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Rereading of the *stipulatio Aquiliana* – how was the total obligation grasped by this device?

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1. Introduction

I distribute my paper to make my oral presentations understood better. I am truly honored and thankful for making presentations here at the 65th SIHDA. Actually, I was given a chance to make a presentation on the works of C. Aquilius Gallus and the *stipulatio Aquiliana* at the Pontificia Universidad Catolica de Chile and I would like cordially to thank Prof. Amunategui, Prof. Carvajal and other colleagues there for the discussions and useful advices. This is an improved version(I hope so!) of it.
This presentation has a focus on the so called *stipulatio Aquiliana*, especially on the version reported in the Digesta fragment of Florentinus[1] and it is a trial to infer the way its composer grasped all the obligations owed by a person from various causes , present or in the future in the characteristic wording. I further try to infer the way of thinking lying behind it with the help of contraposition "*divisio* and *partitio*" proposed by Nörr.

2.Aquilius Gallus in the Development of Contemporary Roman Legal Science
- A Figure sandwiched by two "Innovators may be"

C. Aquilius Gallus worked in the 1st Century B. C. and was a praetor in 66 B. C. He was a pupil of Q. Mucius Scaevola Pontifex (consul in 95 B. C.) and a teacher of Servius Sulpicius Rufus (consul in 51 B. C.).[2] Both of them were the most eminent jurists and the argument on the question "which was the most dominant?" never comes to end until today among Roman law researchers. As to the source, Pomponius[3] is more favorable to the former and Cicero, the contemporary and friend of the latter, favors Servius. But I don't argue this topic in detail. Today's focus is on Aquilius Gallus and he seems to be sandwiched and obscured by these brilliant figures in the development of Roman legal science in the late Republican Rome. The cause why he is behind these two and looks faded is that the source doesn't attest an epoch-making progress accomplished by him. As the quoted source shows, Scaevola and Servius

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[1] Source 2
[2] The genealogy of B. W. Frier, *The Rise of the Roman Jurists – Studies in Cicero's* pro Caecina (Princeton, 1985), p.146 is very helpful.
[3] Source 1.

may have accomplished a decisive advancement while Aquilius was just known to have devised some famous techniques.

3. On the preceding works – theoretical background and reconstruction of logics

Stipulatio Aquiliana is a very important topic in the Classical Roman Law of Obligations and is treated in various textbooks.[4] It is a device in the form of a *stipulatio* to transform all the *obligationes* owed and will be owed by a debtor into one. Then the single *obligatio* is exempted by the subsequent *acceptilatio*. It is treated in the Florentinus - a late classical jurist - fragment of the *Digesta* and the *Institutiones* with a considerable variance among them. [5] I mainly treat the former as a source more probably near to the original invention of Aquilius Gallus considering the expression. It has been often treated in connection with the *novatio*. [6] However, I will confine myself on the way all the *obligationes* are expressed and catalogued in the *stipulatio*. Indeed, the expression of it is very technical and in a sense awkward, so the textbooks cite none or just some part of the source, presumably to avoid too minute explanations. In 1972, a comprehensive and exhaustive work to treat *stipulatio Aquiliana* was published by Sturm. I owe much to this work for the analysis of the wording.

Partitio and *Divisio*

Before proceeding to the text, I would like to mention the work of Nörr as a guide to infer the way of thinking which its composers adopted. [7] It was published in 1972 and proposed the contraposition of "*divisio*(the division of the whole into parts)" and "*partitio*(the enumeration of parts)". Though its main object was the catalogue of sources of law and the possibility of including customary law into it, the argument has, I think, a universality which make to possible to be applied to various objects. The consideration of theorists in classical antiquity including Aristoteles and Cicero is useful. I prepared visual images(PPT) to explain these two concepts. One curious example of *partitio* which I myself can show is the classification of *mandatum* according to the interest of the mandator, mandatory and the third party in the Institutiones of Gaius (3, 155-156) is very typical. [8]

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[4] Funada, III, p.586: Kaser & Knütel, S. 292f.; Talamanca, p.641;Watson(1965), p.218f.
[5] Source 2,3.
[6] Bonifacio;Daube
[7] Nörr
[8] Also, D. 17, 1,2; I. 3, 26, pr. Why the mandatum with the positive interest of all of the mandator, mandatory and the third party was not mentioned can be an enigma. But it can be solved by the theory of *partitio*. *Pars* included without doubt does not have to be mentioned. On this, also refer to Watson(1961), p.114

4. The Techniques of Aquilius Gallus

Now I turn to the catalogue of obligations expressed in the text of Florentinus, which consists of three parts. First, Aquilius Gallus presented the total obligation owed by the debtor(N.N.) in the following way, "Quidquid te mihi ex quacumque causa dare facere oportet oportebit praesens in diemue". This is in fact general and abstract. At a glance, this seems to me to cover all without adding any clauses. But he was not content with the general expressions and mentions a series of possible cases as if he were afraid of finding any uncovered points. And I think he opted for covering all by it in three parts.

I note some comments on the details of the first part. *Oportet* shows that this is an obligation according to the conventional civil law and the wording of "dare" and "facere" shows that the latter implies a wider action to be done.[9] "oportet" and "oportebit", "praesens" and "in diem" shows both the present obligation and the obligation to be fulfilled within a fixed date. He does not present the tenses in the past. Only the present and the future. In sum, the first part concerns the *obligatio* between *personae*. The second part, "quarumque rerum mihi tecum actio quaeque aduersus te petitio uel aduersus te persecutio est eritue", seems to relate to any procedural remedy. The trilogy of *actio*, *petitio*, *persecutio* is difficult to understand. *Actio* may be "in personam" and *petitio* may be "in rem", *persecutio* may be concerning some special fields like *fideicommissum*.[10] However, as Sturm showed as a result of vast research around the sources including city statutes, legal ofpinion of jurists and non legal sources etc., *actio*, *petitio*, *persecutio* could mean "to sue" generally without clear distinction by definition among these components. [11] So, it must be expressed by *partitio* rather than by *divisio*.

As to the third and final part "quodue tu meum habes tenes possides", he must have been aware of the distinction among these three verbs. However, if one takes the meaning of *habere* as a mode of control peculiarly exercised by a *dominus* to his thing, it comes not to make sense. So, following the suggestion of Sturm, it is reasonable to read it as synonymous with *tenere*. [12] These verbs in total must mean a control over *res* by a *persona* just excluging that of a *dominus.* Here, we find a redundancy and

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[9] For the reason why "praestare" was omitted here, please refer to Sturm, S. 111f.

[10] On this, see Sturm, S. 150f. Also, *Accursii Glossa Ordinaria* in the middle age Italy notes them "in personam", "in rem", "in fideicommissum" respectively at the note to Florentinus fragment.

[11] Sturm, S. 157ff. On his conclusion, see Sturm, S.259

[12] Sturm, S.281-283

overlap.

Please refer to the MANGA(a Japanese academic jargon to mean rough visual images) I prepared to demonstrate various dimensions found in this text. (PROJECTION) We can observe the *divisio* of *persona*, *res* and *actio* as well as the *partitio* within the three parts. Mentioning the meaning of the parts and the whole for the late Republican jurists can be an excursus and I confine myself to the *stipulatio Aquiliana*, but we can see a good example of practical legal cataloguing here.[13]

5. Conclusion

This presentation ends up with my impression and feeling. Nörr mentions *Institute* system as a typical *divisio*. [14] It is impressive to me that we can see the clear *divisio* of *res*, *persona* and *actio* in this scheme consisting of three parts. If it is really attributable to Aquilius Gallus in the 1st Century B. C., I wonder at its early establishment. At the same time, I tried to show the *partitio* way of thinking within each parts. From these texts, I feel a strong practical will to avoid any possible lack at the cost of redundancy rather than a scientific coverage of the total without any overlap nor overstepping.

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[13] N örr, S. 758f. D. 50,16,25,1(Paulus ad ed. 21); D. 41,3,30(Pomponius ad Sab. 30)
I would like to add personally D. 5,1,76(Alfenus Digesta 6)concerning the replacement of parts and the maintenance of identity of the whole.

[14] Nörr, S. 767f.

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Partitio and Divisio
stipulatio Aquiliana and the catalogue of obligation – a subtle mixture
partitio and *divisio*?
Persona, *res* and *actio*

5. Conclusion

((sources))
1. “(41)Post hos QUINTUS MUCIUS Publii filius pontifex maximus ius ciuile primus constituit generatim in libros decem et octo redigendo. (42)Mucii autitores fuerunt complures, sed praecipuae auctoritatis AQUILIUS GALLUS, BALBUS LUCILIUS, SEXTUS PAPIRIUS, GAIUS IUUENTIUS: ex quibus Gallum maximae auctoritatis apud populum fuisse Seruius dicit. … (43) … [Seruius] instructus autem maxime a Gallo Aquilio, qui fuit Cercinae”(D. 1,2,2, 41-42 Pomponius ”libro singulari enchiridii ”)
2. "pr. Et uno ex pluribus contractibus uel certis uel incertis uel, quibusdam exceptis, ceteris et omnibus ex causis una acceptilatio et liberatio fieri potest. 1. Eius rei stipulatio, quam acceptio sequatur, a Gallo Aquilio talis exposita est: 'Quidquid te mihi ex quacumque causa dare facere oportet oportebit praesens in diemue, quarumque rerum mihi tecum actio quaeque <u>aduersus</u> te petitio uel aduersus te persecutio est eritue, quodue tu meum habes tenes possides: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit Numerius Negidius'. 'quod Numerius Negidius Aulo Agerio promisit spopondit, id haberetne a se acceptum, Numerius Negidius Aulum Agerium rogauit, Aulus Agerius Numerio Negidio acceptum fecit'. "(D. 46,4,18, pr.-1,"Florentinus libro octauo institutionum")
3. "Est prodita stipulatio, quae vulgo Aquiliana appellatur, per quam stipulationem

contingit, ut omnium rerum obligatio in stipulatum deducatur et ea per acceptilationem tollatur. stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: ‘ quidquid te mihi ex quacumque causa dare facere oportet oportebit praesens in diemve quarumque rerum mihi tecum actio quaeque abs te petitio vel adversus te persecutio est erit quodque tu meum habes tenes possides possideresve dolove malo fecisti, quo minus possideas: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit Numerius Negidius. ’ item e diverso Numerius Negidius interrogavit Aulum Agerium: ‘ quidquid tibi hodierno die per Aquilianam stipulationem spopondi, id omne habesne acceptum? ’ respondit Aulus Agerius: ‘ habeo acceptumque tuli. ’ " (Inst. 3,29,2)

((Select Biliography))

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*D. Nörr, *Diviso und Partitio – Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie* (Her. Von Chiusi et al., *Historiae Iuris Antiqui II*(Goldbach, 2003) ,S.705-774)

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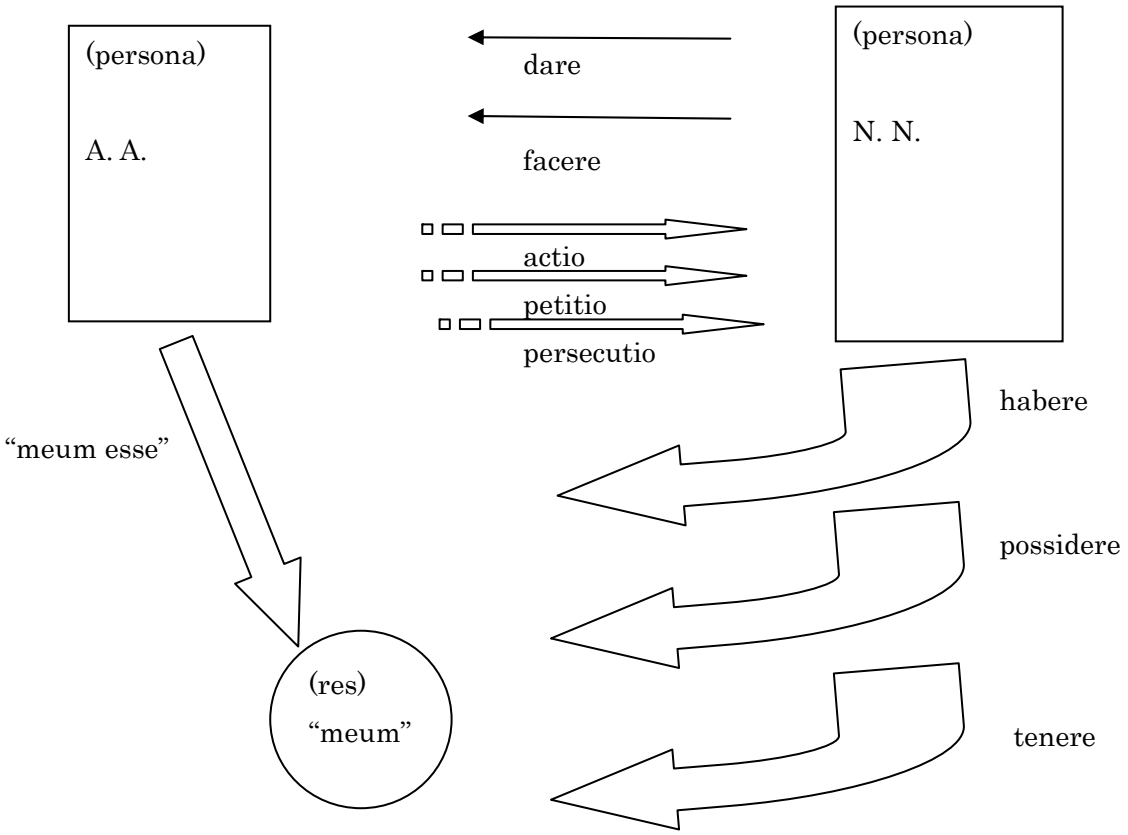

Tempus -> praesens oportet est
in diem oportebit erit

The Catalogue of Obligations found in the *stipulatio Aquiliana*
(D. 46,4,18, pr.-1,"Florentinus libro octauo institutionum") T. Hayashi 2011