SOME CRITICAL REMARKS ON THE ROMAN LAW OF OBLIGATIONS*

1. — Everybody knows that classical Roman lawyers did not develop a systematic theory of what we call 'contract' today. Indeed, in modern European continental law, 'contract' is a general positive concept, which means the acknowledgement of a transaction between two or several persons, producing legal effects, the wideness of which can be various. From the Code Napoléon (art. 1101) to the German BGB (1st book, 3rd section), from the Swiss legislation (Civil Code, art. 7, referring to Obligations Code) down to the Italian Codice Civile of 1942 (art. 1321), everywhere the concept of contract is identified with a bilateral act. This act gives rise to an obligatory bond or any other legal one, or even to a bond on which may depend the settlement, the modification and the extinction of a juridical or at least of a patrimonial relation. Besides, this is a concept, which obtains also in the field of English law, although every concept elaborated by Anglo-American legal science always seems more closely connected with the *ratio decidendi* of a single judgement passed, according to the spirit of case-law jurisprudence. Freedom of agreement, then, is a rule both in English and in continental law.

Roman law, on the contrary, recognizes only some individual types of contracts, so that contract in a general sense never means, of course, anything but an abstract conception. Moreover, by the name of *contractus*, classical jurists mean exclusively obligatory contracts, that is

* This is the general outline of a lecture I have given (with a seminar) as a visiting professor both at the Hebrew University of Jerusalem and at the Law Faculty of Tel Aviv, being a guest of the Israeli Government, on April 19th and 26th 1977. This is also a good opportunity to renew my best thanks to my dear colleagues and friends Mr. R. Yaron, Mr. A.M. Rabello (Jerusalem) and Mr. G. Procaccia (Tel Aviv). It remains only to add that nearly two months before, having been invited to England as a lecturer of Roman Law, I had already spoken about the same subject-matter to the students of Civil Law at London University College and discussed the problems of Roman contract system with many scholars of legal history at Trinity College, Cambridge.

to say each lawful act among those producing an obligation, sanctioned by the so-called *ius civile.*

2. — Nevertheless, is the Roman concept of *contractus*, in the classical jurists' thought, properly and without reserve identifiable with a bilateral act giving rise to an obligatory bond?

Common opinion usually answers this question in the affirmative, though Arangio Ruiz[1] speaks of this as a "latent juridical thought" and other scholars[2] maintain that the original meaning of the Latin word *contractus* was not this. It is necessary, then, to verify this opinion; and we shall begin with Gaius's Institutes, where the starting-point of the contractual system would have been, according to this opinion, the idea of contract as a bilateral act.

3. — First of all, this is the right place to remark that, when Gaius speaks about *obligationes contractae*, he does not only speak about obligations arising *ex contractu.* Indeed, the *obligationes quoquo modo contractae* (2, 14 and 2, 38) were, in his mind, the *obligationes ex contractu* as well as the obligations arising *ex delicto*, because the *modus contrahendi obligationem* did not leave out any legal act from which obligations resulted.

On the other hand, seeing that the *modus contrahendi obligationem* can be both a *negotium gestum* and a *maleficium*, why on earth does the word *contractus* not denote, beside contracts, also unlawful acts (i.e. *delicta* or *maleficia quibus contrahuntur obligationes*)? This question involves the origin of obligations, but the problem we are speaking about does not concern the sociological priority of *negotium* to *maleficium* or of *maleficium* to *negotium*: indeed, while according to Gaius every obligation arises either from contract or from delict, it was only a licit act to create an obligation originally, so much so that the *obligatio ex delicto* took the place of revenge through the change of an agreement into a legal composition between the offender and the

[1] *Istituzioni di diritto romano* (14th ed., Naples 1960; many reprints) 291 f.

[2] E.g. — in the wake of Pernice and Perozzi — Grosso, *Il sistema romano dei contratti* (3rd ed., Turin 1963) 29 ff., and Wunner, *Contractus. Sein Wortgebrauch und Willensgehalt im klassischen römischen Recht* (Cologne-Graz 1964) 4–92, with some of the authors mentioned by them.

injured party.[3] That is why the word *contractus*, which at first could mean nothing but the *negotium quo contrahitur obligatio*, never broke away from licit acts producing obligatory bonds, whereas wrongful acts causing damage (i.e. *delicta*), once obligations arising from delict were recognised, became a mere appendix to the systematization of contracts in the scheme from which that of the Gaian handbook is obviously derived.

4. — Now let me turn to the well-known dichotomy *contractus-delicta* (Gai. 3, 88). Contrary to what has been assumed by scholars again and again,[4] Gaius's statement "*omnis ... obligatio vel ex contractu nascitur vel ex delicto*" cannot have been defective or inaccurate. Therefore, this is a classification of all possible sources of obligation, so that *contractus* must needs embrace any legal act from which obligations resulted, delicts alone being excluded. Moreover, we must not forget that Gaius is pursuing a pedagogic ideal in his works, as he declares in the foreword to his commentary on the Twelve Tables (D. 1, 2, 1), "in every field I think that perfect which consists of all its constitutive elements" (*in omnibus rebus animadverto id perfectum esse, quod ex omnibus suis partibus constaret*)[5].

Well, then, the fact of the matter is that in Gaius's list of the ways in which an obligation is contracted we meet not only with the *indebiti solutio* (Gai. 3, 91), causing the duty to repay money received by mistake, although one cannot place the *indebiti solutio* under the head of contract as a lawful bilateral act, but we find three more licit unilateral acts: *dotis dictio* (Gai. 3, 95 a), *iusiurandum liberti* (Gai. 3, 96) and *nomen transcripticium* (Gai. 3, 128–130).

Let me speak at first about the doubt expressed by Gaius 3, 91, when he writes that the *condictio indebiti* does not properly arise from an

[3] See above all Betti, *La struttura dell'obbligazione romana ed il problema della sua genesi* (2nd ed., Milan 1955); Id., *Istituzioni di diritto romano* II, 1 (Padua 1962) 27 ff.; De Visscher, *Les origines de l'obligation ex delicto*, 1928 = *Études de droit romain* I (Paris 1931) 255 ff.; and further Thomas, *Textbook of Roman Law* (Amsterdam–New York–Oxford 1976) 218 f.

[4] Cf. most of the contributions on this topic, as pointed out by Thomas, op. cit. 221, n. 82.

[5] This statement by Gaius has been especially emphasized by Casavola and by myself: *Gaio nel suo tempo* (Naples 1966) 9–11, 21 f.

obligatio ex contractu. It is easy for an impartial reader to observe the jurist getting muddled not because the duty to repay money received by mistake and enforceable by *condictio indebiti* is regarded as having its foundation in a contract without agreement,[6] but because — as Gaius himself says — a person who thinks that he is paying a debt is seeking to discharge an obligation rather than to create one (*sed haec species obligationis non videtur ex contractu consistere, quia is, qui solvendi animo dat, magis distrahere vult negotium quam contrahere*). Thus Gaius does not own that his dichotomy must be deemed as insufficient, since the *condictio indebiti* is certainly not an *actio ex delicto.* On the contrary, he granted that the term *contractus* can be used to mean a lawful unilateral act, like *indebiti solutio,* from which an obligation arises, according to the civil law. One point, however, should be assumed once and for all: unlike some lawyers before him — and Julian among them (see D. 26, 8, 13) — Gaius doubted the soundness of a strictly detached view dealing with *contrahere,* according to which a ward, if something not due to him be given to him in error without his tutor's authority, was not liable to a *condictio* for the sum not due, any more than he would be for a loan advanced to him. And the meaning of this doubt is that the writer puts forward the exigency of looking always into the purpose (*animus*) of him who does an act, from which an obligation can arise?[7]

Let us next consider the cases, in which one incurs a verbal obligation by a formal declaration of the constitution of a dowry (*dotis dictio*), by the sworn promise of a manumitted slave to perform specified services for his former master, now his patron (*iusiurandum liberti*), and where one incurs a literal obligation by an entry in someone else's ledger of an advance allegedly made to him (*nomen transcripticium*). Three lawful acts, from which three obligations arise, are at stake: but none of them is a bilateral act, connoting agreement.[8] Indeed, *dotis dictio* and *iusiurandum liberti* are always made by the words of a single person, without any previous question of his future creditor (*uno loquente, nulla praecedente interrogatione*: see Gai. 3, 95a–96 in comparison with Gai.

[6] Such is, on the contrary, the belief on many people: see, among others, Arangio Ruiz, op. cit., p. 293.

[7] Biscardi, *Postille gaiane,* in *Gaio nel suo tempo,* 24: cf. Grosso, op. cit. 7, 34 f.

[8] See again Biscardi, ibid. 22.

Epit. 2, 9, 3–4). As regards *nomen transcripticium*, we have just said that it consists in entering an advance made to someone else in one's ledger, the entry itself imposing the duty to pay upon the debtor, even if absent at the moment of the entry (Gai. 3, 128–130). Nonetheless, each of these three acts is called by the jurist *contractus* and never otherwise (see again Gai. 3, 95a–96 and 128 in connection with Gai. 3, 89).

At any rate, why on earth would Gaius have adopted a standard of classification according to the source of the obligation (*contractus-delicta*), that would not be suitable for every legal act from which the obligation arises, including not only every agreement and every wrongful act the civil law recognized as causing an obligatory bond, but also every lawful unilateral act bringing it about, praetorian liabilities being excluded? In fact, besides the nine bilateral acts connoting agreement (*mutuum*, *fiducia*, deposit, *commodatum*, stipulation, sale, hire, partnership, mandate), there were as many unilateral acts from which obligation arose. Of the former acts, Gaius enumerates six *in sede materiae*, of the latter only four. It cannot be that he has forgotten the other five, *negotiorum gestio*, guardianship, co-ownership without partnership and the two kinds of legacy imposing an obligation on the heir (*legatum per damnationem*, *legatum sinendi modo*). Now, although in their classifications Roman jurists did often aim at convergence-points to collect juridical matter under them, being satisfied if they could draw the reader's attention each time to the anomaly of the few abnormal cases,[9] is it possible that here the abnormal cases were nine out of eighteen? No, certainly not![10]

On the other hand, the assumption of some, that in attempting to complete Gaius's contractual system by bringing into it the acts left out by the author, one could insert among the contracts neither legacy nor management of affairs nor guardianship, regarding liability of *tutor* to

[9] Just so Arangio Ruiz, *La società in diritto romano* (Naples 1950) 40, and previously *Studi Riccobono* 4 (Palermo 1936) 379 ff.

[10] Not to have realized this plain truth is what caused several distinguished Romanists to lose their bearings. Gaius was perhaps a modest lawyer, and furthermore an out-of-date teacher in his times, but he had a clear mind. This is what I was thinking when I recently considered Sargenti's vain effort to refuse, as Gaius's presupposition, any other idea of *contractus* but the bilateral obligatory act: cf. his fine work *La sistematica pregaiana delle obbligazioni e la nascita dell'idea di contratto*, in *Prospettive sistematiche nel diritto romano* (Turin 1976) 455 ff.

ward, is quite groundless. It is, indeed, not difficult to raise the following objections to such an assumption.[11]

To begin with legacy, in the case of *legatum per damnationem* as well in the one of *legatum sinendi modo*, the heir contracted an obligation by words (*verbis*), that is, by each of the testator's dispositions *heres meus damnas esto dare* ... ("be my heir under the charge to give ...") or *heres meus damnas esto Lucium sinere rem capere sibique habere* ("be my heir under the charge to let Lucius take the thing and hold it for himself"), both of which were orally resumed in the subsequent *nuncupatio testatoris*: "all that has been written in these wax-tablets ... I now bequeath solemnly" (*haec ita, ut in tabulis cerisque scripta sunt ... ita lego*).

As far as *negotiorum gestio* and *tutela* are concerned, our legal sources bear witness to such a wide gamut of meanings of the expression *re contrahere*, that we may include within the limits of the *obligationes re contractae* not only the obligations arising from *fiducia, depositum* and *commodatum* — omitted by Gaius *in sede materiae* — but also the debts the manager and the guardian are charged with, as well as the compensation for damages and expenses, that co-owners without partnership or joint-heirs incur with each other when common ownership or inheritance has to be divided between sharing parties.

In point of fact, what does *re* (the ablative of *res*) mean in the construction *re contrahere*? Granted *re* hints many times at the delivery of a physical thing (*datio rei*) with various effects, for instance in the sense that by *mutuum* ownership in what was lent passes to the borrower, but of *res deposita commodatave* only detention was transferred to the debtor. However, there are cases also in which *re contrahitur* (that is one incurs a real obligation) when a *res* like the management of a business was taken over by someone. That is why the manager and the guardian as well as the co-owner or the co-heir in the so-called *communio incidens* are liable to the *dominus negotii* or to the ward or to each other. Further, it is precisely the broad meaning of *res* that permits Gaius himself to group the four obligations arising *ex delicto* (Gai. 3, 182) in a single class (*uno genere*), in the *Res cottidianae* (D. 44, 7, 4 in

[11] See my foregoing remarks in *Gaio nel suo tempo*, 22 f., n. 50.

comparison with I. 4, 1 pr.): "Of these obligations, there is a single class, because they all arise from the act itself (*nam hae re tantum consistunt*), that is from the wrongdoing (*id est ipso maleficio*), namely from theft, robbery with violence, wrongful infliction of damage and contumely".

A new piece of evidence of the exhaustiveness peculiar to Gaius' dichotomy *contractus-delicta* is to be found once again in Gaius himself (4, 182), where we come across five specimens of *contractus*, as opposed to some *delicta* (*plurimum enim interest, utrum ex delicto aliquis an ex contractu debitor sit*), and three of them are *fiducia*, guardianship, *depositum*, that is three *contractus* left out *in sede materiae*. What is more, the *contractus* of guardianship is of course a unilateral act.[12]

5. — However, the most important argument to be put forward in favour of this Gaian dichotomy as an exhaustive classification of all legal acts from which obligations arise, consists -- at least from the point of view of Gaius' technical language — in its definition as a *summa divisio obligationum*.

What, indeed, does *summa divisio* mean? *Summa divisio* is nothing but "the principal division", that is to say "the most general" and "the biggest" of all divisions. Briefly and precisely, *summa divisio obligationum* means "the chief division, including all obligations, none excepted." Likewise, the *summa divisio personarum* (Gai. 1, 9 in connection with Gai. 1, 10–12) into *liberi aut servi* includes all men, because all men are either free or slaves; likewise, the *summa divisio rerum* (Gai. 2, 2 in connection with Gai. 2, 3 and 2, 10) into *res divini aut humani iuris* includes all things, nothing excepted: everywhere, a third category of men or things, on the same level, does not exist. Thus, according to Gaius, there is no obligation not arising either from contract or from delict.[13]

To go deeper into this matter, the rhetorical method adopted by Gaius was the so-called *definitio divisionum*, namely the systematic description of a certain matter or concept (*genus*) through a ramification of *formae* or *species*, in which every matter or concept can be divided without leaving out anything at all (*in quas genus sine ullius praetermissione dividitur*), since — as Cicero says (*Topics*, 28 ff.) — the number of

[12] Ibid., 23 with n. 51.

[13] See again Biscardi, loc ult. cit., with regard also to the following considerations.

formae or *species* of which every matter or concept is made up seems always to be fixed (*formarum ... certus est numerus, quae cuique generi subiciantur*), and therefore any omission would constitute a logical fault.[14]

One cannot even reproach our jurist for having been mistaken in the use of the two dialectical instruments *genera* and *species*, when, after dividing all obligations into the *species* of those arising from contracts and those arising from delicts (Gai. 3, 88: *quarum summa divisio in duas species diducitur*), he gives the fourfold classification of obligations arising from contract according to the following *genera*: real, verbal, literal and consensual contracts (Gai. 3, 89: *harum autem quattuor genera sunt*).[15] Seemingly, not really, there is here a reversal of technical terms. It stands, indeed, to reason that — while the thread of the thought (in Gaius's Institutes or in his model) seems to be founded in the rhetorical common-place of *coniectura* — the use of both dialectical instruments we are dealing with (*genera* and *species*) is due to the starting-point of a plurality of obligations, from which, through four *genera contractuum* and later through a fifth one (*unum genus delictorum*: see Gai. 3, 182), the widest *genus obligationis* was created by induction, so that this *genus*

[14] The problem of the logical and historical connection between *genera* and *species* has been re-examined just now, in the wide-ranging and acute study by Talamanca in a volume of the Accademia Nazionale dei Lincei (Quaderno 221: *La filosofia greca e il diritto romano*, Rome 1976–77) and entitled *Lo schema 'genus-species' nelle sistematiche dei giuristi romani*. I would like here to point out also that the first part of the same volume contains another study, linked with the subject and worthy of the highest praise: Grosso, *Influenze aristoteliche nella sistemazione delle fonti delle obbligazioni nella giurisprudenza romana* (ibid. 1, 139–148).

[15] Gaius's fourfold classification of obligations arising from contract, which turns into the *quattuor genera contractuum*, is the subject-matter of a recent valuable article by Cannata, *La 'distinctio' re-verbis-litteris-consensu et les problèmes de la pratique*, in *Festgabe von Lübtow* (Berlin 1970), 431 ff. (of whom I should like to mention also two more essays: "Sulla 'divisio obligationum' nel diritto romano repubblicano e classico", in *Iura* 21 (1970) 52 ff.; "La classificazione delle fonti delle obbligazioni: vicende di un problema dommatico e pratico", in *Materiali per una storia della cultura giuridica*, Bologna 1974, 47 ff.). The author maintains that such a *distinctio* ought to be connected with the practical exigency of giving a ground to the rule of *contrarius consensus*, and that at any rate it is inseparable from the history of interpretation concerning the content of each contract. This does not clash with my opinion, although I do not agree that the fourfold classification of *genera contractuum* would have been born at one birth with the new idea of contract, the former being much older than the latter.

had further to be divided by deduction into the two comprehensive *species* of *obligatio ex contractu* and *obligatio ex delicto.*[16]

6. — Nevertheless, Gaius' fondness for the dichotomy *contractus-delicta* may be nothing but the last flash of an old theory. Truth to tell, in the earlier classical law Labeo is, already, credited with restricting the concept of acts which were contracted to the consensual contracts, in opposition to the current use of *contrahere* (D. 50, 16, 19: *contractum autem ultro citroque obligationem, quod Graeci 'synallagma' vocant*). This is an approach towards a strict or technical meaning of *contrahere*, which not only isolates the participle *contractum* used as a noun in the limited range of transactions or lawful bilateral acts connoting agreement, but what's more in the quite limited one of bilateral relationships producing mutual obligations, like sale (*emptio venditio*), letting and hiring (*locatio conductio*) or partnership (*societas*), according to examples given by Labeo. Even though Labeo's approach — coming from the Aristotelian idea of 'synallagma', as the jurist himself does not fail to declare — did not have a large following among classical jurists (similarly his attempts at distinguishing the senses of *agere* and *gerere* from *contrahere* were unsuccessful), the fact remains that Labeo found too broad a meaning of *contrahere* and *contractus* unsatisfactory.[17]

On the other hand, another shrewd jurist probably of the late first and early second century after Christ, Sextus Pedius, an elegant dictum of whom is reported by Ulpian (D. 2, 14, 1, 3), recognizes that every contract has an agreement at its base: "So general is the term agreement (*conventio*), that there is no contract, no obligation — *scil.* arising from contract — which does not contain an agreement in itself (*nullum esse contractum, nullam obligationem, quae non habeat in se conventionem*), even though it be made by delivery of a thing (*datio rei*) or by words:

[16] To the mention of Orestano's work, "Obligationes e dialettica", in *Jus* 10 (1959) 18 ff., which I suggested in my *Postille gaiane* 23 n. 52, I should like to add here Martini, "Genus e species nel linguaggio gaiano", in *Synteleia Arangio Ruiz* (Naples 1964) 462 ff., who cites with reference to this question, besides De Visscher and Villey, one of my lectures, that I gave in 1963 at Urbino Free University. See furthermore, of the same author, "Le summae divisiones in Gaio", a contribution to *Seminaris romanistico gardesano* (I), Milan 1976, 89 ff.

[17] Very important for the exegetical study of *D.* 50, 16, 19 were, in the last years, the contributions of Albanese, *SDHI* 38 (1972) 189 ff., and Sargenti, op. cit., 471 ff. Prior literature to be found in Kaser, *Römisches Privatrecht* 1 (2nd ed., Munich 1971) 523 n. 15.

for even a stipulation, which is made verbally, is nugatory if there be no agreement".[18]

Hence, from a certain time onwards, *contractus* did not exist without agreement. It followed that bilateral relations which did not rest on agreement were not contractual. Hence, also, the great difficulty in discovering a factor common to other lawful acts producing obligations different from contracts or transactions importing agreement.

To get out of such a scrape there was nothing but a choice between two solutions, which were imposed on later classical jurists by the logic of things[19]: either what I call *fictio contractus* (fiction of an agreement) or the concept of *variae causarum figurae* (various types of causes).

To these two solutions I will devote my further remarks.

7. — There are some jurisprudential texts of the Severan period, where we meet with the endeavour to justify those obligations which don't arise from an unlawful act, but yet are not founded on agreement, as obligations arising from something like an agreement, that is from the shadow of a contract.

Let me read a fragment of Ulpian's commentary *ad Sabinum* (D. 50, 17, 19 pr.):

> *Qui cum alio contrahit, vel est vel debet esse non ignarus condicionis eius: heredi autem hoc imputari non potest, cum non sponte cum legatariis contrahit.*
> ["He who makes a transaction with someone, either is or must be aware of the counter-party's legal status: but this rule does not obtain in the case of heirs against legatees, for the heir might appear to be agreed on the transaction without having the free will to oblige himself".]

Do you see what the jurist tries to state by these words? I think we have to distinguish two different cases. While, for instance, a borrower of money restoring what he has borrowed to his lender, performs no

[18] It is enough to point out once more for this passage (that was a favourite piece of our great Riccobono, *Studi Bonfante* 1, Milan 1929 140 ff., and *Stipulationes contractus pacta*, 1935, 309 ff.) the up-to-date bibliographical information given by Kaser, op. cit. 1, 239 n. 31, 523 n. 11–13, 525 n. 29.

[19] This view has been cursorily raised at the end of my *Postille gaiane*, 24.

valid act, if he is not aware that his lender was a ward and he pays without the participation of the guardian (*tutoris auctoritas*), on the contrary every debt of the heir burdened with a *legatum per damnationem* or with a *legatum sinendi modo* in someone's favour, resting on something which is not an agreement though it looks like it, can always be discharged without previous awareness of the legatee's status.

In another passage, extracted from the 10th book of his commentary *ad edictum* (D. 11, 7, 1), Ulpian himself, referring to *negotiorum gestio funeraria*, says:

> *Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum herede.*
> ["He who spends money on someone's funeral appears to make a transaction connoting agreement with the deceased, and not with the heir".]

The matter at hand is the grant of an *utilis actio negotiorum gestorum contraria* (properly called *actio funeraria*) to him, who bore the cost of someone's funeral and it stands to reason that the obligation of the deceased man's heir to repay the manager's expenses is connected by the jurist to an artificial *contractus*, namely to the fiction of an agreement between manager and deceased.

Perhaps Paul also thought the same, when he tried to relate in general terms, by assimilation rather than by identification, to the concept of *contractus* the *negotiorum gestio* in all other cases in which it was available (on the analogy of *unus contractus* or *multa negotia* — *alius* and *alius contractus* — according to circumstances: D. 3, 5, 15).

A reference to Marcellus — one of the jurists flourishing under Antoninus Pius and Marcus Aurelius — probably on account of a starting-point seen in a note of his on Julian's *Digesta*, is further to be found in a third passage by Ulpian (D. 42, 4, 3 pr.), dealing with *communio incidens*. Here the jurist, with regard to *missio in bona pupilli*, whenever the ward is undefended on trial, discusses the question whether *bona pupilli* must be sold by auction or merely possessed in the following case.

A co-owner of the ward's father wants to claim the realization of his share by the *actio communi dividundo* against the son-heir, but it is

necessary to distinguish — as Julian already suggested — the simple division of common property from the liability, towards each other, for damages and acquired fruits, and also — it seems just implied — whether liability depends either on the father's or the ward's and guardian's acts. Well, then, in order to show the legal foundation of duties and rights between joint owners of the thing, one uses the phrases "*qui nihil cum pupillo contraxit*" and "*cum contractus ex persona patris descendat*". This means, therefore, that both duties and rights (enforceable by *condemnatio*), which existed without any underlying agreement, had their basis, however, on a lawful activity to be compared with *contrahere* in the proper and technical sense of the word.

Thus we should be carrying coals to Newcastle by harping on the string of this scheme of ideas.[20]

8. — The conception of *variae causarum figurae*, found in the work *Res cottidianae*, appears more realistic than the *fictio contractus.*

It is common knowledge that the authenticity of this work, ascribed to Gaius in the Digest — and also styled *Libri aureorum* — is disputed. The work comprises what is obviously an elaboration of Gaius' Institutes,

[20] It will be, rather, worth while calling the reader's attention to the fact that this scheme of ideas could be listed among the cases, that Daube calls "impossibilities" in the law. Indeed, there is Daube's work, "Greek and Roman Reflections on Impossible Laws", *Natural Law Forum* 12 (1967) 1–84 (see a report on it, written by Katzoff, *Index*, International Survey of Roman Law 1, 1970, 76 ff.), where the author discusses several legal institutions, in connection with which the Roman jurists considered a law to be attempting the impossible. According to Daube, Roman jurists knew three kinds of "impossibilities": interference with natural rights (see for instance *D.* 50, 17, 8, I. 3, 1, 11 and Gai. 1, 158, which assert that the civil law cannot destroy the natural rights of blood relationship), interference with fact and concepts (see for instance Gai. 3, 194, the *lex Iulia de adulteriis* of 18 B.C., Coll. 1, 6, 2 and *D.* 7, 5, 2, 1, from which it results that no statute can turn a non-thief into a thief, a non-adulterer into an adulterer, a non-homicide into a homicide, or create a usufruct over money against natural reason, but that it is possible, however, for a lawgiver to treat the different cases respectively as if there were a thief, an adulterer, a homicide or a usufruct), and finally interference with the past (such were, for example, the cases of changing the *fasti*, of *restitutio natalium* and so on). Well then, whenever some jurists pretended the existence of an agreement, if the source of an obligation was a lawful act, but not a contract in the modern sense of the word, perhaps we find ourselves in a situation like those considered by Daube. Actually these jurists were drawing from the case in point the same consequences that would have occurred if there were a transaction importing agreement, or in other terms the logical process to obviate the "impossibilities" dealing with facts and concepts in the law would have been the same in all conceivable cases.

though the order of topics is altered, and probably belongs to the beginning of the post-classical period, but it may include many lecture-notes jotted, if not by Gaius himself, at any rate by some law teacher of the late classical period, even if not by a jurist of the front rank, and occasionally revised in post-classical times.[21]

It is just in a passage from the *Res cottidianae* that Gaius's dichotomy *contractus-delicta* is dropped and replaced by a threefold classification (D. 44, 7, 1 pr.):

> *Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris.*
> ["Obligations arise from contract or from delict or by some provision of law from various types of causes".]

This suggests a clear recognition that, according at least to the opinion professed by most classical laywers who came after Gaius, contract was identified with actionable agreement and delict with a wrongful act which entitles the victim to damages. At the same time, however, all other sources of obligation are classed simply as *variae causarum figurae.*

The various types of cause are precisely the *negotiorum gestio* (D. 44, 7, 5 pr.), the guardianship (D. eod. 5, 1), the obligatory legacy (D. eod. 5, 2), the *indebiti solutio* (D. eod. 5, 3) and the *communio incidens* (I. 3, 27, 3–4). It should occasion no surprise that the third source of obligations does not embrace praetorian pacts and it is due, of course, to post-classical teachers if wrongful acts for which the praetor gave redress by action *in factum* seem to be set for the first time among the other types of causes (D. eod. 5, 4–6).

Once a convenient framework was provided within which obligations arising from lawful unilateral acts could be placed,[22] all efforts to contrive something similar to an agreement where an agreement did not exist were given up. It remains to add that we meet, on the contrary,

[21] Cf. Schulz, *History of Roman Legal Science* (new edition with addenda, Oxford 1953) 167 f., 341.

[22] See on the subject the works mentioned by Thomas, op. cit. 222 n. 89–90, among which the latest Mayer Maly, "Divisio obligationum", in *Irish Jurist* 2 (1967) 375 ff., and Wolodkiewicz, "Obligationes ex variis causarum figuris", in *RISG* 14 (1970) 39 ff.

with the traces of a polemic against the supporters of what I have just called the *fictio contractus* and about which we have spoken.

Let me quote from the continuation of the text holding the trichotomy just explained. The whole text can be restored well enough by collating D. 44, 7, 5 from the beginning to § 3 with I. 3, 27 from § 1 to § 6.

Cause 1). — Management of affairs: *neque ex contractu neque ex maleficio actiones* (scil. *negotiorum gestorum*) *nascuntur: neque enim is qui gessit cum absente creditur ante contraxisse, neque ullum maleficium est sine mandatu suscipere negotiorum administrationem* — ["the actions styled actions for the management of affairs don't properly arise either from contract or from delict: for the manager does not appear to have contracted previously with the absent person, and at any rate, when someone intervenes without a mandate to handle the affairs of another, there is no delict"].

Cause 2). — Guardianship: *tutelae quoque iudicio qui tenentur, non proprie ex contractu obligati intelleguntur* (*nullum enim negotium inter tutorem et pupillum contrahitur*) — ["tutors, again, who are liable to the guardianship action, are considered not strictly bound by contract (for no transaction can be entered into between tutor and ward)"].

Cause 3). — Legacy: *heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur: neque enim cum herede neque cum defuncto ullum negotium legatarius gessisse proprie dici potest* — ["then again, the heir is not, strictly, contractually liable in respect of legacies (for neither with the heir nor with the deceased can the legatee be properly said to have entered into a transaction)"].

Cause 4). — Undue payment: *is quoque, qui non debitum accipit per errorem solventis, obligatur quidem quasi ex mutui datione et eadem actione tenetur, qua debitores creditoribus: sed non potest intellegi is, qui ex ea causa tenetur, ex contractu obligatum esse* — ["likewise, a person to whom another pays, in error, what he does not owe him is bound just as if he had received a loan and is liable to the same action for recovery: but he who is rightly liable on this type of cause cannot be considered bound by a contract"].

Cause 5). — Ownership without partnership: *item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo iudicio, quod solus fructus ex ea re perceperit aut quod solus in eam rem necessarias*

impensas fecerit, non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt — ["again, if people own a thing in common without being in partnership, for instance because it was bequeathed or given them jointly, and one is liable to the other by the action for the division of common property, because he alone took the fruits of the thing or because his co-owner made some necessary expenditure on the thing, he cannot properly be regarded as contractually bound because they made no contract"]; *idem iuris est de eo, qui coheredi suo familiae erciscundae iudicio ex his causis obligatus est* — ["the same applies to the heir who is liable on these grounds to his co-heir by the action for dividing the inheritance"].

Clearly, the author's insistence that in all the various types of cause there never is previous agreement between debtor and creditor can be only explained as a deliberate and not a chance refutation of the different theory connected with a fiction of agreement.

9. — Beyond what we have hitherto described, there is the new category of innominate contracts, which historically presupposed the fusion of civil and praetorian systems of law and was preferred by the Eastern law schools of the later Empire to an enlargement of the category of real contracts, though, like these, they became enforceable upon part performance. It is, however, certain that they constituted the nearest approach that Roman law made to a generalized system of contract.[23]

The final stage of the development is to be found in the fourfold classification by Justinian (I. 3, 13, 2): (*obligationes*) *aut ... ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio* ["obligations arise from contract or as if from contract, from delict or as if from delict"]. In effect, while confirming the above distinction of contract as transaction connoting agreement and delict as a wrongful act causing damage, it adds the separate categories of quasi-contractual and quasi-delictal obligations. The former are those obligations which don't arise from an unlawful act but yet are not founded on agreement; the

[23] Cf. Arangio Ruiz, *Istituzioni* 302 f., and now Thomas, op. cit. 311 f. (with bibliography).

latter cover the cases in which one person is made liable, regardless of fault on his own part, for harm caused to another person.[24]

At this point, I deem it right to stop, yielding to the results achieved and once for all acquired on this subject by today's Romanistic survey, but not without recalling to mind that the fourfold classification passed into some of the modern Codes, such as the French Civil Code (art. 1101 and 1370) and the Italian one of 1865 (art. 1097), while the later Italian Code (in force since 1942) has re-established a kind of trichotomy by the following provision (art. 1173): "Le obbligazioni derivano da contratto, da fatto illecito, o da ogni altro atto o fatto idoneo a produrle in conformità dell'ordinamento giuridico", which is in English: "Obligations arise from a contract, from an unlawful act, or from any other act or fact, which may cause them, in conformity with the legal system".

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[24] See again Thomas, ibid. 222 f., as well as his admirable commentary to the Institutes of Justinian (Amsterdam–New York–Oxford 1975) ad h.1.