The Law of Obligations

Roman Foundations of the Civilian Tradition

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CHAPTER 1

Obligatio

I. THE CONCEPT AND ITS HISTORICAL DEVELOPMENT

1. Obligare—obligatio—obligation

"Nam fundi et aedes obligatac sunt ob Amoris praedium" said Astaphium andlla in Plautus[1] 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] *Epistuiae ad M. Bmtum* 1, 18, 3: see Schulz, *CRL,* pp. 45S sqq.
" The same connotation is inherent in the Dutch (and Afrikaans} word for obligation: " verbшten is".
[5] Inst. Ill, 13 pr. On the origin of this definition cf., most recently, Bernardo Albanese, "Papiniano ela defmizionedi 'obligatio' inj. 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 oj'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

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

[6] See, especially. Kaser, *Altnimisches ins,* pp. 179 sqq.; idem, RPr I. pp. 146 sqq.; Emilio Bern, *La stmttura dell' obbligazione romatta e il probletna della suagenesi* (1955); Okko Behrends, *Der Zwolftafelprozess—Zur Geschiehte des rotnischen Obligationenrechts* (1974), pp. 33 sqq. and passim; Mario Talamanca, "Obbligaziom". 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. I). 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." 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 dchct 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", (19H4) 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) m Genesis 4. 23 and 24: "Hear my voice, ye wives of Lamcch. hearken unto my speech: for I have slain a man to my wounding, and a young man to my hurt. If Cam shall be avenged sevenfold, truly Lamech seventy and sevenfold."

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

[10] Provisions such as § 267 I BGB ("It 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.

This account largely represents the prevailing opinion: the development of dehctual liability is seen as an evolution from revenge (but cf. also Herman van den Brink, *The Charme of Legal History,* 1974. pp. SI sqq.; Wieacker, *RR,* pp. 286 sq.) to compensation. Cf. alreadyJhering, *Geist* I, pp. 118 sqq.; today: Kaser. op. en. 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: ornnis condemnatio pecuniaria. See Paul Koschaker. (1916) 37 */CSS* 355 sqq.; Kaser, *RZ,* p. 287.

'■ For details, see the XII Tables; especially Tables 3, 1: "Post deinde manus iniectio esto. In ius ducito", 3, 2: "Ni iudicatum tacit aut quis endo eo in iure vindicit, secum ducito. Vinci to 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 pare 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 hbram 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 Romatia* 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 rhe service of the creditor. On all this, see Behrends, op. cit., note 6, pp. 113 sqej. (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 Zw6lftafeln", (1976) 93 *ZSS* 261 sqq.. 278 sqq.); cf. also Carlo Augusto Cannata, "Tertiib 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.; Kascr, *Altrb'tnisches ius,* pp. 119 sqq., 138 sqq., 233 sqq.; idem, *RPr* I, pp. 166 sq.; Liebs, *RR,* pp. 229 sqq.; Ulrich von Liibtow, "Zum Nexumproblem", (1950) 67 *ZSS* 112 sqq.; Maine, pp. 185 sqq.; Talamanca, *ED,* vol. 29, pp. 4 sqq.; Herman van den Brink, *lusjasque* (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 pret dans les droits primitifs", in: *Studi in onore di Bdoardo Volterra,* vol. Ill (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 urhe 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.

As to the famous conceptual difference between *"Schuld"* and *"Haftung"* (duty and liability), sec Alois Brinz, "Der Begriff der obligatio", (1874) 1 *QrunhZ* 11 sqq.; De Zulueta, *Gaius* II, pp. 144 sq.; Jolowicz/Nicholas, pp. 160 sqq.; Rabel, *Gruttdziige,* 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. Ill (1917), pp. 8 sqq. For a general evaluation, see Bemhard Diestelkamp, "Die Lehre von Schuld und Haftung", in: Helmut Coing, Walter Wilhclm (eds.), *Wissenschafi 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 altromische 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 el libram. "Me eo nomine a te solvo libroque" were the words, which had to be used by the person to be released: Gai. Ill, 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, *Stipulaiio Aquiliana,* pp. I11 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] Sec 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, sec Nicholas, *Introduction,* pp. 99

Cf. Buckland/Stein, pp. 552 sq.; Pierre Cornioley, *Naturaiis 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 fiir Ulrich von Ltibtow* (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. Ill, 119 a; William Burge, *Commentaries on the Law of Suretyship* (1849), p. 7.

See Mario Rotondi, "Alcune considerazioni sul concetto di obbligazione naturale c sulla sua evoluzione", (1977) 75 *Rii'ista del diritto commentate* 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, *Traitedujeu,* n. 58; § 1271 ABGB, art. 514 II OR. On gaming in Rome and on the reaction of the Roman authorities, *cf.* Marek Kurylowicz, "Die Glucksspicle und das romische Recht", in: *Studi in onore di Cesare Saiifilippo,* vol. IV (1983), pp. 267 sqq.

[36] 656 BGB has been severely criticized as being discriminatory and infringing the basic rights ot 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 Wochenschrifi* 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).

[18] § 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 Verjdhrungs-, 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 ms civile (like the formal stipulatio) but based on the naturalis ratio and which were part, as such, of the ius

[34] 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.

"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. dr., note 27, pp. 256 sqq.; Van Warmelo, *Huldigingsbundet Pont,* pp. 419 sqq.

[43] D. 12, 6, 26, 12. For all details, see Wolfgang Waldstein, *Operae libertomm* (1986) (on Ulp. D. 12, 6, 26, 12 r.f. 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^ 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?
[4] For an outline of the historical development, see J.E. Scholtens, *De Geschiedenis der natuurlijke Verbintenis sinds het Romeinsche Recht* (1931); Van Warmelo, *Huldigitigsbundel Pont,* pp. 421 sqq., Rotondi, (1977) 75 *Rivista del diritto comtnerciale* 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 reelings 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 *Hedhy Byrne and Co. Ltd. v. Heller and Partners Ltd.,*[e<i] based the action on tort. In addition, Rudolf von Jhering's famous "discovery"[61] of culpa in

[52] See A.M. Honorc, *Gaius* (1962), pp. 97 sqq. (100); Witold Wolodkiewicz, "Lc fonti delle obbligazioni nellc istituzioni di Gaio c nelle res cottidianac", (1970) 24 *Rivista italiana per le scienze giuridiche* 138 sqq.
[53] Gai. Ill, 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 Mehrcn, "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.
[35] 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."
^ B.S. Markesinis, "The Not So Dissimilar Tort and Delict", (1977) 93 *LQR* 78 sqq.
[57] See especially the two famous cases of *MacPkerson 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.
See, for example, H. Mazeaud, "La responsabilite civile du vendeur fabricant", (1955) 53 *Revue trimestrielle de droit civil* 611 sqq.
[49] See Werner Lorenz, "Das Problem der Haftung fur primare Vermogensschaden bei der Erteilung einer unrichtigen Auskunft", in: *Festschrift fur 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 Dolle, *furistische Entdeckungen, Verhandlungen des 42, Deutschenfuristentages,* 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/'5 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, odcr Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Vertragen", (1861) 4 *Jhjb* 1 sqq.

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

[64] For an overview of the development in German law, sec Peter Gottwald, "Die Haftung fur culpa in contrahendo", 1982*Juristische Schulung* 877 sqq.; Dieter Medicus, *V'erschulden bei Vertragsverhandlungen*, *Gutachten und Vorschldge zur Uberarbeitung des Schuldrechts,* vol. I (1981), pp. 479 sqq. For a comparative analysis, see Friedrich Kcssler/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, ot 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., 716sqq. 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, *laissezfaire* 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: *lus Privatum Gentium, Festschrift fur 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 fur 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/Kotz/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: Arnaido 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. Ill, 91.

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

[77] Inst. Ill, 13, 2. For details of the development of the divisio obligationum from Gaius' cwo- 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, *II 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: *Studigiuridici 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 Arzte* (1906); *RE,* vol. XIV, col. 2579; Joachim Ritter, *Historisches Worterbuch der Philosophic,* vol. Ill (1974), pp. 1022 sq.; for the Romans, cf., for example, Aulus Gellius, *Nodes Atticae,* Lib. Ill, 10; cf. also the comparative material in the annotations by Fritz Weiss, in: Aulus Gellius, *Die Attischen Nachte,* 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 hohc Spiel der Zahlen", in: O. Seidlin, *Klassische und modems 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 "thejudge 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 (furturn 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. Ill, 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 *Ada Juridica* 149 sqq.; Geoffrey MacCormack, "The Liability of thejudge in the Republic and Principate", in: *A\'RW,* vol. II, 14 (1982), pp. 5, 9 sq., 16 sqq.; Alvaro D'Ors, '"Litem suam facere"', (1982) 48 *SDMI* 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, *Korpervertetzung,* pp. 62 sqq.; Giannctto 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: *Melanges 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 Sanjilippo,* 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-muiuum) 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 slipulatu.
[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 [thej 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. Honore, *Gaius* (1962), p. 102.
[95] Cf. Inst. IV, 5, 3. As to the concept of culpa in eligendo, cf. Geoffrey MacCormack, "Culpa in ehgendo", (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." 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 a celui qui se trouve oblige, resultent ou des quasi-contrats, on des delits ou quasi-delits".* 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, *Obligations,* 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 responsabilita dei 'quasi delkti' nel diritto romano ed il suo influsso sulla responsibility civile moderna", in: *Laformazione storica,* vol. Ill, pp. 1277 sqq. (no common denominator for the quasi-delicts); Longo, *Studi Sanfilippo,* vol. IV, pp. 401

For details, see Hans Hermann Seiler, *Die Systematik der einzelnen SchuWverhaltnisse in der neueren Privatrechtsgeschichte* (Diss. Munster, 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. Ill, pp. 1177 sqq.

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

[10] See Pufendorf, *De jure naturae et gentium,* esp. Lib. V, but also already Hugo Grotius, *De jure belli ac pads,* 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 thejustinianic 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'etre 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, Muhlenbruch, *Doctrina Pandectarum,* Lib. Ill, II (Singulae obligationum species); Windscheid/Kipp, IV. Buch, Zweites Kapitcl.

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

■ Cf. Brinz, *Pandekten,* § 94 *(Geschajtsfordemngen und Strajjorderungen);* further Seller, 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.

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 ATI* 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 Heinccius, *Recitationes in elementa iuris civilis secundum ordinem Institutionum* (Vratislawiae, 1773), Lib. IV, Tit. V, § MXXXII. Further e.g. Pothier, *Traite des obligations,* n. 116: "Oм *appelie delit lefail par iequel une personne, par dot ou maiignite, cause du dommage ou quetque tort une autre. Le quasi-delit est lefait par Sequel une personne, sans maiignite, 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 *delit* and *quasi-delit* 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 .'onsumption 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] Tie cases of strict liability laid down in artt. 1384-1386 do not fall under *"quasi-delit"* but are generally referred to by the term *"responsabilite"*. 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. Ill, pp. 1288 sqq.

[111] Cf. in this context the observation already made by Lorenz von Stein, *Zur Eisenbahnrechts-Biidung* (1872), p. 15: *"Deutschland ist geradezu unerschb'pjlich in Abhandlungen uber Ulpian und Papinian, aber vom Eisenbahnrecht weiss es so gut ah 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 Benohr, "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, Щ* 304 sqq., who still puts loan and unjustified enrichment on a par.

Schweizerisches Obligationenrecht (1911), am. 62 sqq,

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

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 Honore" (2nd ed, 1978, by Newman and McQuoid-Mason)), the quasi-contracts are not mentioned. In other works (such as Hosten/Edwards/Nathan/Bosnian, *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, *c{.,* for example, Carlo Augusto Cannata, "Das faktische Vertragsverhaltnis oder die cwige Wicderkunft des Gleichen", (1987) 53 *SDHI* 310 sqq.

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

[118] Theo Mayer-Maly, "Vertrag und Einigung", in: *Festschrift jiir H.C. Nipperdey,* vol. I (1965), p. 522. Cf. also Seiler, op. cit., note 98, pp. 112 sqq.; Helmut Coing, "Bemerkungen zum uberkommenen Zivilrcchtssystem", in: *Vom deutschen zum europa'ischen Recht, Festschrift fur Hans DSlle,* vol. I (1963), p. 25.

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

[120] Hochstein, *Obligationes,* pp. 11 sqq., 150 sq.; Heinz Hubner, "Zurechnung statt Fiktion ciner Willenserklarung", in: *Festschrift fur 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 Kotz, "Gefahrdungshaftung", in: *Gutachten und Vorschlage zur Uberarbeitung des Schuldrechts,* vol. II (1981), pp. 1779 sqq.; in English, for example, Lawson/Markesinis, pp. 142 sqq., and Zweigert/Kotz/Weir, pp. 309 sqq. with many references.
[123] Cf. esp. Claus-Wilhelm Canaris, "Schutzgesetze—Verkehrspflichten—Schutzpflich ten", in: *II. Festschrift ?ir Karl Larenz* (1983), pp. 27 sqq. (pp. 85 sqq.: *"Die Haftung fur 'Schutzpflichtverletzungen' als 'dritte Spur' zwischen Delikts- und Vertragshaftung")* with many other references.
[124] Cf. BGHZ 21, 319 sqq.; Gunter Haupt, *Uber faktische Vertragsverhaltnisse* (1941); Karl Larenz, *Allgemeiner Teil des Burgerlichen 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 Foremis,* Pars I, Lib. IV, Cap. XXV; Voet, *Commentarius ad Pandectas,* Lib. XLIV, Tit. VII, v. ("Quasi contractus sunt praesumtae conventions, ex quibus mediante facto valida nascitur obligatio"). But see the critical analyses by Vinnius, *Institutions,* Lib. Ill, Tit. XXVIII pr., n. 3 sq. and Pothier, *Traite 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. Macferlcm",* (1984) 37 *Current Legal Problems* 11 sqq. Cf. further Cannata, (1987) 53 SDH/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. Macferlan* (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] . . . understood] 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. Macferlan* (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 kmd of appeal which "beckons to disaster" (p. 5). With *Moses v. Macferlan* 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, "[tjhese 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' *lus 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 Maycr-Maly, (1966) 83 *ZSS* 47 sqq.
Just as in modern English law, where private law is not seen as a system cither. Cf. Schulz, *Principles,* p. 57; on the approach of the Roman lawyers towards abstraction (and systcmatization) 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 decern 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 Norr, *Divisio und Partitio* (1972).
[141] Cf., for example, De Zulueta, *Gaius* II, pp. 23 sq.; Jolowicz, *Roman Foundations,* pp. 63 sqq.
Cf. Hans Kreller, "Res als Zentralbegriff des Institutionensystems", (1948) 66 *ZSS* 572 sqq.
"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: "// 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 Krcller, (1948) 66 *ZSS* 592 sqq.
[145] Gai. II, 97.
[146] Gai. III, 82 sqq.
[147] Gai. II, 97.
[148] Gai. Ill, 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

[1 i] Not only, incidentally, on the Continent, but also in Scotland, namely on Lord Stair's influential *Institutions of the Law of Scotland* (1681) (sec 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 ana English Jurisprudence Yesterday and Today* (Inaugural Lecture, Cambridge, 1969), pp. 7 sqq.; F. H. Lawson, "Institutes", in: *Festschrift fur 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]

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b5 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.

b6 On actions in post-classical law, Kaser, *RPr* II, pp. 65 sqq.; *RZ,* pp. 467 sqq.; *c(.* also Jolowicz, *Roman Foundations,* pp. 75 sqq.

157 Theophilus, *Paraphrases institutionum,* Lib. Ill, Tit. XIII: " дтітерЕс -уар *mav ayuyuiv* at ^VOYCU."

1 This is the difference to English law; *c(.* 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 consideration 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 manieres dont on acquiert la propriete[1]",* (including, inter alia, succession, obligations and matrimo-

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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.

H *System,* vol. I, pp. 401 sqq.

162 V'innius, *Institutions,* Lib. Ill, 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 Bjorne, *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 Gunther Nufer, *Uber die Restitutionslehre der spanischen Spatscholastiker und ihre Ausstrahlung auf die Folgezeit* (unpublished Dr. iur. thesis, Freiburg, 1969), pp. 16 sqq., 59 sqq.; Coing, pp. 190 sqq.

16" 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.

niai 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 o(Book Three is based on the system adopted by Donellus, *Cotnmentarii 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 rechteiiche 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 *"Pandekten-system";* 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 burgerlichen Rechts", (1906) 33 *GrunhZ* 1 sqq.; Philipp Heck, "Der allgemeine Teil des Privatrechts", (1939) 146 *Archiv far die civilistische Praxis* 1 sqq.; Gustav Boehmer, *Ein?hrung in das burgerliche Recht* (2nd ed., 1965), pp. 73 sqq.; Bjorne, 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 Folkc 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.