THE mandate, like the real contracts, was gratuitous. Like them, it was a transaction of good faith. Like them, in most cases, no actual obligation to save either of the participants harmless arose, until something was done. But from the nature of the transaction this something might be negative. It might be the willful or negligent abstention from acting. And since a non-facere does not seem ever to have been called a res, the obligation of the mandate could be referred to nothing else than the indicated willingness of the mandatary to carry out the mandator’s instructions. It was a “consensual”, not a “real” contract.

Our texts classify mandates into those made for the benefit of the mandator exclusively; of the mandatary exclusively; of a third person exclusively and some combination of these benefits. This scheme is of no importance and the classes are mere applications of the requirement of good faith. If A asks B to do an act which can have no other purpose than B’s advantage, it does not seem just or sensible to let B recover from A the damages resulting from a piece of advice which he was at liberty to reject if he chose. But in almost any other case, when B did at A’s urging what he might not have done without it, A could scarcely refuse responsibility for untoward incidents. And it does not seem that he could do so even when, as was frequently the case, A personally derived no profit from the transaction and such profit accrued wholly to a third person or to a third person jointly with B.

What practical importance could there be in a gratuitous contract, defeasible at the will of either party? It might have rarely entered litigation but for the readiness with which it fitted into a commercial transaction of the highest importance, that of personal security, suretyship or guarantee.

In the Institutes, for purposes of teaching, suretyship is treated under the formal contract of stipulation. But in the Digest, most of the cases of suretyship are discussed under a title in which the
formal suretyship or *fideiussio* and mandate are inextricably interwoven. No doubt suretyship could be constituted in the form of stipulation; and from time immemorial had been so constituted. When A asks B—“If X does not pay me, will you?” and B replies in the affirmative, B’s obligation to pay is enforceable as soon as the condition happens.

But when B urges A to become the creditor of X, e.g., when he urges him to stipulate for X’s promise, to lend X money, to sell X goods on credit, or, if after A has done all these things of his own accord, B urges him to abstain from immediate suit against X or otherwise extend further credit to him, that can evidently be called a mandate which B has given A. Then if X does not fulfill his obligation, the loss suffered is damage flowing directly from an act which constituted the mandate, and in good faith B should repair the damage. Making the guaranty by way of mandate was an easy way to obviate the formality of the stipulation, and formality, however slight, was felt as burdensome here as in the more important transactions of sale and letting.

Yet we may note that a guaranty in the form of mandate was eminently a real transaction. Unless and until the mandatary had entered into the obligatory transaction with the third party, the mandate was revocable. It is just conceivable that a revocation might be unseasonable but that can have been the case very rarely indeed. In a stipulation, however, the surety might be bound irrevocably, before the obligation secured came into existence and he would have no power to prevent its coming into existence. Prospective creditors must have found this fact of value—since the formal *fideiussio* was never completely superseded by mandate but maintained itself side by side with the informal contract.

Suretyship at the common law is a contract which, as many English and American decisions are at some pains to tell us, was borrowed from the Roman law and apparently it was borrowed with a certain group of incidents of great and increasing importance. These incidents are the equitable relations which are created by the performance of the guaranty—relations between the surety and the principal debtor, between the surety and the creditor and between several sureties.

Such equities were termed in Roman law *beneficia*, an almost exact equivalent, since the term means a claim granted of grace by

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1 See especially Lumpkin v. Mills (1848) 4 Ga. 343.
the court, just as we may recall that early bills in chancery, were petitions addressed to the Chancellor's mercy. The earliest and most important was the *beneficium cedendarum actionum*, the claim to have all rights of action of the creditor either against the principal debtor or the other sureties, as well as all securities of these rights of action, transferred to the surety. The same difficulty was encountered as that which the common law courts so often met and generally so clumsily.\(^2\) By payment of the principal debt to the creditor, it is discharged. What right of action can then be transferred to the creditor? The Romans found themselves obliged to consider this cession, or transfer of action, as a purchase of the debt, with consequences that must be considered shortly.

It will be seen that the *beneficium* of having the rights of action ceded covers completely the equities both of subrogation and of reimbursement, as we apply them. But there are certain important differences. The Anglo-American system treats the equity as an incident of payment and an indemnity to the paying surety. The Roman system, dealing with it as a purchase, required a demand for such cession made on the creditor by the surety before payment. Otherwise payment discharged the debt completely and there was nothing for the creditor to cede. If the creditor refused cession, he could himself not enforce his claim against the surety, for he would be met by the *exceptio doli*. Such a solution was more clear cut and logical than the usual common law fictions but was full of pitfalls for an unwary and ignorant surety, who might have failed to make a formal demand.

In the time of Hadrian, another *beneficium* was introduced which applied to all types. This was the *beneficium divisionis*. One of several sureties sued for the debt might plead by way of exception that there were other solvent sureties besides himself. If he established his plea, he would be liable only for his pro rata share of the debt. But a failure to set up the exception was fatal since the debt was gone and there was no obligatory relation of any kind between the co-sureties. In our courts we reach a similar result by the equity of contribution, which is not dependent on a preceding demand

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and is not lost by an error in pleading, but puts the burden of collecting the contribution upon the co-surety who has paid.

The difficulties created in every system by the attempt to keep alive a debt which logically must be thought of as extinguished was solved finally neither by fiction nor by dialectic ingenuity but by legislation. Justinian decreed simply that payment by a surety did not bar actions against the other sureties or against the principal. It is quite characteristic that agreements (pacta) providing for this very thing, had become extremely common among merchants before the rescript was issued, so that all the law did at Rome, as was so frequently the case in England, was to give legal authority to a custom in itself almost as binding as the law.

A final protection for the surety was not granted until some years after the Corpus proper was promulgated. A little while after the last edition of the Code, in the fourth Novel (535 A. D.) Justinian established the beneficium which has been variously called ordinis, excussionis and, principally in common law sources, discussionis. It is a form of the equity of exoneration and permits the surety to plead that the principal debtor is solvent and should therefore be proceeded against first. We may say that it turns every guaranty into a guaranty of collection, even though in form it is a guaranty of payment. Exoneration of this type was not usual at the common law, particularly if the guaranty was not expressly declared to be one of collection, but the doctrine of Pain v. Packard seemed to have introduced it into many of the United States and apparently into the states adopting the Field Code.

3 Pactum is the name for the informal contract, that is for any agreement that was not followed by part performance, was not put in the form of the stipulation and was not one of the four "consensual" contracts. It will be fully dealt with later. We may say at this point that in accordance with a much quoted maxim, it would not sustain an action (that is, it could not be used in the demonstratio of the formula) but it could be pleaded in bar by way of exception.

4 The effect of the agreement illustrates with especial clearness the working of the formula. Suppose that two sureties had agreed that they would either share the payment or follow an agreed order of precedence. The principal defaults and one surety pays, thereby extinguishing the debt. He sues the other surety who pleads res adjudicata in his exception, which is met with the replication pacti conventi.

5 Neither excussion nor discussion occurs in this sense in the Roman law sources. Discussion is particularly the term of the Scotch law and the law of Louisiana; Lorimer, Handbook of the Law of Scotland, § 1717; Bell's Commentaries, i, 347; Black's Law Dictionary, s. v. Discussion.

6 (1816) 13 Johns. (N. Y.) 174, criticized but finally accepted in New York. The doctrine is fully examined and disapproved in Harris v. Newell (1877) 42 Wis. 687, which follows the great weight of American authority.

7 Cal. Civ. Code, § 2845. The Code Commissioners expressly quote Pain
The common law doctrines that whatever discharged the principal debtor, equally discharged the surety prevailed at the Roman law. And, as in our law, a defense purely personal to the principal, could not avail the surety. Precisely as in our system, one could agree not to sue the principal without thereby losing the right of proceeding against the surety. But it is not likely that the Roman law had the astounding doctrine that fraud and duress practised by a creditor on a debtor were defenses peculiar to the latter and could not be set up by the surety. The Digest and the Code contain no case in point but the terms dolus and metus were broader than fraud and duress and must have covered such indirect fraudulent practises as well as those aimed directly at the surety.

Similarly there is nothing specifically stated on some questions which play so large a part in our law of suretyship. What was the effect in the suretyship contract of varying the principal obligation? We know how strictly these have been construed until we reach the rule in the Calvert Case that an alteration even to the surety's advantage discharges him. That rule has with the change in attitude toward corporate sureties, suffered a number of modifications, so that the rule may soon be general that only prejudicial alterations discharge the surety and only to the extent of the prejudice. At Roman law the question would, it seems, have to be determined in accordance with the means used to effect the alterations. If these were arranged between the creditor and the debtor by a simple informal pact, they would bind the parties since a suit on the unchanged obligation would be met by the exception pacti conventi. This exception of course could not be pleaded by a surety who had not made the pact. If, on the other hand, a new obligation had been entered into, it is hard to see how this could fail to operate as a novation of which the effect must be to discharge the original contract and by so doing discharge the surety.

I have treated this rather special transaction in detail for the reason that it illustrates better than formal exposition could do the similarities and differences of the legal attitude, developed in the Roman and common law systems. The general ideas, and perhaps some of the details, were borrowed by the younger law from the older but, in every case, as must have been apparent, the institution has suffered characteristic modifications in the transference.

VIII

The flexibility of mandate was not exhausted in becoming a rival of the formal contract of suretyship or fideiussio. It is thought of most frequently as the Roman equivalent of agency.

Here as in suretyship courts and text-writers frequently tell us that the institution was borrowed from the civil law. It is all the more curious that this should be the case since the parent of the civil law, the Roman law, had very inadequately and imperfectly developed it. For ministerial purposes indeed, economic and social conditions made a theory of agency unnecessary. For such purposes a slave or a filius familias may be said to be the natural instrument. A slave might even make contracts in his master's name without having any real freedom of action since the master could reject a disadvantageous transaction and accept a profitable one.

But for many purposes such instrumentalities, which were really only extensions of the master's physical person, were unsuited. Instructions issued by A to B to do a specific thing or general group of things is the essential mark of a mandate. There was no reason why the instructions should not comprise the entering into obligatory transactions with third persons. A failure to carry out such a mandate might subject B to an action by A and expenses incurred by B or losses suffered by B would similarly justify suit against A. The obligations of good faith which are so much insisted on in common law discussions of agency, were taken for granted in the mandate, a transaction of good faith in every respect.

law novation does, but also cases in which a new obligation is created without change of parties. The Field Codes (Cal. Civ. Code, §§ 1530, 1531) expressly take over the civil law novation although it can scarcely be said that our courts have known what to do with it. For example the devious and difficult learning of "successive promises" would be made wholly unnecessary by treating them as novations under this section and upholding the new contracts unless they seem to have been made under duress.
But at the present our principal concern in agency is not with the relations between principal and agent, but with the relations between the third person and the principal. Once the act is done by an agent within the scope of his authority, the agent drops out completely and the binding obligations are those between the principal and the third person. This idea the Romans found insuperably difficult. The mandate issued by A to B required him to make contracts with X, but making contracts meant incurring obligations. B, the agent, cannot possibly extricate himself from the bond which his actual cooperation with X has created. The only difficulty was to get A, the principal, bound by it as well.

By the ordinary bond-making mechanism, the stipulation, this could not be done. One could not stipulate solely for another. But the agent could be instructed to stipulate: "Will you pay me or my principal" and a payment to either would be a discharge. But while the agent could thus qualifiedly bind X to his principal, he was quite incapable of binding his principal to X by stipulation. The most complete solution the Romans arrived at came from another source.

The praetor first put his imperious hand upon the relation between father and *filius familias*, master and slave. Where the contract between the slave and the third person had been made by a specific order of the master, or in the exercise of a definite business by land or sea for which the master had furnished the equipment, the praetor cut off the master's election to repudiate the transaction. But the claim of the third person could be satisfied only out of the slave's *peculium* of which the master had the theoretical title; or out of whatever fruits of the slave's transaction the master actually appropriated. One of the type situations was the conducting of a shop by the slave as his master's representative. The slave was then an *institor* and the action against the master was called the *actio institoria*.

Very early the praetors passed from this common situation into the almost equally common one in which such a shop is managed by a free man under mandate from another. Between a trusted slave and a free mandatary or a tenant, the difference in practice was slight and the creation of an action on the model of the *actio institoria* was comparatively easy.\(^\text{12}\)

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\(^{12}\) The *actio utilis ad exemplum institoriae*, mentioned by Papinian, 14, 3, 19 pr, "the adapted action on the model of the *actio institoria*" bears more than a generic resemblance to the "action on the case." The Chancery in which these "actions on the case" were framed was manned by men who knew something and, often a great deal, of the Roman law.
But although the mandatary thus bound his mandator he did not drop out of the transaction. He remained bound. And the curious result arose that the mandator acquired the rights directly. He could demand a cession of the mandatory's right of action under his mandate contract and in exceptional cases, if the mandatory was negligent or insolvent, the praetor would allow an independent action. This must have been effected by some such modification in the Intention and Condemnation of the Formula as the following: “If it appears that X ought in good faith pay B a certain sum, do you, iudex, condemn X to pay this sum to A.”

How incomplete this is, when compared with agency in the modern civil law or at the common law, need hardly be pointed out. Its only advantage lay in obviating the necessity of our confessedly anomalous undisclosed principal and our fiction of implied warranty of authority. The agent was always liable, authorized or unauthorized. And the principal was always liable, known or unknown, when he took into his possession the fruits of the agency.

Mandate had a further function to perform besides that of creating agency and simplifying suretyship. It made assignment possible. That came through a specialized form of mandate—the procedural type. If a mandatary may be an agent there is no reason why the particular agency should not be that of an attorney in fact or at law. Indeed this special form of agency was common enough to have the specific name of cognitor or procurator. It was common, no doubt, to select a freedman for this purpose between whom and his former master there existed a relation of trust and confidence as well as a requirement of deference. But in any case the procurator needed to sue in his principal’s name and yet be able to collect the judgment himself. The formula in the way just indicated furnished an easy means of trying the issue as one between the principal as obligee and his obligor, but condemning the defendant to pay to the attorney, the procurator. Since the latter was a mandatary he owed the duty of accounting to his principal but to no one else.

If we can contrive to eliminate the duty to account, we have of course most of the elements of an assignment. And that could be done by mere agreement between principal and agent. The procurator was allowed to recover and keep the proceeds, procurator in rem suam. The only additional thing that the assignee in many

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common law jurisdictions has, is the right to sue in his own name—a relatively unimportant privilege.

But the assignee, as an agent, would still be laboring under difficulties. The death of the principal ended the relation. Payment to the principal, the owner of the obligation, extinguished it. The first difficulty was cured by allowing the assignee to bring an adapted action, an action as if he had made the contract in the beginning. It was unnecessary for him to make a fictitious but non-traversable allegation. He told the truth and the *iudex* was instructed on proof to condemn the obligor to the *procurator*. The other difficulty was met by permitting the assignee to notify the original obligor of the assignment. Payment to the assignor would now be a fraud on the assignee. If the latter sued and the defendant pleaded payment, the replication would be *dolus*.

IX

One of the most characteristic forms of modern economic organization is the association, whether in the form of a partnership or of a corporation. We are concerned with them primarily in connection with the obligations of third persons towards the associates, and we recognize that, to a large extent, the foundation of these obligations lies in agency. The agency of one partner, whether his principal is the still illegitimate "partnership-entity" or his co-partner, is an agency of extraordinary powers and almost unlimited scope. The much more limited character of the Roman mandate makes it clear that no common law partnership could be built upon it. And, as a matter of fact, the texts of the Digest that deal with partnership, *societas*, are almost wholly concerned with the rights and duties of the partners among themselves. The furiously contested questions relating to "partnership by estoppel" and "partnership as to the third persons" would have no meaning in a system in which a partner would be liable by his associate's act to third persons only if as a fact he had given a mandate for the act or if as a fact he had appropriated in some fashion the fruits of the transaction.

But between the partners themselves the relations gave rise to nice and complicated situations. The contract was held to be consensual. It came into existence when consent was manifested, however the proposal was initiated and however its approval was indicated. The proposal might vary from the conducting of a single transaction together, to a community for life. It ended as
soon as dissent was manifested whether that dissent was shown in words or in conduct. Once ended either partner might in the action pro socio claim to be reimbursed for any action in fraud of the partnership relation, committed by his partners. There really was no action by one partner against another since joinder of issue in the action pro socio ended the partnership, if it had not already been ended by formal renunciation of either partner.

The creation of a renounceable relation formed, as in mandate, an obligatory transaction only because, as in mandate, inaction might also be a manner of acting. A socius (partner) who through incompetence or dolus refrained from acting when he should have acted, caused damage and was responsible. Only we must remember that this cannot have been frequent and that the real beginning of obligations was generally an overt facere on the part of either partner.

Damages in the action pro socio could be predicated either on a directly prejudicial act committed by a partner or on an improper renunciation. The effect of renunciation was always to dissolve the partnership even though there was an express stipulation not to do so. In that case, of course, the stipulator could sue on his contract. But with or without a contract, societas as a bonae fidei negotium allowed the action pro socio whenever the renunciation was against the equity of the transaction. It did not need fraud to make it inequitable. As early as Augustus, it was laid down that if the result of an honest renunciation was prejudicial, the renouncing partner was liable. To which the rather interesting qualification was added that the prejudice must be measured by the disadvantage not of one partner but of the partnership.14

This, of course, is quite contrary to the received common law opinion where renunciation of a partnership unlimited as to time can be freely made whatever may be the impelling motives.15

In other respects we may say that the bona fides of the partner-

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14 Digest 17, 2, 65, 5.
15 Crawshay v. Maule (1818) 1 Swans. 495, 36 Eng. Rep. R. 479, and the many cases following it. There are a few cases contra, notably Howell v. Harvey (1843) 5 Ark. 270, 39 Am. Dec. 376, which, however, quotes only civil law sources, Pothier, Domat, and of common law writers, Story on Partnership. Story, however, (5th ed., § 273 seq.) says, very fully to be sure, that the rule is that of the civil law, and not the common law. The common law is codified both in the English Partnership Act, the Uniform Partnership Act, § 31, 1, a, and the California Civil Code, § 2450 (2).

However, some cases such as Fletcher v. Reed (1881) 131 Mass. 312, assert that the renunciation must not be made in bad faith, a statement often repeated though generally as a dictum.
ship would demand the highest equities that we can assume an Anglo-American Chancery would apply. The action *pro socio* would allow account, damages, and specific performance as far as the Roman law knew how to effect those things. And it added a special equitable incident which the common law could bring about only indirectly and imperfectly. An unfortunate partner who had not made a fraudulent transfer of his property, could plead the *beneficium competentiae* in the action *pro socio*—that is, he could demand that an amount necessary for his subsistence be withdrawn from the judgment. It was in effect the creation of an exemption by equity at a time when exemption statutes as such were not thought of. However the plea of the *beneficium* was not a discharge of the debt which might be enforced as to any subsequent surplus over the *competentia* till barred by lapse of time.\(^6\)

It was inevitable that in the course of the partnership transactions property should be acquired. Indeed, the effect of at least one—rather rare—type of partnership was an immediate vesting of a joint title in all the property heretofore held in severalty by the partners. The action *pro socio* was not an action of partition. A partition of partnership property on dissolution could be effected by the action *communi dividundo*, in which the condemnation would be replaced by an *adiudicatio* since both sides receive something at the court's hands.

Ownership in common while an extremely usual incident of partnership did not create it. At common law that need scarcely be pointed out, since joint tenancies, tenancies in common, tenancies by the entirety and others, are wholly independent of partnership. But it needed very little to convert a Roman joint ownership into a partnership. If the joint ownership was the result of a deliberate act on the part of the owners, it was at once a type of partnership, the *societas unius rei*. If it came about by operation of law, as in the case of a grant to two grantees or the acceptance of an inheritance, no partnership was created unless the joint owners indicated that they wished it to be created.

Similarly a single transaction may constitute a partnership at Roman law, though hardly at common law.

The tests so carefully applied at the common law in order to

\(^6\) The list of cases in which the *beneficium* might be pleaded is given by Girard, *Manual de Droit Romain* (5th ed.) p. 1034, n. 1. The cases are principally those in which relations of trust and confidence are implied, e.g., suits by a freedman against his patron, the promisee of a gift against the promisor, etc.
determine the existence of a partnership, codified in the Uniform Partnership Act, § 7, would have only a limited value at Roman law. They are really concerned with the claims of third parties against the partners, claims governed wholly at Roman law by the rules of mandate.

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(To be continued.)