## OBLIGATIONS IN GENERAL

1. The notion of obligation is never defined in the classical texts. But Paul, Inst. 2 (D.44.7.3pr) comes pretty close to a definition:

> The essence of obligations does not consist in that it makes some property (*corpus*) or servitude ours, but that it binds (*obstringat*) another person to give, do, or perform something for us.
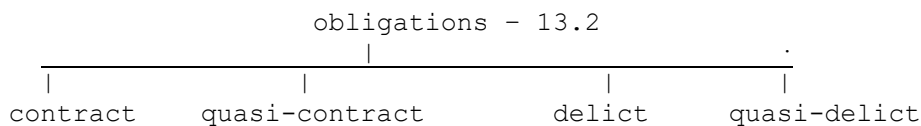
Paul has freed the notion from the actions but does not tell us what's in his category. He goes on to illustrate the importance of intent: delivery of money alone does not give rise to *mutuum* there must be intent; it may be a gift. Saying the words of the stipulation is not sufficient; it may be a joke.

2. J.3.13 is justly famous and is his own: "An obligation is a legal bond, with which we are bound by necessity of performing some act according to the laws of our State." For Justinian obligations are then divided:

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            obligations - 13.1
          _____|_____.
          |                 |
        civil            pretorian
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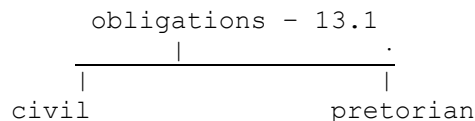
That J. should still be making this distinction 400 years after the praetor had ceased to be an effective force in shaping Roman law is quite amazing. That he does not do anything with the distinction is not at all surprising.

J. then proceeds to divide obligations into four groups, a division that will inform the rest of his treatment of the topic.

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                obligations - 13.2
         _____|_____.
         |          |           |           |
      contract  quasi-contract  delict  quasi-delict
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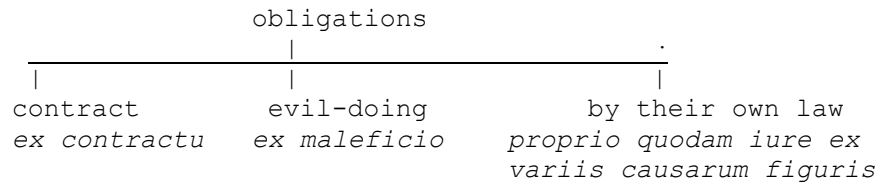
3. Gaius 3.88 offers no definition but proceeds immediately to "Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict."[1]:

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            obligations
          _____|_____.
          |             |
       contract      delict
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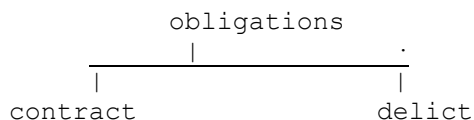
4. D.44.7.1pr (Gaius, Aureorum 2) is a bit fuller: "Obligations arise either from contract or from wrongdoing or by some special right from various types of causes."[2] Which gives us:

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[1] "summa diuisio [obligationum] in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto"

[2] "Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris."

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                       obligations
                           |                        .
          _____
         |                  |                   |
     contract          evil-doing        by their own law
     ex contractu      ex maleficio      proprio quodam iure ex
                                         variis causarum figuris
```

5. Many modern Romanists see a history here. Before we get to the history we have to ask ourselves what is it that we were just looking at. Gaius' work called *Aurea*, 'Golden Things', also called *Res cottidianae*, 'Daily matters', is quoted 20 times in the *Digest*, and a number of the extracts are quite long. It's similar to the *Institutes*, though it was probably shorter, because only 3 books are quoted rather than 4. In the heyday of interpolation-criticism, it was assumed that the *Aurea* was a post-classical work derived from Gaius' *Institutes*, but tainted with post-Classical ideas. The best modern opinion is that the *Aurea* is classical and probably by Gaius. Later in his life Gaius wrote a somewhat shorter and somewhat different version of his Institutes.[3] If that is right, then the development that I am about to describe took place during the classical period. If not, there were hints of it in the classical period, but its full realization did not take place until shortly after the end of that period.

    Fritz Schulz, a radical interpolationist, after asserting that obligation is never defined in the classical texts suggests his own definition of obligation (§ 787): "An obligation is a legal bond between two persons which implies the duty of one to another recognized in the *ius civile* and enforceable by an *actio in personam*." It has to be admitted that this definition fits a great many of the classical texts. The obligations of the *vindicatio* are never so called; those of *fideicommissa*, according to Schulz, only in interpolated texts. (We need not admit that if we are willing to accept, as Schulz was not, that the classical jurists do not always use technical terms in their strictest and most narrow technical sense.) Gaius' *Institutes*, Schulz admits, was beginning to depart from the strict classical definition.[4] Gaius does call obligations: the *actio furti manifesti*, the *actio vi bonorum raptorum*, and the *utiles* actions on the *lex Aquilia*, all of which were praetorian and not *ius civile* actions.[5]

    Praetorian pacts are missing from the *Institutes*, and, so far as we can tell from the *Aurea*, as are the quasi-contracts except for occasional mentions in connection with tutelage, legacies, and mistaken payment.[6] That does not mean that all of these things did not exist in the classical law – they all did – but they do not seem to have been firmly brought under the heading of obligations. Quasi-delicts, almost everyone agrees, is a post-classical category, though, once again, a number of the institutions that Justinian so classifies existed in the classical law.

6. Two points may help to explain the development:

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[3] see Kaser in *Ius Gentium.*

[4] represents a mid-point

[5] Zulueta suggests that the oldest notion did not include delicts, but has the same point on *ius civile*.

[6] *tutela*, *legatum* and *solutio indebiti*

a. In Gaius an obligation is the right, the *stipulator* is the creditor. In Justinian the obligation is the duty. That, in turn, suggests an early connection with an idea that we, though not the Romans, would call property, but they did call it things.

b. The word *obligare* means to bind. That in turn suggests *nexum*, the archaic form of debt-bondage, and a word that also means 'binding'. In the *solutio per aes et libram*, the formal discharge of an obligation, the word *solutio* means not 'payment', as it is frequently translated, but 'loosening' or 'unbinding'. That suggests that the original idea of *obligatio* was that it gave the creditor the right to bind the debtor physically as if he were a piece of property or a slave. But we should also remember that there was a *legis actio per iudicis postulationem*, the *legis actio* by way of asking for a judge, for a *sponsio*, a formal oral contract (GI.4.17a). And that, in turn, suggest a notion of personal obligation independent of property very early.[7]

Some have seen the origins of the idea of obligation in the distinction between owing an obligation and being liable on it. The difference, if you know German, is that between *Schuld* and *Haftung*. If I borrow $100 from you now, I owe you $100 now (*Schuld*). If we have agreed that I don't have to pay it back until the end of the month, I am not liable on it until the end of the month (*Haftung*). This is a rather subtle distinction, one that might not have occurred to people who were not thinking too hard about their law. It does, however, occur quite dramatically in an institution that was very common in the early period (and remained so), personal surety. The surety owes the debt of the principal obligor (*Schuld*), but he is not liable on it until the principal obligor fails to pay (*Haftung*).[8] At this point an obligation arises in the surety. Those who have their doubts about this theory note that *obligatio* corresponds fairly clearly to the idea of *Haftung*, but there is no equivalent for *Schuld* in Latin. That's not quite right, because later law knows *naturales obligationes*, 'natural obligations' that someone like a slave may owe, but on which an action is not available. They may become actionable, for example, if the slave is manumitted. This development, however, occurred long after the idea obligation is thought to have arisen.[9]
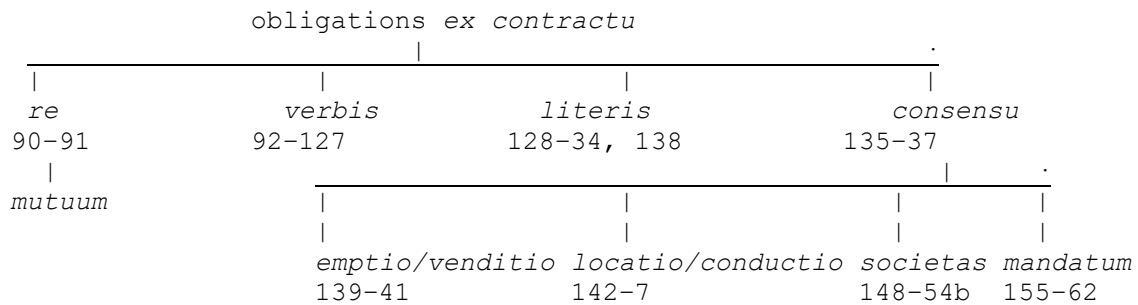
OBLIGATIONS *EX CONTRACTU*

1. Prescinding from these speculations, let us turn to Gaius' treatment of contracts is confined to the *ius civile*, at least of his own time, and this results in some peculiarities:
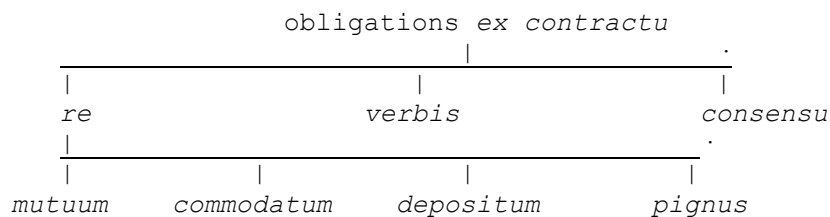
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[7] See Zulueta 2.144–6.

[8] The missing element may be the idea of surety. When a surety becomes the obligor *Schuld* (debt, fault, guilt) and *Haftung* (liability, bail, surety) are combined, and we have the idea of obligation. Z. notes, however, that

[9] Another hint at the same distinction is found in the use of the word *reus* to describe the defendant in a law-suit. That word literally means 'guilty', and corresponds to German *Schuld*.

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            obligations ex contractu
                     |                         .
   |                 |               |              |
  re              verbis         literis         consensu
90-91            92-127        128-34, 138       135-37
  |                 _____|_____.
mutuum              |               |               |         |
                    |               |               |         |
            emptio/venditio locatio/conductio societas mandatum
              139-41           142-7           148-54b  155-62
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a. The first level of the graphic, divides contracts into those *re*, 'by thing', *verbis*, 'by words', *literis* 'by letters' or 'by writing', and *consensu*, 'by consent'. The only contract *re* that is considered is *mutuum*, the basic loan contract; the only contract *verbis*, *stipulatio*, 'stipulation'. Four contracts are considered under *consensu*, *emptio/venditio*, 'purchase and sale', locatio/conductio, 'letting and hiring', *societas*, 'partnership', and *mandatum*, 'mandate'. There is no technical term given for the basic contract *literis*.

The classification in the *Aurea*:

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            obligations ex contractu
                     |                 .
   |                 |                 |
  re              verbis            consensu
  |_____.
  |           |           |           |
mutuum    commodatum   depositum    pignus
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b. The classification in the *Aurea* does not differ dramatically from that in the *Institutes*. The contracts *re*, *verbis*, and *consensu* appear in that order. Although it is not shown on the graphic, the same topics as in the *Institutes* are included in the *Aurea* under *verbis* and *consensu*. The first major difference is that the *Aurea* omits contracts *literis*. This could have been an omission by the compilers, since the contract *literis* did not exist in their time. It could, however, have been an omission by Gaius. As we shall see, his treatment of this contract is confusing, and the contract itself may already have been obsolescent in his time, just the sort of thing that one omits when one is doing a revision of a textbook. The *Aurea* also adds three contracts to the contracts *re*: *commodatum*, *depositum*, and *pignus*. They all existed in the classical law, and the puzzle is why they were omitted from the *Institutes*. The explanation for *pignus* may be that it did not have a civil-law action. The same explanation will not work for *commodatum* and *depositum*, which Gaius himself tells us (4.47) had civil-law actions, though they also had actions *in factum*. The explanation for their omission in the *Institutes* may be that Gaius could not figure out how to fit them in when he wrote the *Institutes*, and that he had figured it out, when wrote the *Aurea*.[10]

c. In both cases, the classification is by the formally binding element, the moment at which the obligation arises: transfer of the thing, exchange of the formal words, writing in the

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[10] Zulueta, p. 150–1. The xfer of the thing does not transfer ownership in these three. They were all also, as Z. sees it, subject to bona fide not stricti iuris actions, and were, as he describes it, 'semi-bilateral'.

account books, and the moment of agreement. Offer and acceptance is our notion not their except in stipulation; consideration is our notion not theirs. Indeed *mutuum* and *mandatum* must be gratuitous in form if not in fact. Whether the will theory is our notion not theirs is a matter of more doubt. Although contracts *consensu* are the only ones where the formally binding element is what we would call 'the meeting of the minds', all of the contracts mentioned required consent.

This was not the only classification of contracts the Romans knew. We also find: (a) formal (e.g., *stipulatio*) vs. formless (all the consensual contracts), (b) *stricti iuris* (e.g., *mutuum*) vs. *bonae fidei* (e.g. sale and hire), (c) gratuitous (*mutuum* and *mandatum*) vs. non-gratuitous (e.g., sale and hire), and (d) unilateral (e.g., *stipulatio*) vs. bilateral (e.g., all the consensual) (the bilaterality here being implicit). Now let's take a look at them individually.

d. *Mutuum* was the loan of money or fungibles, formally gratuitous, and *stricti iuris*. The action to recover the debt was *condictio*, the general action for the recovery of money owed. Gaius gives the example of *condictio* to recover a mistaken payment, something we would regard as quasi-contractual. The fact that he has doubts as to whether it's contractual shows at least that contract and consent in the broad are not far from his mind. In commercial transactions, *mutuum* was normally accompanied with a side stipulation for the payment of interest, which was limited to 12% per annum. *Mutuum* transferred the ownership of the amount lent to the borrower. If he lost it, even through no fault of his own, he was still liable for the amount lent.

As just mentioned, *commodatum*, *depositum*, and *pignus*, which are in the *Aurea*, are notable by their absence in the *Institutes*, as is f*iducia*, which, like the others, could be thought of as a contract made binding by the transfer of a thing. All have actions of their own. All are, or could be, *bonae fidei*, whereas, it would seem, *mutuum* cannot be. We answered above, as best we could, why Gaius did not treat of them here in the *Institutes*.

i. GI.4.47 tells us that *commodatum* and *depositum* had both an *in ius* and an *in factum* action.[11] The *in ius* action was *bonae fidei* expressly; the *in factum* action seems have been so impliedly. Both contracts were forms of what we call bailment. The difference between two was that *commodatum* was for the benefit of the bailee. "Will you lend me your chariot?" *Depositum*, by contrast, was for the benefit of the bailor. "Will you store my chariot while I go to Greece?" Both contracts were gratuitous. If the borrower was to pay for the loan of the property or the owner of the bailed item for the storage space, that was neither *commodatum* nor *depositum*, but different forms of letting and hiring (*locatio*/*conductio*). In *commodatum* the borrower had to return thing undamaged, except in the situation where it was harmed or lost by what we would call an act of God or, perhaps, a foreign enemy. In *depositum*, the bailee was liable only for deliberate damage or what we might call 'gross negligence'.

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[11] Zulueta and Schulz both suggest that the civil action was later. There's material in the EP that suggests that the deposit action is very old, but that can't be right.

      ii.   *Pignus*, corresponding to our 'pledge' or 'pawn', was a transfer of possession of property but not of ownership, usually as a form of security. We are poorly informed about how the arrangement was enforced. The pledgee had the possessory interdicts against third parties and probably against the debtor who took the pledge back without paying. The pledger who had paid may have had to use the *vindicatio* to recover the pledge.

      iii.   *Fiducia* is a transfer of ownership with pacts for its return, usually as a form of security. It had to be made by a *mancipatio* or *in iure cessio*. It had its own *bonae fidei* action in the Edict.[12] It is possible that Gaius regarded it as a form of conveyance rather than of contract. He mentions it in passing, but in no place deals with it specifically.

  e.   Stipulation was a formal oral contract of great antiquity. The *stipulator* posed a question to the *stiplatarius*, who responded in the affirmative. Originally, it would seem that only one Latin verb was used: *Spondesne*? 'Do you promise?' To which the reply was: *Spondeo*. 'I promise'. The number of verbs that could be used gradually expanded. Gaius even suggests a couple that are Greek.

The great advantage of the stipulation was that it could cover almost any kind of lawful transaction. The problem with it was that it was oral, so that a written record was required if the transaction was at all complicated. The record, however, still in Gaius' time, was just that, a record of what had been agreed to orally. One could void the transaction if it was impossible that the oral exchange had taken place, for example, if it could be shown that one party was in Athens and the other in Rome when the transaction was supposed to have happened. There are suggestions, however, if the transaction could have happened (both parties were in Rome on the day in question), one could not void the recorded transaction by showing that they never in fact met.

In the eastern Mediterranean, it seems clear that the written contract was what bound. Gaius 3.134 mentions the chirograph, a unilateral obligatory document, and the syngraph, a bilateral obligatory document, of which there were two copies,[13] as forms of literal obligations special to peregrines. The future lay with contracting in this form, but Justinian does not abolish the stipulation. The recitation in the document that the parties had stipulated in each others' presence seems to have become more and more of a formality that was added to the document without any connection with reality.

G. also mentions *dotis dictio*, the constitution of a dowry in connection with a marriage, and the *iusiurandum liberti*, the oath of a freed person upon being freed, as verbal contracts with an answer. Our word 'spouse', for a one's marriage partner, is ultimately derived from *spondeo*, the formal word of promise in a *stipulatio*. A lot of water poured over the dam in order to get from one to the other.

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[12] Lenel, EP, 2d ed., §107.

[13] Both definitions in Berger.

The extensive material on void stipulations is not a general theory of contract. G. treats of impossibility (but not error), attempts to bind heirs *de novo*, and third-party beneficiary contracts (considered below and changed by Justinian).

The action on the stipulation was *stricti iuris*. The important developments (and they probably came in this order) are: (a) the introduction of the *exceptio doli*, the exception of fraud, and (b) the introduction of the notion of error.

f. The Romans had a problem with third-party beneficiary contracts. The Anglo-American common-law for a long time did too, and the reasons may be related: a reluctance to allow the conveyance of obligations. In Roman law a stipulation in the form "Do you promise to give to Titius?"[14] was void. A stipulation "Do you promise to give to me and Titius?"[15] gave the promisor an alternative method of payment, but it gave Titius no right to sue.[16] In the *adstipulatio*, the question was posed by the *adstipulator* in the form "Do you promise the same?" that is, the same as the promise that the principal *stipulator* had just extracted. Both could sue, and the suit by one discharged the obligation to the other. The word 'same' had to be used. If there were two stipulations that promised the same thing but did not use the word 'same', then the discharge of one obligation would not discharge the other.[17]

g. *Adpromissio* was the opposite of *adstipulatio*. Here there were multiple promisors responding to the question "Do you promise the same?" It was thus a form of personal surety. There were numerous forms of it, each with slightly different consequences. There was much legislation about this institution, and, unlike *adstipulatio*, which Justinian abolished, it remained very much in effect in the post-classical law.

h. The only contract *literis* on which G. spends any time is called by modern Romanists *expensilatio*.[18] Gaius' account is cryptic, and the institution did not survive until Justinian's time. What seems to be involved is the change of a consensual to *stricti iuris* debt or a change of debtors, in both cases made by changing an entry in account books. The creditor's books are what Gaius talks about, but there probably were changes in the debtor's books as well.

i. Gaius spends quite a bit of time on the four contracts *consensu*. They all survived with some modification into Justinian's time, and from there into medieval and modern Continental law. They all involve common commercial transactions for which it is useful

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[14] Dare Titio spondes?

[15] Dare mihi et Titio spondes?

[16] I originally had: 'Much statutory material omitted here.' I think that's reference to provisions of the lex Aquilia that made it furtum for Titius not to turn over what he had received, although it may be to *adpromissio*.

[17] Unlike A-A tben, *adstipulatio* was a form of agency. The *adstipulator* who collected was obliged to turn over what he had received to the principal stipulator. Under the l. Aquilia this was enforced by holding him guilty of *furtum* if he failed to do it. Later the contract of mandate was used. Agency, also a later development, was more efficient. G. thinks that *adstipulatio* is only useful in the situation where the *stipulator* had died, because an ancient rule prevented the heir of the *stipulator* from collecting on his ancestor's stipulations. Justinian abolished this rule, and *adstipulatio* does not appear in the Digest.

[18] The word does not appear in Logeion or in Niermeyer.

to have default rules when the parties fail to specify what is to happen if something happens that they may not have thought about or have failed to specify, at least in any way that can be proved.

j. *Emptio*/*venditio* is literally 'purchase and sale', a phrase that we still use, curiously enough, in contracts for the sale of real estate. Gaius assumes that there is some definite thing (*res*) that is being sold. He tells us that the price must be definite, but follows the Sabinian rule that the price can consist in another good. The Proculeans disagree, holding the barter (*permutatio*) is a different form of contract, not sale. *Permutatio* is also not a sale for Justinian; it is a kind of innominate contract *do ut des* 'I give so that you might give', which is enforceable only if it is partially performed.

For Gaius the contract of sale is perfected once there is an agreement about the thing to be sold and the price. That means that *arrha*, earnest money, need not be given. *Arrha* is a Semitic word, and it seems that in the mercantile world of the eastern Mediterranean, the giving of *arrha* marked the point at which the contract was complete. Gaius is clear that *arrha* is not part of Roman law; Justinian is quite muddled on the topic. Justinian also adds a bit on risk, which Gaius does not. Absent the contrary agreement of the parties and with some exceptions, risk of the loss of the goods falls on the buyer once the goods have been identified to the contract. This also seems to have been the classical rule.

k. *Locatio/conductio* is literally 'letting and hiring'. We use both of these terms, but we don't always use them together. We speak of 'letting' a building contract, but we don't normally think of the builder as hiring the contract. We hire a laborer, but we don't normally think of the laborer letting his services. In the case of things, we do use both terms. Avis leases (a form of 'let') cars, we hire them. We don't normally use 'hire' in the context of real estate except in the colloquial phrase 'hire a hall'. If we keep in mind that every contract of *locatio*/*conductio* must have a *locator*, a letter, and a *conductor*, a hirer, we can explain the Roman terminology.

Modern Romanists, but not Gaius, see three basic contracts here: *locatio/conductio rei*, 'letting and hiring of a thing', a lease of property with no sharp distinction, at least conceptually, between movables and immovables; *locatio/conductio operis faciendi*, 'letting and hiring of a job to be done', such as a building contract or a contract to make a ring,[19] and *locatio/condctio operarum*, 'letting and hiring of man-days', such as a contract with a day-laborer. The distinction between the two personal services contracts roughly corresponds to our distinction between an independent contractor and an employee. Notice, however, that the terminology flips. In *locatio/conductio operis faciendi* it is the person who is getting the service who is the *locator*, whereas in *locatio/conductio operarum* it is the person who is doing the service who is the *locator*.

Sometimes whether a contract is one of sale or hire depends on how it turns out. Gaius gives the chilling example of a contract involving an enslaved gladiator. If the gladiator is killed, it's a sale; if he comes back alive it's a hire.

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[19] with a manufacturing jeweler

1. *Societas* is partnership. It is the Roman business unit for free men. The Romans did have institutions that roughly corresponded to our corporations, but they did not seem to use them for business purposes, with the possible exception of banks.[20] *Societas* had its origins in the Roman family. An inheritance *ercto non cito*, roughly 'not moved for division', could remain undivided among the heirs for a long time, perhaps even for generations. The s*ocietas omnium bonorum*, 'partnership of all goods' seems to have arisen out of the inheritance *ercto non cito*. But long before the classical period, partnerships could be formed not of all the partners' goods but of some of them for a particular purpose.

   The partners were not liable to third-parties on contracts made by one of the partners, but the partner was obliged to bring into the partnership gains on the contracts that he had made for partnership purposes, and the partners were obliged to compensate him for any losses or costs on such contracts but only up to their contribution to the partnership. Thus, some measure of limited liability was achieved, but the partner who made the contract was personally liable on it to the third-party for the full amount.

   Some of these partnerships were very large. We hear of *societates publicanorum*, partnerships of tax-farmers,[21] which seem to have had large amounts of capital at their disposal, and were subject, at least in some periods, to special rules.[22]

m. This contract is frequently called 'agency', but it is better not to. In our law an agent acquires for or binds his principal, and does not acquire for or bind himself. The mandatary acquired for or bound himself, but was obliged, like a partner in *societas*, to turn over the thing acquired or the benefits of the contract to the *mandans*.

   The contract of mandate must be, at least formally, gratuitous, though the mandatary, like the partner, was entitled to reimbursement for his costs. If there was an agreement to pay the mandatry for his services, that was *locatio*/*conductio*, not mandate. The mandatary could be given an *honorarium*, a word that we still use in connection with giving a speaker a fee for a speech. The *honorarium*, however, could not be recovered by an action in the classical period; it did become recoverable in the later empire but only by way of the *extraordinaria cognitio*.

   As in our law of agency, a mandatary could not exceed his authority; if he did, he was not entitled to reimbursement.[23]

   (Slide 1)The mandatary should be contrasted with the *procurator*, whom Gaius treats only in passing, and two key passages are defective in the manuscript. A *procurator* could appear on behalf of his principal in litigation and bind his principal to the result. In

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[20] OCD s.v. banks. He notes that rules about them can be constructed from the Digest but does not attempt to do so.

[21] Left this out on the basis of the OCD article 'and societates argentariorum, partnerships of money-changers or bankers'.

[22] The one mentioned by Berger, s.v. publicani, is that the death of one them did not dissolve the partnership but the share of the decedent would pass to his heir.

[23] I left out the rather large social element here, that an upper-class Roman would not work for money, that this was the contract by which one hired and orator, etc.

the classical period he could not acquire for his principal by mancipation or *in iure cessio*, though he probably could acquire for his principal through delivery. How far he could go in entering into informal contracts on behalf of his principal is somewhat unclear. Clearly, in a consensual contract, he could transmit the terms of the contract to the other party and obtain his/her consent. What is unclear is how far the procurator could go in negotiating those terms.[24]

2. Acquisitions of obligations through others (§§ 163–67a). The law of persons returns. Note how the concept of agency is hidden in here. Stipulation and mancipation technically restricted to Roman citizens may be done by slaves on behalf of their masters.

3. G. devotes a considerable amount space to how are contractual obligations are extinguished.

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            extinction of obligations ex contractu
                                |
   _____
   |            |               |              |           |
 solutio   acceptilatio   per aes et libram   novatio   litis contestatio
 §168      §§169–72       §§173–5             §§176–9    §§180–1
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a. *Solutio* – §168 – this is simple performance

b. *Acceptilatio* – §§169–72, a release by *stipulatio* – perhaps originally only used for releasing stipulations, but *novatio* allows other obligations to be converted into stipulations for purposes of release

c. *Per aes et libram* – §§173–75 – releases obligations incurred *per aes et libram* – *legatum per damnationem* is probably the main one in classical times; it is also used for releasing judgment debts

d. *Novatio* – §§176–79 – as in our law, something new must be added, but that new thing may be simply changing the form of a consensual obligation to a stipulation

e. *Litis contestatio* – §§180–81. This has no exact equivalent in our law, though the principles of res judicata and collateral estoppel achieve a similar effect. In Roman law when issue was joined in an action on an obligation, the underlying obligation was extinguished, and the original obligee had to rely on the results of the litigation. The concept of extinction by *litis contestatio* admitted of a distinction between *iudicium legitimum* (personal actions *in ius concepta*) and *iudicium imperio continens*, actions based on the *ius honorarium*. In the case of the first, *litis contestatio* extinguishes the obligation in the civil law; in the case of the second, *litis contestatio* gives rise to an exception if another action is brought on the obligation.

f. A method of extinguishing obligations that Gaius does not mention is *pactum*, an informal agreement not to sue that the praetor recognized as giving rise to an exception. A *pactum* not to sue until a particular date is the one most often mentioned in the sources, but it would seem that the *pactum* could also be that the obligee would never sue.

OBLIGATIONS *EX DELICTO*

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[24] Left out the general procurator, the factotum. This social role was clearly pushing the concept of procurator, even in Gaius' time.

1. Delict may originally have referred to legal permission to do to the other person what the other person had done to you, *talio*, 'talion': "an eye for an eye or a tooth for a tooth." There is not an great deal of evidence for that, but just enough that the speculation may be worth making. If that is right contractual and delictual obligations can't come together until the idea of talion is removed. Be that as it may be, delict is clearly an obligation for G. G.'s delicts are easier than his contracts, but also less satisfying.

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                                delicts
                                   |                              .
  _____
     |                    |                   |                 |
  furtum          vi bonorum raptorum    damnum iniuria datum  iniuria
  183-208               209                  210-19            220-25
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Gaius divides delicts into four categories: *furtum*, 'theft', *vi bonorum raptorum*, 'goods taken by force', *damnum iniuria datum*, literally 'damage done contrary to the law', a lability under the lex Aquilia of c.200 BC, and *iniuria*, literally 'an act contrary to law', which is sometimes translated 'outrage'.

2. Delict is a curious category for us, sitting some place between tort and crime. The Romans regarded the delictual actions as private ones because the victim (in some sense, see *iniuria*) must bring the action. Criminal actions also had private prosecutors, but the criminal prosecutor need not be the victim. Tort won't do as a translation because the delictual actions are highly penal, even under the *lex Aquilia*. The penal character of the actions is shown by:

   a. the multiplication of damages (in the case of *furtum*, if we add the *condictio* it can be five-fold)

   b. by the fact that they are not passively transmissible, the action ceased when the perpetrator died

   c. by the fact that as in our law joint tort-feasors are jointly and severally liable, and, unlike our law, the victim may recover more than once

   d. by noxal liability, the fact that an owner of a slave or the father of a child in power could simply hand over the slave or child to the victim rather than paying the damages

   e. the defendant who denied liability and was held liable had to double damages

3. For Gaius all of these actions are fault-based; except for *damnum iniuria datum* they all require intentional conduct.

   a. *Furtum* is theft. As in our law, there had to be an intent to steal, an *animus furandi*, but unlike common-law theft there did not have to be any removal from the owner's possession, any handling or using the thing, when one knew that the owner would not allow it, was *furtum*. *Furtum* came in four types: *manifestum*, roughly equivalent to the common-law's 'hand-having thief', a 4-fold penalty; *nec manifestum*, where the thief was not caught in the act, a 2-fold penalty; *conceptum*, the discovery of stolen goods in someone's house after search, a 3-fold penalty, and *oblatum*, placing stolen goods in someone's possession so that he would be held liable for theft, a 3-fold penalty.

   b. *Vi bonorum raptorum* is theft by force. It has, curiously, a praetorian action. One would have thought that the *actio furti manifesti* would have done the job, at least under most definitions of manifest theft. It gave a 4-fold penalty if brought within a year and simple

damages if after a year. There is a debate whether the *condictio* also lay, but most think that it did not in the classical period. The praetorian action lay before *recuperatores*, and that, somewhat surprisingly, was quicker than before a single *iudex*. This may be the reason for the praetor's intervention.

As a general matter, the classical Roman law of theft has not received a very good press. The basic divisions go back to the XII Tables, and later ages were content to make fixes, which made the law more complicated and a little less 'primitive' but not particularly effective. Even Justinian, by whose time there was a criminal law of theft, did not reform the theft actions.

c. *Damnum iniuria datum* was a statutory action under the lex Aquilia. It only applied to damage to property, but, of course, slaves were property. It is the only delict of the four that Gaius lists that did not require intentional action by the wrongdoer. What corresponded to our notion of negligence – the word is *culpa*, 'fault' – is something that we should discuss in the last weeks of the course. Direct forcible injury was required under the statute. The *utilis* praetorian action applied to indirect injury. The parallel to common-law trespass and case is striking, so striking that that one might wonder if there is influence.

d. *Iniuria* was an intentional injury to a free person. It could cover both physical and verbal assault. There was no general remedy in Roman law for the negligent killing of a free person.[25] There may have been a praetorian action for expenses for negligent injury to a free person. It is amazing that there should be doubt about that. Compensating those who get hurt does not seem to have been a primary purpose of the Roman law of delicts.

4. Gaius omits all the separate praetorian penal actions. Justinian gives some hint of them under the quasi-delict category. Included are a couple of nuisance actions: *damnum infectum*, threat from a neighbor's property (D.39.2) and the action for throwing or pouring things from a house onto an area where people pass by (*de his qui deiecerint uel effuderint*, D.19.3). The *actio doli*, the action for fraud, is also classified as a quasi-delict in Justinian, probably because it was praetorian, because to us there is little about it that is quasi. The actions are all quite classical.

5. What's missing from Gaius' account of obligations:

a. Justinian has a classification that he calls 'innominate contracts', contracts without a name. He offers a four-fold classification: *do ut des*, *facio ut facias*, *facio ut des*, and *do ut facias*: 'I give that you may give', 'I do that you may do', 'I do that you may give', and 'I give that you may do'. From this we can see that we are dealing with partially performed contracts. The categorization is less than helpful because the sought-after performance may consist in abstaining from doing something rather than doing something. It is clear, at least to all but the most radical of interpolationists, that the classical jurists were playing around with this problem, perhaps from as far back as the time as Labeo.

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[25] But cf. D.19.3.1, a fifty *aurei* penalty which looks suspiciously Justinianic.

It is also clear that at least some of these contracts did have names: *Aestimatum* (handing over a thing with an agreed-for price for sale or return), *permutatio* (barter), *precarium* (gratuitous transfer of land or chattels subject to revocation at the will of the transferor), *transactio* (a general term for compromise or release of a claim). This last may not fall under the general heading, but it may if what we call consideration is given. A text of Labeo's (D.18.1.50) suggests that he may have allowed something called an *actio praescriptis verbis* for some of these. *Aestimatum* does have an action in the edict. The praetor certainly allowed exceptions to be brought on pacts. How far the classical jurists generalized about these things is a matter of considerable controversy.

b. *Condictio*. As Gaius hints in discussion of mistaken payment and also hints in his discussion of *specificatio* (2.79), the *condictio* was available in classical law for certain kinds of recoveries that later law and our law would call quasi-contractual. It was certainly available in classical law for recovery against a thief, perhaps in most situations in which the penal delictual actions also lay. How far it was available for anything else that we might call unjust enrichment is controversial, but there are certainly texts that suggest a rather wide availability in such situations.

c. *Negotiorum gestio* and tutor's and curator's liability. *Negotiorum gestio* is an interesting concept that does not have a real analogy in our law, though there are some hints of it in the concept of intermeddling. It might be thought of as like a mandate, but with no contract of mandate. The person who undertook to do something that benefitted another person, even if s/he was not specifically authorized to do it was entitled to be reimbursed for his/her costs. The *negotiorum gestor* might also be liable if s/he screwed up and in fact made the person who was supposed to benefit worse off. The concept was clearly used in the case of tutelage of those below the age of puberty and of *cura* of those who could not look after their own affairs.

There were, moreover, praetorian actions both for the *gestor* and for the one whom he was supposedly benefitting (mentioned in G.4.62 as bonae fidei w/o further discussion) that were available against those who were neither tutors nor curators. There are titles in both the Digest and the Code (D.3.5, C.2.18) about *negotiorum gestio*, though there is some controversy about how much of what is in those titles reflects classical and how much Justinian's law. The concept of *negotiorum gestio* passed into the European civil codes and is generally thought to represent an important difference between European civil law and Anglo-American common law.