of actions.

[161] *System*, vol. I, pp. 401 sqq.

[162] Vinnius, *Institutiones*, Lib. III, Tit. XIV, 2.

[163] It was only in the 18th century that the French lawyer Pothier set himself the task of putting the texts of the Digest into a systematic order; see his *Pandecta Iustinianae in novum ordinem Digestae*.

[164] Cf. the accounts given by Jolowicz, *Roman Foundations*, pp. 61 sqq.; Peter Stein, "The Fate of the Institutional System", in: *Huldigingsbundel Paul van Warmelo* (1984), pp. 218 sqq.; Andreas B. Schwarz, "Zur Entstehung des modernen Pandektensystems", (1928) 42 *ZSS* 578 sqq. and Lars Björne, *Deutsche Rechtssysteme im 18. und 19. Jahrhundert* (1984), pp. 131 sqq. More specifically on the system developed by the Spanish scholastics (which was based on their restitution doctrine), see Günther Nufer, *Über die Restitutionslehre der spanischen Spätscholastiker und ihre Ausstrahlung auf die Folgezeit* (unpublished Dr. iur. thesis, Freiburg, 1969), pp. 16 sqq., 59 sqq.; Coing, pp. 190 sq.

[165] The system of Justinian's *Institutes* was also essential in the shaping of the national legal systems in the 17th and 18th centuries; on these "Institutes of National Law", see Klaus Luig, 1972 *Juridical Review* 193 sqq. Luig has coined the term "Institutionalists" on the model of the "Institutional writers" of Scottish law, i.e. the authors of systematic expositions of private law. As far as Institutional writing in Scotland, England and America is concerned, see Lawson, *Festschrift Zajtay*, pp. 339 sqq.

nial property law!).[166] Only with the acceptance of Georg Arnold Heise's celebrated five-membered scheme[167] did the discussion finally die down; it came to be known as "*Pandektensystem*" and forms the systematic basis of the BGB: general part, obligations, things, family law and succession. The differentiation between the law of obligations and things is, of course, of Roman origin, in so far as it represents the transformation into substantive law of the dichotomy between actiones in rem and in personam. It had been emphasized, for instance, by Grotius, who devoted the second book of his *Inleiding* to "Beheering" (defined as " 't recht van toe-behooren bestaende tusschen den mensch ende de zaecke zonder noodigh opzicht op een ander mensch"),[168] the third to "Inschuld" (" 't recht van toe-behooren dat den eenen mensch heeft op den anderen om van hem eenige zahe ofte daed to genieten").[169,170] Family law owes its recognition as a separate systematic entity to the natural lawyers who based their systems on the double nature of man—as an individual and, at the same time, as a part of larger groups in society. They thus dealt first with rules relating to the individual as such (including, especially, the law of property) before then proceeding in widening circles to matters such as family law (which they separated from the law of persons), the law of companies and other associations, societas, public law and public international law.[171] The position of the law of succession varied greatly. Quintus Mucius and Sabinus had placed it right at the beginning of their "ius civile". Then it was merged for a long time with the law of things as being one of the ways of acquiring ownership. If we today usually conclude our system with the law of succession, this tradition also dates back to the natural lawyers: with the separation of family law from the law of persons, the former began to exert a considerable attraction on succession, especially intestate succession.[172] Persons, or rather what was left of it, remained right at the beginning of the system—not, however, as a separate entity but as part and parcel of the general part.

[166] The composition of Book Three is based on the system adopted by Donellus, *Commentarii de Jure Civili*. As to the Prussian Code, which was based on a totally different system, cf. supra, note 100.

[167] Cf. his *Grundriss eines Systems des gemeinen Civilrechts zum Behuf von Pandekten-Vorlesungen* (1807).

[168] II, I, 58.

[169] II, I, 59. The first book is entitled "Van de beginselen der rechten ende van der menschen rechteliche gestaltenisse".

[170] Others had rather blurred this distinction. The extent to which the question of systematization had been controversial is demonstrated by the fact that, while traditionally obligations had been dealt with as part and parcel of "res", attempts were not wanting to accommodate, the other way round, the law of things within the framework of the law of obligations. Cf. e.g. Jean Domat, *Les loix civiles dans leur ordre naturel*, who subdivided the law into engagements and successions.

[171] This systematic approach goes back to Samuel Pufendorf, *De jure naturae et gentium* (1672). It found legislative realization in the Prussian Code.

[172] Cf., for example, the structure of Christian Wolff's *Institutiones iuris naturae et gentium* and of part II, 2 PrALR.

This "general part" is the truly distinctive feature of the "*Pandektensystem*"; it has left its mark not only on the BGB, but on the whole science of law in Germany (and all the systems influenced by German law). To abstract and bring forth a body of general rules has great systematic advantages as well as severe inherent dangers.[173] It has a rationalizing effect and contributes to the scientific precision of legal analysis. On the other hand, comprehension of the law is rendered extremely difficult for someone not specifically trained in legal thinking. Thus, for example, the possibility of placing a person under guardianship is envisaged in § 6, but the details of the procedure are set out only in §§ 1896 sqq. Many of the general rules about the law of obligations are not, in fact, to be found in Book Two, but in the general part: how contracts are to be concluded, the effect of error or metus on the validity of contracts, etc. And if, for instance, one is dealing with the sale of some hinnies or pigs, one has to consult—the order being determined by the rule of lex specialis derogat legi generali—the special rules about the purchase of livestock, the more general (but still fairly special) rules given for the contract of sale, the general part of the law of obligations and, finally, the general part of the BGB. The general part is a child of legal formalism; legal philosophies based on social ethics are bound to reject this abstract,[174] technical and unconcrete way of structuring law and legal analysis. As far as, in particular, the BGB is concerned, additional criticism can be levelled at the content of its general part: for it does not contain rules about the basic principles of legal behaviour, about the exercise of rights in society,[175] principles of statute interpretation, the sources of law or the powers of a judge; instead, a variety of topics are included, which one should hardly expect there, such as the law of associations, foundations, extinctive prescription or the giving of security.

Yet, all in all, and even though it is not based on uniform principles of classification—whilst the law of things and the law of obligations are subdivided because the one deals with absolute and the other with relative rights, family law and succession are characterized as systematic entities by nothing but the simple fact that all rules relating to two areas of social reality have been put together[176]—the "*Pandektensystem*" has become firmly engrained in German private law. As a result, the law of obligations is today allocated an undisputed compartment of its own.

[173] On the history, content and value of the general part, see Schwarz, (1921) 42 *ZSS* 587 sqq.; Wieacker, *Privatrechtsgeschichte*, pp. 486 sqq.; Ernst Zitelmann, "Der Wert eines 'allgemeinen Teils' des bürgerlichen Rechts", (1906) 33 *GrünhZ* 1 sqq.; Philipp Heck, "Der allgemeine Teil des Privatrechts", (1939) 146 *Archiv für die civilistische Praxis* 1 sqq.; Gustav Boehmer, *Einführung in das bürgerliche Recht* (2nd ed., 1965), pp. 73 sqq.; Björne, op. cit., note 164, pp. 250 sqq.

[174] On the "German Abstract Approach to Law" and for comments on the system of the BGB, see Folke Schmidt, (1965) 9 *Scandinavian Studies in Law* 131 sqq.

[175] See, for example, art. 2 ZGB (Switzerland): Everyone must act in good faith in exercising his rights and performing his duties.

[176] Cf., for example, Boehmer, op. cit., note 173, pp. 71 sq.

IV. PLAN OF TREATMENT

In the chapters that follow, first the law of contract, then unjustified enrichment, and finally the law of delict will be dealt with. The discussion of contract commences with the special contracts before it focuses on general doctrines. This progression from the concrete to the more abstract and general would appear to accord best with the way the Roman lawyers developed their law of contractual obligations. As far as the special contracts are concerned, contracts verbis, litteris, re and consensu are distinguished. This fourfold (!) scheme of contractual obligations is based on the manner in which the contract was concluded; as with the two other important systems discussed in this chapter, it dates back to Gaius.[177]

Fundamental, however, to the subject matter of this book is the Roman concept of an obligation and it appears to be apposite, therefore, first to consider three of its most important implications (Chapter 2). We shall then proceed to discuss the stipulation, prototype of a contract verbis and cornerstone of the Roman contractual system. Two particularly important types of transaction (conventional penalties and suretyship) which had to be concluded by way of a stipulation will be examined next (Chapters 4 and 5). The following two chapters are devoted to the four real contracts (mutuum, commodatum, depositum, pignus), the next eight to the four consensual contracts (emptio venditio, locatio conductio, mandatum and societas).[178] Though not a

[177] Gai. III, 89 (also 119 a); cf. also Gai. D. 44, 7, 1, 1; *Inst.* III, 13, 2. This scheme is discussed by Ulrich von Lübtow, *Betrachtungen zum gaianischen Obligationenschema, Atti Verona*, vol. III (1951), pp. 241 sqq.; Max Kaser, "Gaius und die Klassiker", (1953) 70 *ZSS* (RA) 157 sqq.; Grosso, *Sistema*, pp. 73 sqq.; Carlo Augusto Cannata, "La 'distinctio' re-verbis-litteris-consensu et les problèmes de la pratique", in: *Sein und Werden im Recht, Festgabe für Ulrich von Lübtow* (1970), pp. 431 sqq.; cf. also idem, "Sulla 'divisio obligationum' nel diritto romano repubblicano e classico", (1970) 21 *Iura* 52 sqq. On the further history and reception of this classification, see Seiler, op. cit., note 98, passim.

[178] The rather mysterious (Vincenzo Arangio-Ruiz, *Istituzioni di diritto romano* (14th ed., 1968), p. 328) obligatio litteris mentioned (only!) in the *Institutes* of Gaius (III, 128 sqq.) will be passed over since it did not form part of the legacy of classical Roman law to the European ius commune. It may have originated as a consequence of the expansion of trade and commerce during the time after the second Punic war, when it became increasingly inconvenient to use the form of a stipulation (requiring the presence of both parties in one and the same place) in order to oblige somebody to pay a sum of money. The obligatio litteris (giving rise to an obligatio stricti iuris) arose as a result of the entry ("expensum ferre": cf. Gai. III, 129; Cicero, *Pro Q. Roscio comoedo*, I, 2) by the creditor into his codex accepti et expensi. This codex (mentioned by Cicero, op. cit., II, 5 sqq.) appears to have been a kind of inventory which was drawn up by a Roman paterfamilias (usually monthly) in order to record (in chronological sequence) all receipts, expenses, claims and debts. It thus reflected the development of a family's financial position and was the basis of the accounting system of a Republican household; as such it enjoyed a specific vis, diligentia and auctoritas (cf. Cicero, op. cit., II, 5 sqq., when he also refers to the codices as "aeterna, servantur sancte, perpetuae existimationis fidem et religionem amplectuntur"). The entry that gave rise to the obligatio litteris appears to have been made by the creditor at the request of his debtor (usually in the form of a—written—iussum); it was based on a fictitious loan (a pecuniam credere with regard to which neither a datio (cf. infra, p. 153) nor a stipulation had been effected) and had a novatory effect: it replaced another obligation, for instance one

contract, negotiorum gestio will be dealt with, for the sake of convenience, as an appendage to mandatum. Donation will be discussed last (Chapter 16); it was not a contract in classical Roman law, but became one in post-classical times. The chapter on pacta and innominate real contracts will take us into the general part of our study of the law of contract, for it is here that we find the doctrinal bridge towards the modern general law of contract. In the subsequent chapters consideration will therefore be given to the most important problem areas affecting every type of contract: how does it come into existence and what is it based upon; what are the effects of error, of metus and of dolus on the contractual relationship between the parties; what are the principles governing the interpretation of contracts; under which circumstances are contracts invalid and how can the obligations arising therefrom be terminated; which provisions may the parties include in their contract (conditions and time clauses will be dealt with as an example of two particularly important examples); and what are the consequences of a breach of contract. The law of unjustified enrichment forms the subject of Chapter 26; together with negotiorum gestio (Chapter 14), it is the only "quasi-contract" considered in some detail. With Chapter 27 we embark on our discussion of the law of delict; some general comments will be followed by a consideration of the most important specific delicts: furtum, damnum iniuria datum and iniuria. Finally, we shall turn our attention to certain instances of strict liability.

arising from a contract of sale. For a thorough analysis along these lines, cf. Ralf Michael Thilo, *Der Codex accepti et expensi im Römischen Recht* (1980), pp. 42 sqq., 79 sqq. (on the Roman bookkeeping and accounting system), pp. 162 sqq. (on the codex accepti et expensi), pp. 276 sqq. (on the contract litteris); cf. further, for example, Savigny, *Vermischte Schriften*, vol. I (1850), pp. 205 sqq.; De Zulueta, *Gaius* II, pp. 163 sqq.; Thielmann, *Privatauktion*, pp. 110 sqq.; 196 sqq.; Watson, *Obligations*, pp. 18 sqq.; Pierre Jouanique, "Le codex accepti et expensi chez Cicéron", (1968) 46 *RH* 5 sqq.; M.W.E. Glautier, "A Study in the development of Accounting in Roman Times", (1972) 19 *RIDA* 310 sqq.; Honsell/Mayer-Maly/Selb, pp. 251 sqq.

CHAPTER 2

Stipulatio alteri, Agency and Cession

I. STIPULATIO ALTERI

The concept, sketched in the preceding chapter, of the obligatio as being a strictly personal bond between the two parties who had concluded the contract found highly characteristic expression in the fact that Roman law did not recognize contracts in favour of third parties, (direct) agency and the cession of rights.

1. Alteri stipulari nemo potest

(a) The rule

"A contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance." This is how the BGB (§ 328 I) introduces its title on contracts in favour of third parties. For a Roman lawyer such a statement would have been inconceivable. ". . . vulgo dicitur", said Gaius (II 95),[1] "per extraneam personam nobis adquiri non posse": Roman law generally refused to acknowledge the validity of agreements in terms of which third parties were intended to acquire rights. It is safe to assume that in early Roman law "privity of contract", in this sense, was so much a matter of course that it hardly needed to be emphasized: legal acts and their effects were seen as a unity. Legal effects were not abstracted from the persons performing the formalities and could therefore not be made to originate in the person of an independent outsider.[2] "Decem milia Titio dari spondes?": under a stipulation of this type it was, as a result, impossible for the two contracting parties to confer the right on Titius to claim the ten thousand from the promisor. But did that mean that stipulations of this kind were invariably invalid? Was it not conceivable to regard the promisor as bound to the *stipulator*, i.e. his contractual partner, who could then force him to make performance to Titius? In such a "non-genuine" contract in favour of a third party, legal effects would arise and exist only between the acting parties. The answer of the Roman lawyers was succinctly summed up by Ulpianus (D. 45, 1, 38, 17): "Alteri stipulari nemo potest, praeterquam si servus domino, filius patri stipuletur." The origin of this famous rule, which had such a lasting effect in the history of private law, has to be seen according to traditional opinion in the formalities required for a stipulation.[3] A conceptio verborum of the above-mentioned type did not comply with the set form of question and answer, because, at least in the beginning, a stipulation had to contain the word "mihi", and it thus had to secure performance to the stipulator, not to Titius.[4] However, the rule was not abandoned even at a time when the formalities were seen in a more liberal light by the jurists; on the contrary, it was probably only then that its implications for the freedom of the parties to adapt and vary their formal declarations were fully realized and that the rule was framed and formulated.[5] Also, its application was not confined to stipulations but extended to all obligations: "Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cavere potest."[6]

(b) The interest requirement

Roman lawyers tried to rationalize the rule and they explained it on the basis that the stipulator did not have any actionable interest in the conclusion of a stipulatio alteri: ". . . inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur, nihil interest mea" (Ulp. D. 45, 1, 38, 17).[7] These considerations may not be altogether convincing for a modern lawyer[8]—some sort of interest must, typically, also exist in a stipulatio alteri, otherwise a sensible man would hardly enter into such an agreement. This in itself is no reason to reject the text as spurious. The same argument is documented in other texts;[9] it relates to the procedural rule of omnis condemnatio pecuniaria.[10] If every judgment had to be for a definite sum of money, then performance had to be

[1] Cf. also *Inst.* II, 9, 5. On this maxim, see, most recently Renato Quadrato, "Rappresentanza", in: *ED*, vol. 38, 1987, pp. 426 sqq. (proposing a new and very narrow construction of the crucial term "extraneus"; it did not, for instance, cover liberti and amici).

[2] Schmidlin, *Rechtsregeln*, pp. 70 sqq.

[3] Wesenberg, *Verträge zugunsten Dritter*, pp. 11 sq., but see infra, pp. 72 sqq.

[4] Kaser, *RPr* I, pp. 539 sq., 543, n. 49.

[5] Schmidlin, *Rechtsregeln*, pp. 71 sq.; cf. also Okko Behrends, "Überlegungen zum Vertrag zugunsten Dritter im römischen Privatrecht", in: *Studi in onore di Cesare Sanfilippo*, vol. V (1984), pp. 1 sqq.

[6] Q.M. Scaevola D. 50, 17, 73, 4. The reference to pacta and leges dictae has often been regarded as interpolated. However, in this fragment Scaevola succinctly refers to the three possibilities which might conceivably create effects in favour of third parties, and there is no reason why such enumeration should not be classical. Contracts are probably not mentioned because the naming of a third party was regarded by the jurist as such a deviation from the typical pattern that it was treated as an incidental provision (lex dicta); cf. Wesenberg, *Verträge zugunsten Dritter*, pp. 9 sq. Further on D. 50, 17, 73, 4, see Wieacker, *RR*, p. 578. On pacta in favorem tertii, see Peter Apathy, "Zur exceptio pacti auf Grund eines pactum in favorem tertii", (1976) 93 *ZSS* 97 sqq.

[7] On this text and its implications, cf., most recently, Behrends, *Studi Sanfilippo*, vol. V, pp. 5 sqq.

[8] Cf. the criticism by Schulz, *CRL*, n. 822.

[9] Cels. D. 42, 1, 13 pr.; 45, 1, 97, 1; Pomp. D. 45, 1, 112, 1; Pap. D. 45, 1, 118, 2; cf. Medicus, *Id quod interest*, pp. 217 sqq.

[10] Kaser, *RZ*, pp. 286 sqq.

capable of being evaluated in monetary terms.[11] That was possible only if every obligation involved an interest, the pecuniary value of which could be estimated. If the plaintiff sued for a certum,[12] the objective value of the objects due to be delivered had to be ascertained.[13] If an incertum was being sued for,[14] the judge had to assess the loss suffered by the creditor as a result of non- or malperformance. But how could an estimation of quod interest[15] be made if the stipulator breached his duty to perform towards a third party? That need not normally have bothered the stipulator. Yet there are cases in which the stipulator has an obvious interest in the promisor carrying out his duties towards the third party, and it is quite in keeping with the argument advanced in D. 45, 1, 38, 17 that here the lawyers were prepared to grant an action, i.e. to treat a stipulatio alteri as valid.[16] Such an interest could arise out of the fact that the stipulator was liable to the third party for the performance of the promisor. An example of such a situation is provided by Ulp. D. 45, 1, 38, 20:

> "Is, qui pupilli tutelam administrare coeperat, cessit administratione contutori suo et stipulatus est rem pupilli salvam fore. ait Marcellus posse defendi stipulationem valere: interest enim stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo, si aliter res cesserit."

Here a tutor wanted to leave the entire administration of the ward's property to his co-tutor and asked him for a cautio rem pupilli salvam fore, that is, for a guarantee (in the form of a stipulation) that he would properly administer this property. As this stipulation had been concluded between the two tutors and provided the tutor cessans with an actio ex stipulatu against the tutor gerens, but imposed a duty on the latter to see to it that his administration of the ward's property would not prove to be detrimental, it was a contract in favour of a third party.[17] However, both Marcellus and Ulpianus regarded the stipulation as valid. The first tutor, although he had ceased to act as a tutor,

[11] Cf. Ulp. D. 40, 7, 9, 2; Voci, *Le obbligazioni romane*, vol. I, 1 (1969), pp. 229 sqq.

[12] Cf. e.g. the condictio certae rei: "Si paret Num Num Ao Ao tritici Africi optimi modios centum dare oportere, quanti ea res est, tantam pecuniam iudex Num Num Ao Ao condemnato, si non paret, absolvito."

[13] In the case of certa pecunia (cf. the condictio certae pecuniae) condemnation was for that specific sum of money.

[14] Cf. e.g. the actio empti: "Quod As As de No No hominem Stichum emit, quidquid ob eam rem Num Num Ao Ao dare facere oportet ex fide bona, eius iudex Num Num Ao Ao condemnato, si non paret, absolvito."

[15] Cf. generally Medicus, *Id quod interest*; H. Honsell, *Quod interest*; and infra pp. 826 sq.

[16] Cf. the general statement in *Inst.* III, 19, 20; C. 8, 38, 3 pr. (Diocl. et Max.) (see the interpretation by Max Kaser, "Zur Interessenbestimmung bei den sog. unechten Verträgen zugunsten Dritter", in: *Festschrift für Erwin Seidl* (1975), pp. 82 sqq.).

[17] Towards the ward the second tutor is in any event liable for maladministration under the actio tutelae. Normally the cautio would have been concluded between tutor and ward. It mainly served the function of providing a basis for suretyship stipulations.

was still liable if the ward's affairs were badly administered.[18] He had left the administration to his co-tutor suo periculo and thus had an interest in reducing this periculum by providing for himself a means of forcing the tutor gerens to carry out his obligations.[19] Another example is discussed in Ulp. D. 45, 1, 38, 21 where the promisor of an insula facienda had asked a substitute to promise that he would carry out the building operations for the original stipulator. The (second) stipulation was valid because the stipulator was himself liable as promisor in the first stipulation.

(c) Origin of the rule

More examples could be cited.[20] In analysing them, one is driven to the conclusion that the "interest requirement" only states something obvious: the plaintiff can sue if he has a (financial) interest capable of being assessed by the judge. One would hardly need a rule such as "alteri stipulari nemo potest" to exclude actionability in cases where there is no such interest. On the other hand, one has to take into consideration that it was impossible for the judge to grant an action to the stipulator/plaintiff where the content of the stipulation was (alteri) certum dare. For, according to the wording of the applicable actions,[21] the judge could condemn the defendant only in the sum of money or the objective value of the objects due; he did not have the discretion (by virtue of a "quidquid . . . oportet" clause) to assess any other interest. In the case of a stipulatio alteri, however, the sum of money or the objects concerned are not due to the stipulator/plaintiff and so there was no possibility for him to sue. Thus it seems more convincing to see the origin of the "alteri stipulari nemo potest" (or, preferably, the "alteri dari stipulari nemo potest") rule as lying in the peculiarities of the Roman law of procedure[22] rather than in the formalities of the stipulation: where a promise of (alteri) certum dari had been made, no action was available;[23] in all other cases[24] the promisee could sue,

[18] Even though only in subsidio. On the liabilities of co-tutors, especially the relationship of tutor gerens and cessans, see Ernst Levy, "Die Haftung mehrerer Tutoren", (1916) 37 *ZSS* 14 sqq., 59 sqq.

[19] A different interpretation is given by Wesenberg, pp. 12 sqq. But see Max Kaser, "Die römische Eviktionshaftung nach Weiterverkauf", in: *Sein und Werden im Recht, Festgabe für Ulrich von Lübtow* (1970), p. 491; Alejandro Guzman, *Caucion tutelar en derecho romano* (1974), pp. 272 sqq.

[20] Cf. Kaser, *Festschrift Seidl*, pp. 75 sqq.; Apathy, (1976) 93 *ZSS* 102 sqq.

[21] Cf. e.g. supra, notes 12 and 13.

[22] Hans Ankum, "Une nouvelle hypothèse sur l'origine de la règle Alteri dari stipulari nemo potest", in: *Études offertes à Jean Macqueron* (1970), pp. 21 sqq.

[23] Cf. Gai. III, 103; also Paul. D. 45, 1, 126, 2. See Ankum, *Études Macqueron*, pp. 25 sq.

[24] That is, with regard to contracts for incertum dare or facere. But see Pap. D. 45, 1, 118, 2, where the alteri certum dari is regarded from the point of view of the stipulator as facere, i.e. an incertum.

provided he had an actionable interest.[25] With the decline of the formulary procedure these distinctions were bound to become meaningless. Instead, however, of abolishing "alteri (dari) stipulari nemo potest", Justinian emphasized it as a general rule and finally eliminated the "dari".[26] Yet, at the same time, by also generalizing the idea that the promisee had to be able to sue wherever there was an actionable interest, he emasculated it for all practical purposes.

2. Strategies to evade the restriction

Furthermore, the awkward problem of the lack of interest could easily be avoided by the parties; they simply had to add a stipulatio poenae and to make forfeiture of the penalty dependent on non-performance by the promisor towards the third party: "ergo si quis stipuletur Titio dari, nihil agit, sed si addiderit de poena 'nisi dederis, tot aureos dare spondes?' tunc committitur stipulatio" (*Inst.* III, 19, 19). It was one of the functions of stipulationes poenae to render unnecessary the assessment of what was owed as a consequence of a breach of the promise.[27] Irrespective of whether there was an interest or not, if what had been promised had not been given, the lump sum of "tot aureos" was forfeited:

> "[P]lane si velim hoc facere, poenam stipulari conveniet, ut, si ita factum non sit, ut comprehensum est, committetur stipulatio etiam ei, cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit, sed quae sit quantitas quaeque condicio stipulationis" (Ulp. D. 45, 1, 38, 17).

In this way, a (non-genuine) contract in favour of a third party could be made indirectly enforceable. The penalty clause put the promisor under some pressure to honour his promise and, thus, the practical effects of the "alteri stipulari nemo potest" rule were less dramatic than would appear at first glance.[28] Also, the parties could avail themselves of the institution of a solutionis causa adiectus.[29] While a promise could not be

[25] Interestingly, an "interest-theory" of a very similar kind ("He that hath interest in the promise shall have the action") played a crucial role in the shaping of the English "privity of contract" doctrine (on which see infra, p. 45). For a modern analysis, see Vernon V. Palmer, "The History of Privity—The Formative Period (1500–1680)", (1989) 33 *American Journal of Legal History* 7 sqq.

[26] Cf. Ulp. D. 45, 1, 38, 17, which, from this point of view, has to be regarded as partially interpolated. See Kaser, *Festschrift Seidl*, p. 87. Paul. D. 45, 1, 126, 2 seems to have escaped the attention of the compilers.

[27] Cf. infra, pp. 95 sq.

[28] Cf. in this context the interesting considerations of Wesenberg, *Verträge zugunsten Dritter*, p. 20; he argues that the main function of the modern contract in favour of a third person (as, for example, regulated in the BGB) is to make provision for relatives. The father of a family wants to protect wife and children against the possibility that the estate might not suffice for their maintenance after his death. In Roman times the subsistence minimum of the civis Romanus and his relatives was provided for by other means (cf., for example, the cura annonae).

[29] This institution has been analysed in great detail by the Roman lawyers. Cf. the casuistry in Pothier, *Pandectae Justinianae IV* (1819), pp. 266 sqq.; Wesenberg, *Verträge zugunsten Dritter*, pp. 20 sqq.

made in favour of Titius, it could be made in favour of either me or Titius. A stipulation of the type "mihi aut Titio dari spondesne?" was valid; although, of course, no right to claim payment was being conferred on Titius, he was entitled to receive payment: "Titius nec petere nec novare nec acceptum facere potest, tantumque ei solvi potest" (Paul. D. 46, 3, 10). Thus, the situation here is similar to the one arising under a (non-genuine) penalty clause:[30] performance only to me is "in stipulatione", performance to Titius is a datio merely "in exsolutione". If, on the other hand, the addition of Titius could not only be regarded as solutionis causa, but if (part-)performance to him was the object of the stipulation ("mihi *et* Titio decem dari spondesne?"), the stipulation, at least as far as this addition was concerned, could not be regarded as valid.[31] The Sabinians, following a very formal "blue-pencil approach",[32] simply struck out what was invalid—i.e. the word "et Titio". The result was that, contrary to the obvious intention of the parties, the ten were owed to the stipulator. The Proculians, however, went beyond the strictly literal interpretation of the formal declaration and regarded "et Titio" not merely as an invalid part of the formula but as an invalid negotium. It would be strange, they argued, if the invalidity of the stipulation in favour of Titius were to have the effect of automatically increasing the amount owed to the stipulator. Thus they advocated upholding the stipulation in the stipulator's favour for five.[33] Furthermore, delegatio solvendi[34] and adstipulatio[35] served to compensate for the lack of, and to satisfy the need for, a contract in favour of third parties.

3. Changes in post-classical law

Still, however, the principle that the third party could not acquire a right was maintained. This began to change only in late classical imperial law. Here we find texts such as C. 8, 54, 3 (Diocl. et Max.):

> "Quotiens donatio ita conficitur, ut post tempus id quod donatum est alii restituatur . . . benigna iuris interpretatione divi principes ei [in quem liberalitatis compendium conferebatur] utilem actionem iuxta donatoris voluntatem competere [admiserunt]."

A donatio sub modo had been concluded; the donee had to pass on the donation to a third party after a specified period. According to ius vetus, neither the donor (a donee charged with a modus could, as a rule, be sued for performance only if the modus had been strengthened by

[30] Cf. Paul. D. 44, 7, 44, 5; infra, pp. 98 sq.

[31] Gai. III, 103 and Schmidlin, *Rechtsregeln*, pp. 72 sqq.

[32] On which, see infra, p. 78.

[33] This is the line taken by Justinian: *Inst.* III, 19, 4. Cf. also Iav. D. 45, 1, 110 pr.

[34] The creditor authorizes the debtor to make performance to a third person; cf. e.g. Afr. D. 46, 3, 38, 1.

[35] An accessory creditor, who was entitled both to receive performance and to sue; his right, however, depended on that of the main creditor. Cf. Gai. III, 110 sqq.; Schulz, *CRL*, pp. 491 sqq.

stipulation) nor the third party had an action to enforce the agreement. Under these circumstances, the emperors granted an equitable action to the third party.[36] This recognition of a genuine agreement in favour of a third party constituted the first direct inroad into the "per extraneam personam nobis adquiri non posse" principle. The authenticity of this text is borne out by the Fragmenta vaticana.[37] We find a series of other cases in the Codex and even in the Digest,[38] as, for example, Ulp. D. 13, 7, 13 pr.,[39] where an actio in factum is granted to a pledgor after the pledgee, in the course of selling the pledged object, had agreed with the purchaser that the debtor should be able to redeem his object from the purchaser; there is also C. 3, 42, 8,[40] where the two parties to a depositum had arranged that the depositee should return the property, not to the depositor, but to a third party, and where this third party is given an actio depositi utilis.[41] But these texts are all very probably interpolated. They show, however, that by the time of Justinian the range of exceptions to the classical principle had been considerably increased. Thus, the compilers had brought a certain amount of inconsistency and confusion into the sources.[42] While still retaining and even emphasizing the principles of "alteri stipulari nemo potest" and "per extraneam personam nobis adquiri non potest", they had taken over, extended or introduced a number of situations in which these principles did not apply. Reconciliation and harmonization of the sources in later times therefore became a difficult and cumbrous undertaking. Also, some of those exceptions lent themselves to an unhinging of the principles. Thus, the history of the contract in favour of a third person is rather varied and eventful.[43]

[36] Cf. Wesenberg, *Verträge zugunsten Dritter*, pp. 29 sqq.; Ankum, *Études Macqueron*, p. 23.

[37] Vat. 286.

[38] They are specified and discussed by Wesenberg, *Verträge zugunsten Dritter*, pp. 23 sqq. Cf. also Windscheid/Kipp, § 316, 2; Hans Ankum, *De voorouders van een tweehoofdig twistziek monster* (1967), pp. 15 sqq.; Behrends, *Studi Sanfilippo*, vol. V, pp. 48 sqq.

[39] "Si, cum venderet creditor pignus, convenerit inter ipsum et emptorem, ut, si solverit debitor pecuniam pretii emptori, liceret ei recipere rem suam, scripsit Iulianus et est rescriptum ob hanc conventionem pignerаticiis actionibus teneri creditorem, ut debitori mandet ex vendito actionem adversus emptorem. sed et ipse debitor aut vindicare rem poterit aut in factum actione adversus emptorem agere."

[40] "Si res tuas commodavit aut deposuit is, cuius precibus meministi, adversus tenentem ad exhibendum vel vindicatione uti potes. Quod si pactus sit, ut tibi restituantur, si quidem ei qui deposuit successisti, iure hereditario depositi actione uti non prohiberis: si vero nec civili nec honorario iure ad te hereditas eius pertinet, intellegis nullam te ex eius pacto contra quem supplicas actionem stricto iure habere: utilis autem tibi propter aequitatis rationem dabitur depositi actio" (Diocl. et Max.).

[41] The common denominator of all these exceptions seems to be that an action was granted "to the third person . . . against one who took a thing with notice of [the third person's] right": Thomas, *TRL*, p. 247.

[42] Kaser, *RPr* II, pp. 339 sq.; Emilio Albertario, "I contratti a favore di terzi", in: *Festschrift für Paul Koschaker*, vol. II (1939), pp. 26 sqq.

[43] See Ankum, *De voorouders*, op. cit., note 38, pp. 17 sqq.; Coing, pp. 423 sqq.; Ulrich Müller, *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter* (1969),

4. The evolution of the modern contract in favour of a third party

(a) Alteri stipulari nemo potest: rule and exceptions

It took a long time before the "alteri stipulari nemo potest" principle was finally overcome; this principle, incidentally, was taken to prohibit what we today call genuine contracts in favour of a third party, non-genuine contracts in favour of a third party and (direct) representation—i.e. every contract which would either aim at creating rights, or rights and obligations, in the person of a third party, or bind one of the contracting parties to perform in favour of the third. Some authors extended the application of C. 8, 54, 3 and used this constitution as a crystallization point for rules about stipulationes alteri.[44] Others availed themselves of the transformative potential inherent in the "interest" concept.[45] By accepting more and more liberally an interest of the creditor in the conclusion of such a contract, the rule against (non-genuine) contracts in favour of third parties could be totally eroded. Thus we find Gothofredus categorically stating "[H]ominem beneficio adfici nostra interest".[46] Other writers, again, argued that all the exceptions already recognized in Roman law negated the rule.[47] Savigny saw the solution to the problem largely in an extensive application of unauthorized agency.[48] The glossator Martinus Gosia, one of the famous quattuor doctores, maintained that "alteri stipulari nemo potest" referred only to the actio directa and did not prevent the third party from acquiring an actio utilis.[49] According to the commentators, the principle did not apply to "personae publicae" such as notarii or iudices.[50] The canonists recognized an interesting exception in cases where the promise in favour of a third party had been affirmed by oath: if the promise had to be regarded as invalid, perjury

pp. 29 sqq.; Wesenberg, *Verträge zugunsten Dritter*, pp. 101 sqq.; Johannes Christiaan de Wet, *Die ontwikkeling van die ooreenkoms ten behoewe van 'n derde* (1940), pp. 28 sqq.

[44] De Wet, op. cit., note 43, e.g. pp. 63 sqq., 68 sqq., 140.

[45] Cf. for the humanists, for example, Franciscus Duarenus, *In Tit. de Pactis*, cap. III, 7 sq.; for the usus modernus e.g. Benediktus Carpzovius, *Definitiones Forenses ad Constitutiones Electorales Saxonicas, Lipsiae et Francofurti* (1694), Pars II, Constitutio XXIX, Def. XX, nn. 1 sqq.; Constitutio XXXIII, Def. XXVII.

[46] Dionysius Gothofredus, *Corpus Juris Civilis Romani*, Lib. XLV, Tit. I, 38, § 17, t; cf. also e.g. Vinnius, *Institutiones*, Lib. III, Tit. XX, 4, n. 3, but see also 19.

[47] Cf. Stryk, *Usus modernus pandectarum*, Lib. II, Tit. XIV, § 12: ". . . et sic non negatur aptitudo, per alium quaerendi obligationem, sed negatur regalia [sic; regula?]."

[48] Savigny, *Obligationenrecht*, vol. II, pp. 81 sqq.

[49] Cf. the analysis by Müller, op. cit., note 43, pp. 44 sqq.; Wesenberg, *Verträge zugunsten Dritter*, pp. 102 sqq.; as to the discussion amongst the medieval legists and canonists generally, cf. also Hans Ankum, "Die Verträge zugunsten Dritter in den Schriften einiger mittelalterlicher Romanisten und Kanonisten", in: *Sein und Werden im Recht, Festgabe für Ulrich von Lübtow* (1970), pp. 559 sqq.; idem, *De voorouders*, op. cit., note 38, pp. 17 sqq.

[50] Cf. already Accursius, gl. Nihil agit ad I. 3, 20, 4. This exception was based mainly on Ulp. D. 46, 6, 2–4, which deals with a servus publicus. Cf. esp. Hermann Lange, " 'Alteri stipulari nemo potest' bei Legisten und Kanonisten", (1956) 73 *ZSS* 279 sqq.; Coing, p. 425.

(which meant sin) would have been sanctioned.[51] And some influential Spanish writers (such as Antonio Gomez and Covarruvias)[52] argued that alteri stipulari nemo potest had been rendered practically obsolete as a result of the widespread recognition of "ex nudo pacto oritur actio":[53] for even if a stipulation in favour of a third party might have to be regarded as invalid,[54] an informal pactum to the same effect did not incur objections.[55] Generally, however, until the 17th century and partially even until the end of the 19th century, the "alteri stipulari nemo potest" rule was reaffirmed and applied—be it out of reverence for the sources of Roman law,[56] be it because a stipulatio alteri was regarded as a logical impossibility[57] or as irreconcilable with the nature of stipulations,[58] or be it that no specific need for agreements in favour of third parties was recognized: under these circumstances, and in view of the fact that obligations constituted limitations on the natural freedom, it was not regarded as justifiable to grant recognition to this kind of transaction.[59] At the height of pandectism, Alois Brinz, in his famous textbook, still tried to reconcile the Justinianic exceptions with the "alteri stipulari nemo potest" principle in order to prove both its logical stringency and its historical significance.[60]

(b) The abandonment of the rule

But these attempts were hardly more than the last thunderings of a lost battle. In the 17th century the great breakthrough towards the recognition of the contract in favour of a third party had taken place and the prevailing new attitude had already influenced many of the codes of that time. In contrast to the contemporary lawyers in Italy, France and Germany, the "elegant" jurisprudence in the Netherlands had turned away from the Roman principle of "alteri stipulari nemo potest".[61]

[51] Cf. Lange, (1956) 73 *ZSS* 297 sqq. Note in this context the promise required of schismatic bishops who returned to the church: ". . . promitto tibi N. et per te sancto Petro apostolorum principi, atque eius Vicario N. beatissimo Gregorio, vel successoribus ipsius."

[52] Cf. Coing, p. 425.

[53] Cf. infra, pp. 537 sqq.

[54] On the essence and significance of stipulations under the ius commune cf., however, infra, pp. 546 sqq.

[55] This line of argument (despite not being supported by the Roman sources) also commended itself to some writers of the German usus modernus (cf. Stryk, *Usus modernus pandectarum*, Lib. II, Tit. XIV, § 12) and of Roman-Dutch law (Van Leeuwen, *Censura Forensis*, Pars I, Lib. IV, Tit. XVI, n. 8); cf. also Grotius, *De jure belli ac pacis*, Lib. II, Cap. XI, § 10.

[56] Especially by the humanists; cf. Müller, op. cit., note 43, pp. 73 sqq.

[57] Cf. Brinz, *Pandekten*, § 374 (p. 1627). Cf. also Savigny, *Obligationenrecht*, vol. II, p. 84 (stating that, from the point of view of "good and accurate theory" the doctrine has to be rejected "out of hand").

[58] Brunnemann, *Commentarius in Pandectas*, Lib. XLIV, Tit. VIII, Ad. L. 11, n. 1.

[59] Donellus, *Commentarii de Jure Civili*, Lib. XII, Cap. XVI, 9 sq.; Savigny, *Obligationenrecht*, vol. II, p. 76.

[60] § 375.

[61] See especially Ankum, *De voorouders*, op. cit., note 38, pp. 27 sqq.; De Wet, op. cit., note 43, pp. 104 sqq.; Müller, op. cit., note 43, pp. 98 sqq.

This move was possibly indirectly influenced by a law of King Alfons XI of Spain from 1348,[62] but it was mainly based on the needs and usages of the rapidly expanding Dutch economy. One of the first to take the "consuetudo" into account was Johannes Jacob Wissenbach, who stated the Roman rule and then continued:

> "Et moribus hodiernis vel paciscendo, vel legem dicendo, vel stipulando alter alteri cavere potest . . . Neque id mirum videri debet. Nam roganti, quare Jure Civili alteri stipulari nemo possit, vix aliam dederis rationem, in quo acquiescat, quam hanc, quia ita legislatori placuit . . . Mores ergo id Romanorum placitum, facile subigere poterant."[63]

A couple of years later, Simon van Leeuwen had this to say in his *Censura Forensis* about bills of exchange: "Nostris autem vicinisque regionibus, praesertim inter mercatores nihil frequentius quam quod in litterarum obligationibus, non modo sibi aut alteri, sed in genere cuicunque literatum latori valide stipuletur."[64]

However, the frontal attack on "alteri stipulari nemo potest" was launched by the natural lawyers, led by Hugo Grotius. Significantly,[65] in his *Inleiding tot de Hollandsche Rechtsgeleertheyd*, Grotius had still stated that "niemand door een ander inschuld bekomen [kan] zonder opdracht".[66] It was only in his *De Jure Belli ac Pacis* that he asserted the incompatibility of "alteri stipulari nemo potest" with natural law:

> "Si mihi facta est promissio, omissa inspectione an mea privatim intersit, quam introduxit ius Romanuma, naturaliter videtur mihi acceptandi ius dari efficendi ut ad alterum ius perveniat, si et is acceptet. . . . Nam is sensus iuri naturae non repugnat."[67]

The recognition of the contract in favour of a third party thus came as a consequence of the emphasis which Grotius put on will and consensus as essential elements of the contract.[68] Another consequence, however, is the specific limitation of this construction which lies in the fact that the third party does not (directly) acquire a right under the contract between the other two, but that a declaration is required to accept the benefit. Strictly speaking, therefore, the right of the third party arises from a vinculum iuris between himself and the promisor. The situation

[62] Cf. Didacus de Covarruvias a Leyva, "Variae Resolutiones Juridicae", in: *Opera Omnia* (Francofurti, 1573), Lib. I, Cap. XIV, 11. Both Müller, op. cit., note 43, and Coing, p. 430, emphasize that the break with the "alteri stipulari nemo potest" rule ultimately originated in Spanish legal science; cf., for example, the discussion in Perezius, *Praelectiones*, Lib. VIII, Tit. LV, n. 9.

[63] *Exercitationes*, Ad Regulas Juris, Disput. XI, l. 73, 5 (should read: 16).

[64] Pars I, Lib. IV, Cap. XVI, 8. The discussion among the Dutch jurists has been summed up by Voet, *Commentarius ad Pandectas*, Lib. XLV, Tit. I, III; cf. also Groenewegen, De legibus abrogatis, Inst. Lib. III, Tit. XX, § 19 alteri.

[65] Cf. Reinhard Zimmermann/David Carey-Miller, "Hugo Grotius—Generis humani iuris consultus", 1984 *Jura* 1 sqq.

[66] III, I, 36; but see also III, III, 38.

[67] Lib. II, Cap. XI, § 18. As so often (cf. Otto Wilhelm Krause, *Naturrechtler des sechzehnten Jahrhunderts* (1982), pp. 150 sqq.), Grotius built on the foundations laid by the late scholastic Spanish legal science (cf. supra, note 62.).

[68] Wieacker, *Privatrechtsgeschichte*, pp. 293 sq. and especially, Diesselhorst, *Hugo Grotius*, passim: cf. infra, p. 544.

is thus not dissimilar from what we are accustomed to call unauthorized agency.[69] It was in this form that the contract in favour of a third party made its way into the Prussian,[70] Bavarian,[71] and Saxonian[72] codifications. The Austrian code was more conservative in this respect and retained the "alteri stipulari nemo potest" principle.[73] So did, under the influence of Robert-Joseph Pothier,[74] the French code civil.[75] It made provision for only two narrowly defined exceptions in art. 1121: a "*stipulation au profit d'un tiers*" is valid, "*lorsque telle est la condition d'une stipulation que l'on fait pour soi-meme ou d'une donation que l'on fait a un autre.*"[76] The Roman idea of the actionable interest necessary for a valid stipulation (Ulp. D. 45, 1, 38, 17), as well as the donatio sub modo in C. 8, 54, 3 are clearly evident in this provision. The French courts have, however, regarded the first alternative (namely that the contract must not only be for the benefit of the third party but that there must be a simultaneous promise for the benefit of the promisee) as being satisfied if the promisee derives any "profit moral" from the transaction.[77] Thus, they have unhinged the principle of art. 1165 and introduced into French law—contra legem, as it were—the modern contract in favour of third parties. According to the "*théorie de la création directe de l'action*" the third party acquires the right directly at the time when promisor and promisee conclude their contract; his own declaration does not have a constitutive effect. This has brought French law into line with modern German law; the "mature"[78] solutions found in 328 sqq., providing, inter alia, for life insurance contracts and farm surrender agreements, are due to the conceptual clarity achieved by the pandectists.[79] Grotius' construction, on the other hand, lives on to this

[69] It is hardly surprising that both sometimes get mixed up in South African law; cf. e.g. Leslie Rubin, "The Legal Consequences of Contracts Concluded by a negotiorum gestor", 1954 *Butterworth's South African LR* 131 sq.; Lee, *Introduction* p. 439.

[70] § 75 I 5 PrALR.

[71] Theil 4, Cap. 1, § 13 Codex Maximilianeus.

[72] § 854 Sächsisches Gesetzbuch.

[73] § 881 ABGB; reformed, however, by the third Theilnovelle in 1916.

[74] *Traité des obligations*, nn. 54 sqq.

[75] Art. 1165 code civil; on the origin of the provisions regarding contracts in favour of a third party in the French and Dutch codifications, see Ankum, *De voorouders*, op. cit., note 38, pp. 30 sqq.; as far as French law is concerned, cf. also Edouard Lambert, *Du contrat en faveur des tiers* (1893), passim.

[76] This provision has been received in Louisiana (but has been changed subsequently). On the history of "stipulations pour autrui" in Louisiana, see J. Denson Smith, (1936) 11 *Tulane LR* 18 sqq.

[77] The most important parts of the "vast edifice which the French courts have constructed on the frail foundation of art. 1121", especially Despretz c. Wannebroucq, Cass. civ. 16.1.1888, are easily accessible in Kahn-Freund/Lévy/Rudden, *A Source-book on French Law* (2nd ed., 1979), pp. 454 sqq.; cf. also Nicholas, *FLC*, pp. 177 sqq.

[78] Zweigert/Kötz/Weir, pp. 126 sqq., 138.

[79] Cf. especially Windscheid/Kipp, § 316. In § 316 a, a variety of theories and constructions (mostly based on fictions) is discussed which were proposed in the course of the 19th century in order to get around the effects of the "alteri stipulari nemo potest" rule.

day in the modern Roman-Dutch law of South Africa.[80]

(c) Privity of contract

All in all, the civil-law systems seem more or less to have thrown off the fetters of the Roman "alteri stipulari nemo potest" principle.[81] If, therefore, one wants to name a legal system that to this day quite obstinately conceives of contractual obligations as necessarily bilateral "vincula iuris", in a way which is very unabstract and similar to the Roman view, one has to look at the English common law.[82] There, in the words of Viscount Haldane LC, "certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a ius quaesitum tertio arising by way of contract".[83] This rule is usually justified by reference to the doctrines of "privity of contract" and "consideration" (consideration must move from the promisee). However, again not unlike their Roman counterparts, English lawyers have not been able altogether to ignore the practical need for allowing third parties to sue and have, therefore, in some cases found other means of achieving this end. More particularly, trust constructions (usually of a more or less fictitious nature) have been employed in this context.[84]

II. AGENCY

1. Direct representation: introduction

Not only the contract in favour of a third party but also the modern law of agency have been developed, in the civil-law systems, largely in opposition to the situation in Roman law. Again, it was the "alteri stipulari nemo potest" principle which stood in the way; again, however, matters were complicated by the fact that the Corpus Juris Civilis did not really present a very clear and consistent picture. Again, it was Hugo Grotius who had a major impact on the development; in particular, he advanced the legal analysis by distinguishing for the first time between contracts in favour of a third party and agency: "Solent

Cf. in this context the polemic though instructive remarks by von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (1848), as quoted by Zweigert/Kötz/Weir, p. 126.

[80] Cf. e.g. *Mutual Life Insurance Co. of New York v. Hotz* 1911 AD 556 sqq.; *McCullogh v. Fernwood Estate Ltd.* 1920 AD 204 sqq. and the criticism by De Wet, op. cit., note 43, pp. 146 sqq.; De Wet en Yeats, pp. 94 sqq. For a different view, see J. Kerr Wylie, "Contracts in favour of third parties", (1943) 7 *THRHR* 94 sqq.

[81] Cf. the comparative analysis by Zweigert/Kötz/Weir, pp. 124 sqq.

[82] Cf. the comparative analysis by Zweigert/Kötz/Weir, pp. 133 sqq.; and the historical analysis by Palmer, (1989) 33 *American Journal of Legal History* 3 sqq.

[83] *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd.* [1915] AC 847 (HL) at 853; cf. also *Beswick v. Beswick* [1967] 2 All ER 1197 (HL); Treitel, *Contract*, pp. 458 sqq.

[84] Cf. Buckland/McNair, pp. 214 sqq.; Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, (1930) 46 *LQR* 12 sqq.; Louise Wilson, "Contract and Benefits for Third Parties", (1987) 11 *Sydney LR* 230 sqq.

et controversiae incidere de acceptatione pro altero facta: in quibus distinguendum est inter promissionem mihi factam de re danda alteri, et inter promissionem in ipsius nomen collatam cui res danda est."[85] This distinction is based on Grotius' general emphasis on the will of the contracting parties, and it has remained fundamental ever since.[86] It was developed as a consequence of the rejection of the "alteri stipulari nemo potest" principle. As long as this principle was applied, it was seen to refer to all situations in which an independent third party acquired a right under a contract which had been concluded between two other parties. This is exactly what (genuine) contracts in favour of third parties and agency have in common, and therefore it had hardly been necessary thus far to differentiate cases which were prohibited anyway. Agency, as we see it today, refers to a situation where one person (the agent), authorized by a third party (the principal), concludes a transaction on behalf of the latter with another person, with the result that such transaction will take effect between the *principal* and this other person.[87] Thus, the main difference from what we call a contract in favour of a third party lies in the fact that in the one case the principal in every respect becomes party to the contract that has been concluded by the agent; the agent is merely acting as a conduit pipe and has no concern with the effects of the transaction. In the other case, the third party acquires only the right to claim performance. He does not become a party to the contract which is concluded, and becomes effective, between promisor and promisee. Thus, the imposition of a *duty* to perform is conceivable only in the case of agency; a contract not only for the benefit of, but casting a burden on a third party is not, and has never been, admissible.[88] If one looks at the will of the parties concerned, one can say that the agent wants to accept the promise in the name of the principal, whereas the promisee under a contract in favour of a third party wants to act in his own name for the benefit of the third party. For agency, the continental legal systems specify a further requirement: the agent has to act in the name of the principal,[89] and

[85] *De jure belli ac pacis*, Lib. II, Cap. XI, 18.

[86] The distinction is sometimes blurred; cf., for example, supra, notes 48, 69.

[87] Thus, one person acts, but the effects of that act arise in a third party. Rabel, "Die Stellvertretung in den hellenistischen Rechten und in Rom", in: *Atti del congresso internazionale di diritto romano*, vol. I (1934), p. 238, has called this a legal miracle ("*Ursprünglich gibt es nirgends eine direkte Stellvertretung. Sie ist ein juristisches Wunder*").

[88] Cf. Paul. D. 45, 1, 83 pr.; Windscheid/Kipp, § 317; Klaus-Peter Martens, "Rechtsgeschäft und Drittinteressen", (1977) 177 *Archiv für die civilistische Praxis* 139 sqq. The validity of such a transaction is (in modern times) incompatible with the autonomy of each individual to enter into legal transactions (*Privatautonomie*). In the case of agency, this problem does not arise, as the principal has conferred the power of agency on the agent.

[89] Cf., for example, Windscheid/Kipp, § 73, n. 15; Wolfram Müller-Freienfels, *Die Vertretung beim Rechtsgeschäft* (1955), pp. 15 sqq.; Karsten Schmidt, "Offene Stellvertretung" 1987 *Juristische Schulung* 425 sqq.; cf. also art. 1984 code civil; art. 1388 codice civile. For a comparative evaluation, see Philippos Doris, "Die unmittelbare Stellvertretung des BGB im

must therefore make it clear to the other party that he is not acting in his own name.[90] This is the publicity principle[91] which, incidentally, had also already been enunciated by Grotius and the other natural lawyers.[92] In contradistinction, English law recognizes the "undisclosed principal":[93] as long as the agent has authority to act at the time when the contract is made, the principal acquires rights and duties under this contract even if the agent did not reveal the fact that he was acting on behalf of another. Although this has often been regarded as a strange anomaly of English law,[94] the undisclosed principal has managed to creep into one civil-law system, namely the usus hodiernus of Roman-Dutch law.[95] According to the South African Appellate Division, the opportunity to expel the uncouth intruder has unfortunately been lost.[96]

2. No general concept of agency in Roman law

Roman law did not know a general concept of agency. Certain situations were recognized in which persons could act through middlemen, but a comprehensive legal institution of agency was never developed.[97] This, as far as the acquisition of rights through an agent is concerned, was another consequence of "per extraneam personam nihil nobis acquiri potest".[98] That, in turn, one could not incur obligations

Lichte funktions- und strukturähnlicher Rechtsgebilde in anderen Rechtsordnungen", in: *II. Festschrift für Karl Larenz* (1983), pp. 161 sqq.

[90] Cf. § 164 II BGB, which formulates with unsurpassed elegance: "In the case, that the will to act in another person's name, is not apparent, the absence of the will to act in one's own name is not to be taken into consideration."

[91] It aims at protecting both the party with whom the "agent" contracts and third parties (who have an interest in the certainty and clarity of legal relations).

[92] Cf. e.g. Christian Wolff, *Institutiones juris naturae et gentium*, § 551.

[93] Cf. Wolfram Müller-Freienfels, "The Undisclosed Principal", (1953) 16 *Modern LR* 299 sqq.; idem, "Comparative Aspects of Undisclosed Agency", (1955) 18 *Modern LR* 33 sqq.; S.J. Stoljar, *The Law of Agency* (1961), pp. 203 sqq.

[94] Cf. e.g. G.H.L. Fridman, *The Law of Agency* (4th ed., 1976), pp. 191 sqq.

[95] *Lippert & Co. v. Desbats* 1869 Buch 189; *O'Leary v. Harbord* (1888) 5 HCG 1; cf. J.C. van der Horst, *Die Leerstuk van die "Undisclosed Principal"* (1971).

[96] *Cullinan v. Noordkaaplandse Aartappelkernmoerkwekers Kooperasie Bpk.* 1972 (1) SA 761 (A) at 767F–G: "Ofskoon . . . die leerstuk . . . inderdaad indruis teen die grondbeginsels van ons reg, is die onderhawige myns insiens nie 'n geval waar ingegryp en die leerstuk oorboord gegooi kan word nie. . . ."

[97] Cf. Axel Claus, *Gewillkürte Stellvertretung im Römischen Privatrecht* (1973); G. Hamza, "Aspetti della rappresentanza negoziale in diritto romano", (1980) 9 *Index* 193 sqq.; idem, "Fragen der gewillkürten Stellvertretung im römischen Recht", (1983) 25 *Acta Juridica Academiae Scientiarum Hungaricae* 89 sqq.; Kaser, *RPr* I, pp. 260 sqq.; idem, "Zum Wesen der römischen Stellvertretung", (1970) 9 *Romanitas* 333 sqq.; idem, "Stellvertretung und 'notwendige Entgeltlichkeit'", (1974) 91 *ZSS* 146 sqq.; Ludwig Mitteis, *Die Lehre von der Stellvertretung* (1885); Müller, op. cit., note 43, pp. 14 sqq.; Joseph Plescia, "The Development of Agency in Roman Law", (1984) 30 *Labeo* 171 sqq.; Raphael Powell, "Contractual Agency in Roman Law and English Law", 1956 *Butterworth's South African LR* 41 sqq.; Quadrato, *ED*, vol. 38, pp. 417 sqq.; Rabel, *Atti*, op. cit., note 87, pp. 235 sqq.; idem, *Grundzüge*, §§ 118 sqq.

[98] But cf. Alessandro Corbino, "Forma librale ed intermediazione negoziale", in: *Sodalitas, Scritti in onore di Antonio Guarino*, vol. V (1984), pp. 2257 sqq.

through an independent third person seems to have been so obvious that a similar rule did not even have to be formulated. For an explanation one has to look back to the formalism of the old law with its magical roots: the ceremonies connected with transactions such as mancipatio and nexum and the sacral elements of the old stipulatio seem to have necessitated performance of the formal acts in personam.[99] That Roman lawyers clung to this principle during the more advanced stages of legal development and even applied it to the informal contracts, some of which came to be the main transactions of daily life and of commercial intercourse, provides striking evidence of their characteristic traditionalism.[100] To us, today, agency appears to be an essential device in any developed and sophisticated economy which avails itself of the advantages of a division of labour for the production and distribution processes.[101] How could the Romans do without it? They were, after all, a nation whose economic and social structure,[102] from about the time of the Punic wars, was no longer determined so much by agriculture as by commerce, finance and city life.[103] The answer lies partly in the structure of the Roman economic system, more particularly in the organization and functioning of the family unit; besides, the Romans used other devices which allowed them to approximate the practical effects of agency. Also, the rule regarding the exclusion of agency was not as rigidly applied as is sometimes suggested; if their traditionalism led the Roman lawyers to retain the

[99] Cf. Mitteis, op. cit., note 97, pp. 13 sqq.; Kaser, *RPr* I, p. 260. A totally different hypothesis has recently been advanced by Claus, *Stellvertretung*, pp. 14 sqq. According to him, (ancient) Roman law did not object to agency in the sense that a free person could acquire rights and incur obligations on behalf of somebody else. Taking as his point of departure what Erwin Seidl (for example in: *Ägyptische Rechtsgeschichte der Saiten- und Perserzeit* (2nd ed., 1968), pp. 45 sqq.) has called "the principle of necessary remunerativeness"—which, according to Seidl, originally applied in Roman law just as in all other (early) legal systems (cf. for England the doctrine of consideration)—he argues that if the remuneration had come from the property of a third party or if what had been acquired had benefited the property of the third party, that third party, and not the person concluding the contract, would be liable and entitled under the transaction. Only later on, when the will of the parties began to be emphasized and ultimately replaced the principle of necessary remunerativeness as the basis of the contractual transactions (that is, since the end of the third century B.C.) did the jurists introduce the prohibition of agency. For a refutation of this theory, see Kaser, (1974) 91 *ZSS* 146 sqq.

[100] On this topic generally, see Schulz, *Principles*, pp. 83 sqq.; Dieter Nörr, "Zum Traditionalismus der römischen Juristen", in: *Festschrift für Werner Flume*, vol. I (1978), pp. 153 sqq.

[101] Müller-Freienfels, *Vertretung*, op. cit., note 89, p. 53.

[102] Cf. M.I. Finley, *The Ancient Economy* (1973); Tenney Frank (ed.), *An Economic Survey of Ancient Rome*, vol. I, v (1959); M. Rostovtzeff, *The Social and Economic History of the Roman Empire* (1926); and the essays collected in M.I. Finley (ed.), *Studies in Ancient Society* (1974) and Helmuth Schneider (ed.), *Zur Sozial- und Wirtschaftsgeschichte der späten römischen Republik* (1976); Wieacker, *RR*, pp. 347 sqq.

[103] As to what follows cf. especially the clear and instructive analysis by Kaser, (1970) 9 *Romanitas* 333 sqq.; also Rabel, *Grundzüge*, §§ 118 sqq. On the reasons for an increasing need for agency (and thus: for the intervention of the praetor), see Powell, 1956 *Butterworth's South African LR* 42 sqq.

principle,[104] their pragmatism allowed for exceptions where necessary. Roman law was never conceived of and developed as a system of rigid rules, but rather from a casuistic point of view.[105]

3. Acting for (and through) others in Roman law

(a) Indirect representation and other substitute devices

Firstly, the Romans knew, of course, what we would call indirect representation:[106] the "agent" could conclude the contract (e.g. of sale) in his own name and demand transfer of ownership to himself; he was then obliged under whatever his relationship with the "principal" might be (often a mandatum) to hand over to the "principal" whatever he received. Indirect representation is based on a iussum (or ratihabitio),[107] the (informal) declaration of the "principal" to the "agent" acknowledging the results of the "agent's" acts. This "iussum" is different from the modern "authority" in that it had no "external effect": it did not give rise to a contractual relationship between the "principal" and the party with whom the "agent" contracted. Legal relationships existed only between the "principal" and "agent" on the one hand, and the "agent" and his contractual partner on the other. Thus, indirect representation is cumbersome in that it requires two legal transactions instead of only one. The "principal" is in a comparatively weak position: it is only the "agent" who can sue under the contract concluded by him; once ownership has been transferred to

[104] But cf. W.M. Gordon, "Agency and Roman Law", in: *Studi in onore di Cesare Sanfilippo*, vol. III (1983), pp. 341 sqq., who argues that "Roman law gradually reached a position where the advantage of going further was more theoretical than practical and Roman law reached this situation in a way which gave practical results which were in certain respects preferable to those which would follow from the adoption of direct agency" (p. 343). For a critical evaluation of the traditional opinion, see also Quadrato, *ED*, vol. 38, pp. 417 sqq.

[105] Cf. esp. Max Kaser, "Zur Methode der römischen Rechtsfindung", in: *Ausgewählte Schriften*, vol. I (1976), pp. 3 sqq.

[106] The institutions of buying commission and commission for sale are modern examples of indirect agency. They are based on the desire to make use of independent entrepreneurs at foreign trading centres and on the preference of the buyers or sellers at these foreign trading centres to contract with the representative on the spot rather than with some unfamiliar and far-off principal. Transactions through commission agents were very popular in the 19th century; owing to the modern means of transport and communication their importance has decreased considerably, cf. Karsten Schmidt, *Handelsrecht* (3rd ed., 1987), pp. 762 sqq. Agency, for the fathers of the BGB, meant "direct agency" (cf. supra, p. 46); they regarded (rules about) indirect agency as obsolete and dispensable. Time has shown that this attitude was too rigid; the need for indirect agency in certain circumstances has had to be accommodated by the courts (cf., for example, the *Geschäft für den, den es angeht* (transaction for whom it concerns), on which, see Karl August Bettermann, *Vom stellvertretenden Handeln* (1937), pp. 90 sqq.; Klaus Müller, "Das Geschäft für den, den es angeht", 1982 *Juristenzeitung* 777 sqq.). As far as Roman law is concerned, the importance of indirect agency as a satisfactory alternative to direct agency is stressed by Gordon, *Studi Sanfilippo*, vol. III, pp. 344 sqq.

[107] Ratihabitio is subsequent assent; cf., for instance, Ulp. D. 46, 8, 12, 1; 3, 5, 5, 11. On the theory and history of ratification in the law of agency, see Gualtiero Procaccia, (1978–79) 4 *Tel Aviv University Studies in Law* 9 sqq.

the "agent", the "principal" can avail himself of an actio in personam only to enforce the passing on of ownership to himself. As a result, he is, for instance, exposed to the risk of his "agent's" insolvency.

Secondly, there was the possibility of concluding a contract by means of a nuntius.[108] While in the case of agency it is the agent who makes the declaration leading to the contract—in his own name (indirect representation) or in the name of the principal (direct representation), but in any event as his own declaration—the messenger merely transmits somebody else's declaration.[109] He is not involved in the formation of the contract but in a purely mechanical way; what he transmits is not regarded as his own, but as his "principal's" declaration. The situation is thus similar to the conclusion of a contract by way of letter.[110]

In the third place, Roman law provided for certain situations where one party acted for another not as an agent but in his own right. This was the concept of trusteeship: the trustee held a right in somebody else's interest; on account of the fiduciary relationship he was bound, however, to safeguard these interests of the beneficiary. Fiducia fits into this category (be it cum creditore or cum amico contracta).[111] Also, the procurator ad litem may be mentioned here: he did not act as a representative in the way that the dominus litis would have become party to the litigation; he litigated over somebody else's claim, or obligation, in his own right.[112] Another example is tutela. Even though the law made the greatest efforts to enable persons under tutela to undertake the required legal acts themselves (subject to auctoritas tutoris), there remained situations where the tutor had to act *for* them.[113] This he did domini loco,[114] i.e. he was apparently regarded as having some sort of (functionally limited) title over the person and property of the ward.[115] Interestingly enough, however, this view seems to have undergone some change. Already according to classical law the tutor could acquire possession and (as far as this was possible through the acquisition of possession, as, for instance, in the case of

[108] This applies to the informal transactions only. Where, for example, formal oral declarations by the stipulator and promisor are required (stipulatio), the parties could not make use of nuntii.

[109] As to the concept of a nuntius, cf. Flume, *AT*, § 43, 4; Götz Hueck, "Bote—Stellvertreter im Willen—Stellvertreter in der Erklärung", (1952–53) 152 *Archiv für die civilistische Praxis* 432 sqq.; Mitteis, op. cit., note 97, pp. 128 sqq.

[110] Paul. D. 18, 1, 1, 2: "Est autem emptio iuris gentium, et ideo consensu peragitur et inter absentes contrahi potest et per nuntium et per litteras."

[111] Gai. II, 60.

[112] Kaser, *RZ*, pp. 152 sqq.; Claus, *Stellvertretung*, pp. 52 sqq.

[113] As, for example, where the impubes was still an infans or where he was absens.

[114] Paul. D. 26, 7, 27: "Tutor, qui tutelam gerit, quantum ad providentiam pupillarem domini loco haberi debet."

[115] Cf. especially Max Kaser, "Ruhende und verdrängende Hausgewalt im älteren römischen Recht", (1939) 59 *ZSS* 31 sqq. (35 sqq.).

traditio or usucapio) ownership for the ward.[116] The inadmissibility of agency was apparently limited by the Roman lawyers to the strictly legal sphere, and possession was not regarded as a right but as a mere factum. Gradually, however, the praetor also started, after the termination of the tutela, to grant actiones utiles for and against the former ward where the tutor had acquired contractual rights[117] and incurred obligations[118] on behalf of the ward.[119] Here the basic principle against agency was certainly disregarded.

Fourthly, third parties could, under certain circumstances, *dispose* over the rights of others and in this way act for those other persons. The non-owner could transfer property or encumber it with a right of pledge, the non-creditor could release the debtor from his debt by means of a pactum de non petendo, etc., provided only that the transaction required no formalities and that the true owner, creditor, etc., had either approved of the transaction or ratified it.[120] The Romans did not regard the third party as an agent in these cases; he was not acting on behalf of the party entitled to the right, but was entering into a transaction of his own.

(b) The paterfamilias acting through his dependants

All these devices would still not have obviated the need for agency in Roman law. Fifthly, therefore, and most importantly, the fact has to be taken into account that a paterfamilias could act through his children in power and his slaves. These persons were not able to have proprietary rights; thus, whatever they acquired fell to the paterfamilias.[121] Whether they had acted in their own name or not was irrelevant; neither did it (usually) matter whether the paterfamilias knew of or had willed their acts.[122] Max Kaser[123] has explained this phenomenon in terms of the concept of "*Organschaft*": in the same way as a human being uses his limbs or as (today) a juristic person uses his organs to act, the Roman paterfamilias was able to act through his dependants. For the purposes of acquisition, they served the function of animated

[116] Ner. D. 41, 1, 13, 1; Paul. D. 41, 2, 1, 20.

[117] Cf. Ulp. D. 26, 7, 9 pr.; Ulp. D. 13, 5, 5, 9.

[118] Cf. Scaev. D. 36, 3, 18, 2.

[119] Actiones utiles were also granted for and against municipia on account of the acts of their actor (representative in court): Paul. D. 3, 4, 10; Ulp. D. 13, 5, 5, 7 sqq.; cf. further Ulp. D. 12, 1, 27.

[120] Cf. Gai. D. 41, 1, 9, 4; Ulp. D. 6, 1, 41, 1; Paul. D. 13, 7, 20 pr.

[121] Cf. recently Wolfgang Krüger, *Erwerbszurechnung kraft Status* (1979), pp. 21 sqq.; as far as the acquisition of *possession* through persons in power is concerned, see Hans-Peter Benöhr, *Der Besitzerwerb durch Gewaltabhängige im klassischen römischen Recht* (1972). On the problems arising in situations where a slave has several domini, see Geoffrey MacCormack, "Nomination: Slaves and Procurators", (1976) 23 *RIDA* 191 sqq.

[122] Cf. Gai. II, 86 sqq.

[123] (1970) 9 *Romanitas* 343 sqq.

instruments.[124] Thus, the acquisitive acts were not, as would also have been conceivable, regarded as totally ineffective or irrelevant. Where, on the other hand, the filiusfamilias or slave had incurred an obligation, the paterfamilias was not normally bound.[125] In fact, the position of the creditor was very weak: slaves could not be parties to a lawsuit, and execution against children in power, as long as they did not have proprietary capacity, was excluded. In classical law these obligations against persons in power were regarded as obligationes naturales.[126] As a result, it must have appeared unattractive and risky to contract with a filiusfamilias or a slave. Thus, in order not to stifle legal relations and business life, the praetor intervened and was prepared, under certain circumstances, to grant actiones "adiecticiae qualitatis"[127] against the paterfamilias. The common denominator of most of these actions was a (tacit or express, general or specific) authority given to the person in power to act on behalf of the paterfamilias. This is particularly obvious in the case of the actio quod iussu,[128] where an express (formless) authority even had to have been communicated to the party with whom the person in power was about to contract, but it also applied to the actio de peculio,[129] where the son in power or the slave had been given a peculium (the paterfamilias was then liable for all commercial debts incurred up to the value of the peculium at the time of condemnation); to the actio exercitoria,[130] which lay against the exercitor navis for commercial debts incurred (within the terms of the so-called "praepositio")[131] by his magister navis, and to the actio institoria,[132] which was available against an employer for commercial debts incurred (again: within the terms of the praepositio) by an employee who had been put in charge of a taberna or some other negotiatio.[133] Besides these, an actio de in rem verso[134] was available if the person in power had used what he had acquired under the contract

[124] We find the same idea in public law: populus Romanus and municipia act through their magistratus. Cf. also the post-classical concept of the delegatus principis (C. 1, 50 and 51).

[125] Cf., for example, Gai. D. 50, 17, 133: "Melior condicio nostra per servos fieri potest, deterior fieri non potest." Could slaves alienate property for their masters? For details, see Hans Ankum, "Mancipatio by Slaves in Classical Roman Law?", 1976 *Acta Juridica* 1 sqq.; idem, "Mancipatio by Slaves in Classical Roman Law", in: *Huldigingsbundel Paul van Warmelo* (1984), pp. 6 sqq.

[126] Cf., for example, Ulp. D. 44, 7, 14.

[127] Cf. generally e.g. Claus, *Stellvertretung*, pp. 64 sqq. and passim. The term has its origin in Paul. D. 14, 1, 5, 2: "[H]oc enim edicto non transfertur actio, sed adicitur."

[128] D. 15, 4; C. 4, 26.

[129] Gai. IV, 72a–74a; *Inst.* IV, 7, 4–4c; D. 15, 1; C. 4, 26.

[130] D. 14, 1; C. 4, 25.

[131] "Non tamen omne, quod cum institore [sc.: vel exercitore] geritur, obligat eum qui praeposuit, sed ita, si eius rei gratia cui praepositus fuerit, contractum est, id est dumtaxat ad id quod eum praeposuit" (Ulp. D. 14, 3, 5, 11).

[132] D. 14, 3; C. 4, 25.

[133] On the interpretation of the term "institor", cf. the analysis by Nikolaus Benke, "Zu Papinians actio ad exemplum institoriae actionis", (1988) 105 *ZSS* 597 sqq.

[134] D. 15, 3.

to enrich the property of his paterfamilias. The most interesting of these remedies in the present context were the actiones exercitoria and institoria because they were granted irrespective of whether or not the exercitor navis or institor was a person in power.[135] Thus, we are dealing here with instances where a freeman was able to obligate a third party who had authorized him to do business on his behalf. This approximated agency. However, magister navis and institor were and remained the parties to the contract which had been concluded; the liability was extended only to the exercitor navis/employer, who could now be sued in solidum.[136] Also, these "principals" were sometimes granted the contractual actions of their "agents" against the other party as actiones utiles.[137]

(c) Procuratio

Sixthly, attention has to be drawn to the institution of procuratio.[138] Wealthy people used to have a procurator omnium bonorum to look after and administer their property. In pre-classical times they would appoint to this position one of their own freedmen who had been specifically trained for the job and who, on account of the patronal power, was still very much dependent upon his (former) master even after manumissio had taken place. Later on, this power gradually dwindled and the freedman was increasingly regarded as a legally independent person (with the effect that reciprocal claims between procurator and principal became possible); also, freeborn persons were now employed as procuratores. As with tutors, procurators could acquire possession and (through the acquisition of possession) ownership for the principal.[139] As in the case of the institor and the magister navis, contractual rights acquired by the procurator were also granted to the principal as actiones utiles.[140] Eventually, Papinian also made the principal liable for the debts incurred by the procurator in connection with the range of activities for which he was appointed: he

[135] Gai. IV, 71; Ulp. D. 14, 1, 1, 4; Ulp. D. 14, 3, 7, 1.

[136] Liability in solidum = several persons owe one performance in such a manner that each of them is bound to effect the whole performance, but the creditor is entitled to demand the performance only once. Cf. today, for example, § 421 BGB.

[137] Cf. Marcell./Ulp. D. 14, 3, 1; Paul. D. 46, 5, 5.

[138] Piero Angelini, *Il procurator* (1971); Okko Behrends, "Die Prokuratur", (1971) 88 *ZSS* 215 sqq.; Hamza, (1983) 25 *Acta Juridica Academiae Scientiarum Hungaricae* 97 sqq.; J.-H. Michel, "Quelques observations sur l'évolution du procurator en droit romain", in: *Études offertes à Jean Macqueron* (1970), pp. 515 sqq.; Kaser, *RPr* II, pp. 100 sq.; idem, (1974) 91 *ZSS* 186 sqq.; Renato Quadrato, "D. 3, 3, 1 pr. e la definizione di 'procurator'" (1974) 20 Labeo 210 sqq.; idem, *ED*, vol. 38, pp. 422 sqq.; Watson, *Obligations*, pp. 193 sqq.

[139] Cf., for example, Gai. II, 95; (on which, see Claus, *Stellvertretung*, pp. 174 sqq., but also Quadrato, *ED*, vol. 38, pp 426 sqq.); *Inst.* II, 9, 5. Nomination by the procurator determined whether he or his principal acquired: see MacCormack, (1976) 23 *RIDA* 191 sqq.

[140] Pap./Ulp. D. 19, 1, 13, 25.

advocated an analogous application of the actio institoria to the free procurator as actio ad exemplum institoriae actionis.[141]

Finally, exceptions to the rule against agency were admitted with regard to certain honorarian obligations (precarium, receptum nautarum, etc.).[142] Another rule is probably attributable to Greek influence: if somebody gave a loan on behalf of another person, the action against the borrower to reclaim what had been handed over (the "condictio") was granted to that other person.[143] Very liberal rules were applied in the cognitio extra ordinem procedure.[144]

4. The erosion of the rule against agency

Thus far we have been looking at classical law. West-Roman vulgar law[145] brought about considerable changes and some (dogmatically and conceptually crude) advancement towards the recognition of agency. That was due partly to certain transformations in the legal position of those persons who were used to act on behalf of others, partly to a lack of comprehension and appreciation of the formalistic inhibitions that had prevented the lawyers in earlier times from allowing extranei to act for each other. East-Roman classicism, however, frowned upon these developments and went back to the classical rules. Only in some minor respects did Justinian advance and consolidate the position.[146] Merely on the basis of the Corpus Juris Civilis, it was therefore hardly possible in later ages to argue for the general recognition of agency. "Generale est, ex alterius stipulatione alteri accionem non queri",[147] had to be the general principle at times when Roman law enjoyed supreme

[141] Pap. 14, 3, 19 pr.; Pap./Ulp. D. 19, 1, 13, 25; Pap./Ulp. D. 17, 1, 10, 5; Ernst Rabel, "Ein Ruhmesblatt Papinians", in: *Festschrift für Ernst Zitelmann* (1913); Claus, *Stellvertretung*, pp. 259 sqq.; Quadrato, *ED*, vol. 38, pp. 431 sqq.; Benke, (1988) 105 *ZSS* 607 sqq.

[142] Cf., for example, Ulp. D. 43, 26, 6, 1; Ulp. D. 4, 9, 1, 3.

[143] Cf. e.g. Afr./Ulp. D. 12, 1, 9, 8; Scaev. D. 39, 5, 35, 2; Paul. D. 45, 1, 126, 2; Kaser, (1974) 91 *ZSS* 177 sqq.; Ulrich von Lübtow, "Die Darlehensgewährung durch den Prokurator", in: *Studi in onore di Edoardo Volterra*, vol. I (1971), pp. 149 sqq.; Fritz Pringsheim, *Der Kauf mit fremdem Geld* (1916), p. 109.

[144] Ulp. D. 14, 1, 1, 18; Paul. D. 14, 5, 8. On the cognitio extra ordinem, the latest form of civil proceedings in Roman law, which was first concurrent with, but later replaced the formulary procedure, cf. Kaser, *RZ*, pp. 339 sqq., pp. 410 sqq.; Honsell/Mayer-Maly/Selb, pp. 557 sqq.

[145] Levy, *Obligationenrecht*, pp. 60 sqq. On the post-classical developments, see also Sandro Angelo Fusco, "*Pecuniam commodare*" (1980), pp. 44 sqq.

[146] Cf. the details in Kaser, *RPr* II, pp. 99 sqq.; Claus, *Stellvertretung*, pp. 337 sqq. Probably the most important change related to the acquisition of possession (and through possession, ownership) through extranei which was now no longer restricted to tutores and procuratores, but generally admitted: *Inst.* II, 9, 5; C. 7, 32, 1. This generalization, however, possibly dates back already to late classical times: cf. Alan Watson, "Acquisition of Ownership by 'traditio' to an 'extraneus' " (1967) 33 *SDHI* 189 sqq.; Kaser, (1974) 91 *ZSS* 194 sq.

[147] Irnerius, "gl. danda ad D. 3, 3, 27, 1", in: Enrico Besta, *L'opera d'Irnerio*, vol. II (1896), p. 42.

authority.[148] Even canon law, in accordance with "ecclesia vivit lege Romana",[149] did not abandon the principle of "alteri stipulari nemo potest",[150] although the Church clearly favoured representation as an essential element of Christian life and belief.[151] Down to the 19th century there were legal writers who regarded it as irreconcilable with the nature of an obligation for a contractual right to arise directly in the person of a third party. The "principal" (mandator) could acquire that right only through a cession by the "agent" (mandatary).[152]

On the other hand, of course, the scene was set for a gradual erosion of the rule against agency. Already the commentators formed stratagems to bypass it under certain circumstances: they argued, for instance, that an actio utilis should be granted to the principal in all the cases where the actio directa could not be ceded.[153] Also, one finds attempts to water down the relevance of the procurator's, magister navis's and institutor's obligation: with the termination of their office it would fall away.[154] According to Martinus Gosia[155] (whose opinion, however, did not gain acceptance)[156] the prohibition of Roman law

[148] Especially at the time of the glossators and the humanists. For a general discussion, see Coing, pp. 423 sqq.; J.C. de Wet, " 'n Bydrae tot die geskiedenis van die ontwikkeling van direkte verteenwoordiging by die sluiting van ooreenkomste", (1942) 6 *THRHR* 99 sqq., 210 sqq.; Müller, op. cit., note 43, pp. 29 sqq.; Paolo Cappellini, "Rappresentanza", in: *ED*, vol. 38 (1987), pp. 435 sqq.; Hasso Hofmann, *Repräsentation* (1974), pp. 152 sqq.; for the more modern history, see Wolfram Müller-Freienfels, "Die Abstraktion der Vollmachtserteilung im 19. Jahrhundert", in: Helmut Coing, Walter Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. II (1977), pp. 144 sqq. For a discussion of the (comparative) history of agency, see also Gualtiero Procaccia, "On the History of Agency", (1976) 2 *Tel Aviv University Studies in Law* 56 sqq.

[149] See, for example, Adalbert Erler, in *HRG*, vol. I (1971), cols. 798 sq.

[150] The oft-quoted brocard (esp. in English law) "qui facit per alium, facit per se" goes back to two regulae contained in the Liber Sextus, Lib. V, Tit. XII, De regulis iuris LXVIII and LXXII (Bonifacius VIII). It was, however, hardly more than a guideline and did not establish a legal rule about agency (in private law) which would have abrogated the Roman principle. Cf. Hermann Lange, (1956) 73 *ZSS* 286 sqq.; Müller, op. cit., note 43, pp. 62 sqq., but see also Procaccia, (1976) 2 *Tel Aviv University Studies in Law* 70 sqq.

[151] One may think, for instance, of Christ's death as satisfactio vicaria for Adam's fall (likewise a peccatum vicarium) or of the Pope as vicarius Christi. Also the hierarchical structure of the Church has always necessitated acting for others. For details cf., for example, J. Ratzinger, "Stellvertretung", in: H. Fries (ed.), *Handbuch theologischer Grundbegriffe* (1963), vol. II, pp. 566 sqq.; Hofmann, op. cit., note 148, pp. 47 sqq., 116 sqq. and passim; Settimio Carmignani Caridi, *Rappresentanza*, in: *ED*, vol. 38 (1987), pp. 485 sqq. On the development of agency in the early canon law, cf. Anton Kradepohl, *Stellvertretung und katholisches Eherecht* (1964), pp. 28 sqq. On agency in the conclusion of a marriage according to canon law, see Kradepohl, pp. 64 sqq.

[152] Cf. Vangerow, *Pandekten*, § 608 (vol. III, pp. 293 sqq.); Mühlenbruch, *Doctrina Pandectarum*, § 131.

[153] ". . . in his quae adeo sunt personalia, quod ex persona procuratoris non possunt transire in dominum procurator repraesentat persona domini directo sicut nuncius": Bartolus, *Commentaria*, D. 39, 2, 13, § Si alieno, 3. This thought was based on texts such as Ulp. D. 14, 3, 1; Paul. D. 46, 5, 5; vide supra, note 137.

[154] Cf. e.g. Bartolus, *Commentaria*, D. 3, 3, 67, § Procurator qui pro evictione.

[155] Cf. supra, p. 41 (note 49).

[156] But it was approved and taken over in the 16th century by Franciscus Hotomanus; cf. the analysis by Müller, op. cit., note 43, pp. 96 sq.

related only to the acquisition of the actio directa by the third party and not to the acquisition of an actio utilis. Throughout the centuries lawyers attempted to find ways and means of extending whatever approximated agency in the Digest. Friedrich-Carl von Savigny, for instance, used the institution of nuntius to try to show that the Romans had recognized agency;[157] furthermore, he alleged that the "alteri stipulari nemo potest" rule had been applied only to stipulations: since stipulations no longer existed, the rule had, for all practical purposes, been abrogated and therefore did not stand in the way of agency.[158, 159]

5. The evolution of the modern concept of agency

By this time, however, despite all the theoretical disputes, the institution of agency was firmly entrenched in practice. The needs of the expanding commerce had, since the Middle Ages, been the most important impetus for the recognition of this device; also, the changes in economic, political and social structures[160] somehow had to be accommodated. It is therefore hardly surprising to find the "alteri stipulari nemo potest" principle already abandoned in the statutes of the upper Italian city states, those early centres of flourishing trade and commerce,[161] and then in 17th century Roman-Dutch jurisprudence.[162] Even though the Dutch authors did not yet distinguish between agency and stipulatio alteri, they carved out and emphasized some aspects which to us are of fundamental importance for the law of agency today: the agent's acts *directly* bind the principal (Ulrich Huber:[163] "Moribus hodiernis ut obligatio immediate per alium cui mandatum dedimus in nos transit, ita nec dubium est"); the agent must have acted in the name of the principal (Johannes Voet:[164] ". . . quas [actiones] tamen nostris moribus cedi haud opus, quoties mandatarium non suo, sed mandantis nomine contraxisse expressum est; . . . si suo nomine procurator contraxerit, cessionem actiones fieri necesse est");[165] and the principal is

[157] *Obligationenrecht*, vol. II, § 57.
[158] *Obligationenrecht*, vol. II, § 56.
[159] On the relationship and mutual impact of the actio de in rem verso and agency, see Kupisch, *Versionsklage*, pp. 30 sqq.
[160] It is rather surprising to see how, for instance, some of the humanists condemned slavery as not being reconcilable with the Christian teaching, but nevertheless extensively discussed and regarded as binding the sources of Roman law relating to the legal position of slaves (for instance, in the present context, as one of the exceptions to "alteri stipulari nemo potest"). But see, on the other hand, Simon van Leeuwen (*Censura Forensis*, Pars I, Lib. II, Cap. XII, n. 2), who argued that since slavery had been abolished, the Roman rules relating to acquisition through slaves had to be applied to those free persons ("famulos, et ministros liberos homines, qui nobis operis suis inserviunt") who had taken their place.
[161] Cf. analysis and references in Müller, op. cit., note 43, pp. 55 sqq.
[162] Cf. De Wet, (1942) 6 *THRHR* 210 sqq.; D.J. Joubert, *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979), pp. 13 sqq.
[163] *Disputationes Iuris Fundamentales* (Franequerae, 1688), Disp. LI, n. 9.
[164] *Commentarius ad Pandectas*, Lib. XVII, Tit. I, IX.
[165] In the same passage, Voet, incidentally, compares procuratores and nuntii: ". . . quia procuratores hodie in negotiis contrahendis considerantur magis ut nuncii." This has been translated by Percival Gane (*The Selective Voet*, vol. III (1956) in the following way: ". . . because agents are rather regarded today in making business contracts as messengers." On that basis, Voet's opinion has been criticized in (1910) 27 *SALJ* 385. According to Müller, op. cit., note 43, p. 109, Voet is saying that the agent is more than a nuntius.

not only an additional debtor but he is liable *in the place of* the agent (Simon van Leeuwen: "A quibus tamen moribus nostris in tantum receditur, ut non in institores aut praepositos directa detur actio, sed adversus ipsos Dominos praeponentes agi debeat, qui institorum nomine tenentur, nisi cum iis sit actum quos institores aut praepositos suos negant").[166]

Whilst the writers of the Dutch jurisprudence, and later on also of the German usus modernus pandectarum, argued from the point of view of commercial practice and the mores hodierni, it was left to the natural lawyers (who subjected Roman law to criticism from the point of view of natural justice) to break away decisively from the principle of "alteri stipulari nemo potest" and to lay the conceptual cornerstones for the future.[167] This state of affairs is reflected in the first wave of codifications inspired by natural law and enlightenment.[168] In the course of the 19th century, the conceptual framework was further refined. Brinz[169] and Windscheid[170] firmly established the so-called representation theory: it is the agent's will (not the principal's as expressed through the agent) that is necessary for the conclusion of the contract. Thus, the agent is not to be regarded as some sort of juristic organ through which the principal acts.[171] As a consequence of this perspective, the requirements for the validity of the contract concluded through the agent (as, for instance, whether there was fraud, duress or error) have to be judged with a view to the person of the agent, not the principal.[172] Paul Laband[173] eventually introduced the conceptual distinction between the grant of authority and the legal relationship giving rise to it (mandate). This became known as the doctrine of

[166] *Censura Forensis*, Pars I, Lib. IV, Cap. III, n. 10.
[167] Cf. supra, pp. 43, 45 sq., and Müller, op. cit., note 43, pp. 123 sqq. This was then also taken over in the usus modernus, cf. e.g. Leyser, *Meditationes ad Pandectas*, Spec. DXIX; for France, see Pothier, *Traité des obligations*, nn. 74 sqq. For details of the development, see, in particular, Coing, pp. 426 sqq., 429 sq.; Cappellini, *ED*, vol. 38, pp. 447 sqq.
[168] Cf. § 85 I 13 PrALR; §§ 1002 sqq. ABGB; Theil 4, Cap. 9, § 7 Codex Maximilianeus; § 788 Sächsisches Gesetzbuch; artt. 1984, 1998 code civil.
[169] Brinz, *Pandekten*, § 371.
[170] Windscheid/Kipp, § 73 (pp. 350 sqq.).
[171] This had been Savigny's opinion (*Obligationenrecht*, vol. II, §§ 54 sqq., 57, 59) ("*Geschäftsherrntheorie*"; organ theory); for an analysis, see Heinz Mohnhaupt, "Savignys Lehre von der Stellvertretung", (1979) 8 *Ius Commune* 60 sqq.; cf. for England also Stoljar, op. cit., note 93, pp. 14 sq.
[172] Cf., for example, § 166 BGB; Flume, *AT*, § 43, 3. This is also the situation pertaining in modern Roman-Dutch law; see, for example, De Wet en Yeats, p. 87 sq.; Joubert, op. cit., note 162, pp. 24 sqq.
[173] "Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch", (1866) 10 *ZHR* 183 sqq.

abstraction in agency,[174] on which the BGB and most subsequent codifications of private law around the world are based.[175] Whilst the mandate relates to the (internal) relationship between principal and agent, the grant of authority determines the (external) relationship between the principal and the other party with whom the agent concludes the contract. Both acts are independent of each other: there can be a mandate without grant of authority, just as it is possible to have a grant of authority without mandate. Not much differently, English law distinguishes between agency as a contract engendering rights and duties and as a transfer of authority;[176] it does not, however, put this insight to any systematic use.[177] In modern Roman-Dutch law, the concept of authorization as an abstract (unilateral) juristic act[178] is still vying with the traditional view of agency as one of the specific contracts ("mandat"), namely "*un acte par lequel une personne donne une autre le pouvoir de faire quelque chose pour le mandant et en son nom*".[179]

III. CESSION

1. Nomina ossibus inhaerent

Finally, assignment (cession)![180] "Nomina ossibus inhaerent" said the medieval lawyers in their metaphorical way:[181] the action arising from the obligation hinges on the bones and entrails of the creditor and can no more be separated from his person than the soul from the body. If the obligation is something highly personal, a vinculum iuris that attains its individuality by virtue of having been created between two specific parties, it is clear that it could not be regarded as transferable in

[174] Cf. especially Müller-Freienfels, in: *Wissenschaft und Kodifikation*, op. cit., note 148, pp. 144 sqq.; for a comparative view, see also Procaccia, (1976) 2 *Tel Aviv University Studies in Law* 81 sqq.; Gerd Justus Albrecht, *Vollmacht und Auftrag* (unpublished Dr. iur. thesis, Kiel, 1970), passim.

[175] Cf. e.g. §§ 164 sqq. BGB; artt. 1387 sqq. codice civile; §§ 211 sqq. Civil Code (Greece). For a comparative analysis of agency in modern civil-law systems, see Wolfram Müller-Freienfels, "The Law of Agency", in: A.N. Yiannopoulos (ed.), *Civil Law in the Modern World* (1965), pp. 77 sqq.

[176] Cf., for example, Fridman, op. cit., note 94, pp. 8 sqq.

[177] Zweigert/Kötz/Weir, p. 101. On the history of agency (and its relationship with the privity requirements of modern contractual doctrine), see, most recently, Palmer, (1989) 33 *American Journal of Legal History* 28 sqq.

[178] J.C. De Wet, "Agency and Representation", in: Joubert (ed.), *The Law of South Africa*, vol. I (1976), n. 115.

[179] These are the words of art. 1984 code civil. They are based on Pothier, *Traité des obligations*, nn. 74 sqq. In South African law this view is maintained by A.J. Kerr, *The Law of Agency* (1979), pp. 1 sqq., 15 sqq., whose whole treatise is, in turn, greatly influenced by Pothier. (The *Traité du contrat de mandat* has, incidentally, been translated into English: B.G. Rogers, *Pothier's Treatise on the Contract of Mandate* (1979).)

[180] The word "assignment" is derived from assignare (assignatio), cession from cedere (cessio). Only the latter expression occurs in the Roman sources (C. 4, 35, 22 sq.).

[181] Cf., for example, Azo, *Summa Codicis*, ad C. 4, 10 (p. 118, left col.); cf. Erich Genzmer, "Nomina ossibus inhaerent", in: *Mélanges Philippe Meylan*, vol. I (1963), pp. 159 sqq.

early and classical Roman law: the claims were taken as being inseparably related to the one individual creditor–debtor relationship.[182] However, each society in which commerce plays a role sooner or later has to face a strong demand to increase the circulation of credit; to us today it is a matter of course that the right to claim, i.e. the expectation to receive what is owed, constitutes an asset within the estate of the creditor,[183] which he should be able to sell, to exchange, or to donate and which, therefore, has to be easily transferable. All modern legal systems do indeed provide some way in which such a transfer can be effected.[184] Thus, the BGB boldly provides that "a claim may, by contract with another person, be assigned by the creditor to him (assignment). On the conclusion of the contract the assignee takes the place of the assignor."[185] Other systems have not gone quite so far: the code civil, for instance, attributes only a relative effect to the assignment—the agreement to assign the claim is valid between assignor and assignee; as far as third parties are concerned, the assignee is regarded as having acquired the claim only once the debitor cessus has been formally (i.e. through the agency of a bailiff) notified of the assignment, or if he has "accepted" the assignment by judicial or notarial document.[186] But how did Roman law manage to do without cession? In order to accommodate the needs of commercial life the lawyers availed themselves of two other legal institutions to achieve

[182] Cf. Schulz, *CRL*, p. 628: "It could not be otherwise. A law in which execution on the person of the debtor is a living institution cannot allow a creditor to transfer his right to another without the consent of the debtor, thereby perhaps substituting a harsh creditor for a mild one." For the same consideration in Jewish law, see S.J. Bailey, "Assignment of Debts in England from the Twelfth to the Twentieth Century", (1931) 47 *LQR* 535.

[183] Cf. already Hugo Donellus, *Commentarii de Jure Civili*, Lib. XV, Cap. XLIV, VIII ("Nam et hae sunt in bonis nostris").

[184] Cf. the analysis in Zweigert/Kötz/Weir, pp. 108 sqq.

[185] § 398 BGB. As to the history of this section cf. Klaus Luig, *Zur Geschichte der Zessionslehre* (1966), pp. 100 sqq., 130 sqq. In the civil-law systems we speak of singular succession to obligations (as opposed to the universal succession of the heir). The assignment is usually based on a sale of the right: the contract of sale provides the obligationary agreement to cede or, put differently, the assignment is the real agreement executing the obligation incurred by virtue of the sale of the right. (The situation is thus similar to the sale of corporeal objects, where both traditio and a "real" agreement are necessary to transfer ownership; cf. infra, p. 239). This applies to legal systems (such as the German and the South African) which require an act separate from the obligationary contract (e.g. of sale) to transfer the right. The matter is different in French law, where ownership of corporeal objects passes on account of the contract of sale. Consequently, the French Code also deals with *cession de créance* in the context of the law of contract.

[186] Artt. 1689 sq. code civil. These provisions are based on the writings of Domat and Pothier and, through them, ultimately on the *Coutume de Paris* (with the famous rule: *un simple transport ne saisit point*—a mere cession does not place the "assignee" in "possession" of the claim); cf. Frans Heinrich Grosskopf, *Die geskiedenis van die sessie van vorderingsregte* (1960), pp. 78 sqq. Even though they have been not inconsiderably modified by the courts, they have proved to be too cumbersome for commercial practice. Both legislator and courts have found ways to get around them, as, for instance, by using the institution of *"subrogation personnelle"* (artt. 1249 sqq.). Cf. Ghestin, "La transmission des obligations en droit français positif", in: *La transmission des obligations* (IXes Journées d'étude juridique Jean Dabin, 1980), pp. 3 sqq., 36 sqq.

results similar to an assignment: novation and procedural representation.[187]

2. The use of novation and procuratio in rem suam

"[N]am quod mihi ab aliquo debetur, id si velim tibi deberi . . . opus est ut iubente me tu ab eo stipuleris; quae res efficit ut a me liberetur et incipiat tibi teneri; quae dicitur novatio obligationis";[188] the old creditor would authorize the debtor to assume a new obligation towards a third party. This was called a delegatio obligandi[189] and had a novatory effect in so far as the new obligation replaced the old one. "Quod Titio (Titius being the old creditor) debes, mihi dari spondesne?" would be the question of the new creditor, and with the debtor's answer, "spondeo", the transaction was concluded. The new obligation had exactly the same content as the old one (idem debitum), but contained one new element (novum),[190] namely the change of creditors. Compared to a straightforward assignment of a right, this way of proceeding had three obvious disadvantages: as we are dealing with a novation, the new obligation had to be couched in the form of a stipulatio, which might not always be convenient; as the debtor had to be party to the new stipulation, the success of the whole transaction depended on his co-operation; and as the old obligation was not transferred but extinguished, all accessory security rights which might have been created automatically lapsed and had to be constituted anew.

These disadvantages could be avoided if the (old) creditor appointed the person to whom he wanted to transfer the claim as his cognitor or procurator in rem suam,[191] i.e. he authorized the "assignee" to sue the

[187] Cf. esp. Biondo Biondi, "Cessione di crediti e di altri diritti", in: *Novissimo Digesto Italiano*, vol. III (1959), pp. 152 sqq.; Luig, op. cit., note 185, pp. 2 sqq.; Georg H. Maier, "Zur Geschichte der Zession", in: *Festschrift für Ernst Rabel*, vol. II (1954), pp. 205 sqq.; Wladyslaw Rozwadowski, "Studi sul trasferimento dei crediti in diritto romano", (1973) 76 *BIDR* 11 sqq. On the possibility of achieving a change of creditors by way of an oath (iusiurandum), see Fritz Sturm, "Der Eid im Dienste von Abtretung und Schuldübernahme", in: *Studi in onore di Gaetano Scherillo*, vol. II (1972), pp. 514 sqq.

[188] Gai. II, 38.

[189] Paolo Cosentino, "Osservazioni in tema di mandatum e di delegatio", (1966) 69 *BIDR* 299 sqq.; Wolfgang Endemann, *Der Begriff der Delegatio im klassischen Römischen Recht* (1958).

[190] Ulp. D. 46, 2, 1 pr.: "Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio, hoc est cum ex praecedenti causa ita nova constituatur, ut prior perematur novatio enim a novo nomen accepit et a nova obligatione." Cf. also Gai. III, 176 and Kaser, *RPr* I, pp. 647 sqq.

[191] The power to act as cognitor was conferred by formal declaration upon the procedural opponent (cf. e.g. Gai. IV, 83). The appointment of a procurator in rem suam required neither a formal act nor a declaration to the procedural opponent; an internal arrangement between dominus litis and procurator was sufficient. Cf. Kaser, *RZ*, pp. 152 sqq. On the role of "paraprofessional" cognitores within the Roman judicial system, see Frier, *Roman Jurists*, pp. 65 sqq.

debtor in his own name[192] and to keep whatever he received. Thus the "assignee" acted "in rem suam" for his own benefit. This authorization is often referred to as a mandatum ad agendum. The term "mandate", however, should be used with circumspection, as in the present context it does not refer to the consensual contract of mandatum,[193] but is an untechnical equivalent of the terminus technicus "iussum".[194] While procedural representation of this type could largely achieve the economic results of an assignment, without being dependent on the co-operation of the debtor, it had certain other drawbacks: the "assignor", after all, remained creditor and could, by instituting a claim himself, by accepting the debtor's performance, by releasing the debtor from his obligation, etc., still frustrate the purpose of the whole transaction. This situation changed only once litis contestatio had taken place: due to what has sometimes been called the "novatio necessaria" connected with the founding of the trial,[195] the new creditor now replaced the old one.[196] Up to the time of litis contestatio the "assignor" could also freely revoke the "assignee's" authority to sue.[197] Furthermore, the iussum ad agendum in rem suam possibly came to an end with the death of either of the two parties.[198] This somewhat precarious situation of the "assignee" was to a certain extent ameliorated by means of a cautio: the old creditor had to promise by way of stipulation (to which a penalty could be attached)[199] not to

[192] "Sine vero hac novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri": Gai. II, 39. Cf. Wulf-Dieter Gehrich, *Kognitur und Prokuratur in rem suam als Zessionsformen des klassischen römischen Rechts* (1963); Rozwadowski, (1973) 76 *BIDR* 39 sqq.

[193] The contract of mandatum would be invalid, because the whole transaction is "tua tantum gratia", cf. infra, p. 422.

[194] Cf. Kaser, *RPr* I, pp. 265 sq., 653. Thus, a distinction has to be drawn between the authority as such (iussum) and the causal transaction giving rise to the granting of such authority, e.g. the purchase of the claim (or, in the case of procuratio in rem alienam a mandatum stricto sensu).

[195] In the case of iudicia legitima and as far as actiones in personam were concerned, litis contestatio had the effect of extinguishing the cause of action (dare facere oportere) and replacing it by a condemnari oportere, the defendant's subjection to the possible condemnation (actio consumitur): Gai. III, 180. The similarity to novation is obvious. One of the differences, however, lies in the fact that accessory rights did not fall away with the extinction of the old obligation: cf., for example, Marci. D. 20, 1, 13, 4 for hypotheka.

[196] Whether litis contestatio had this effect only in regard to a cognitor or also to a procurator in rem suam is disputed: cf. Gehrich, op. cit., pp. 74 sqq.; Rozwadowski, (1973) 76 *BIDR* 97 sqq.

[197] Cf. Paul. D. 3, 3, 16, 7; Paul. D. 3, 3, 42, 2.

[198] That does not already follow from the intransmissibility of the contract of mandatum, for we are concerned here with a iussum. As to the death of the dominus litis, see Ulp. D. 3, 3, 15 pr., a text which has since the times of the French humanist, Antonius Faber, often been regarded as spurious—the question is very controversial: Gehrich, op. cit., note 192, pp. 28 sqq.; Grosskopf, op. cit., note 186, pp. 9 sqq.; Maier, op. cit., note 187, pp. 207 sqq.; Rozwadowski, (1973) 76 *BIDR* 70 sqq. For the death of the "assignee", see C. 8, 53, 33 pr.

[199] See Rabel, *Grundzüge*, p. 130.

interfere with the "assignee's" right.[200] However, such a cautio did not, of course, transfer the claim to the "assignee"; legally, the (old) creditor was still able to proceed and thus to upset the position of the "assignee", who in turn could claim only what the "assignor" had recovered from the debt (or the penalty).

3. Post-classical developments, Corpus Juris and ius commune

All in all, while meeting the commercial demand for circulation of claims to a not inconsiderable degree, neither novation nor procedural representation could be regarded as really satisfactory substitutes for assignment. It is, therefore, hardly surprising to find under the imperial law from the time of Antoninus Pius onwards a growing tendency to improve the position of the assignee by making it more independent of the assignor. This was done by the granting of an actio utilis in cases where the mandate to act as cognitor or procurator in rem suam had been terminated due to the death of either of the parties,[201] but (more importantly) also totally independently of any kind of procedural representation: first in a case of purchase of an inheritance,[202] but soon also when an individual claim had been sold,[203] given as a dos,[204] etc. By the time of Justinian,[205] the actio utilis was granted whenever the parties had intended to transfer a claim, no matter what transaction was involved.[206] The assignee was thus no longer claiming as a mere cognitor or procurator, that is, on account of an actio mandata, but in his own right[207]—a right which could no longer be affected by revocation or death. However, the actio utilis did not really transfer the claim either, because the old creditor's actio (directa) continued to exist: if, for instance, the debtor performed towards the creditor, the "assignee's" action was thwarted. On the other hand, the debtor could possibly raise an exceptio doli against the actio directa, which considerably weakened the "assignor's" position.[208] But that was possible only if the debtor knew of the assignment. Such knowledge obviously being in the "assignee's" interest, we find that in

[200] Cf. Gai. II, 252; Maier, op. cit., note 187, pp. 218 sqq.; Rozwadowski, (1973) 76 *BIDR* 73 sqq.

[201] C. 4, 10, 1 (Gord.).

[202] Ulp. D. 2, 14, 16 pr.: "Si cum emptore hereditatis pactum sit factum et venditor hereditatis petat, doli exceptio nocet. nam ex quo rescriptum est a divo Pio utiles actiones emptori hereditatis dandas, merito adversus venditorem hereditatis exceptione doli debitor hereditarius uti potest."

[203] Diocl. et Max., C. 4, 39, 8.

[204] Val. et Gall., C. 4, 10, 2.

[205] He closed the last gap by deciding the case that a claim had been donated: C. 8, 53, 33.

[206] Cf. generally Fridolin Eisele, *Die actio utilis des Zessionars* (1887); Max Kaser, "Zum 'pignus nominis' ", (1969) 20 *Iura* 177 sqq.; Rozwadowski, (1973) 76 *BIDR* 124 sqq.

[207] His name would thus appear in the intentio of the formula; in the case of procedural representation, the intentio gives the name of the "assignor", while only the condemnatio is framed in favour of the representative.

[208] Luig, op. cit., note 185, pp. 6 sq.

post-classical East-Roman law the practice of denuntiatio, i.e. a notification of the debtor by the "assignee", gradually became entrenched. Soon the situation was further improved in that the debtor, as a consequence of denuntiatio, could now no longer discharge his obligation by rendering performance towards the old creditor.[209] Details concerning the denuntiatio (did this practice originate in late classical law?; did it have the effect of extinguishing the "assignor's" actio directa?; did the same consequences arise if the debtor obtained notice of the assignment otherwise than by denuntiatio?) are controversial.[210] But if one takes into consideration the breakdown of the classical concept of an "actional law" in post-classical times and the change in meaning, nay pointlessness,[211] of the concept of actiones utiles that went with it, one can say that for all practical purposes assignment as a transfer of the substantive right from the old to the new debtor (i.e. a singular succession to obligations) had become recognized by the time of Justinian.[212]

However, Justinian incorporated into his Corpus Juris Civilis classical sources dealing with procuratores in rem suam, actiones mandatae and utiles and thus juxtaposed as existing law the various stages through which the development of assignment had passed. It is small wonder that this sort of arrangement caused great confusion after the Digest had been rediscovered and Roman law was to be applied again.[213] The glossators,[214] in their attempt to explain and harmonize the conflicting sources by logical means, reverted to the old dogma of the untransferability of rights. How, they argued, could claims be regarded as transferable if one of the most common ways of "ceding" a claim had obviously been the appointment of a procurator in rem suam? The use of this institution would otherwise have been impossible. Also, if up to the time of denuntiatio or litis contestatio payment to the old creditor released the debtor from his obligation, how could that be explained rationally other than by assuming that the "assignor's" claim still existed? As far as the meaning and effect of the

[209] Cf. Alex., C. 8, 16, 4; Gord., C. 8, 41, 3 (probably interpolated).

[210] Discussion and references in Rozwadowski, (1973) 76 *BIDR* 91 sqq., 155 sqq.; Luig, op. cit., note 185, pp. 6 sqq. On the significance of the denuntiatio in the ius commune (does "denuntiatio simplex" suffice or is the drawing up—and handing over—of a formal instrument required?; what is the effect of denuntiatio or—in France—insinuatio?), cf. Coing, pp. 447 sq.

[211] As Groenewegen, *Tractatus de legibus abrogatis*, Cod. Lib. VIII, Tit. XLII, l. 3, n. 3, aptly put it: "Sed quemadmodum hodie sublatis actionum formulis, . . . extra ordinem, . . . et suppresso actionum nomine . . . jus dicitur, ideoque directae et utilis actionis distinctio penitus sublata est."

[212] Cf. Levy, *Obligationenrecht*, pp. 155 sqq. In the Codex we find terms such as "actiones transmittere" (C. 8, 53, 33) and "actiones per cessionem transferre" (C. 5, 12, 31 pr.).

[213] For the history of assignment in the European ius commune, see the works by Grosskopf and Luig, also the overview by Coing, pp. 445 sqq.; Bruno Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernunftrecht* (1975), pp. 1 sqq.; Susanna Johanna Scott, *Sessie in die Suid-Afrikaanse reg* (1977), pp. 4 sqq.

[214] Cf. the analysis by Grosskopf, op. cit., note 186, pp. 43 sqq.

actio utilis and its connection or interrelationship with the actio mandata were concerned, a whole host of theories, hypotheses and speculations were developed.[215] These disputes carried on throughout the centuries; in Germany it was maintained until well into the 19th century that rights, by nature of the concept of an obligatio, could not be regarded as transferable.[216] Christian Friedrich Mühlenbruch tried to show that the introduction of the actio utilis had not, in fact, changed the principle of the "assignee" merely acting as procurator of the "assignor". According to him, the actio utilis had been based on the fiction of a mandate: it was *as if* the "assignee" had been authorized to act as procedural representative.[217] What was transferred was *in any event* never the claim but merely the exercitium actionis. So influential was Mühlenbruch's theory that during the first half of the 19th century it totally dominated the scene.[218] That might seem surprising to us, because he did not make any reference to the sources of Roman law for the fiction which he introduced. But at that time the construction of logically consistent systems was what one aimed for, and axiomatic arguments, based on the nature or essence of a certain concept, and the use of fictions were well-recognized and oft-used tools for that purpose.[219]

4. The turning of the tide

From about 1855, however, the tide was turning. Bernhard Windscheid[220] refuted Mühlenbruch's theory as being conceptually and historically wrong; he showed that the granting of the actio utilis had finally been recognized as a full transfer of the claim. In his view, the assignor ceased to be creditor once the assignee had "taken possession" of this action; i.e. especially if either denuntiatio or litis contestatio had taken place. Otto Bähr[221] went further and argued that denuntiatio was not required for a transfer of the claim; by mere agreement with the

[215] Cf. the desperate exclamation by Cacheranus, as quoted by Grosskopf, op. cit., note 186, p. 75: "Videtis igitur, doctissimi Lectores, varias Doctorum opiniones, et doctrinas, a quibus facile se extricare non est, nisi elevemus oculos ad Christum Iesum, Dei veritatem et sapientiam."

[216] Cf., for example, Christian Friedrich Mühlenbruch, *Die Lehre von der Cession der Forderungsrechte* (3rd ed., 1836), p. 22; Mackeldey, *Systema iuris Romani*, § 333; Vangerow, *Pandekten*, § 574, n. 1.

[217] Mühlenbruch, op. cit., note 216, pp. 147 sqq.

[218] As far as the pandectist literature is concerned, cf. Luig, op. cit., note 185, pp. 47 sqq.

[219] Generally on the use of fictions, see Maine, pp. 13 sqq.; Gustav Demelius, *Die Rechtsfiktion in ihrer geschichtlichen und dogmatischen Bedeutung* (1858); Josef Esser, *Wert und Bedeutung der Rechtsfiktionen* (2nd ed., 1969); Lon L. Fuller, *Legal Fictions* (1967); Karl Larenz, *Methodenlehre der Rechtswissenschaft* (5th ed., 1983), pp. 251 sqq.; Peter Birks, "Fictions Ancient and Modern", in: *The Legal Mind, Essays for Tony Honoré* (1986), pp. 83 sqq.; Wieacker, *RR*, pp. 324 sqq.; Tomasz Giaro, "Über methodologische Werkmittel der Romanistik", (1988) 105 *ZSS* 223 sqq.

[220] *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (1856), pp. 148 sqq.; also in Windscheid/Kipp, §§ 329 sqq.

[221] "Zur Zessionslehre", (1857) 1 *JhJb* 351 sqq.

assignor the assignee could attain the position of—exclusive—creditor. This agreement, like traditio in the case of corporeal objects, is independent of the obligatory transaction (the causa) on account of which the transfer is effected. This is what was finally incorporated into the BGB.[222]

Even before the time of Mühlenbruch, incidentally, there had for a long time been tendencies to contest the traditional dogma that had been handed down from the glossators to the commentators and from them to the humanists. "Inspecta porro consuetudine existimarim cedentem facta semel cessione nullam penitus retinere actionem, et quicquid juris habuerit in cessionarium transferri": this statement by Lambertus Goris[223] is representative of the practically oriented jurisprudence in the Northern Netherlands during the 17th and 18th centuries;[224] acknowledgment of the needs of commercial practice led to the abrogation, as a matter of customary law, of the Roman doctrines about cession. This view both influenced the usus modernus in Germany[225] and provided the basis for modern South African law.[226] The natural lawyers, too, in opposition to the doctrines espoused by the humanists, recognized assignment as a full transfer of the right. They construed assignment of rights as the transfer of ownership of res incorporales and systematically juxtaposed it with the transfer of ownership of res corporales (which, in their view, also required consensus ad idem between alienor and alienee).[227, 228] This functional parallel between transfer of ownership and assignment, and the idea of a conceptually independent contract effecting the transfer of the right, has also had a lasting effect on the modern civil-law systems.[229] It was

[222] Cf. also already §§ 376 sqq. I 11 PrALR.

[223] *Adversariorum iuris tractatus*, Tract. III, Pars I, Cap. I, 5.

[224] Cf. the analysis by Grosskopf, op. cit., note 186, pp. 103 sqq., 116 sqq.

[225] Vide Johann Schilter, *Praxis iuris Romani in foro Germanico, Francofurti et Lipsiae* (1713), *Exercitatio ad Pand. XXX*, §§ LXII sqq.

[226] Cf. De Wet en Yeats, pp. 225 sqq.; P.M. Nienaber, in: Joubert (ed.), *The Law of South Africa*, vol. II (1977), nn. 324 sqq.; Susanna Johanna Scott, *The Law of Cession* (1980). Very influential in South African practice has been Johann van de Sande's book *De Actionum Cessione*. Being, however, a Frisian author, he can be regarded as authority for Roman-Dutch law strictu senso only with circumspection. The reception of Roman law in Friesland has been more far-reaching than in Holland. The problem of cession provides a good example, for in accordance with what they understood the Roman law to be, both Van de Sande and Ulrich Huber did *not* regard claims as transferable (cf. e.g. Van de Sande, Cap. VIII, 19: "[actio] intra viscera ejus, cui debetur, haere[a]t").

[227] Cf. e.g. Christian Wolff, *Institutiones juris naturae et gentium*, §§ 313 sqq.; Darjes, *Institutiones iurisprudentiae universalis*, §§ 489 sqq. For a detailed analysis, see Huwiler, op. cit., note 213, pp. 45 sqq.

[228] On the concept of cession in the codifications influenced by natural law (Codex Maximilianeus Bavaricus, PrALR and ABGB), see Huwiler, op. cit., note 213, pp. 103 sqq.

[229] Even though we would not today regard the holder of a right as its "owner", assignment (as with transfer of ownership) both in German and South African law is an abstract legal act (abstract, that is, from the obligational agreement; a different view based on the tradition of "cessio sine causa facta non valet" was still adopted, for instance, by Van de Sande, *De Actionum Cessione*, Cap. II, 3). As to the development of the concept of cession

thus only at the end of a long historical development that first the Roman law, and then again the European ius commune, recognized claims as fully transferable items of property.

Two final remarks may be apposite. Once the interests of trade and commerce have been thus accommodated (in that the right of the assignee has been strengthened to the extent that he—and only he—is entitled to claim on account of his agreement with the assignor), the protection of the debtor must become the main concern of the law.[230] After all, he is facing a new creditor without his having had any say in the matter. His interests demand a restriction of the assignee's position in at least two ways: the debtor must not be worse off after the claim has been assigned than he was before, i.e. the assignment must not curtail any defences he might have been able to raise against the assignor;[231] and payment made to the assignor must discharge the obligation, provided the debtor did not know of the assignment.[232] Post-classical Roman law further provided a special protection against professional purchasers of claims who wanted to benefit from the bad economic climate: if they had paid less than the actual amount of the debt when purchasing the claim, they could not recover more from the debtor than they had paid themselves.[233] Like Anastasius, later legislators and courts have from time to time viewed assignment with a somewhat suspicious eye.

The second point is that the same type of development can also be observed in other legal systems. Like Roman law, the old English common law regarded the contractual vinculum iuris as something so personal that the claims arising therefrom could not be transferred to a

as an abstact legal act, see Klaus Luig, "Zession und Abstraktionsprinzip", in: Coing/Wilhelm (ed.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. II (1977), pp. 112 sqq.

[230] Cf. especially Luig, in: *Wissenschaft und Kodifikation*, op. cit., note 229, pp. 112 sqq.

[231] Cf. Paul. D. 18, 4, 5; § 404 BGB; *Van Zyl v. Credit Corporation of SA Ltd.* 1960 (4) SA 582 (A) at 588F–H. The general principle in South African law, as in German law, seems to be that the position of the debtor must not be adversely affected as a result of the cession: cf. Voet, *Commentarius ad Pandectas*, Lib. XVIII, Tit. IV, XIII; De Wet en Yeats, pp. 231 sq. As to the position of the debtor where assignor and assignee have tried, by means of the assignment, to deprive him of his counterclaims, see the fascinating decision *L.T.A. Engineering Co. Ltd. v. Seacat Investments Ltd.* 1974 (1) SA 747 (A) with a full discussion by Jansen JA of Ulp. D. 3, 3, 33, 5 and Gai. D. 3, 3, 34. Cf. Paul van Warmelo, (1974) 91 *SALJ* 298 sqq.; Zimmermann, *RHR*, pp. 66 sq.

[232] Cf. C. 8, 16, 4 (Alex.); § 407 BGB; *Lovell v. Paxinos and Plotkin: in re Union Shopfitters v. Hansen* 1937 WLD 84 at 86. In French practice (since about the 16th century) the debtor has been protected in a different manner: by formalizing the act of cession and requiring "signification" of the debtor. Only such signification (denuntiatio) was seen to transfer the claim; cf. e.g. supra, pp. 59, 63.

[233] The lex Anastasiana: C. 4, 35, 22. Cf. still Windscheid/Kipp, § 333; Van de Sande, *De Actionum Cessione*, Cap. XI, and also artt. 1699 sqq. code civil. The rule has not been adopted in the BGB; in South Africa it is regarded as having been abrogated by disuse: cf. *Seaville v. Colley* (1892) 9 SC 39.

third person.[234] However, the old creditor could authorize the "assignee" to sue on his behalf and then to keep the proceeds.[235] This institution of a "power of attorney" served a rather similar function to the Roman procuratio in rem suam. A sophisticated system of transfer of claims had already been developed in the first two hundred years after the Battle of Hastings under the influence of Jewish law—the Jews had soon begun to monopolize the financial business—but had disappeared with the banishment of the Jews at the end of the 13th century.[236] Thus it was left to equity to improve the situation of the "assignee": where a claim enforceable in equity had been assigned, the equity judges allowed him to claim directly in his own name. Where, however, a "legal chose in action"[237] was involved (that is, a right which had to be sued for "at law" before the King's judges), two trials were necessary: the assignee had to obtain a judgment in equity requiring the assignor to tolerate the claim in his name, as well as one "at law" against the debtor. It was only the Judicature Act in 1873 that brought about a long-overdue procedural simplification.[238]

[234] Cf., for example, Holdsworth, *HEL*, vol. VII (2nd ed., 1937), p. 520: ". . . the assignment of such a right of action by the act of two parties was unthinkable."

[235] Pollock and Maitland, vol. II, pp. 224 sq.

[236] On this interesting episode and on the traces that it left in English law (as, for example—possibly—the common-law exceptions in favour of such assignments as concerned the King; the Jews, as the King's villains, were considered to be dealing in his property and on his behalf), see Bailey, (1931) 47 *LQR* 516 sqq. As the reasons for the rejection of the customs of the Jewry (which would have made debts freely assignable) Bailey refers to the unpopularity of their originators, the reaction of a people released from hated oppression, and the obstinate inertia of the common law.

[237] As to this term (which is still in use today), see Holdsworth, *HEL*, vol. VII, pp. 515 sqq.

[238] On the historical development in England, see Percy H. Winfield, "Assignment of Choses in Action in Relation to Maintenance and Champerty", (1919) 35 *LQR* 143 sqq.; Bailey, (1932) 48 *LQR* 248 sqq., 547 sqq. Bailey sums up his analysis in the following words (p. 579): "The history of this subject shows clearly that the common law Courts obstructed the development of a sound and uniform doctrine of assignment. . . . This was due to their inability to harmonize any such doctrine with the general principles which they evolved."