Real Contracts In Roman Law

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Abstract

The real contracts are those that in order to arise require both the will of the parties - intentional element - and the material remission of the object (res) which constitutes the subject of the contract – material element. Real contracts are born in re, meaning through tradition or remittance of the object and the meeting of the two is enough for the formation of the contract without the need for written or oral solemnities[1]. For example, when submitting something to a person in order to preserve it, a deposit contract is concluded, which in addition to the consent of the depositary and the one of the person who receives the deposit, the remission of thing which is the subject of the deposit was also asked for.

Keywords: roman law, contracts, real contracts, mutuum, fiduciary, pledge, bailment, deposit

Introduction

Real contracts appeared at the end of the old era and the beginning of the classical era, during the economic development of the Roman society, with the exception of the pledge that appeared in the second century AD. The emergence of real contracts has served the interests of the dominant classes, for a better operation of the trade which was the main source of enrichment of Rome. The development of trade required numerous legal acts, and the interests of the Knights, the new social class, required the formation of legal instruments that could be used more easily. Thus, the real contracts were outlined with an identity of there own, each corresponding to a given legal operation and described by using a specific technical term.

Real contracts in Roman law were: mutuum (consumption loan), fiduciary (transfer of ownership with the convention of restitution), pledge, bailment (loan for use) and deposit. Fiduciary, pledge, bailment and deposit were contracts in good faith (bonae fidei), in the sense that the judge had the right, in the event of a dispute, to appreciate the operation that took place between the parties according to equity and good faith, while mutuum was a strict law contract (ius strictum); its meaning comes from the primitive loan agreements, and in case of dispute, the judge resolves it within the strict limit of the convention. Besides mutuum, which was a unilateral contract, the other real contracts were imperfect.

Further we offer an analysis of real contracts, taking into account that currently some legal features have been preserved.

Main aspects

Mutuum (loan for consumption)

Mutuum was the contract under which the debtor is obliged to transmit to his lender things of the same kind, quality and quantity with the ones he received for consumption[2]. Etymologically, the word "mutuum" comes from the phrase “ex meo tuum fit” (mine becomes yours); the correct name in Roman times was mutui datio (loan).

The person who took a loan was required to repay only what he had received, this is why it was argued that mutuum is a free contract, a simple convention that was not sanctioned by law and was based on trust. Also, it has been argued that the loan would have been sanctioned through sacramentum or through condictio. From the formal point of view, mutuum was really a free contract, but in fact, through mutuum usury was made.
In the old age the remission of a thing was direct and material so the transmission was carried out from hand to hand. In the classical era there have been situations where the understanding of the parties accompanied by a fact that suggested the intention of the parties to transmit the thing was sufficient.

**The conditions** that had to be met in order for the mutuum to be valid:

a) To have as objects things that could be weighed, counted or measured – for example namely, wine, grain, oil, etc.

b) The things that were delivered to the borrower should have been transmitted with the property title - mutui datio. Transmission of property was done through tradition.

c) There should have been an agreement of will between the parties relative to the loan, an agreement between the lender and borrower in which the debtor is obliged to repay what he has taken at term, in the same quantity and quality. This agreement does not allow the borrower to return more than he has received, for the obligation is formed through the remittance of the thing.

**The legal characters** of mutuum:

1. Mutuum is a real contract. Transmission of the thing’s property that forms the subject of the contract was absolutely necessary.

2. Mutuum belongs to the category of trivial contracts, a unique species of these contracts. The simple given agreement of the parties was not enough, but required the submission of the thing’s property.

3. Mutuum is a unilateral contract for the obligation that arises is born only for the borrower (debtor). The transmission of the thing by the lender is a form condition necessary for the birth of the contract, so it is not made to enforce an obligation to the creditor.

4. Mutuum is a contract of strict law and it is interpreted according to the letter of the convention between the parties.

5. Mutuum was a jus gentium contract and it can be used in the relations between citizens and pilgrims.

**The effects of mutuum:**

Mutuum is born *in re*, meaning that the material remittance of the thing takes place and through this the ownership of the thing. The borrower could dispose of the thing lent and consume it, with the condition that at the deadline set, to return to the loaner things of the same quality and quantity as the thing lent. In respect to the accidental loss of the borrowed thing, the borrower is not liberated by the repayment obligation because the risk was assumed by the borrower and he owes a fungible thing (of gender). In accordance with the principle - *genere non perunt* (things of gender do not perish), the debtor has to buy another thing of the same kind in the same quantity and quality, so when the time comes he is be able to fulfill the obligation to the creditor.

The obligation of the debtor, in the old Roman law was sanctioned by *legisactio per condictionem*, sanction replaced at the end of the Republic with *actio certae creditae pecuniae* (when the object of the obligation was an amount of money) and with *action certae rei* (when the debtor had to return a determined individual thing).

**Foenus (loan with interest)**

Loan with interest was practiced from the very old age, and has very serious consequences, causing deep social changes that have emphasized even further the differences between rich and poor.

Originally, foenus took the form of stipulation. So the borrower received 200 sesterces, but promised to return 300 sesterces. The difference of 100 sesterces was paid by the borrower although he did not receive this money when settling the stipulation.

After the emergence of mutuum, foenus took either the form of stipulation or mutuum’s form which was accompanied by a stipulation of interest. In the latter case, two distinct acts were drawn up: mutuum, which had as his object the stipulation, which had as object the interest (stipulatio sortiset usurarum). The loan with interest in the form of stipulatio sortiset usurarum was achieved with simple and faster forms and that is why it was preferred by the Romans.

Because the interest rates had gained ground in Rome, they tried to limit them. A provision to this effect was included in the Law of the XII Table, according to which the interest could not exceed
the twelfth part of the capital, which meant 8.33% of the amount borrowed. But the interest was monthly and not annual and could lead to doubling of the capital within one year.

The law Liciniae Sextia contained provisions favorable to the borrowers. According to it interest payments were going to be deducted from the capital. At the end of the IV th century BC, the interest-bearing loan was forbidden. Mutuum was actually sanctioned through actions which allow the creditor to impose to the debtor particular stipulations, through which the debtor undertakes to pay the amount due, yet a third, if it is proved that the action brought by the creditor was founded. Thus, creditors borrowed large amounts of money that the borrowers could not pay at time and then resorting to the Praetorian stipulation forced the debtors to pay the amount due plus a third of it, in case they lost the trial.

The provisions of the Genucia law could be bypassed through the substitution of a latin since the prohibition to charge interest applies only to citizens. In practice, the roman citizen requires the service of a latin which had very high interest for the amounts borrowed. Later Genucia Law also applied to the Latins.

Fiduciary
It is the real contract that arises by transmitting the property through mancipium or in iure cessio, transmission accompanied by a convention through which the purchaser promises to re-submit the property of the thing to the one from which he has received it. Originally, the fiduciary contract has had many functions, which gradually have been taken over by other real contracts.

Chronologically speaking, at the beginning fiduciary has been used for the purpose of establishing a guarantee through the transfer of ownership of a thing by the debtor to its creditor through mancipatio or in iure cessio, transmission accompanied by an agreement according to which the creditor promises to retransmit the property of that thing to the debtor provided he paid his debt to maturity. This application of the contract was named by Gaius fiducia cum creditore. Subsequently, this function of fiduciary was taken over by the pledge, in a manner more advantageous for the parties.

Gradually, fiduciary was used in order to achieve the loan for use, by transmitting a thing by the debtor to his creditor, transmission accompanied by an agreement through which the debtor promised to return the thing after using it up to a certain time limit. The loan for use was then taken over by the bailment contract.

Fiduciary was also used with the purpose of preserving a thing by the borrower, who promised to relay it to the creditor when the latter requests it. Later, this function has been taken over by the deposit agreement. This application of the contract was named by Gaius fiducia cum amico.

In the definition of the fiduciary contract we do not use the terms "lender" and "borrower". I saw, in the cases referred to in the use of fiduciary, that the one transmitting the ownership of a thing is either the borrower of a sum of money and the conditional creditor of the thing – when fiduciary was used for the purpose of building a guarantee – or simply the lender of the thing sent – when fiduciary was used in order to preserve something by the debtor. In the legal practice fiduciary presents a number of shortcomings for the alienator, because they accepted the transmission of the thing with ownership. By losing ownership of the thing, he could not use the right of pursuit and that of preference if the accipiens disposed of the thing. In this situation, the one who disposed of the thing risked to never regain it or even not to acquire its value. In the event that accipiens became insolvent, the alienator could not harness the full right, but only parts of it, in proportion to the value of the thing sent, because he did not have the right of preference. Another drawback of the fiduciary was also the fact that it required the use of solemn acts, like mancipatio or in iure cessio. These solemn documents have become a brake on the pace of business’ continues growth; the parties were interested to use simple acts, free of formality. At the same time, fiduciary was not accessible to pilgrims, because it required acts of civil law. For these reasons, gradually, fiduciary’s functions have been taken over by pledge, bailment and deposit, simple and effective acts, grafted on tradition.

The pledge
The pledge is formed by submitting the possession of a thing by the debtor to his creditor through tradition, transmission accompanied by a convention through which the creditor is obliged to
retransmit the thing after the debtor has paid the debt. The term used in the Roman law texts for pledge was “pignus”. But the word pignus also referred, in a general sense, to mortgage. From the second century AD the term “pignus” means only pledge, while the word mortgage was designated by the term “ipotiki”, a word of Greek origin. The pledge contract was sanctioned in the second century AD after bailment and deposit. However, it is treated after the fiduciary, because it took over the main function of fiduciary, to constitute a real guarantee. But, in comparison to fiduciary, the pledge has a number of advantages, namely:

- Firstly, the pledge is a convention based on tradition, which was a simple act, accepted by both citizens and pilgrims;
- Secondly, possession and not property was transmitted and so the debtor remains the owner of the thing transmitted with a guarantee title;
- Thirdly, the debtor, as the owner, could use the right of pursuit and the right of preference. Enjoying these rights, the debtor, after the payment of the debt, can straighten against third parties and if he would have came in competition with other creditors of his creditor he could exercise his right of preference.
- Fourth, the pledge contract perfectly ensures the interests of the creditor, both in relations with the debtor, as well as in relations with third parties. We keep in mind the fact that the debtor cannot enter into possession of the thing given through pledge before the debt is paid off, because they would commit a furtum possessionis; at the same time, third parties can not prevent the creditor to exercise the possession of the thing because it is protected by law through possesory interdicts.

Another advantage of the pledge is the ability of the parties to conclude a convention called anticreed, based on which the fruits of the thing sent with title of guarantee can be retained by the lender and considered interest. The analysis of the contract of pledge and real guarantee of pledge reveals that they have different physiognomies because they are two legal figures that should not be confused. So although the real pledge’s guarantee is the effect of the contract of pledge, however, there are situations when the contract of pledge can exist independently of the real guarantee of pledge. For example, if the borrower conveys a thing that does not belong to him, the pledge is valid, because its mode of formation does not involve transfer of ownership, but only possession, but real guarantee of pledge does not arise.

The deposit
It is a real contract formed by transmitting the detention of a thing through tradition by a depositor to a depositary; the depositary, is obliged to keep the thing and return it at the request of the depositor. The subject of the contract of deposit can be only moveable property, and not immobile ones. The deposit has following legal characteristics:
- is a real contract born in re, through tradition, accompanied by the convention that the depositary will keep the thing and return it to the depositor at the request of the latter.
- through tradition, the depositary is responsible for the detention of the thing but does not become its owner;
- is a free contract;
- a depositary may not use the thing kept because he would have committed furtum usus, and the depositor could ask for the thing back before the time limit;
- the object of the contract of deposit can only be a mobile thing.

In the old law the deposit is not sanctioned. Law of the XII Tables considered the failure to return the thing from the depositary furtum and granted to the depositary an action that could get him twice the value of the thing. The obligation of the depositary was sanctioned by the actio deponiti directa, a civil action of good faith and at the same time an infamous action.

Commodatum (bailment)
It is the loan agreement concluded for the use of borrowed things utendum datum. Through the bailment contract the detention of a thing was transmitted through tradition, from a person called lesser to another person named lessee.
The subject of the contract of bailment did not include goods that can be consumed at their first use; the property still remains with the lesser. Tradition was made in conjunction with a convention through which the lessee is obliged to return the thing at the deadline, after using it according to the law. The lessee was a simple holder and was obliged to take care of the thing, and was responsible for negligence *levis in abstracto*, and in exchange for the use of this thing he did not have to pay anything.

The lesser has the following legal characters:
- is a real contract, formed in re through tradition accompanied by an agreement;
- is a contract in good faith
- the property of the thing is transmitted, but only its detention;
- is a free contract, having as main purpose indebted a friend;
- the object of the contract can constitute a mobile or immobile thing, considered as *species*;
- the lesser may not ask for the thing back before the deadline and if a deadline was not fixed, the lesser may not ask for the thing back before the lessee used it completely;
- the lessee should take care of it, being responsible for the default *levisin abstracto* and he must return the thing together with its fruits and products, at the time and place established.

Instead of conclusion: As a common denominator of real contracts, as outlined in the specialty literature[3], we consider that their foundation is deducted from the principle of equity in private relations, namely the principle of unjust enrichment in the doctrine of the Justinian compilers.

**References**