

Book VIII.
Title XXXVII.

Concerning the contract of and defaults in a stipulation.
(De contrahenda et committenda stipulatione.)

Bas. 43.5; Dig. 45.1.

Headnote.

Stipulations.

The character of a stipulation under the Roman law has already been stated in the headnote to C. 2.3. It was there pointed out that it was the one remaining formal contract of the Roman law in Justinian's time. It was a unilateral contract, binding only the promisor, entered into by questions and answers, and essentially verbal, although, as pointed out in note to law 1 of this title, it came, by custom, to be generally embodied in a written document. Being verbal, it could not be entered into except by persons in the presence of each other. Inst. 3.19.12. And it follows that deaf or dumb or insane persons or infant could not be a party thereto. D. 45.1.1 pr; Inst. 3.19.7-10. The formalities thereof in the beginning doubtless required strict compliance, but, as pointed out in the laws of this and the next title, the rule was gradually somewhat relaxed. If the question was: "Will you give?" and the answer, "Why not?" a stipulation was considered as having been entered into, but a nod in answer to a question was not sufficient.

D. 45.1.1.2. The answer must conform to the question, and must be reasonable closely connected therewith in time. If the question was: "Will you give January 1st?" an answer: "I will give April 1st," did not give rise to a stipulation. D. 45.1.1.3; D. 45.1.1.37 pr; Inst. 3.19.5. It might be entered into in Latin or Greek, in whole or in part, provided that the parties understood each other. D. 45.1.1.7. It, like other contracts, had to have a *causa*, a ground or reason as its basis. That point is treated at length in the note to C. 2.3 and need not be referred to further. A stipulation, like other contracts, might be void if against the law or contrary to good morals or public policy. D. 45.1.26 and 27; D. 45.1.35 pr and 1; D. 2.14.7.17. It could not be enforced if impossible of fulfillment. Note C. 8.37.8. While perfectly legal, though exacted by fraud or fear, these elements might be set up in defense and defeat its enforcement. D. 45.1.36; C. 8.37.9; C. 8.38.5.

Its use was exceedingly extensive. It was in fact co-extensive with the field of contract. Numberless places in this Code attest that fact. A stipulation might be attached to every agreement that was made, for the purpose of eliminating as many defenses as possible, and may in that respect be compared with the written contract under seal under the common law of England. It was the contract of "strict law," and few defenses were available. Generally, the only question was: Has the stipulation in fact been entered into? It might be exacted to guarantee possession and as security against eviction or fraud. It might be sued to secure the manumission of a slave or the payment of a loan, or the fulfillment of any other contract. D. 45.1.3 pr and 4pr; D. 45.1.52.1; D. 45.1.102; D. 45.1.122.2 and 126. 2. This is particularly illustrated by the law of suretyship, for every obligation admitted of the addition of a surety. D. 46.1.1; D. 46.1.8.1 and 8.6. It was mostly used to make the so-called pacts an enforceable obligation. These pacts are

mentioned at length at C. 2.3 and headnote thereto, and reference is hereby made thereto. Thus it was used to exact the payment of interest, or a penalty, and in connection with novations and many contracts of suretyship, which, generally, except for the stipulation, would be naked pacts and not enforceable. Sohm 402-406. As to a pact for interest due to bankers, see Nov. 136, c. 4, appended to C. 8. 13. 27; and see headnote C. 4.32.

The use of the stipulation was not confined to the field of contract alone, but was also employed in connection with judicial or quasi judicial proceedings, and corresponds to some of the English contracts of record; e.g. recognizances; they were so-called contracts entered into by one party to a judicial or quasi-judicial proceeding for the security or protection of the other at the order of the judge or magistrate. Moyle, Inst. 395 note; Inst. 3.18. Thus a surety might be required in connection with the erection of a new structure, or as a guaranty against threatening damages, referred to at length in the note to C. 8.10.14. So, too, a surety might be demanded as security against fraud; or for the pursuit of a runaway slave; or to pay legacies to an heir; or that a ward's property would not be squandered by a guardian or curator. Inst. 3.18; D. 45.1.5 pr. Some of the foregoing, and other matters, will be treated more at length in the notes to the laws in this and the next title.

The word "stipulate" has in some cases the same meaning as "stipulator" in Latin, that is to say, the meaning of exacting a promise, while in most cases it has the same meaning as "promise." In order to obviate any misunderstanding, the phrases "promissor" or "promisee" of a stipulation has ordinarily been used, and the word "stipulate" whenever used, is employed in the sense of "promise."

8.37.1. Emperors Severus and Antoninus to Secundus.

Although it was not added to the letter, which you enclosed in your petition, that a stipulation was exacted by the promisee, nevertheless, if the transaction took place in the presence of the parties, it is to be considered that the answer of the promisor followed a preceding interrogation (stipulatione).

Recited April 15 (200).

Note.

Commencing with the beginning of the third century A.D., the stipulation became mostly an empty formality. A local custom was very prevalent in the Eastern Roman Empire, that writing was essential to the validity of a contract. And while the Roman law did not, generally, accept this view (C. 2.3.17), it was to a large extent influenced by such custom. So the law came to be, though a stipulation was essentially an oral contract, entered into by question and answer, in the presence of the parties, that what a man wrote should be accepted as true, unless the contrary were shown. Inst. 3.20.8; 35 Z.S.S. 215. And even a special limitation came to be applied in connection with showing that the parties did not enter into a contract in the presence of each other, when a statement in writing showed such presence. Law 14 h.t. And any clause inserted at the end of a contract, showing that the obligee exacted a stipulation, and that the obligee promised, or a clause signed by the obligor to the effect "interrogated, I answered," or that Titius (the obligee) asked, and Maevius (the obligor) promised, was held sufficient to show a stipulation. D. 2.14.7.12; Bruns, Fontes 335, 336; 47 Z.S.S. 95; Mitteis, V.R.u.R.R. 486. In fact the law went further. Whatever was stated in writing was not only held to show the truth, but came to imply prerequisites. Thus if a man wrote that he became a surety,

all formalities were considered to have been duly observed. The instant rescript is in line with that, for it means that if the obligor stated in writing that he had promised, a preceding interrogation would be implied, if the parties were present - in other words that a stipulation had been entered into. C. 1 h.t; C. 14 h.t; Paul, Sent. 5.7.2; D. 45.1.134; D. 2.14.7.12; D. 27.7.4.3; Inst. 3.19.7; Inst. 3.20.8; Riccobono in 35 Z.S.S. 215.

8.37.2. The same to Diocletes.

If you exacted a stipulation that money should be given to your daughter who was in your power, you are not forbidden to sue on the obligation which was acquired for your benefit.

Promulgated November 4 (210).

Note.

The general rule, as fully explained in note to C. 4.27.1, was that the benefit of a contract can accrue only to the immediate parties thereto, and that one man cannot have a contract made, or a stipulation entered into, by another, in favor of a third party. But the property of a son, speaking generally, belonged to the father, and the contract mentioned in the foregoing law accrued directly in favor of the father himself who exacted the stipulation. Hence general rule did not apply. See also C. 8.38.3; C. 5.12.26; C. 5.14.4; C. 4.14.7.

8.37.3. Emperor Antoninus to Hadrianus.

If, when you loaned money, the stipulation was taken in the name of Julianus, as an accommodation, when he was not there, since with such formula of words, nothing is affected, you may know that the obligation of the contract belonged to you. And if Julianus, therefore, demanded and received the money from the debtor, and you ratified that transaction, you have an action against him on volunteer agency.

Promulgated February 24 (217).

Note.

See C. 2. 18. 9. As stated in the note to the previous law (see C. 4.2.4), a stipulation could not be exacted by one man in favor of a stranger. C. 4.27.1, and note. If, however, it was for the interest of the promisee of the stipulation that the stipulation in favor of a stranger be performed, it was valid, and the promisee exacting the stipulation could sue for default. Note C. 4.27.1. The present law says that the stipulation was invalid because the stranger, the third party, was not present. Now it appears from Inst. 3.19.19; D. 45.1.38.20, (deemed to 35 Z.S.S. 289), that if an agent exacts a stipulation from another in the presence of the principal, the latter has a right of action (*utilis*) on the stipulation. D. 45.1.79. And evidently, judging from the present law and also from C. 8.38.3, if such third person was present in whose favor a stipulation was exacted, he had a right of action on the stipulation, for as 9 Cujacius 1196 says it will be presumed that he, too, was a party to the stipulation.

In the instant case, he was not present, and hence the stipulation was void. Now generally, a loan made in the name of another, accrued in favor of such other. C. 4.27.3. The point of doubt was whether it did in the present case, and the answer is in the negative. But the payment to such third person might be ratified, and the money recovered from him. 9 Cujacius 1179.

8.37.4. Emperor Alexander to Sabina.

According to the response of Domitius Ulpian, Prefect of Food Supply, jurist and my friend, a wife who exacted a stipulation (from the husband) that when she should die she might bequeath on-half of her dowry to whomever she might wish, (in effect) exacted a stipulation that this part of the dowry should be returned to her upon her death. Promulgated March 31 (222).

Note.

The objection here raised doubtless was that a stipulation exacted by one party in favor of another was void. It was held that this was not such a stipulation, and that it was valid. See law 11 of this title and C. 4.11.1, and note; C. 5.12.25.

8.37.5. Emperors Diocletian, Maximian and the Caesars to Isidora.

As has often been decided, the laws do not always permit a person who made a naked promise to fulfill it. 1. But since your opponent, as you state, also entered into a stipulation with you that, if he should do anything contrary to the agreement, he would give you an amount equal to that involved in the transaction, and that after the commencement of the suit this condition was fulfilled, it is agreed that the right to claim the amount mentioned in this stipulation became effective. Subscribed November 27 (293).

Note.

This law illustrates the principle that a stipulation was used in order to transform a pact that was not actionable into a contract that was actionable. See as to pacts C. 2.3 and headnote to that title. "Always" in the first sentence is interpolated. In classical law a naked pact never gave rise to an action. 43 Z.S.S. 356. See C. 2.3.14.

8.37.6. The same to Erotius.

You should know that an amount agreed to be give pursuant to a compromise, may be claimed, if the pact was accompanied by a stipulation for a definite or indefinite amount.

Subscribed at Sirmium December 17 (293).

Note.

A simple agreement of a compromise was a naked pact, and therefore not actionable. A compromise made and carried out, however, by one party, as for instance the dismissal of a lawsuit, became what was called an innominate contract - a contract fulfilled by one party, and hence though no stipulation was added to such contract, an equitable action (*praescriptis verbis*) lay. C. 2.4.4; C. 2.4.6; C. 2.4.33; Buckland 523. It is conceivable that a compromise would not be an innominate contract, for instance where nothing had yet been done, and no action had been started. In such case the only liability on the compromise could arise out of a stipulation attached.

8.37.7. The same to Antoninus.

Neither the absence of a guardian or curator hurts a stipulation, since there is no doubt that also a female less than twenty-five years old may receive a stipulation in her favor in the absence of her curator.

Subscribed January 16 (294).

Note.

A child over seven years of age could enter into a stipulation or contract incurring an obligation, only with the guardian's authority. Such authority was not, however, necessary for any act by which the minor simply improved his condition. Inst. 1.21 pr; Inst. 3.19.9 and 10. A child under seven years of age, under paternal power, could not bind himself even with the consent of his father. Inst. 3.19.10. See C. 8.38.1; C. 5.59.1.

8.37.8. The same to Posidonius.

A promise that a slave will not die is an impossible promise. But he who has such a stipulation rightly demands payment after the slave's death.

Subscribed February 18 (294).

Note.

Impossibility.

A contract to be valid must be possible of fulfillment. Generally an agreement for an impossibility was void. An impossible condition, under the Roman law, was one which, according to the course of nature, could not be fulfilled. Thus a promise to touch the sky with a finger was void. So a stipulation for the delivery of a thing, which did not or could not exist, such as a slave who has died, though thought to be alive, or an impossible creature, like a hippocentaur, was void. Inst. 3.19.1 and 11; D. 45.1.7; D. 45.1.35 pr. But a stipulation to give "if I do not touch the sky with my finger" was considered unconditional and could be sued upon at once. Inst. 3.19.11; D. 45.1.7. And the impossibility must be general; simply because the promisor himself could not fulfill, did not avoid the promise, if the power to fulfill existed in someone. D. 45.1.137.5.

Not every impossibility, however, excused performance. It might exist by reason of some law, and yet the promisor be held for damages. If, for instance, a man sold a piece of ground which in fact was dedicated for religious purposes, the contract itself, made in reference thereto, was void, but the seller would be held responsible for the damages.¹ D. 11.7.8.1. So where a man was sold as a slave, who was actually free, the seller was responsible on his contract for the damages. D. 18.1.4 and 5. And the tendency in later law was not to excuse such legal impossibility, but to hold the seller responsible in damages. Buckland 417, 418; Girard 465, 466. Knowledge of the impossibility on the part of the buyer, however, excused performance. Buckland 418.

An impossibility might arise also subsequent to the making of the contract, and a supervening impossibility, as, for instance, the destruction of a specific thing that was promised, excused performance. D. 45.1.37. Non-performance must not, however, be due to the delay, fraud or neglect of the promisor. Buckland 557; 2 Roby 17, 18; Hunter 638.

While performance was due immediately where no time was fixed, yet if the contract implied time, immediate performance, being an impossibility, was not necessary. If, for instance, performance was to be at a distant place, the promisee was not bound to travel day and night in all weather; if a contract was to build a house, only ordinary speed and exertions of an active builder were necessary. D. 45.1.41.1; D. 45.1.72 and 137.2; 2 Roby 18.

¹ [Blume] Not so if sold "res sacre."

8.37.9. The same to Capita.

If you gave Zeno a stipulation through fear of death or of great bodily injuries, you can defend an action (brought thereon) by setting up that defense. 1. But if nothing of that kind is proven, and the stipulation rests, not on a disgraceful but on a worthy consideration, the promise is not invalidated because (given) on the pretext of a pending or intended accusation. 2. If the money, however, was promised (as a bribe) not to institute a criminal accusation, the claim to recover it will be denied, since no such agreement is permitted to be made.²

Subscribed at Variana October 13 (294).

8.37.10. Emperor Leo to Erythrius, Praetorian Prefect.

All stipulations, recognized by law, though not entered into by the usual or direct words, but by any words whatever which express the consent of the contracting parties, shall, recognized by the laws, be valid.³

Given at Constantinople January 1 (472).

8.37.11. Emperor Justinian to Mena, Praetorian Prefect.

Completely disposing of the subtle disquisition, whether (an effectual) promise by a stipulation could be exacted to take effect after death or during death, or the day before death, or whether a legacy or trust left in a testament (in like manner) had any validity, we direct that whatever the contracting parties provide by stipulation or pact, or whatever a testator orders in his testament, shall be valid according to the terms of the contract or testament, although it is to take effect only after death or the day before death or during death.

Given at Constantinople December 18 (528).

Note.

See also C. 8.37.4. A promise for performance so many days before the death of either party was void. See C. 4.44.1 and exhaustive note.

8.37.12. The same to Mena, Praetorian Prefect.

Clarifying an obscure point of the ancient laws which has given much occasion for protracted litigation up to this time, we ordain that if anyone promises under a stipulation to do or give something definite within a certain time, or to do what the promisee wishes, adding that he will pay a penalty if the promise is not fulfilled within the time fixed, he may know that he may not, in order to evade the penalty, object that no one reminded him, but he shall be subject to this penalty, according to the tenor of the stipulation without admonition, since he should himself keep his promise in mind, and should not ask that this be done for him by others.⁴

Given at Constantinople April 6 (529).

² [Blume] For a similar law, see C. 2.19.10 and note. See also headnote of that title and C. 8.38.5.

³ [Blume] See full note to law 1 of this title.

⁴ [Blume] C. 4.65.2.1. See Vangerow p. 192; see C. 8.13.10.

8.37.13. The same to Julianus, Praetorian Prefect.

Deciding an ancient dispute, we ordain generally that every stipulation to give or do something, or to both give out and do something, is transmissible to and against heirs, whether special mention of heirs is made or not. For why should obligations justly applicable to the principals not be transmissible to and against heirs? 1. And such stipulations shall have the same effect as stipulations containing only a promise to give, inasmuch as the heirs can just as well do what was promised to be done, and the technical, subtle reasoning that the duty to do something imposed on one man cannot be carried out by another is not to be accepted. 2. Since the nature of all men is nearly the same, why should not anyone do the required act more or less perfectly, in order not to nullify the wishes of men by such quibbling?⁵

Given August 1 (530) at Constantinople.

8.37.14. The same to John, Praetorian Prefect.

It is time to decide a very important question which frequently arises in courts, so that it may no longer trouble our Empire. It is the custom to add to many contracts, especially duebills given for loans, that a stipulation (annexed to such contracts) was made through certain slaves. But certain unscrupulous men have therein found material for dispute; some men contending that no slave was present; others that the slave did not belong to the man stated by the writing to be the owner of such slave. Again if it was stated in writing that the stipulation was entered into, not by slaves, but in the presence of the principals themselves, it was disputed whether the actual presence of the parties was necessary to be shown. 1. And since it is useful that slaves should be able to be called in connection with contracts, and it is also useful to have documents contain the statement of the presence of the parties, as in the case of person of high dignity, or women, whose natural modesty forbids them to show themselves indiscriminately, we ordain that such written documents shall be valid, and if a slave is mentioned and is stated to belong to a certain person, it must be accepted as true that the slave was present and received the stipulation for the benefit of the master mentioned, and it shall not be questioned that the slave was present or that he belonged to the master for whom, according to the writing, he received the stipulation. 2. And if it is stated that the transaction took place in the presence of the parties themselves, this, too, must be accepted as true, provided that both parties were in the same city on the same day on which such document was written, unless the party, who claims that he or his opponent was not present, shows by clear and evident proof - and best by writing, but if that cannot be done, then by credible witnesses to whom no exception can be taken - that he or his adversary were not in the city on that day; otherwise, such documents must, on account of their utility to contracting parties, be given full credit.

Given November 1 (531).

Note.

A stipulation between persons not made in the presence of each other was void. This rule afforded contentious persons opportunity of litigation by alleging, after some interval, that they or their adversaries, or the slaves acting for them, had not been present on the occasion in question, or that a slave - who might act for his master - was not in fact

⁵ [Blume] See also law 15 of this title.

the slave of the man whom he purported to represent; for another man's slave could not act for him. Hence the present law makes the recital of the presence of the parties and of the ownership of the slaves indisputable proof of the fact, except as herein mentioned, and also makes the presence of the parties *prima facie* proof, and in fact conclusive, unless the absence of one of the parties on the date of the execution of the document from the city is shown. This law is mentioned at length in Inst. 3.19.12. See also full note at law 1 of this title.

8.37.15. The same to Johannes, Praetorian Prefect.

If anyone had promised by stipulation that when he should die he would build a tenement house for the promisee, such stipulation appeared to the ancients as impossible of fulfillment. But, analyzing the intention of the contracting parties, the truth seems to be that the parties contracted that the obligation, while in the beginning that of the decedent, should rest on his heirs till carried into effect. For there is no one so stupid so as to enter into a stipulation thinking that he can erect such a building in a moment, or that he could complete such work without assistance. 1. We, therefore, ordain that if such a contract is made, the heirs shall be liable thereunder, so that the act which the decedent promised to do at the time of his death, shall be carried out by his heirs, as though special mention of the heirs had been made, though not actually so made. For as a stipulation made as to giving something is obligatory on heirs, so if it relates to doing something, though as of the time of death, it shall, the same as a stipulation made as to giving something, be binding upon the heirs, so that a stipulation for doing something may not differ from one providing for giving something, and our law may be harmonious in all things. 2. This rule shall, in like manner, be applied to bequests of legacies.⁶
Given October 18 (532).

⁶ [Blume] See also law 13 of this title.