From Oral to Written: The Rise of Written Form in Roman Law

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Abstract:
This paper examines the relationship between oral to written form in Roman law and the changing role of formal requirements in legal acts. Although Roman law is often associated with rigorous formalism, the use of writing remained exceptional for much of antiquity. In the classical period, legal transactions were typically performed orally and reinforced by prescribed gestures, while written records served primarily as evidence without constitutive effect. Limited exceptions existed, such as literal contracts or certain types of testaments, where written documentation increasingly secured the testator's will and enhanced legal certainty. During the post-classical era, provincial practice and everyday commerce encouraged broader use of written instruments, blurring the distinction between evidentiary and constitutive documents. Under emperor Justinian, the range of acts requiring written form expanded further – from inheritance declarations and manumission. He specially regulated sales agreements, in which a mutual decision to conclude in writing postponed the moment of contractual perfection until the document was duly drafted and executed.

Keywords: written form; legal acts; Justinian; contracts; wills; stipulation; legal certainty

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Introduction

Nearly every legal system, past and present, selects certain legal acts for which it imposes special formal requirements. Sometimes the manifestation of will must take a special form; in some cases, we can even speak of a ritualized act comprising a set of various operations,

utterances, and gestures. For such a ritual to succeed, it must proceed in a precisely defined way – it must be a formalized act. In archaic and classical Roman law, a range of legal acts can be identified in which particular emphasis was placed on their formal requirements. That form usually consisted in performing prescribed movements and reciting given words. A requirement of written form was rather exceptional, which marks a significant difference from contemporary law. This difference, however, is not incomprehensible. It followed from a range of time-bound reasons, above all from the low level of literacy in the ancient world. The aim of this paper is to examine the relatively rare instances in which legal acts were recorded in writing, and to trace the development of their regulation from classical law through the post-classical period to the age of emperor Justinian.

Written Acts in Classical Law

Whereas archaic law is known for strict adherence to the prescribed form of legal acts, in the classical period this formalism began to diminish. This development was tied to broader changes, including the weakening of the connection between private law and religion. Formal requirements survived only where they served practical needs for legal certainty or where traditions were so old and established that there was no desire to discard them.[1]

Informal acts were particularly favourable to the growth of commerce, a fact reflected in the emergence of consensual contracts, which were by their nature informal. Yet it is important to recognize that commercial needs did not entirely exclude the possibility of using a written form. In the marketplace, specific gestures or ritual formulas might have been impractical, but a written record could prove useful. A legal act committed to writing was easier to demonstrate, thereby strengthening legal certainty. For this reason, especially where more substantial performance was involved, the requirement of writing supported the interests of trade. This explains why, in the classical period, we encounter records attesting to legal acts that nonetheless had only the character of declaratory documents. Trade was not constrained by a mandatory written form, but merchants – or anyone else – could, if they considered it useful, make use of writing as a convincing proof of the transaction. Written form was thus not a condition of validity, but the record served as evidence admissible in court. An illustration of this reasoning is offered, for example, by Gaius in connection with the mortgage: *Contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae: nec ad rem pertinet, quibus fit verbis, sicuti est et in his obligationibus quae consensu contrahuntur. et ideo et sine scriptura si convenit ut hypotheca sit et probari poterit, res obligata erit de qua conveniunt. fiunt enim de his scripturae, ut quod actum est per eas facilius probari poterit: et sine his autem valet quod actum est, si habeat probationem: sicut et nuptiae sunt, licet testationes in scriptis habitae non sunt.*[2] In a fragment included

[1] KASER, Max. *Das römische Privatrecht*. 1. Abschnitt. Das altrömische, das vorklassische und klassische Recht. Beck: München, 1971, p. 230.

[2] D. 20.1.4 (*Gaius l. s. de form. hypoth*.): "*A mortgage is made by consent, when someone agrees that his property will be bound by way of mortgage for some obligation. As in consensual contracts, it does not matter what words are used. So if an agreement for a mortgage not in writing can be proved, the property will be bound as agreed. The purpose of writing is to prove the transaction more easily, but if it can be proved otherwise, it is valid without writing, like an undocumented marriage.*" The source of all translations of Books 16–29 of the Digest: WATSON, Alan. *The Digest of Justinian*. Volume 2. Philadelphia: University of Pennsylvania Press, 1998.

in the Digest, Gaius explains the usefulness of making a written record, but – somewhat surprisingly – he clarifies through a comparison with marriage that he does not mean cases requiring obligatory written form, but only declaratory recording. This explanation, drawn from the same work of Gaius, appears again in book 22 of the Digest, once more in the context of the mortgage and again using the same comparison with marriage: *... fiunt enim de his scripturae, ut quod actum est per eas facilius probari possit: et sine his autem valet quod actum est, si habeat probationem, sicut et nuptiae sunt, licet testatio sine scriptis habita est.*[3]

By contrast, a genuine written form of legal act with constitutive effect was required only rarely. In such cases, the document did not merely serve to attest to the performance of another act, nor was it necessary to carry out some additional action as a condition of validity. The act performed in writing itself produced the intended legal effect. What may be confusing, however, is that the document alone does not clearly reveal whether it has the character of a written legal act or merely of evidence attesting to an act carried out orally.[4] It can therefore sometimes be difficult to determine how a given document should be classified. Examples of legal acts carried out in written form in the classical period were the so-called literal contracts. Gaius' Institutes explicitly mention them in the classification of obligations according to their mode of origin: *Et prius videamus de his, quae ex contractu nascuntur. harum autem quattuor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu.*[5] These were obligations that required an entry in the account books in order to be perfected.[6] Gaius' Institutes then report two distinct ways in which they could arise: *Litteris obligatio fit veluti in nominibus transscripticiis. fit autem nomen transscripticium duplici modo, vel a re in personam vel a persona in personam.*[7] The source further specifies that the transfer from a matter to a person, which created a literal contract, consisted in replacing a consensual contract – explicitly mentioned are contracts of sale, lease, or partnership. It was not only the type of contract that could be replaced; a transfer from one person to another was also possible, thereby effecting a change in the creditor.[8] According to the available sources, this legal institute was used primarily during the Republican period, which is why Gaius' Institutes describe it with relative authenticity. In the age of Justinian, information about its existence was still preserved, and the Justinianic Institutes mention it perhaps out of a sense of duty, so as not to omit the institutes of classical Roman law. In practice, however, literal contracts had clearly fallen out of use and were largely replaced by stipulations, as the Institutes go on to explain: *Olim scriptura*

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3 D. 22.4.4 (*Gaius l. s. de form. hypoth.*): "*... The point of writing is to prove the transaction more easily, but the transaction, if proved, is valid without it, like an undocumented marriage.*"

4 MITTEIS, Ludwig. *Römisches Privatrecht bis auf die Zeit Diokletians*. Erster Band. Leipzig: Verlag von Duncker und Humblot, 1908, p. 291.

5 Inst. Gai. 3.89: "*We first treat of those which we founded on contract, which are of four orders, for contract is concluded by delivery of a thing, by words, by writing, or by consent.*" The source of all translations of Gaius' Institutes: POSTE, Edward. *Gai Institutiones or, Institutes of Roman law by Gaius*. Oxford, The Clarendon Press, 1904.

6 BĚLOVSKÝ, Petr. *Obligace z kontraktu*. Auditorium: Praha, 2022, p. 200.

7 Inst. Gai. 3.128: "*Literal contracts, or obligations created by writing, are made by transcriptive entries of debit or credit in a journal. Transcriptive entries are of two kinds, either from thing to person or from person to person.*"

8 Cf. Inst. Gai. 3.129–130.

fiebat obligatio, quae nominibus fieri dicebatur, quae nomina hodie non sunt in usu. Plane si quis debere se scripserit quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest…[9]

Conversely, in the case of acts *mortis causa*, written form was used over a long period, and with time it gained both importance and popularity. At first, we find only the declarations of witnesses, who attested to the oral act of the testator and the familiae emptor, serving as evidence that the legal act had in fact been carried out.[10] The development of the mancipatory testament, however, reached a stage in the classical period where, alongside the still-existing oral appointment of heirs, the testator was allowed to present to the witnesses at the mancipation a document containing the appointment of heirs and to confirm its authenticity before them. The witnesses, however, were not made familiar with its contents: *... deinde testator tabulas testamenti manu tenens ita dicit: HAEC ITA UT IN HIS TABULIS CERISQVE SCRIPTA SUNT, ITA DO ITA LEGO ITA TESTOR, ITAQUE VOS, QVIRITES, TESTIMONIUM MIHI PERHIBETOTE; et hoc dicitur nuncupatio: nuncupare est enim palam nominare, et sane quae testator specialiter in tabulis testamenti scripserit, ea uidetur generali sermone nominare atque confirmare*.[11] In this case, written form offered two clear advantages: the recorded information promised greater durability, and the testator did not have to reveal during his lifetime who would inherit from him. On the other hand, among the drawbacks – though less serious compared with the fallibility of memory – was the risk of forgery. Evidence that this threat was taken seriously, and most likely represented a genuine problem requiring a solution, is found in the *senatusconsultum Neronianum* of 61 AD, which prescribed the precise manner in which the tablets containing the record had to be sealed.[12] There is no doubt that the validity of such an act depended on the proper performance of the mancipation and the formal declaration by the testator. Legal theory, however, tends to emphasize that the properly sealed testament served merely as evidence and was not a condition for the validity of the will.[13] It must nevertheless be emphasized that without this document the testator's will could not be known and the heirs could not be appointed. In practical terms, the document was indispensable, for without it the testator's intention could not be carried out.

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9 Inst. Iust. 3.21: "*Formerly there was a kind of obligation made by writing, and said to be contracted by the entry of a debt in a ledger; but such entries have nowadays gone out of use. Of course, if a man states in writing that he owes money which has never been paid over to him, he cannot be allowed, after a considerable interval, to defend himself by the plea that the money was not, in fact, advanced…*" The source of all translations of Justinianic Institutes: MOYLE, John Baron. *The Institutes of Justinian*. Oxford: Clarendon Press, 1913.

10 KASER, Max. *Das römische Privatrecht*. 1. Abschnitt, *op. cit.*, p. 231.

11 Inst. Gai. 2.104: "*… Thereupon the testator, holding the tablets of his will, says as follows: 'This estate, as in these tablets and in this wax is written, I so grant, so bequeath, so declare; and do you, Quirites, so give me your attestation.' These words are called the nuncupation, for nuncupation signifies public declaration, and by these general words the specific written dispositions of the testator are published and confirmed.*"

12 MEYER, Elizabeth A. Writing in Roman Legal Contexts. In: JOHNSTON D. (ed.). *The Cambridge Companion to Roman Law*. Cambridge: Cambridge University Press, 2015, pp. 86–87.

13 Cf. SOMMER, Otakar. *Učebnice soukromého práva římského*. Díl II. Právo majetkové. Praha: Všehrd, 1946, p. 289. KINCL, Jaromír – URFUS, Valentin – Michal SKŘEJPEK. *Římské právo*. Praha: C. H. Beck, 1995, p. 279. Max Kaser then speaks of a development from mere evidence to the written form of a legal act.: KASER, Max. *Das römische Privatrecht*. 1. Abschnitt, *op. cit.*, p. 680.

We can speak with certainty of the written form of a will in the situation where the praetor granted *bonorum possessio* solely on the basis of an entry in the tablets, provided they were secured with the required number of witnesses' seals: *Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti bonorum possessionem pollicetur…*[14] The tablets thus became a ground of *delatio* on their own, and the need for mancipation or any other formal act disappeared. For a number of practical reasons, this form of disposition *mortis causa* grew increasingly popular, and in the practice of post-classical law the written testament gradually displaced the oral appointment of heirs. Nevertheless, written form did not become exclusive, and testators could choose between written or oral form according to their preference – or more likely their ability, since not everyone could read and write. Much like in a will, selected expressions of the testator's will could also be recorded in a codicil, which at first took the form of a simple informal letter. This corresponded to the general rule that a *fideicommissum*, typically expressed in a codicil, required no formalities in either oral or written form. As legacies grew in importance, however, the need to confirm their making through witnesses increased. Emperor Theodosius eventually addressed this need with a decree requiring the presence of witnesses for *mortis causa* dispositions outside a testament. If a codicil was written, it had to be signed by five witnesses together with the testator: *In omni autem ultima voluntate excepto testamento quinque testes vel rogati vel qui fortuitu venerint in uno eodemque tempore debent adhiberi, sive in scriptis sive in sine scriptis voluntas conficiatur. testibus videlicet, quando scriptura voluntas componitur, subnotationem suam accommodantibus.*[15]

The *Lex Aebutia* of the 2. century BC introduced the use of written form into Roman civil procedure as well. The highly formalized *legisactiones*, which depended on the precise recitation of prescribed words, were eventually replaced by the formulary procedure. In this new system, words and symbols were mainly superseded by a written formula that appointed the judge and set out instructions to guide his future decision:[16] *Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate veterum, qui tunc iura condiderunt, eo res perducta est, ut vel qui minimum errasset, litem perderet; itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones, effectumque est, ut per concepta verba, id est per formulas, litigaremus.*[17] The development of civil procedure can be seen as anexample of a broader tendency: along the timeline from ancient Rome to the present, we observe a shift from acts carried out through the recitation of prescribed phrases and the performance of specific gestures to acts executed in written form. The procedural formula, like the will and the literal contracts, shows that written forms of legal acts began

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14 Inst. Gai. 2.119: "*The praetor, however, if the will is attested by the seals of seven witnesses, promises to put the persons named in the will in juxta-tabular possession…*"

15 C. 6.36.8.3 (a. 424): "*In every last will, except for a testament, five witnesses, either invited or who happen to be present, must be employed at one and the same time, whether the will is drawn up in writing or not in writing, the witnesses, namely, when the will is composed in writing, adding their subscription.*" All translations of Justinianic Code are the work of the author of this paper.

16 VÁŽNÝ, Jan. *Římský proces civilní*. Praha: Melantrich, 1935, p. 24, 32.

17 Inst. Gai. 4.30: "*But all these branches of statute-process fell gradually into great discredit because the excessive subtlety of the ancient jurists made the slightest error fatal; and accordingly they were abolished by the lex Aebutia and the two leges Juliae, which introduced in their stead the system of formulas or written instructions of the praetor to the judex.*"

to be used out of practical necessity, in situations where there was an exceptional interest in preserving certain information. A written record is, after all, more reliable in practice than even the largest number of witnesses. Both the formula and the testament also reveal a second source of motivation for adopting written form: in each case, the information was transmitted to someone who was not present at the act itself. The text of a will was read only after the testator's death – by persons who could not be identified in advance, since neither the moment nor the circumstances of death could be known beforehand. Similarly, the written formula functioned as a kind of letter: an instruction read by the judge, who had not been present during the *in iure* phase of the proceedings, and who was to continue the case on that basis until its conclusion with the pronouncement of judgment.

Post-Classical Development

The imperial period is generally regarded as an age of vulgarization and decline of law. This trend could also be seen in relation to the form of legal acts; indeed, it brought with it, for example, the disappearance of literal contracts. In people's perception, the distinction began to blur between cases where a document served merely as evidence and cases where it constituted written form in the true sense of a legal act.[18] Yet this seemingly negative development also introduced aspects that enhanced legal certainty and could therefore be viewed as beneficial. One such benefit was the significant expansion of situations in which documents were produced as a more reliable means of proof.

A particular institute in which this development became apparent was the stipulation. Already in the period of the republic, it was customary for the parties to this purely verbal contract to draw up a written document serving as proof that the stipulation had been performed. In the post-classical period, however, this practice shifted under the influence of provincial law. In the territory of present-day Greece, where the use of written form in legal acts had long been established, the oral stipulation in the strict sense never really took hold. Instead, the document attesting to the performance of the stipulation was supplemented with a stipulation clause. This document declared that an oral stipulation had duly taken place – even though it never actually had.[19] The making of an oral and formally correct stipulation was presumed; this was a case of an irrebuttable legal presumption – one might even provocatively call it a legal fiction. As the requirements for the wording of a stipulation gradually loosened, a paradox emerged: the declaration that an oral promise had been made became more accurate, since even when a written document was drawn up, the promise was often spoken informally as well. This development was highlighted by an imperial constitution of emperor Leo in 472 AD, which explicitly allowed the use of any words, not only the prescribed ritual formula: *Omnes stipulationes, etiamsi non sollemnibus vel directis, sed quibuscumque verbis pro consensu contrahentium compositae sint, legibus cognitae suam habeant firmitatem.*[20] In practice at the time, the performance of a stipulation could be proven by virtually any document, even if it contained no

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18 KASER, Max. *Das römische Privatrecht*. 2. Abschnitt. Das nachklassischen Entwicklungen. Beck: München, 1959, p. 50.

19 VÁŽNÝ, Jan. *Římské právo obligační*. Část I. Bratislava: Univerzita Komenského, 1924, p. 44.

20 C. 8.37.10 (a. 472): "*All stipulations, even if composed not in solemn or direct words but in whatever expressions according to the agreement of the contracting parties, shall, being recognized by the laws, have their own validity.*"

stipulation clause at all.[21] Emperor Justinian continued this line of development and allowed this contract – still formally oral – to be concluded in writing in fact: not only without the prescribed words being spoken, but even without the parties to the obligation being present together at its creation. He established the presumption that if a *cautio* confirming the stipulation declared that the parties had indeed spoken the promise, this was to be believed: *Et si inter praesentes partes res acta esse dicitur, et hoc esse credendum, si tamen in eadem civitate utraque persona in eo die commanet, in quo huiusmodi instrumentum scriptum est, nisi is, qui dicit sese vel adversarium abesse, liquidis ac manifestissimis probationibus et melius quidem, si per scripturam, sed saltem per testes undique idoneos et omni exceptione maiores ostenderit sese vel adversarium suum eo die civitate afuisse: sed huiusmodi scripturas propter utilitatem contrahentium esse credendas.*[22] From the standpoint of legal theory, the document recording a stipulation still had the character of mere evidence attesting to the performance of another act that created the contract; it was therefore not a written form of the legal act, and the document itself had no constitutive effect. Nevertheless, this legal arrangement comes close in practice to a written contract, since it was capable of faking both the making of the oral promise and the simultaneous presence of the two parties.

The influence of Greek law, however, need not have been the only reason for the expanding practice of drawing up documents. As the use of *mancipatio* and *in iure cessio* as formal methods of transferring ownership declined in the 3. century AD, everyday practice sought new ways to effect the transfer of ownership and delivery of things. Although *traditio* offered itself as a solution, it was not always a suitable instrument and was in practice sometimes replaced by the drafting of documents.[23] This is connected with the blurring of the distinction – so clear in classical law – between the perfection of a contract and the transfer of ownership. The belief that delivery of a thing was insufficient to transfer ownership and possession without the existence of a document does not appear to have been merely an isolated misunderstanding. Imperial constitutions can be found that felt the need to emphasize explicitly that the physical delivery of a thing produced all the intended effects even without being confirmed in written form: *Minus instructus est, qui te sollicitum reddidit, quasi in vacuam possessionem eius, quod per procuratorem emisti, non sis inductus, cum ipse proponas diu te in possessione fuisse omniaque ut dominum gessisse. licet enim instrumento non sit comprehensum, quod tibi tradita sit possessio, ipsa tamen rei veritate id consecutus es, si sciente venditore in possessione fuisti.*[24] Although such misconceptions had to be refuted by imperial legislation, the practice of concluding contracts

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21 VÁŽNÝ, Jan. *Římské právo obligační*, *op. cit.*, p. 44.

22 C. 8.37.14.2 (a. 531): "*And if it is said that a matter was transacted between the parties being present, this also is to be believed, provided however that both persons remained in the same city on the day on which such an instrument was written, unless the one who says that either he himself or his adversary was absent shall show by clear and most manifest proofs and better indeed if by writing but at least by witnesses everywhere suitable and above every exception that he himself or his adversary was absent from the city on that day, but such writings are to be believed on account of the advantage of the contracting parties.*"

23 LEVY, Ernst. *West Roman Wulgar Law, The Law of Property*. Philadelphia: American Philosophical Society, 1951, p. 128.

24 C. 7.32.2: "*He is poorly informed who has made you anxious, as if you had not been put into vacant possession of that which you bought through a procurator, since you yourself allege that you have long been in possession and have acted in all things as owner. For although it is not included in the instrument that*

in writing gained popularity even in the western part of the Roman Empire, which had not been as strongly shaped by Hellenistic legal thought with its long-standing preference for written form. In the post-classical period it became common, especially in the case of purchases of more valuable property such as land or slaves, for contracts to be drawn up in writing.[25] Especially in situations where goods and money were not exchanged simultaneously, there arose a need to have the mutual obligations clearly written down and confirmed. The written contract was thus regarded as an instrument providing unequivocal proof of the transaction: *Qui enim pretium competens instrumento confecto dederit, ita debet firmiter possidere, ut et distrahendi pro suo debito causam liberam habeat…*[26] The drafting of written contracts was also connected with the new obligation to report and register the sale of land for tax purposes. To ensure the authenticity of these documents, however, emperor Constantine in the first half of the 4. century AD tightened the requirements regarding the presence of witnesses[27] through his constitutions.[28] Emphasis was placed on ensuring that the legal act was carried out with sufficient formality and in the presence of the required number of witnesses, who guaranteed the publicity of such an act. In light of contemporary practice, it was assumed that they typically attested to the conclusion of a legal act recorded in writing. The purpose of this regulation was said to be the promotion of legal certainty and the prevention of dealings with land by those who were not its owners. It seems, however, that the emperor's true motivation lay less in the benefit of individuals or concern for the development of the legal order, and more in fiscal policy and the effort to prevent tax evasion.[29]

The Response of Justinianic Law

Under the reign of emperor Justinian we can observe an expansion of the range of legal acts for which written form was required in the strict sense. Some of these were newly regulated during Justinian's era – and from the outset in written form. By its very nature, the inventory was written: it could be drawn up by an heir within the framework of the so-called *beneficium inventarii*, if he wished to protect his own property against the claims of the testator's creditors. The heir was liable to those creditors only up to the value of the estate, which therefore had to be inventoried. The heir added a signed declaration in the presence of a notary, witnesses, and the legatees in attendance.[30] Special regulation of written declarations of will is also found in the so-called *legitimatio per nuncupationem*, which consisted in the simple statement by a father that a given person was his child. This was expressly a declaration of will in written form, whether in a private or public document, or in a testament: *Ad haec autem et illud sancire perspeximus. ut si quis filium aut filiam habens de libera muliere, cum qua nuptiae consistere possunt, ducat in instrumento sive*

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possession was delivered to you, nevertheless by the very truth of the matter you have obtained it, if with the seller knowing you have been in possession."

25 LEVY, Ernst, *op. cit.*, p. 131.

26 CT. 5.10.1: "*For he who has given the proper price with an instrument drawn up ought so firmly to possess, that he may also have the free right to sell for his own debt…*" The translation is the work of the author of this text.

27 KASER, Max. *Das römische Privatrecht*. 2. Abschnitt, *op. cit.*, p. 50.

28 Frag. Vat. 249, Frag. Vat. 35.

29 LEVY, Ernst, *op. cit.*, pp. 128–129, 139.

30 Cf. Nov. 1.2.1.

publico sive propria manu conscripto et habenti subscriptionem trium testium fide dignorum, sive in testamento sive sub gestis monumentorum, hunc aut hanc filium suum esse aut filiam, et non adiecerit naturalem…[31] Whether this constitutes legitimation in the strict sense, however, is disputed, and the effects of the declaration in question are contested in the scholarly literature.[32] Written form was also required, for example, in situations where a husband sought to defend himself against suspicion of improper conduct between another man and his wife. The provision obliged the husband, before bringing any accusation or punishment, to send that man three written warnings confirmed by witnesses. Only if, after these admonitions, he again caught his wife with the man could he take action – either personally or through the court: *His quoque etiam illud adicimus, ut si quis forsan suspicatur aliquem velle suae uxoris illudere castitati et contestationes ei ex scripto tres destinaverit habentes testimonia virorum fide dignorum, et post has tres ex scripto contestationes invenerit cum convenientem suae uxori, si quidem in sua domo aut ipsius uxoris aut adulteri aut in popinis aut in suburbanis, esse licentiam marito propriis manibus talem perimere nullum periculum ex hoc formidanti.*[33] It seems clear that the main reason for choosing written form was its greater evidentiary value – especially important where, upon fulfilment of the prescribed conditions, the addressee of the warnings faced the threat of death.

The development of written acts is further illustrated by the expansion of variants of manumission. *Manumissio per epistolam* by definition presupposed that the letter itself produced the effect of setting the slave free: *Sancimus itaque, si quis per epistulam servum suum in libertatem producere maluerit, licere ei hoc facere quinque testibus adhibitis, qui post eius litteras sive in subscriptione positas sive per totum textum effusas suas litteras supponentes fidem perpetuam possint chartulae praebere. et si hoc fecerit, sive per scribendo sive per tabularium, libertas servo competat quasi ex imitatione codicilli delata, ita tamen, ut et ipso patrono vivente et libertatem et civitatem habeat romanam.*[34] Justinianic legislation also required that, in the case of manumission before friends, the act be recorded in writing: *Sed et si quis inter amicos libertatem dare suo servo maluerit, licebit*

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31 Nov. 117.2: "*We have considered it proper to order that when anyone has a son or a daughter by a free woman, with whom legal marriage can be contracted, and states either in a public or private instrument, bearing the signatures of three reliable witnesses, or in a will, or in the public records, that So-and-So is his son or his daughter, without adding the word 'natural', such children shall be legitimate…*" The source of all translations of the Novels: SCOTT, Samuel Parsons. *The Civil Law*. Vol. XVII. Cincinnati: Central Trust Company, 1932.

32 INSADOWSKI, Henryk. *Rzymskie prawo małżeńskie a chrześcijaństwo*. Lublin: Drukarnia Państwowa, 1935, p. 261.

33 Nov. 117.15pr.: "*We also add to what has been already enacted that where anyone suspects some man of desiring to violate the chastity of his wife, and after having notified him three times in writing to desist and obtained the evidence of three men worthy of confidence, and after this he finds him associating with his wife, either in his own home, in that of his wife, or in that of the adulterer, or in a public house, or in the suburbs, he shall be permitted to kill him with his own hands without being apprehensive of any responsibility.*"

34 C.7.6.1.1c (a. 531): "*We therefore decree that, if anyone should prefer to bring his slave into freedom by letter, it shall be permitted for him to do this with five witnesses being present, who, after his letter either set down in the subscription or spread throughout the whole text, by adding their own letters may be able to provide lasting credibility to the document. And if he has done this, whether by writing it himself or through a notary, liberty shall belong to the slave as if granted by imitation of a codicil, provided however that, while the patron himself is still living, the slave shall have both liberty and Roman citizenship.*"

ei quinque similiter testibus adhibitis suam explanare voluntatem et quod liberum eum esse voluit dicere: et hoc sive inter acta fuerit testificatus sive testium voces attestationem sunt amplexae et litteras tam publicarum personarum quam testium habeant, simili modo servi ad civitatem producantur romanam quasi ex codicillis similiter libertatem adipiscentes.[35] It is noteworthy that both enactments liken the effects of these new forms of *manumissio* to the emancipation of a slave carried out by codicil, thereby granting them the same legal weight and validity. Although the comparison between acts *inter vivos* and *mortis causa* may appear disproportionate, it seems that the constitutions needed to justify the new methods of granting freedom by reference to an already existing option that did not require a ritual filled with acts and symbols. Thanks to this analogy, the granting of freedom by letter or by declaration before friends carried all the necessary legal consequences, and the slave at the same time acquired Roman citizenship. In the case of *manumissio per epistulam*, the act of emancipation took place directly through the drafting of the letter, so that one may truly speak of a written form of legal act, without which the emancipation could not occur. By contrast, *manumissio inter amicos* primarily required the expression of will before the prescribed number of witnesses, and the recording of the act had more the value of evidence. Yet, as in the case of the stipulation, one might consider the theoretical possibility that the effects of manumission could arise solely from the written record, without any oral declaration of will. Nevertheless, since – unlike the stipulation in earlier periods – no qualified form, words, or gestures were required for the declaration made before friends, it is likely that situations in which a record with witnesses was drawn up but no oral will was expressed did not in fact occur.

An enactment of emperor Justinian preserved in the Code concerns legal institutes that had long existed and become well established, though its true meaning may not be entirely clear at first glance: *Contractus venditionum vel permutationum vel donationum, quas intimari non est necessarium, dationis etiam arrarum vel alterius cuiuscumque causae, illos tamen , quos in scriptis fieri placuit, transactionum etiam, quas instrumento recipi convenit, non aliter vires habere sancimus, nisi instrumenta in mundum recepta subscriptionibusque partium confirmata et, si per tabellionem conscribantur, etiam ab ipso completa et postremo a partibus absoluta sint, ut nulli liceat prius , quam haec ita processerint, vel a scheda conscripta, licet litteras unius partis vel ambarum habeat, vel ab ipso mundo, quod necdum est impletum et absolutum , aliquod ius sibi ex eodem contractu vel transactione vindicare: adeo ut nec i llud in huiusmodi venditionibus liceat dicere, quod pretio statuto necessitas venditori imponitur vel contractum venditionis perficere vel id quod emptoris interest ei persolvere.*[36] Since the enactment dates from the very beginning

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35 C.7.6.1.2 (a. 531): "*But also if anyone should prefer to grant liberty to his slave among friends, it shall be permitted for him, with five witnesses similarly being present, to declare his will and to say that he wished him to be free, and whether he has testified this among the records or the voices of the witnesses have embraced the attestation and the letters of both the public officials and the witnesses are present, in a similar way the slaves shall be brought to Roman citizenship as if from codicils, likewise obtaining liberty.*"

36 C. 4.21.17pr. (a. 528): "*Contracts of sales or exchanges or donations, which it is not necessary to notify, and also the giving of earnest money or of any other cause whatsoever, yet those which it has been decided should be made in writing, and also settlements, which it is proper to record by an instrument, we decree shall have no force otherwise than if the instruments have been received into the register and confirmed by the subscriptions of the parties and, if they are drawn up by a notary, also completed by him and finally executed by the parties, so that it is not permitted to anyone, before these things have been thus carried*

of emperor Justinian's reign, it is reflected in the text of the Justinianic Institutes: *Emptio et venditio contrahitur, simulatque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit. nam quod arrae nomine datur argumentum est emptionis et venditionis contractae. sed haec quidem de emptionibus et venditionibus quae sine scriptura consistunt obtinere oportet: nam nihil a nobis in huiusmodi venditionibus innovatum est. in his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. donec enim aliquid ex his deest, et poenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione.*[37]

What, then, did emperor Justinian actually order? It must be concluded that this enactment did not by itself introduce a general obligation to conclude sales, exchanges, donations, or settlements in written form, nor did it in any other way set out a defined list of acts for which written form was required. Both of the cited sources explicitly state that the regulation applied only to certain transactions designated as ones to be made in writing, while alongside them there remained a category of acts not subject to writing. Nor is the list of contract types mentioned in the text closed, such that one could claim Justinian subjected them to a special regime. Written form of legal acts was therefore not mandated in the cited enactments; rather, the scope of acts governed by the constitution was defined. Written acts are distinguished from oral ones, for which the Institutes in their introduction recall the general rule that a contract of sale, as a consensual contract, is formed by agreement on price and subject matter. Although this was a fundamental principle of classical law, it may not have been entirely familiar to readers of the 6. century AD, so that what Justinian presented as an old and long-standing rule may have sounded to contemporary lawyers like something new. They may have been particularly surprised to learn that in the case of valuable goods they had any choice at all – and that they were permitted to conclude a contract of sale without any written record.[38] The true meaning of the cited regulation becomes clear when it, for written contracts, establishes a departure from the general rule of classical law. Even if the parties had agreed on the subject matter and the price, if they wished to conclude the contract of sale in writing, it became perfected only with the proper drafting of the document, not by mere oral agreement of the parties. The contract

out, either from a sheet written, although it may have the letters of one party or of both, or from the register itself, which has not yet been completed and executed, to claim any right for himself from that contract or settlement: to such an extent that in sales of this kind it is not even permitted to say that, the price having been fixed, a necessity is imposed on the seller either to complete the contract of sale or to pay to him what is of interest to the buyer."

37 Inst. Iust. 3.23pr.: "*The contract of purchase and sale is complete immediately the price is agreed upon, and even before the price or as much as any earnest is paid: for earnest is merely evidence of the completion of the contract. In respect of sales unattested by any written evidence this is a reasonable rule, and so far as they are concerned we have made no innovations. By one of our constitutions, however, we have enacted, that no sale effected by an agreement in writing shall be good or binding, unless that agreement is written by the contracting parties themselves, or, if written by some one else, is at least signed by them, or finally, if written by a notary, is duly drawn by him and executed by the parties. So long as any of these requirements is unsatisfied, there is room to retract, and either purchaser or vendor may withdraw from the agreement with impunity…*"

38 LEVY, Ernst, *op. cit.*, p. 150.

had to be completed and signed, and, where necessary, duly registered. A text drafted by the parties but lacking a signature and proper completion did not yet establish the sale. The cited enactment thus safeguarded the legal certainty of the contracting parties, who, if they had agreed on a written form, had to wait for the proper execution of the document for the contract to be validly concluded and the obligation to arise. During the remainder of his reign, Justinian also devoted attention to other aspects of written contracts, such as the method of dating documents,[39] verifying the authenticity of handwriting in signatures, and the necessity of confirmation by witnesses.[40]

Conclusion

Instances of legal acts being recorded in writing – whether with constitutive or merely declaratory effect – were not as frequent in ancient Rome as they are today. Throughout history, however, certain situations can be traced in which written form was required, particularly where it was necessary to preserve the content of a legal act over time or to make it known to a third party not present at its expression. From the very beginning, there also seems to have been a need to confirm in writing transactions that formed part of daily life, such as purchases – especially where the object was of greater value – or where it was necessary to record a special agreement concerning the division of payment of the price and delivery of the item. The recording of such contracts in writing did not arise from legislative compulsion, but from the choice of the parties involved, at least in the form of evidence. In the case of so fundamental an act as the stipulation, imperial enactments even responded to the practice of reducing the originally oral promise to writing and ultimately accepted that by the force of actual practice it had become possible to carry out the act entirely without oral expression. The growing spread of written documents led to the need to safeguard their authenticity and to subject them to the requirement of attestation by the appropriate number of witnesses. It is particularly striking that emperor Justinian had to clarify precisely when a written contract of sale came into existence and was validly concluded. Where the parties had agreed on a written form, they could not subsequently rely on their oral agreement as to the *essentialia negotii*; instead, they had to wait until the document was properly executed for the contract to become binding.

Although Roman law is often associated with excessive formalism and numerous demanding requirements for the performance of certain legal acts, its addressees were not particularly burdened with any obligation of written form. While the legal regulation of the time drew on a range of historical circumstances, the result was that ordinary transactions were not weighed down by a mandatory requirement of writing. At the same time, some form of written record was always possible if the parties desired it. The law then supplemented this practice with safeguards to ensure the trustworthiness of written legal acts.

39 Cf. Nov. 47.
40 Cf. Nov. 73.