3. Personal Character of Rights and Obligations.

It is generally thought that originally dealings between free men -- leaving children and slaves under power out of consideration -- were personal between the parties; that all obligations, accordingly, became extinct when one of the parties thereto died. Distinct traces of that rule can be found in the Code.(81) Thus, up to the time of Justinian, a contractual duty not to be performed until after the death of one of the parties was a nullity. The jurists had found a means of modifying the rule, but it had never been legally abolished, until Justinian, by a law of 530, followed by another in 531, provided that "it shall be permitted to create rights of actions and obligations to have effect only in favor of and against heirs."(82) Two laws in the Code show traces that one method devised by jurists to evade the strictness of the old rule, was to mention the heirs of the parties. The constant practice of doing so

(81) The writer considered the subject at somewhat greater length before the Wyoming Bar Association. See Proceedings, 1935-1937, p.111 ff.

(82) C.8,37,11; C.4,11,1; See C.8,37,4.

gradually resulted in recognition of their rights, even though not mentioned. Justinian dispensed with the necessity therefor in any and all cases.(83) Again, we find that debts due to or in favor of a deceased did not become part of his estate.(84) From that the inference is permissible that they were not originally transmissible. Furthermore, we find traces of the practice of detaining the corpse of a deceased until his debts were paid. Even as late as Justinian, a law was passed prohibiting it.(85) Resort to that extreme means would seem to show that, perhaps, there was, originally, no other method by which the debts of a deceased could be collected.

The personal character mentioned is also shown by the laws of agency. Direct agency was not permitted. With the exception of possession, nothing could be acquired by anyone through a free person not within his power.(86) An interesting passage states: "If you managed the business of your wife, and you bought property in her name, you did not acquire an action on the purchase for either her or yourself, since you cannot acquire it for her, and you do not want it for yourself."(87)

(83) C.8,37,13 and 15; See Korosec - "Erbenhaftung"(1927); Rotondi, Scr. Giur. 2,130 ff., 310, 315; Festschrift Hanausek, 139.
(84) C.2,3,26; C.4,16,7.
(85) C.9,19,6.
(86) C.4,27,1.
(87) C.4,50,6,3.

A father gave a dowry for his daughter to his son in law, and exacted a stipulation that it should, in a certain event, be returned to a third party. Diocletian wrote that, since the father did not want the stipulation in his own favor, and since the law forbade it to be taken in favor of the third person, no right of action at all was acquired.(88) Other texts in the Code are similar in effect.(89) The rule did not apply if a person with patria potestas caused the promise to be given in favor of a person under his power, for in such case, the promise was equivalent to a promise to himself.(90) The exigencies of commerce and trade gradually forced exceptions to the rule. There is considerable doubt as to the extent in which it was still applicable in the time of Justinian.(91) For centuries previously it had been recognized that a procurator could acquire the possession for his principal.(92) So if any one appointed another to manage a shop, ship or business -- e.g., the lending of money -- the principal was liable on the contracts made by such agent.(93) Again, a loan

(88) C.5,12,26.
(89) C.4,50,7; C.5,12,19; C.5,14,4; C.5,39,5; C.8,38,3 and 6. C.8,37,3
(90) C.8,37,2.
(91) See Proceedings Wyoming Bar Association, 1935-7, p.115.
(92) C.7,32,1 (itp); C.7,32,8; G.2,95.
(93) C.4,25.

made to another belonged to the person in whose name it was made. Justinian provided that if the agent lending the money should take a pledge or mortgage in connection with the loan, such pledge and mortgage, created by simple contract, should become accessory to it by operation of law.(94) Thus all or substantially all strictly commercial transactions were excluded from the general rule above stated. The rule was also relaxed in special cases. Thus where a grandfather had given a dowry, and it was agreed with him that it should be returned to the grandchild who was not in his grandfather's power, the agreement could be enforced by the grandchild.(95) When a deposit was made by an agent under an agreement that it should be returned to the owner, the agreement could be enforced by the principal.(96) A gift was made, under an agreement that it should be restored to another upon non-fulfillment of a condition attached to the gift. The third person was permitted to sue when the condition was not fulfilled.(97)

(94) C.4,27,3. As to loan made to agent, see C.2,24,4; C.4,2,13; C.4,26,8,3.
(95) C.5,14,7.
(96) C.3,42,8.
(97) C.8,54,3; Kisele, Beitraege does not consider this a true contract in favor of third party.

The personal character of an obligation is, of course, also shown by non-assignability thereof, which was originally doubtless the law.(98) That fact, however, is not shown in the Code. On the contrary, it appears that a mandate might be given by the creditor to another(99) to sue on the debt; if given for the benefit of such other, it operated, of course, as an assignment. But the later law went further. Writing had become the prevalent method of entering into contracts. Debts were ordinarily evidenced by writing. This made it easy to adopt the ultimate rule that a debt might be sued on by the purchaser in his own name.(100)

(98) Buckland, Textbook, 520.
(99) C.4,10,1; C.8,41,3.
(100) C.4,39,7 and 9.