

EX PACTO ACTIO NON NASCITUR.

Ex nudo pacto inter cives Romanos actio non nascitur.—Paul. Sent. 2, 14, 1.

Nuda pactio obligationem non parit.—Ulp. in Dig. 2, 14, 7, 4.

The history of this rule is the history of Roman contracts. Yet a few of the salient points in the story may be summarily sketched, for through them runs an interesting development of law parallel to that affecting the rule that the slave had no personality,¹ the rule that a wife held toward husband the legal relation of daughter,² and to the development of the informal modes of acquiring property as equal to the formal modes.

The modern civilian sees no line of cleavage between pact, or convention, and contract; for the former, speaking generally, is sanctioned by an action at law. The meeting of the minds of the parties imposes the obligation. But the law of Rome had a very different theory. We cite the last two of the great classical jurists. Ulpian says: "A simple pact creates no obligation." Paul says: "No right of action at law arises from a mere pact." Ample testimony to show that the Roman rule, that a mere convention could not create an obligation, ground an action, was never abrogated. How, then, was it treated?

The Roman theory held that for a convention to become binding in law it must be clothed with such a juristic form as would transform it into a contract, would sanction it by an action at law. The early law contained enough such juristic forms to show a pretty complete system. Even the extant fragments of the Twelve Tables mention³ an old contract "with the bronze and the scales," the *nexum*, showing the quaint formalities of the symbolical sale for "spot cash," with its "scale bearer" and the five witnesses. So

¹ See the writer's paper on Freedom and Slavery in Roman Law, AM. LAW REGISTER, Vol. 40 (N. S.), No. 11, page 637 ff.

² See the writer's paper on Some Viewpoints of Roman Law, etc., AM. LAW REGISTER, Vol. 41 (N. S.), No. 2, page 98.

³ *Cum nexum faciet mancipiumque, uti lingua nuncupassit ita ius esto.*

long as the *nexum* involved an actual weighing out of uncoined metal, it could, of course, be used for loan contracts only, but after it became a mere symbol any obligation to pay a sum could be created by it whatever the cause was for entering into it. Cicero tells us⁴ that the Twelve Tables had a formal contract using the religious form—the oath, the *sponsio*. Probably this was the origin of the best known of the formal contracts, which one might almost call the “specialty” of the classical law, namely the contract by dialogue, oral question and congruent answer, the “verbal” contract or *stipulatio*. This form was capable of extension to all possible promises. Further, we find a formal written contract, *litis*, which must be entered in an account book by the creditor with the debtor’s consent.

The commoner agreements of Romans in the early state could be made binding by setting them in such juristic forms. But the simple meeting of minds had absolutely no juristic significance. Formalism ruled a long time before the dawn of the conception that a legal obligation could be imposed without formalities—the idea of an informal contract.

So long a sway implies certain merits. What were they? The advantages that formalism always has—precision and certainty. The time elapsing between the meeting of the minds and the actual formation of the contract permitted mature reflection. Again, proof in early Rome being drawn mainly from witnesses, the formality would grip the attention of the witness, and stick in his memory better than would the termination of an often long and confused series of proposals and counter proposals. Further, the judge was freed from the burden of interpretation. Not only was the question: “Was there a contract?” comparatively easy to answer by: “Yes, if the formality was gone through,” but the question: “What was the content of the contract?” did not turn on subtle interpretation or variable considerations of equity but on patent and substantial facts. The contract itself clearly stated the object thereof. Judge or juror could not remake it, add to it, or subtract from it. Interpretation being strict, both parties to the contract knew pre-

⁴ Cic. De Off. 3, 31, III.

cisely,—the creditor, what he would obtain; the debtor, what he must perform.

These merits, however, involved correlative disadvantages. A formality always implies hindrance—the time required for it,—interference with other business. Furthermore, strictness itself of interpretation might prejudice the interests of a party. The creditor could demand only what had expressly been promised, and had no recourse if debtor delayed execution, or showed bad faith. Take a case⁵ on a *stipulatio* to give the slave A. A. dies through neglect of promissor. Decision, no recourse.⁶ For the creditor should have required the debtor to promise the necessary care. So the creditor who failed to insert a forfeit could get no damages for delay in execution. The debtor, too, was not allowed to plead error, deceit, or constraint. However, in an early stage of civilization, these disadvantages would hardly be perceived. For contracts were infrequent acts for which both parties had time fully to prepare the minds, and the legal conscience probably had not developed sufficiently to be revolted by sporadic cases of inequity.

Rome and Roman civilization grew. Business as it grew found this system cramping, and opened the eyes of the law to its demerits. Transactions became so numerous that speed was essential. This loss of time was unendurable. The citizen traveling in a far off corner of the world-state, or fighting her battles, could not come home to go through the ancient Roman form. Must the business wait till Aulus of Rome and Numerius of Syracuse can get together and go through the oral dialogue? And, as court calendars filled with contract cases, the public conscience, too, awoke to the injustice in a system under which one party had no remedy for the fraud or inhumanity of the other.

Such considerations led during the last years of the Republic and under the Empire, to a change in the spirit of the law. This change showed itself sometimes in less strict interpretation, sometimes in less strict formalities. The rigors of interpretation equity also remedied in a measure, for the praetor introduced remedies to meet the mischiefs

⁵D. 45, 1, 91, pr.

⁶*Ad dandum, non faciendum tenetur.* Loc. cit.

of fraud and violence. Such considerations also led to the creation of new contracts that were not formal, some of them being of strict interpretation, others not of strict law. These contracts were the "real" contracts, and the "consensual" contracts.

The earliest of the "real" contracts was the "loan for consumption," *mutuum*. In this A. lends to B. a "consumable," say money, B. to return an equal amount of like quality. Originally such a loan would have required to make a legal contract the secular formality "with bronze and scales," called *nexum*, or the religious formality in which B. took an oath, the *sponsio*. In later days the parties would have gone through the oral verbal formality, *stipulatio*, in which A. asked: "Do you sacredly promise,—*spondesne?*" and B. replied: "I do,—*spondeo.*" Or the "literal" contract, *literis*, would have been inscribed by A. with B.'s consent in A.'s ledger. Still later the rule—very significant in the history of law—obtained that, in default of the completion of the formality the mere delivery of the consumables⁷ created the contract called *mutuum*, gave the right to bring an action at law.

Mutuum, or loan for consumption, was the earliest of the "real" contracts. The law developed three other "real" contracts that are well known: the loan for use (*commodatum*), the contract of deposit (*depositum*) and pawn (*pignus*). But an older contract for obtaining the same results as these three should be mentioned, the contract of trust (*fiducia*), for through it the three received their beginnings.

The contract of trust was certainly used to give security for payment of a debt and with regard to a deposit and probably in case of a loan for use. The mode was as follows: A. alienates the object to B. B. then enters into a pact or convention to alienate the same object to A. at a stated time or place—in case of deposit, upon the demand of A.; in case of pledge for security, upon the payment of the principal debt. In all these cases the convention to return was called a pact of trust (*pactum fiduciae*). Business had undoubtedly used it when the only sanction was moral, the

⁷ *Res quae primo usu consumuntur*, as, e. g., wine, oil, flour, money.

fides of the recipient, long before the law would enforce it. Later an action at law was allowed to one who had alienated under a pact of trust, if the recipient did not execute the pact, which thus became virtually a contract.

Yet it was awkward and indeed risky to loan or deposit by the process of first divesting oneself of the property right and then receiving a pact for the return of the property. Naturally, it seemed simpler to divest oneself of the physical possession, retaining the property right and the technical possession. At this point that ever-recurring phenomenon in the history of Roman law appears—the equitable remedies of the praetor. This “keeper of the people’s conscience”⁸ had developed a series of injunctions (*interdicta*), which protected mere possession. Under the contract of trust the property right had passed over; now the property right is held and temporary possession is turned over to one who enters into a convention to return the possession. Thus were developed the new pacts of loan, deposit and pawn. Even after the law gave an action to enforce the contract of trust, it refused legal remedies in the case of these new pacts. Here equity came in again, and the praetor devised and furnished remedies in equity. Equity, as so commonly in the Roman system, but blazed the path for the civil law, which eventually, in the last years of the Republic, reached the point of allowing special actions called, respectively, action on loan for use (*actio commodati*), or action on deposit (*actio depositi*), and on pawn (*actio pignoratitia*). At that moment other vital exceptions to the rule, *ex pacto actio non nascitur*, had arisen. These pacts had become contracts. The contract of trust naturally fell out of use except for security for debt where it had certain advantages. This fact explains how it is that the classical jurists name only four “real” contracts (arising, they say, *re*, “from the thing,” possession of which is given): loan for consumption (*mutuum*), loan for use (*commodatum*), deposit (*depositum*), and pawn (*pignus*).

It was probably about the time when the formulary system of procedure at law began that there appeared the four

⁸ See the writer’s paper on Justinian’s Redaction. *AM. LAW REGISTER*, Vol. 40 (N. S.), No. 4, page 199, note.

contracts that are called consensual: sale, hire, agency and partnership.⁹

Sale, or, as the Romans called it, "purchase and sale" (*emptio-venditio*), is the contract by which one party engages to furnish the useful and permanent possession of an object while the other party engages to pay in return a certain sum. Under the ancient formal system, to accomplish these two objects it would have been necessary to have two separate *stipulationes*, or verbal contracts, one from the vendor, one from the vendee, each becoming in turn creditor and debtor. Under the new system the vendor had as remedy the specific action on sale (*actio venditi*) and the vendee the specific action on purchase (*actio empti*), and these were grounded in the mere consent, or meeting of minds. So in the contract of "letting and hiring" (*locatio-conductio*), under which the mere convention of one party to furnish for a certain time the enjoyment of the thing, or a certain amount of labor, and of the other party to pay in return a sum of money grounded the respective actions, on letting (*actio locati*) and on hiring (*actio conducti*). So in the contract of agency (*mandatum*) which, on account of the wide difference distinguishing it from the English agency, it were wiser to call "mandate," and of which one may say tentatively that one party charges the other who is to act gratuitously: in this convention is grounded an action on mandate (*actio mandati*). And, finally, in the contract of partnership (*societas*), under which the simple pact to devote something in common to a lawful aim in order to obtain therefrom a reciprocal advantage, grounded for each party the action on partnership (*pro socio*).

What now are the main differences that distinguish from the old formal contracts these pacts that, in defiance of the rule *ex facto actio non nascitur*, have obtained recognition in Roman law as imposing legal obligations, as themselves contracts,—namely, the "real" and the "consensual" contracts? Their most salient difference consists in the fact that they are not formal. Their validity does not depend on the condition that certain formalities shall have been carried out. Their only necessary conditions are those per-

⁹Gai. Inst. 3, 135 ff. Just. Inst. 3, 22, pr., 1.

taining to their actual substance, conditions derived from their economic purpose, from that *publica utilitas* by virtue of which they have been excepted from the general rule, *ex pacto actio non nascitur*,—raised from the nothingness of pacts to be contracts. Sale binds A. and B. not because they have gone through a formality, but because their minds have met upon the thing and upon the price. That which renders the gratuitous loan for consumption (*mutuum*) actionable is not a formality imposed by law, but the handing over of the consumable without which there could be no loan.

In the matter of interpretation,¹⁰ too, they differ, with the exception of *mutuum*, in being contracts of good faith (*bonae fidei*), or free interpretation. In construing them the juror is to seek behind the words of the parties their intent, to supplement the forgetfulness of the creditor, to protect the debtor from any inequity that would result from the letter of the contract. The charge of the magistrate (*formula*, given in advance of the hearing by the juror of evidence) prescribed that the juror (or judge of fact) should decide what was justly due "*ex bona fide*," that is, gave him a new power in the interpretation of the contract. To illustrate from cases: The vendor of a slave under the consensual contract of sale was required not only to deliver him but to care for him up to the time of delivery; in case of culpable delay in execution he was liable for damages. *Per contra* the debtor might counter-plead fraud (*dolus*), or constraint (*vis, metus*). It was this power, freedom of interpretation, that took the fetters from commerce, facilitated the numerous, complex, speedy transactions of a great commercial world-empire.

Theory has attached the reason for gradually developing this power of the judge to a third characteristic which separates the informal and "*bona fide*" contracts from the formal contracts and the *mutuum*. The latter were unilateral contracts, that is, put only the one party under an obligation—made one of the parties exclusively a creditor and the other exclusively a debtor. Only one party was put under an obligation in the *nexum*, the *stipulatio*, the "literal"

¹⁰ Gai. Inst. 3, 137. Just. Inst. 3, 22, 3.

contract, the *mutuum*. But the later contracts which we have considered were all bilateral, created reciprocal obligations, *i. e.*, made each party at the same time both creditor and debtor. Three of these immediately and inevitably produce such reciprocal obligations. These contracts are sale, hire and partnership. The others do not immediately produce other obligations than to return the object, or to execute the mandate. But they may later create the reciprocal obligation, say for the depositor to pay the depositee's expense in preserving the object, or for the principal to pay the agent's expenses. And actions (called *actiones contrariae*) were allowed in order to enforce these last obligations. Thereupon these contracts became also bilateral. Theory says that the larger powers of interpretation were given the judge, and the contracts made *bonae fidei* because of the need of putting the judge in a position to appreciate the whole of the contract, weigh reciprocal obligations, and allow the just *compensatio*.

At any rate the contracts we have mentioned constitute the system that Gaius and Justinian have in mind in the well-known passages (G. 3, 89. J. 3, 13, 2.) stating that contracts arise *re, verbis, literis, and consensu*. But it would be a serious error to conclude that there developed no other exceptions than the "real" and the "consensual" contracts to the rule *ex pacto actio non nascitur*.

Imperial law recognized other exceptions—now under the name of contracts, now under other names.

The jurist Labeo at the very beginning of the Empire, when dealing with a case somewhat as follows: A. had goods on B.'s boat, B. sells the goods and defaults, and the circumstances fail to show whether the contract is one of hire of the boat or of letting the service of the shipmaster,—took an advanced step in deciding that in such a case the bilateral pact, accompanied by execution by one party, entitled to a remedy. From this beginning gradually developed the general rule that bilateral pacts not already named (*noninatae*) as contracts, and accompanied by execution by one party would ground an action to compel execution by the other party (*actio praescriptis verbis*, in which the magistrate in his charge detailed the special circumstances

and turned the case over to the jury). Such pacts formed a further exception to the rule, *ex facto actio non nascitur*, and were called contracts innominate (without name). Other exceptions of a bilateral nature were Zeno's emphyteusis, a special contract for lease in perpetuity, and Justinian's pact of compromise (to compromise a case out of court).

Again, an interesting development arises from the equity of the praetor,—indeed is but a continuance of the function in equity he had shown in developing the *commodatum*, *depositum* and *pignus*—namely, the so-called praetorian pacts (*pacta praetoria*). For their development he used the equity action called *actio in factum*. Such further exceptions to the rule, *ex facto actio non nascitur*, included the peculiar pacts regarding effects of travelers taken in charge by common carriers (shipmasters, *receptum nautarum*), and innkeepers (*receptum cauponum*), and the pact of a banker to pay another's debt (*receptum argentarii*), and a pact (made to obtain delay) to pay a debt (already due) by a certain date (*pactum de pecunia constituta*). It must not be forgotten that by Hadrian's legislation all the contents of the praetor's edict, including the praetorian pacts, so-called, became statute law. But further yet imperial law sanctioned by actions the pact of gift (*donatio*) and the pact to furnish a dowry (*dos*), which conventions, though called "legal" pacts (*pacta legitima*), were therefore exceptions to the rule, that is, were genuine contracts.

To sum up, the extent of the rule *ex facto actio non nascitur* has been immensely delimited by the exceptions real, consensual, and innominate contracts, praetorian and "legal" pacts. But in the Roman system the rule was never abrogated. Its expression is but slightly changed by the insertion of the adjective "mere," or "non-legalized." It reads now: *ex nudo pacto actio non nascitur*. Even under Justinian the only remaining formal contract, *stipulatio*, must be used to make binding conventions that fell outside these exceptions. Among such were all bilateral conventions not falling within the consensual contracts (such were, *e. g.*, exchange and division), in case there had been no execution by one party, and all unilateral pacts that were not "real"

contracts, or praetorian, or "legal" pacts (such, *e. g.*, were pacts to open a credit, a unilateral pact to sell, or pact to buy).¹¹

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¹¹ But pacts that were not actionable could be set up in defence, by way of counterplea.

Following as I have in the main Girard's treatment, I have not emphasized the influence of the *Jus Gentium* with its development of remedies for non-Romans; and the subject of "*Causa*," with its historical relation to the English doctrine of "Consideration," seemed to me to demand a paper by itself. As suggesting such a study and at the same time furnishing the distinction of a case on the rule "*ex pacto*," etc., I subjoin: Just. Codex 2, 3, 10, "nec obesse tibi poterit, quod dici solet, *ex pacto actionem non nasci*. Tunc enim hoc iure utimur cum pactum *nudum* est: alioquin, cum pecunia datur et aliquid de reddenda ea convenit, utilis est conductio." A. has furnished the groom X. a dowry for M., X.'s bride, and X. has entered into a pact with A. to return the dowry if the marriage terminate. The condition has arisen. The pact is not "bare" (*nudum*) but clothed in the "*causa*,"—in this case, of course, "consideration executed by one party."