Revisiting Roman Contracts:

Justinian's Treatment of the Contract Verbis and Litteris

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Introduction

The contracts *verbis* and *litteris* were two of the four categories (*genera*) of contracts recognized by both the Institutes of Gaius and of Justinian in their classification of Roman legal obligations.[1] The existence of both categories of contracts can be traced back to the earliest periods of Roman law, [2] but the popularity in practice of each diverged from the classical period up until the time Justinian's Institutes were published in 533 AD.

The contract *verbis*, epitomised by the *stipulatio*, became a cornerstone of Roman contract law, playing an important role in the world of Roman commerce and finance, whilst the contract *litteris* fell into disrepute.

This article will compare and contrast the two Institutes' treatment of the contract verbis and the contract *litteris*, and examine the possible reasons why Justinian retained the contract *litteris* as a category of contract despite its practical obsolescence. By doing so, this article firstly demonstrates that the diverging fates of the two contracts reflect broader changes in Roman legal and social life as the Empire grew in area and importance (before its eventual decline) and secondly, that the inclusion of the contract *litteris* in Justinian's Institutes should be considered as part of Justinian's wider attempts to return the Roman empire to its former greatness.

Background on Justinian's Institutes

From the outset, we notice a desire for structure and order in Justinian's Institutes. Even in his commission of the Digests, we are aware that the compilers were to abridge and to alter as much as was necessary to avoid repetitions, contradictions and anything that was obsolete. [3]

This desire for order carries over into the Institutes and his treatment of contracts. Indeed, as will become evident, the oral requirement of the *stipulatio*, as well as the preservation of the contract *litteris* as a distinct type of contract, should best be viewed as Justinian's attempt at an appearance of structured and undiluted legal principles reminiscent of classical Roman law (cf. the rise of vulgar law) as opposed to a faithful description of common practice.

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[1] F de Zulueta, *The Institutes of Gais Part I*, (OUP 1958) at §3.89; P Birks & G McLeod, *Justinian's Institutes*, (Cornell University Press 1987) at §3.13.2.

[2] The contract *litteris* existed as early as the end of the second century BC: A Watson, *The Law of Obligations in the Later Roman Republic*, (Oxford Clarendon Press 1965) pp. 16; the *stipulatio* is believed to have predated the Twelve Tables: P du Plessis, *Borkowski's Textbook on Roman Law*, (OUP 2015) pp 297.

[3] B Nicholas, *An Introduction to Roman Law* (OUP 1990) pp. 40.

3. Treatment of the Contract verbis

3.1 Institutes of Gaius

Contract *verbis* ("contracts by words") were contracts made by word of mouth as suggested by the descriptive classification *verbis*. Whilst the *stiuplatio* was by far the most important verbal contract, Gaius mentions that there are two other instances where obligations can be contracted verbally, namely the *dotis dictio* ("declaration of dowry") and the *iusiurandum liberti* (freedman's oath").[4] The dotis dictio was a solemn declaration of dowry whereas the *iusiurandum liberti* was a solemn oath made by a freedman immediately after manumission to render services for his patron; these were both niche applications of the contract *verbis*. As Birks confirms, these other two verbal contracts were both highly specialised and by Justinian's time, were obsolete and understandably excluded from the revised Institutes.[5] These two types of contract *verbis* help contrast and demonstrate the oddity of Justinian's inclusion of the contract *litteris*, which equally had become obsolete long before the time of Justinian's reign as one of the categories of contracts within the new Institutes.

The *stipulatio* was of enormous importance within the Roman law of contract and arguably the most important type of Roman contract. The *stipulatio* required a communication between the contracting parties and specifically a question and an answer which had to correspond with each other during Gaius' time. Gaius provides us with an example of questions and answers that would give rise to a *stipulatio*.[6] It is important to note that Gaius remarks that *dari spondes*? *spondeo*? were a part of the *ius civile* and peculiar to Roman citizens.[7] This certainly may, as noted by commentators, be reflective of the *stipulatio's* religious origins from as early on as the times of the Twelve Tables. Yet as Gaius explains, the other examples are a part of the *ius gentium* and are valid between all men. The acceptance of other words such as *dabo* and *promitto* for the purposes of the *stipulatio* can perhaps be seen as an important inroad into and evolution away from the formalities emphasised by the *ius civile* even during Gaius' time, a trend that further accelerates in the later classical period (circa 200 AD onwards).

Gaius lastly qualifies circumstances that might render a *stipulatio* void. For example, if the object of the conveyance cannot be conveyed, (e.g. a free man whom one believed to be a slave) or if the object cannot exist at all (e.g. a hippocentaur), the *stipulatio* would be void.[8] At §3.105 and §3.106, Gaius explains that a deaf man (and implicitly, a mute man) cannot enter into a *stipulatio* as the *stipulatio* requires a correspondence of speaking and hearing between the two parties. This is a rigid and seemingly overly formal requirement that serves as a useful comparison with Justinian's description of the *stipulatio* approximately three centuries later.

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[4] Institutes of Gaius §3.95a
[5] P Birks & E Descheemaeker, *The Roman Law of Obligations*, (OUP 2014) pp. 52
[6] Institutes of Gaius § 3.92
[7] ibid §3.93
[8] ibid §3.97-3.99

Another important point to note is that Gaius explains that the *stipulatio* is also void if the promisor (one who makes a promise) does not answer the question put to him at §3.113.

3.2 Institutes of Justinian

Justinian's treatment of "obligations by words" at §3.15 of the Institutes is surprisingly similar to Gaius's treatment and seemingly anachronistic given the changes in practice of the past centuries. For example, the core requirement of the *stipulatio*, namely a question and answer spoken orally remains a prominent requirement. There are however nuanced differences in Justinian's treatment such as the relaxation of the exact words used for the creation of a *stipulatio*, (as originally listed by Gaius: *spondere*, *promittere*, *fidepromittere*, *fideiubere*, *dare*, and, *facere*) as well as the relaxation of the spoken language so long as both parties understand each other's meaning and the words used.[9]

The reader might be surprised by the continued existence of the same oral requirements given the historical evidence that common practice tended to push Roman law away from its traditional formalistic approach.

Firstly, we are aware that even as early as the late Republic, circa first century BC, there had been a rise of written records (*cautiones*) used as evidence of *stipulationes* (i.e. evidence that the question-and-answer had been followed). Birks and Descheemaeker mentions Cicero's writing in *Topica* 26.96 as an example of the use of such written records.[10]

Secondly, it was provided by a rescript of Severus that if the *cautio* alleged a *stipulatio*, even if a *cautio* was defective (in that it spoke of the *promissor* having promised but did not record the question being asked) an actual *stipulatio* was to be presumed. Indeed, given the influence of Greek law where writing was common, (as well as from a practical evidentiary standpoint), it is highly plausible that the written record *cautiones* did become common practice alongside the oral *stipulatio*.

Certainly, with the enactment of the *constitutio Antoniniana* circa 212 AD, when all peregrine ("foreign") free men within the Empire were afforded Roman citizenship, the practice of using *cautio* in lieu of the oral *stipulatio* would have been solidified. This is because many of these foreigners followed the Greek practice of written contracts. Indeed, a written document with the stipulatory question and answer, by all appearances, seemed sufficient to satisfy the Roman law requirement for the *stipulatio*.

Nicholas explains this development of writing by likening it to "…the case of the *mancipatio*, what originates simply as evidence of an oral act comes eventually to take place of that act". [11]

[9] Justinian's Institutes §3.15.1
[10] The Roman Law of Obligations pp. 56
[11] An Introduction to Roman Law pp 194

The Constitution of Leo in 472 AD would surely have provided the final dagger to the oral *stipulatio*, where it was provided that a *stipulatio* should be valid so long as the intention of the parties was clear. Riccobono argues, and most modern scholars accept, that the need for an actual question and answer would have been formally abandoned by this ruling, a recognition of the prevalent practice.[12] It is thus beyond a doubt that the *stipulatio* had significantly changed since the beginning of the Empire.

Nevertheless, Justinian refused to accept such a "degeneration" of the traditional Roman *stipulatio* into a written contract both in principle and in practice. Instead, we see Justinian hoping to reconcile the principles of classical Roman law and contemporary practice by strengthening the evidentiary weight of the *cautio*.

Justinian thus emphatically repeats the oral nature of the *stipulatio* at §3.19.7 by imposing the rule of incapacity on those who could not speak or hear the words, similar to what Gaius did at §3.105, as mentioned earlier. He also insists on the traditional congruency requirement: "Next, a stipulation is ineffective if the answer fails to match the question",[13] a requirement that is repeated earlier in the Institutes of Gaius at §3.113.

To reconcile the widespread practice of using *cautio* (likely in lieu of an oral *stipulatio* altogether) , Justinian introduces a strong presumption that the parties were deemed to be present when evidenced by a *cautio* : "We there provided that documents which indicate that the parties were present are to be regarded as conclusive…"[14]

Such a presumption was rebuttable only by clear proof that one or the other party was absent, from the place at which it was dated, for the whole of the day on which the *cautio* was made. It is clear that Justinian and his draftsmen went to great lengths to preserve the traditional requirements of the *stipulatio* whilst attempting to give the formal law an inkling of resemblance to actual practice.

4. Treatment of the Contract litteris

4.1 Institutes of Gaius

Our knowledge of the contract *litteris* primarily derives from a brief account by Gaius from §3.128-134 and there is certainly a want of detail. The contract *litteris* in Gaius' time was a contract formed by writing where each paterfamilias ("head of the household") kept a ledge of transcriptive entries in which one of two types of entries was recorded: either a re in *personam* or a persona in *personam*.[15] The former converted an existing contract obligation into writing, to benefit from the certainty of writing, whilst the latter transferred a debt from one person to another. We know that the contract itself was called *nomina transscriptitia*. Thus even in the classical period, the contract *litteris* was a subsidiary or derivative form of contract and not necessarily a source of an original obligation in its own right.

[12] S Riccobono, *Stipulation and the Theory of Contract* (Balkema 1957)
[13] Justinian's Institutes §3.19.5
[14] ibid §3.19.12
[15] Institutes of Gaius §3.128

Most commentators agree that the brevity of Gaius's treatment suggests that the contract was becoming obsolete, if it was not already so, even at the time of the publication of Gaius' Institutes.[16]

By Justinian's time, the contract *litteris* was obsolete. This was largely due to the emergence of large-scale banking and state involvement in the economy reducing the economic role of the paterfamilias and the need for a family ledger. The practice of accounting ledgers was efficient in the agrarian society of early Rome where dealings were primarily between neighbours with little state intervention, but became inefficient as the expanses of the Roman Empire grew. Another reason for the decline of the contract *litteris* was the rise of the *stipulatio* and the widespread practice of using *cautiones* as mentioned above.

4.2 Institutes of Justinian

Similar to Justinian's treatment of the contract *verbis* and the *stipulatio*, emphasis is placed on form over substance, leading to a departure from an accurate reflection of legal practice of the time. For example, in the new Institutes, there is still oddly a reference to obligations by writing (de *litterarum obligatione*)[17].

For Justinian, the inclusion of the contract *litteris* seems awfully artificial, especially given that contract *litteris* were of marginal importance even in Gaius's time. Briefly, the contract *litteris* under Justinian was one that served a conclusive evidentiary purpose as opposed to itself being a source of contractual obligations. As Nicholas writes about Justinian's treatment of the contract *litteris*: "the facts are exceptional and unimportant. To erect them into an independent class of contract unnecessarily complicates and distorts the law."[18]

A better way of understanding Justinian's inclusion of the contract *litteris* might be his enthusiasm for order and to follow the fourfold pattern throughout the new Institutes: four types of contracts, four delicts, four real contracts, four consensual contracts. This rather pedantic style of draftsmanship can be seen in turn as part of Justinian's desire for perfection at the microlevel of Rome's formal legal system, and part of his larger goal of bringing back the beauty and prosperity of the early Roman Empire.

We can further see the artificiality of de *litterarum obligatione* if we recall our discussions on the *dotis dictio*, and the *iusiurandum liberti*, the two other forms of the declining contract *verbis* mentioned earlier in our discussions of how Gaius treated contracts by words. It can safely be assumed with equal certainty that by the post-classical period (i.e. 350 AD onwards), neither the *dotis dictio* or the *iusiurandum liberti* were in active use. Thus, it is no surprise (and in stark contrast to the inclusion of obligations by

[16] See n5 P Birks & E Descheemaeker, n2 A Watson.
[17] Justinian's Institutes §3.21
[18] An Introduction to Roman Law pp. 198

writing) that they are completely omitted from Justinian's Institutes without even a single mention of their application in the classical period.

5. Conclusion

Having examined the similarities and differences of treatments between the two Institutes, it undoubtedly seems that Justinian's treatment of the contract *verbis* and contract *litteris* was highly influenced by his desire for an appearance of an organised system of the law of obligations, indeed, one reminiscent of the glories of Classical Roman law when the Empire was at its peak.

The fortunes of the two types of contracts also reflect the economic and historical development of the Empire. As the Empire matured, Roman contract law moved away from its early roots where village life predominated interaction between private citizens towards a vast and complex commercial focused system where the *stipulatio* with its flexibility could flourish over the much more restricted contract *litteris*.

References

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