4. Stipulation and Pact.

One of the most interesting subjects in the Roman law is that which relates to pacts and to the stipulation. It has been treated at length by Professor Riccobono.(101) It would be a fine contribution to English literature on the Roman law if some one would undertake to translate his splendid articles. I shall make my remarks on the subject -- mainly in so far as it appears in the Code -- as brief as possible.

The original, archaic form of the stipulation, as an oral contract, is preserved for us in the Code, for it is stated:(103)

> "If it is shown that a promise to pay interest was (rightly) made in answer to a previous interrogation, such interest is justly owing, even though not mentioned in the instrument of indebtedness."

However, the laws or rescripts of the Code dealing with this subject are not as apt to lead to misunderstanding as are the texts in the Digest. We have the date of the foregoing rescript. It is of the

(101) 35 Z.S.S. 214 ff; 43 Z.S.S. 262 ff.

(103) C.4,32,1.

time of the emperor Pius. Later laws clearly show us what Prof. Riccobono calls the degeneration of the stipulation. A rescript bearing the date of 200 A.D. tells us that if a man states in a contract in writing that he has solemnly promised, it will be presumed that an interrogation in connection with a stipulation has preceded.(104) The rescript is deemed to be interpolated.(105) Nevertheless it shows the change in the form of such contract. In 472, the emperor Leo wrote(106) that "all stipulations, recognized by law, though not entered into by solemn or direct words, but by any words whatever which express the consent of the contracting parties, are valid." While there is some doubt as to the exact meaning of the law, it is clear that it recognizes the intent of the parties as the primary requisite of the contract, and that formal, solemn words shall be no longer necessary. Justinian, perhaps in part, referred to this law when he stated(107) that "the customary words of stipulation, and the subtle or rather useless form thereof has been permitted to pass out of use." In the Byzantine period it was usual to add to a

(104) C.8,37,1.
(105) Riccobono in 35 Z.S.S. 278.
(106) C.8,37,10.
(107) C.2,55,4,7.

written instrument the so-called stipulation clause.[108] Justinian recognized such clause as sufficient to create a stipulation, not only in the Digest,[109] but inferentially also in the Code.[110] Frequent disputes seem to have arisen as to whether or not this clause stated the truth; that is to say, whether the contract was executed in the presence of the parties, for such presence was required.[111] So Justinian provided in an enactment of 531[112] that whenever it should be stated in the written instrument that the parties were present, that should be taken as conclusively true, unless it were shown that on the day the instrument was executed one of the parties was not present in the city. In other words, he practically eliminated the requirement of the presence of the parties, and in that respect put the stipulation nearly on the same footing as a pact. Still another provision, and showing the degeneration of the archaic stipulation in a glaring light, was made in 530,[113] whereby Justinian enacted that a stipulation should be implied

(108) Bas.11,1,7 (Heimbach, 1,571)
(109) D.2,14,7,12; C.12,1,40; D.45,1,122,1.
(110) C.8,37,14.
(111) C.8,38,3 pr.
(112) C.8,37,14.
(113) C.5,13,1.

in every agreement relating to dowry.

We find further evidence on this subject when we consider the pact. Generally speaking, the tendency was from formalism to informality. Vulgarly speaking, the pact went up, the stipulation down. They approached each other gradually, until nearly every pact had the binding force of a stipulation. The latter, in its original solemn form, necessarily required all which was intended to be covered thereby to be embraced within the question. But such requirement was eliminated by the provision in the Code[114] which states that "complainant suing on a stipulation, which was added for the purpose of making the pact enforceable, rightly demands that the decision be in his favor, whether such pact preceded the stipulation or was interposed immediately after it." Again, we find a text[115] which states that if a pact is made, and a stipulation is added which provides for a penalty in case the pact is not fulfilled, the promisee has the option to sue for the penalty or for the performance of the pact. Here a pact which was not clothed

(114) C.2,3,27.
(115) C.2,3,14.

in a stipulation was made enforceable merely by reason of the stipulation for a penalty -- a step far removed from classical law. In other instances pacts were made directly actionable. Thus the emperors Theodosius and Valentinian provided[116] that "a promise in any sort of words shall suffice to enforce payment of a dowry, which has been agreed to be paid, whether the promise is in writing or oral, and even though no stipulation accompanied the simple promise to pay." So, too, a second promise of an existing debt was made enforceable.[117] An oral promise to submit a dispute was required to be fulfilled.[118] A simple pact by a manumitted slave that he would pay his former master a sum of money as a reward for the manumission was raised to the dignity of an enforceable contract by Justinian.[119] And what perhaps astonishes the common-law student most is that Justinian made an oral promise of a gift actionable.[120]

(116) C.5,11,6.
(117) C.4,18,2.
(118) C.2,55,4-5.
(119) C.4,14,3; compare Bas.24,5,3.
(120) C.8,53,34.