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Max Radin

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Fundamental Concepts of the Roman Law

(This is the second of a series of articles being written by Professor Radin on Roman Law.)

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The stipulation created an obligation. It did so, we may say, of its own mere virtue without the aid of any legal theory or definition. And the obligation was the basis of an action, that is to say, any attempt at evading or disregarding or breaking the obligation might result in a constraint exercised by the obligor against the obligee within legally defined limits. Both obligation and action had been concretely and vividly in the minds of Romans for centuries before they attempted to state in general terms what an obligation was.

In the Institutes of Justinian there occurs a famous definition of an obligation: obligatio est iuris vinculum, quo necessitate adsstringimur alicuius solvendae rei secundum nostrae civitatis iura. This cannot really be translated but we may get some idea of its meaning from a free paraphrase like the following: “Obligation is a bond created by law in accordance with the laws of our community. This bond we can be compelled to sever by the performance of some act, generally the transfer of some thing.”

There has been some controversy about whether the older law would not have taken this as the description of an action rather than an obligation. It does not much matter, provided we do not think of action exclusively as a matter of procedural technique. The difference between the two terms is very like that which Hohfeld sought to establish between primary and secondary claims. The obligation was that which the transaction itself created. The action was the transmuted form of the obligation as it appeared in the petition of redress.

At the Common law this transmutation is fundamental and striking. A contracts to get services from B. His claim, however, will be for money damages. He contracts to get merchandise. His claim is again for money in lieu of the goods. Only in the rare

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1 Inst. iii, 13, pr.
cases of specific performance, whether affirmative or negative, is the "secondary" or transmuted claim a close approximation of the primary one. But at Roman law, the transmutation in stricti iuris transactions was formal rather than real. A bond, a vinculum iuris, had been created by our act. To loose that bond, solvere obligationem, the law demanded a specific act, the very act indeed which formed the content of the obligation. When the act, as in most cases, was a dare, that is, consisted in the delivery of a concrete res, it is easy to see how it could be enforced. When it was a facere, the doing of some other act, it is not so easy to see what the praetor or his appointee, the iudex, did to enforce it. Certainly there was no imprisonment for contempt of court. We must assume that a peremptory order to pay issued by a magistrate holding imperium would awe even the most contumacious debtor into obedience. Yet there were slippery debtors then as now, like the Damasippus of Horace's Satires, against whom one might have the most conclusive case and still be as far as ever from having one's money.\(^2\)

Whatever were the means of enforcing the condemnation, it is clear that in a stricti iuris negotium, like stipulation, the iudex condemned the defendant to do the thing he was obligated to do, to sever the bond in the only way such transactions permitted severance. When we turn to other transactions, to other acts creating obligations, we have a wholly different situation to examine.

The obligation we have so far been considering was that which a person in cooperation with another created by a ritually efficacious act. He probably would have called it an obligation even if he had not been fairly sure that the magistrate would add his powerful coercion to consciences that sought to free themselves from the bond. In a great many other cases besides stipulation, he was fairly certain that if he acted in a certain way toward another person, the magistrate would intervene to compel further acts between the parties. Some of the situations in which this was almost sure to happen were obviously of late origin and did not come to be a part of the law until the term obligation had got a great deal of moral coloring attached to it, but some of them were quite old, perhaps older than the stipulation itself. Yet it is likely that in all these cases, the duty created by the act or acts was called an obligation by an undiscriminating age only because the same kind of magisterial

\(^2\) Horace, Satires, ii, 3, vss. 69-73.
assistance was invoked as was necessary to make practically effective the half-magical bond of the stipulation.

The classification of these situations served a pressing practical need. Some easy means was required to discriminate the many transactions and situations which the magistrate will let severely alone from those to which he will give his invaluable aid. Several such classifications were attempted.

We know the classification made by Gaius about 150 A.D. because it is also the classification of the Common law. Obligations, many of our books still say, are founded on contract or tort, which with "implied contract" and "contract of record" would, at a pinch, cover, or seem to cover, almost any situation that got into court. Gaius, however, was not quite so primitive. He admitted a miscellaneous class, *ex variiis causarum figuris*, "from various types of situations"; and Justinian's Institutes rather boldly separated this miscellaneous group into quasi contract and quasi delict, (tort). Common law in the nineteenth century did not get further than to add the miscellaneous class of Gaius to its list of obligatory transactions, by adopting the term quasi contract, although many courts and writers of digests have, apparently, not yet got so far, lest they should seem to show an indecent haste in overtaking Gaius.

Modestinus, who wrote in the third century, made a suggestion which found little favor. He abandoned the word contract altogether, and used in its place the various bases of contract,—performance on one side, stipulation, agreement. To these he added statute, executive order, and finally wrongful act, as well as what we might call externally imposed necessity. He had accordingly seven sources of obligation and a classification that avoided pretty completely any abstract analysis.

The classification of Modestinus has distinct merit, but we shall be unable to do very much with it, so firmly have contract and tort established themselves as two coordinate and equally important

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8 Dig. 44, 7, 1, pr. The passage is suspected of being interpolated. Cf. what is said on the entire question of interpolations in the previous article, 12 California Law Review, 395, 398, n. 4.

4 The Cyclopedia of Law and Procedure, and the American Digest, even its Second Decennial, knows Quasi Contract only as a heading for cross-reference. Professor Keener, Professor Thurston and Professor Woodward have made collections of Cases on Quasi Contracts, but the term occurs very rarely in cases themselves.

5 Dig. 44, 7, 52.
bases of obligation. It will be noted that the first three, all treated as contracts in the ordinary terminology, have in common the element of conscious cooperation. The others lack this element, and three of these we may examine very briefly.

When Modestinus speaks of an obligation \textit{ex necessitate}, he is referring to a situation like the following. A slave is made his master's heir. He has no choice but to accept, or rather, the inheritance, with all its debts as well as its assets, is his without being assumed. This is a situation peculiar to the Roman law, which has no real counterpart in ours. Again by statute, a duty may be specifically imposed on A toward B, or a command of a magistrate may direct A to do some act in B's interest. The obligation issues out of the \textit{maiestas} of the legislative body or the \textit{imperium} of the magistrate. It is, to be sure, a \textit{vinculum iuris}. It has all the attributes of the definition of the Institutes. But it will be seen that both of the parties bound to each other in these situations are passive, that neither took any active steps which resulted in the creation of the bond.

Finally, there are certain acts which public opinion reprobates. These acts are wrongs and the wrongdoer finds himself under an obligation to pay money or deliver a res to the person wronged. Surely there is no conscious cooperation here. Indeed, we cannot say in any useful sense that even the obligee's act created the obligation, since it was not directed to any such end, but had a wholly different purpose.

The duty to obey a statute or a command of the magistrate is something which we do not need the concept of an obligation to understand. Commands issuing from such a source must have been drastically enforced long before the curious idea of binding up was ever transferred from the ritual of magic to that of stipulation. It was of the essence of the magistrate's \textit{imperium} that he could coerce. One of the symbols of his office was the ax and rods. He had no need of imposing an obligation, who could use the dreadful words: "\textit{I, lictor; caput obnubito: arbori infelici suspendito.}" "Go, lictor, veil his head and hang him to the baleful tree." But although the magistrate preserved order, and would doubtless prevent outrage between citizens in his presence, it was no part of his task to vindicate of his own motion wrongs committed

\footnote{Livy, i, 26, 6, 11.}
elsewhere. That was a matter of private vengeance. When, therefore, long before our sources of Roman law begin, the range of private vengeance was restricted to a limited class, something had to be substituted for it. This something was a right of action before the magistrate, and being, therefore, indistinguishable from an obligation in its effective form was classed with obligation.

At the Common law, the nature of the obligation created by a wrongful act is in general undisputed. The purpose is compensation. The victim is to be made whole. Since this is also the theory of damages in breach of contract, a certain confusion of attitude is sometimes caused, which is not altogether morally healthy. To the Roman, the obligation created by a wrongful act, the obligation *ex delicto*, had a very different purpose. It was wholly penal.

*Poena*, the penalty, is properly the ransom which the injured man may demand from the wrongdoer whom, in the exercise of self-help, he has seized *flagrante delicto*. We may plausibly guess that the magistrate intervened first to free the wrongdoer if he had paid the *poena*, and to refuse to free him unless he did so. Finally, he intervened to prevent seizure until the claim for the *poena* had been perfectly made out. It is clear that this ransoming penalty is in no sense the equivalent of the damage sustained, but is a means of placating the victim's wrath. It is a satisfaction with which the magistrate will force him to be content, in lieu of the more primitive satisfaction of a bloody vengeance on the transgressor.

The Roman delictual obligation always retained this penal character. The four delicts,—a term indifferently rendered by *delicta*, *maleficia*, *peccata*—which are specifically treated in the Institutes owe the stress laid upon them to historical accident. They were probably the first cases in which the praetor interfered. They are, in the order treated in the Institutes, theft, robbery, insult, wilful or negligent damage to property. This is clearly not the product of a scientific analysis, and it is far from being an exhaustive list of the delicts even so early as the Twelve Tables.

The first two, theft and robbery, deal with property rights. They consist in the wilful invasion of the *dominium* of an owner. The injured person can of course reclaim his property or its equivalent at any time. And over and above that he can claim a penalty which is set at four times the value of the res, if the thief is caught in the act, two times its value if he is caught later on, and three times its value, if, though the thief was taken later, the theft was
accompanied with violence. The owner could recover the penalty from all of several tort-feasors, which meant that he might get many times the value of the thing stolen and the thing itself to boot. Who was permitted to take advantage of this action is a matter we must consider later when we deal with property relations in general.

The third delict of the Institutes is iniuriae. It consisted of an invasion of the personality of the victim, in a sense that was, or at any rate soon became, peculiarly Roman. A blow, a mutilation, a bodily injury of any kind, was not conceived as lessening the property interests of the person injured, by reducing his earning power, but as a diminution of his standing in the community. He was less of a personage because of it, if he let it go unredressed. The same thing followed if he was insulted verbally or in a lampoon. Nor need the act be directed specifically to the plaintiff. Whatever the act, if it implied an affront, the person affected might claim the penalty. A commonly cited illustration is that of an insult offered to a married woman. This might give an actio iniuriarum to her, her husband, her father, her son, her brother, or to anyone who had a duty of protecting her. The inferences which spectators of the affront might draw was that her male protectors were too feeble or too cowardly to resent it.

Self-help was permitted here long after it had been frowned upon in cases of theft. As far as mutilation was concerned, self-help was given legislative sanction in the Twelve Tables, and though it dropped out of use some time after it seems never to have been formally abolished. In other cases of bodily indignity, such as a blow, the Twelve Tables set a fixed money penalty quite adequate in its time, but ludicrously inadequate when the value of money fell. Later, a more complicated system was established in which the penalty was fixed by arbitrators, very likely upon the basis of proposals made by the victim himself. How little the idea of compensation entered here may be seen from the fact that the amount was assessed in accordance with the time, place, occasion and the social position of the persons involved.

It may therefore be noted as a curious fact that damages for mental suffering which our courts find so difficult, and frequently

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7 Tab. viii, 2; Festus L. 363; Gellius, N. A. 20, 1, 14; Gaius, Inst. iii, 223.
8 This is the much cited story of Veratius, most accessible perhaps in Gibbon, Decline and Fall, iii, ch. 44. The story comes from Gellius, N. A. XX, 1.
impossible, to estimate, were the rule in the tort of *iniuriae* at Roman law. The attitude of not a few American courts, which have deliberately denied redress in these cases because of the assumed difficulty in determining the money value of mental distress, would have been incomprehensible to a Roman magistrate. American practise is, of course, determined by the fact that the theory of damages is compensatory, while juries are inclined to estimate them on a penal basis. We might look with a little envy on a system which in this respect derived its theory from its practise.

Theft was a wrong which lessened A's property in order to increase B's. By a series of statutes, of which the last was a very old law called the Lex Aquilia, a wrong was redressed which lay in the destruction or lessening of A's property without such benefit to the tort-feasor. That malice might find sufficient incentive in the mere harm caused to an enemy is an ancient human characteristic, but it is legitimate to suppose that in the majority of cases, it was rather negligence than wilful wrong that caused the damage which the Lex Aquilia sought to prevent. If that is so, the penal character of the action would inevitably suffer a great modification. There was no occasion for giving so large an inducement to the injured person to forego self-help.

Indeed, when the Lex Aquilia or its predecessors was passed, recourse to a court in lieu of self-help may already have been taken for granted in the psychology of the people. The point of view of the law appears shifted. It concerns itself with *damnum iniuriae datum*, damage caused without justification, not as in theft and *iniuriae*, with the reprehensible act itself. Evidently all that can be reasonably asked of the offender is to make good the damage, *sarcire damnum*. In cases of negligence, the injured person would ordinarily ask no more. In cases of malice, it was highly likely that acts amounting to theft or *iniuriae* would be incidentally committed which would give the basis for material penalties.

But even in the Lex Aquilia, the penal character of the action was not wholly lost sight of. After all, whether it was negligence or malice that caused the damage, the personal responsibility of the tort-feasor was engaged. The damage must be *iniuriae datum*, it must be inflicted without justification. For that reason the compensation that was demanded was not based on the value of the res at the moment of destruction or damage but on its highest value within a certain period before that, one year, if it was destroyed,
thirty days, if it was merely damaged. There can be no doubt that
this was intended to make the way of the tort-feasor a little harder,
but it is really not so different from strict compensation. In most
cases it must have been impossible to prove the value of the res
at the exact moment of loss. The highest value within a limited
period was also likely to be the only value that had been demon-
strably established. Yet in some instances the effect was penal, and
in all cases it was meant to be.

In the later European law, action under the Lex Aquilia became
generalized into the basic tort action. If the term res is given
the broad sense it will readily bear in Latin, any wrong is bound
to cause the loss of some res or the reduction in value of some
res. Since penalties became the exclusive province of a system
of criminal law, it is not difficult to see that a list of nominate torts
is hardly necessary when any wrongfully inflicted damage could
be redressed under such a general action. But in generalizing it,
the modern systems threw the emphasis back upon the wrongful
act. Liability was predicated upon fault, and it was not until the
last decades of the nineteenth century that the conditions of modern
industry compelled a readjustment of what seemed the most funda-
mental principle of delictual obligation.

The four delicts of the Institutes do not, as has been said,
exhaust the delicts which were actionable at Roman law. Some,
still enforced in the time of Justinian, were already ancient then,
and are of the highest interest, though apparently not of first rate
importance. One might sue the iudex, if, in the archaic phrase, litem
suam fecerit, if he meddled with the litigation; and he was charged
with doing so both when he was incompetent and when he was
corrupt.9 One might sue for tampering with the fidelity of a slave.
An important action lay for acts done in fraud of creditors, an
action both in its effect and in its presuppositions like the corre-
sponding action of the Common law.

Two actions which originated in the last century of the Republic
deserve special mention. These were the actions of duress and
fraud, quod metua causa and dolus. We shall meet these terms
again, but for the present need deal with them only as independent

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9 This is classified in Justinian's Institutes (iv. 5 pr.) among the quasi
delicts, doubtless because the iudex was as liable for ignorance as for
deliberate wrong. However, it seems to involve culpability in relation
to the particular sufferer more than the quasi delicts do.
sources of obligation. Whatever A had obtained by threats or deceit from B, he was condemned to restore within a specified time or pay fourfold damages, and third parties who had even bona fide profited by these acts were similarly liable to the extent of their enrichment. These actions are interesting because they are particularly clear examples of what were called arbitrary actions. The defendant is condemned in the alternative, either to restore or to pay quadruple damages. Evidently the praetor will no longer use his imperium to enforce the findings of his iudex, and the only manner in which the specific performance involved here could be effected was by threatening a larger judgment if the lesser one was not paid. A hopelessly insolvent debtor could disregard either.

All these other delictual actions have nothing but compensation in view. When penalties are mentioned, they are merely means to secure this compensation. The wrongs complained of came within the purview of the courts, at a time when men in general no longer needed to be bribed into refraining from self-help, when it was as natural to seek redress from a court as it had once been to get satisfaction from the person of the offender.

Yet there, was one striking instance in which self-help was retained. That was the case of adultery. In the time of Augustus, in popular feeling, the right of killing the adulterer, or of using any other form of vengeance was still unlimited. It began at about that time to be surrounded with restrictions but it was not completely done away with. Adultery, as a matter of fact, never became the basis of a civil suit. This one most unmistakable of maleficia did not grow into a delict for the obvious reason that an obligation could not be substituted for self-help, where self-help was still permitted.

Obligation then has a double source. We may tie ourselves up by doing acts that can have no other effect or meaning than that of binding us. Or we may commit wrongs and be compelled to pay money lest a worse thing befall us. But in the dealings between man and man, there were many acts which were neither ritual nor wrongful but which soon came to justify magisterial inter-

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10 Horace, Satires, i, 2, vss. 41-46.
vention and thus be grouped with those that create obligations. These were the transactions of good faith, *negotia bonae fidei*.

Suppose A had stripped himself of his property in B's interest, or performed services for B's benefit. If both are honest men and good citizens, the transaction will not end there. It may be a gift; in which case, B owes his benefactor at least gratitude, and under all circumstances ought not be permitted to evince an extreme ingratitude. And if it was not a gift, if there was an understanding that B should do something in return, or if right-minded men would do something in return, this something would be required of him by good faith, and as soon as the magistrate took good faith under his protection, an obligation to act in good faith was created.

No doubt "good faith" is a term of vague and uncertain content. Yet it does not mean more than the standard of conduct one may reasonably expect from one's fellows. There seem to have been Greek communities in which a promise not confirmed by oath or secured by pledge was not obligatory. That is only another way of saying that in these communities, no one took such promises seriously or regulated his conduct in reliance upon them. It was therefore not bad faith to break them. But at Rome, whatever may have been the reason, men did take such understandings seriously, and when they did so, they claimed the magistrate's aid by as good a right as in any other case. Just as the magistrate's conscience shuddered at the breach of a bond created by the ritual of stipulation, just as it seemed unconscientious that a wrongdoer should go literally scot-free, so in other instances, *bona fides* made an urgent demand upon his intervention.

Now, transactions of good faith are as various as human relations. A great many schemes can be devised into which most of them can be made to fall. One that is as good as any is the system devised in the third century by the jurist Paul. Just as in the case referred to in note 3, supra, this passage is declared to be interpolated. The evidence, in my opinion, is inadequate to establish that. Indeed the classification is quite consistent with the habit of mind of Paul, whom v. Ihering, as Professor Munro Smith tells us, called "the Puchta of the ancient world."

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11 Dig. 19, 5, 5. Just as in the case referred to in note 3, supra, this passage is declared to be interpolated. The evidence, in my opinion, is inadequate to establish that. Indeed the classification is quite consistent with the habit of mind of Paul, whom v. Ihering, as Professor Munro Smith tells us, called "the Puchta of the ancient world."
It will be noticed that the transaction is a visible external act, a *dare* or a *facere*. Until that takes place, whatever the understanding of the parties, there is no demand in good faith for the intervention of the magistrate. The relations of the parties need no readjustment, because they have not yet been disturbed. And when the act has been done, the readjustment that the praetor will enforce is not based on the understanding of the parties. The recipient of the *dare* or the *facere* is not bound because the two parties have agreed on a certain give and take. The meeting of the minds, the real or the illusory character of the consent has little to do with it. The praetor will try to make the recipient do what an honest man would wish to do under the circumstances.

But the understanding between the parties, their agreement, their consent, was not altogether irrelevant. If it did not create an obligation, it measured it. If we take the first species of Paul, *do ut des*, of which the commonest form was the exchange, it is plain that the understanding about what the things were that were to be exchanged, must have been reached before the initial transfer took place. When it does take place, A feels that he is entitled to counter-performance. He certainly could not demand anything more, and B could obviously not offer anything less. They are both estopped,—we need not balk at the use of this excellent word, even in Roman law—to the extent that their words and conduct have indicated. It may well be that the magistrate, or his *iudex*, might question the equivalence of the counter-performance. With that the *iudex* has nothing to do. The plaintiff can not in good faith ask his associate in the transaction to set a higher value of what was first transferred than he himself had done. Perhaps men of an especially sensitive morality, philanthropists or saints, would do so. But it was not reasonable to expect that people ordinarily encountered should be philanthropists or saints, and good faith was merely this crystallized reasonable expectation.

A group of transactions which would all have been put into the framework, *do ut des*, had it existed when these transactions originated, consists of those which in the Institutes are called Real Contracts. The name was applied to them because they all began with the delivery of a res from A to B, and they were so familiar and so old, that the mere naming of them would constitute a sufficient understanding between the parties as to what was reasonably to be expected of them in the premises. The Real Contracts were the
mutuum, or loan for consumption, the commodatum, or loan for use, the pignus, or pledge, and the deposit, terms which, even in their Latin form, have been orthodox elements of Common law terminology, since the case of Coggs v. Bernard.12

Some of these contracts are certainly older than law itself; that is, they must have been frequently entered into and have forced themselves on popular attention before a magistrate was ever called upon to vindicate their breach or any breach. When it became common to call everything that justified the intervention of a magistrate an obligation, it was impossible to refuse that name to the bond created by these transactions, although it is likely that these transactions were longer left to the consciences of individuals to adjust than the stipulation or the delict.

Once admitted to be obligations, they had the serviceable characteristic that there was an obvious point at which to affix the obligation. That was the delivery of the res, to be returned in genere in the case of the mutuum, and in specie in the other cases. Later practise introduced a number of refinements into these common situations, and these readily enough became a part of the complex that went under the name of each of them, so that it still remained enough to name the transaction in order to apprize the participants of what in good faith was expected of them.

There was one obvious obligation of the recipient. He had at some time to return the res in kind or in specie. If the thing had been lost without anyone's fault, the giver could not very well, ex fide bona, demand it. Nor was there good faith or good sense in such a demand, even if the thing was lost through the recipient's carelessness, if as in the case of deposit, the giver ought to have taken the recipient's bad habits into account. A borrower for use on the contrary, whether known to be careless or not, might reasonably be expected to exercise an unusual degree of diligence, while in the case of a loan for consumption, such as a loan of money, it was certainly immaterial how careless or careful the borrower was of his money. He none the less owed repayment.

This matter of due care has been somewhat excessively schematized. It is not really correct to say that one of the obligations of the recipient of the res, in commodatum, pignus or deposit was to use a certain amount of care. No action lay against him, if he did

12 (1703) 2 Ld. Raymond 909, 1 Smith L. C. 369.
not. But the amount of care was very material in determining the bona fides of the demand for the restitution of the res. It is likely that a nice discrimination of degrees of care did not take place until later on. Certainly the three degrees of care, which Lord Holt\(^{13}\) thought he found in the Roman sources, are not there at all. The distinction between kinds of negligence, between *culpa levis in abstracto* and *culpa levis in concreto*, between both of these and *culpa lata* or *lato ir*, was made either by the civilians or by the compilers of the Digest. When they occur in our texts, they seem to be loosely descriptive words rather than technical terms.

All these "real" contracts were meant to be gratuitous. The *mutuum* carried no interest unless a special stipulation for interest was made. The care of the property in the deposit, its use in the *conmodatum*, could not be paid for. If an agreement for payment was made, it denatured the transaction. It was no longer one of the contracts named, but a wholly different one. Yet a great many collateral agreements could be made, concerning the place or the nature of the use or custody, and these were eminently material in determining the good faith of demanding restitution of the res. If a borrower could not restore the property and had been guilty of carelessness, he might still plead by way of exception, that he had been specially exempted from the duty of care by the lender.

In the action on the stipulation, the primary obligation was also the secondary one. What the defendant had promised is what the plaintiff asked the court to assist him in getting. In delictual actions, a penalty was demanded. But in actions arising out of real contracts, the primary obligation could generally not be enforced. In most cases the recipient of the res failed to restore it, not because he would not, but because he could not. The res had been destroyed through his negligence. By the Aquilian law, damage resulting from negligence had long been actionable, but, as we have seen, the penal character of the demand had been whittled away to what in most cases must have been mere compensation. In these real contracts, there was the less reason for attaching a penalty to the defendant's negligence, because the plaintiff was no longer, as in all delicts, a passive sufferer, but had actively participated in bringing the transaction about. If good faith justified the claim for redress, this claim could never go beyond the restoration of the status quo, and since by hypothesis, that was strictly speaking impossible, the

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\(^{13}\) Coggs v. Bernard, supra, n. 12.
money value of the lost res was an approximate equivalent. The transmutation of a primary claim of varied content into a secondary claim that pretty uniformly sounds in money damages,—a transmutation characteristic of the Common law system—is clearly presented at Roman law for the first time in these actions based on good faith.

All the contracts that could be fitted into the four species of Paul, with the exception of the real contracts of the Institutes and the so-called consensual contracts, were in the later Civil law called Innominate,—a term which means unclassified, or miscellaneous. Exchange was the commonest, and the status of exchange was for a long time in doubt. In the main, these contracts had no great economic importance, but they were extremely convenient frames into which new economic situations could be put. As a grotesque example, we may cite the fact that in the witchcraft trials of relatively modern times, the compact between the witch and the Devil was declared to be of the form, do ut facias.14

VII

Paul apparently meant his scheme to fit all contracts, including those which in the Institutes are classed as "consensual." These are emptio-venditio, or sale, locatio-conductio, which included lease, hiring and contracts for services, societas or partnership, and mandate, which, among other possibilities, covered agency. Evidently, even if these contracts had no theoretical common basis, their enormous practical importance would have justified a separate treatment.

A theoretical common basis had, however, long been found for them. They were declared to be based upon mere consent. The obligation arose as soon as the parties were of one mind as to the transaction, and that agreement was to be inferred, not from the performance of a fixed ritual, but from any of their words or actions. The elements of the transaction could be analyzed and the performance of each one secured by stipulation. In many cases that was done. But it was not necessary. The agreement was itself obligatory.

Though sales were plainly the most important and must have been in some form known from the remotest antiquity, the develop-

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14 Torreblanca, Libri de Magis, (1613) quoted by Wächter, Die Hexenprozesse in Deutschland, Beiträge z. Deut. Gesch, p. 87.
ment of the consensual element can best be seen in mandate, the least characteristic of all this group. Mandate consisted in instructions given by A to B to do some act wholly or partly on A's behalf, or at any rate, not wholly on B's behalf. We may call this agency, if we take care not to drag in the legal connotations of this term, and above all to remember that the contract created no relations whatever between the principal and third persons, except so far as general property rights permitted the third person to pursue his res into the hands of anyone enriched by it.

In mandate, until B had acted, A might renounce or B might repudiate the transaction. The obligation consequently depended on the arbitrary will of either party. We should be tempted to call this no obligation at all, following excellent Roman authority. When we add to that that the transaction was gratuitous, that to accept money for the services, transformed the mandate into something wholly different, there seems the less reason for treating this transaction as different in type from the real contracts, although the res here, as in the Innominate contracts, was a facere.

But there was an important qualification to the right of repudiation or of renunciation. Neither might be made unseasonably. If A, relying on B's expected services, can no longer get them done without additional expense; or if B has involved himself in such preparation for these services that he cannot countermand them without loss, there was at least the obligation in good faith to make the loss good. This still makes the obligation depend upon an actual external act. But there was one special situation in which it was necessary to go further. Suppose, at the moment of repudiation, B had as yet taken no steps, but that his inaction had caused the loss to A of an opportunity that does not again present itself. Here is a form of damage that good faith may well wish to compensate, but if we seek a moment at which to attach the obligation, it can only be when the mandate was accepted, when the agreement was reached.

Max Radin.

School of Jurisprudence,
University of California.

(To be continued)