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Rise and fall of the specificity of contracts[1]

Roberto Fiori

1. The first change: the rise of the specificity

1.1. I think we should start from archaic law. As we all know, in the first period of Roman history very few *negotia* existed. If we believe, as I do, that *nexum* was performed by way of a *mancipatio*, we are left with just two institutions, that is the *mancipatio* itself and the *stipulatio*.

This scarcity of institutions, however, should not lead us believe – as is sometimes done – that archaic law was characterised by a lack of flexibility. It is true, of course, that the economy was not as developed as it will be from the 3rd century BC on, but we have to bare in mind that these *negotia* were structured in a form that allowed the parties to construct many individual arrangements.

This is evident in the case of the *stipulatio*, which was an empty vessel that could be filled with every content, depending only on the question that the promisee would pose to the promisor.

But this is also true for the *mancipatio*, which was not a *venditio* in the classical sense, but rather a *venum dare*, that is an 'onerous giving' that had the effect to confer to the *emptor* a final or a temporary power over things or people: from the temporary *mancipium* over the vendor's *filius* or a *nexus*, to the real sale of a thing, from the *ius eundi* over a land, to the *manus* over a woman. The different arrangements were actually distinguished from one another only by the declarations (*nuncupationes*) pronounced during the ceremony.

To these general *negotia* corresponded a general action, the *legis actio sacramenti*, that in its two guises, *in rem* and *in personam*, could be used for every kind of claim: and since it is unlikely that the differences among arrangements that were introduced in the *negotia* by the words of the parties were not relevant in the trial, we must suppose, notwithstanding the outward broadness of the *actio*, that there was some way to let the actual declension of the general scheme emerge.

1 For the translation of the texts I have followed, when possible, The Digest of Justinian, translation edited by A. Watson, Philadelphia 1985[1].

1.2. If this is the starting point, how did the specificity of contracts arise? I think we must not look for the reason in substantive law, but rather in the history of Roman civil procedure.

The most convincing hypothesis regarding the coming into existence of the formulary trial is, in my opinion, that it was created by the *praetor* through the granting of *formulae in factum conceptae* for all the claims that he thought ought to be protected, even though alien to *ius civile*. However, since he based this protection on a promise, made in the *edictum*, to grant a trial (*iudicium dabo*), he could not of course make a general promise that would bind him to protect every claim, even those he thought were not worthy of protection, but had to specify every single occurrence deserving a *iudicium*.

It was probably after the structure of the new trial had been shaped, that *formulae in ius* were created to protect civil law claims. They did not actually need to be specific, because the *actiones civiles* are available (*competunt*) to the citizen and do not need to be granted by virtue of the *imperium praetoris*. However, since the formulary trial was only later extended to them, the features of the *actiones civiles* did not affect the configuration of the trial.

This is, I think, the reason why the formulary trial is built on the new rule of the specificity of actions: it was not a free choice of the praetor or of the jurists, but rather a necessary implication of the fact that the protection was originally granted to claims that could not be related to the *ius civile* and had to be specifically listed.

I think we can consider this as the first change in the history of private arrangements. It was caused by the need to grant protection to new institutions arising from the international trade of the Mediterranean. It occurred before the birth of the contracts, and was a move from generality to specificity.

2. The 'general' action: Labeo

2.1. Until now, we have spoken of a trial founded on the use of praetorian actions, granted thanks to the promise of justice contained in the *edictum praetoris*.

However, as I have tried to show in a book published some years ago[2], the formulary trial did not have a single structure during the republican period, but was rather built on two different patterns.

The distinction has been preserved, as a fossil, in the different shapes of the formulae known to us in the classical period: on the one side, there existed formulae that began with the *intentio* and the alternative '*si paret ... si non paret...* '; on the other side, formulae that began with a *demonstratio* followed by the *intentio* '*quidquid ob eam rem dare facere oportet* (sometimes *ex fide bona*)' and ended with the words '*si non paret absolvito*'.

2 R. Fiori, Ea res agatur. I due modelli del processo formulare repubblicano, Milano 2003.

The first type of formula was peculiar to the *formulae in factum* and to some *formulae in ius* created for claims of *ius Quiritium* already protected by the *legis actiones* – like, for example, the *rei vindicatio*.

The second type, on the other hand, was used only for *formulae in ius* created for civil law actions that implied a confession of the defendant – like the *actio legis Aquiliae in simplum* – or which were related to the *ius gentium* – like the *iudicia bonae fidei* or the *actio ex stipulatu*.

The reasons for the different construction of these two types of formulae cannot be tackled here. Rather, what is of interest to us is the fact that in the first type the transaction of the parties is mentioned in the *intentio*, i.e. in the part of the *formula* that contains the claim of the plaintiff, and since the ground for the *actiones praetoriae* was the promise made by the praetor in the edict, the *intentio* had to correspond entirely to this promise.

In the second type, on the other hand, the transaction was described in the *demonstratio*, whereas the *intentio* was generic, using the words 'everything that is due giving or doing' (*quidquid dare facere oportet*): the intentio was probably less binding for the judge, since it was not referring to a *iudicium dabo* of the *praetor*. It therefore did not need to correspond to any prearranged scheme.

The effect of this difference seems to have been that the specificity of actions was, in the *formulae* with *demonstratio*, less important than in the other formulae. And this seems to explain why in our sources of the 3rd–2nd century BC no clear distinction between two of the most important contracts of this time, that is hire and sale, existed. In Plautus, for example, some transactions are called '*locationes*' that in accordance with the classical standards would rather be called '*venditiones*' (like 'to let out or hire lambs to be killed', *locare conducere agnos caedundos*[3]). The same transactions are indifferently called either sale or hire (like *emere vendere operam*[4] alongside *locare conducere operam*[5]). And in Cato, we read of a 'sale of the winter pasture' (*pabulum hibernum venire*)[6] – i.e. a sale that lasted only within a fixed time – and of a 'sale of the produces of the sheeps' (*fructum ovium venire*) where the emptor is also called *conductor*[7].

3 Plaut. Aul. 567–568; Capt. 818–819.

4 Plaut. Epid. 120; Mil. 1076.

5 Plaut. Aul. 455; Rud. 843–844.

6 Cat. Agr. 149. The *summarium* speaks of a *lex pabulo locando*, but it was probably written later; for the same reason, I do not treat here the *calcem coquendam dare*, the *politionem dare*, and the *vineam curandam dare* of Cat. Agr. 16 and 136–137.

7 Cat. Agr. 150. On the problem see R. Fiori, La definizione della locatio conductio. Giurisprudenza romana e tradizione romanistica, Napoli 1999, 27–28.

2.2. A clear distinction between hire and sale was probably first drawn in the works of Q. Mucius Scaevola and certainly in the works of Servius Sulpicius Rufus.

Nevertheless, it is quite interesting that these jurists – and particularly Servius and his school – deal with the features of both contracts, but are not particularly engaged in the problem of a demarcation of their boundaries.

On the one hand, they allow a passing of property within a *locatio conductio*[8] without assuming – as many later jurists and the Justinianean compilers will do – that it was a distinctive feature of the *emptio venditio*. (It is interesting to note, that in the Middle Ages the Republican solution will be regarded as an exception to a rule, and on it will be shaped the so-called *locatio conductio irregularis*.)

On the other hand, neither Mucius nor Servius speak of *nova negotia*. According to the common opinion this should not sound strange, since it is generally held that the creation of a remedy for the so-called innominate contracts first occurred in the works of Labeo. This last assumption, however, gives rise to two further issues.

First, if we assume that from the 3rd century BC, the economy born from military and commercial expansion of Rome in the Mediterranean had become so complex that the need had already arisen for the creation of remedy to protect transactions not ascribable to specific contracts, i.e. to specific actions, then it seems puzzling that these problems only found a solution centuries later.

Secondly, in my view, it is simply not true that Labeo invented a remedy for the protection of *nova negotia*[9]. The extent of his role in this process has been found in some texts that we shall briefly consider.

2.3. The first is taken from Papinian's *quaestiones*:

> Lab. ad ed. fr. 98 Palingenesia = D. 19.5.1.1 Pap. 8 quaest. *Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit.*
>
> 'Labeo writes that an *actio civilis* in factum should be given to the owner of cargo and against a ship captain when it is unclear whether he hired the ship or leased out the transporting of cargo [as a job]'.

The *actio civilis in factum* mentioned in this text should probably be recognised as an action on the case[10] whose formula was preceded by *praescripta verba*,

8 Cf. Q. Muc. 2 iur. civ. fr. 6 Palingenesia = D. 34.2.34 pr. Pomp. 9 ad Q. Muc.; D. 19.2.31 Alf. 5 dig. a Paulo epit. (see Fiori (note 7) 50–80).

9 Cf. already A. Pernice, Parerga. III. Zur Vertragslehre der römischen Juristen, ZRG rom Abt 9 (1888) 256–257. For a more detailed analysis of the following texts see M.F. Cursi – R. Fiori, Le azioni generali di buona fede e di dolo nel pensiero di Labeone, BIDR 105 (2011) 145–160.

immediately followed by the appointment of the judge and by an *intentio incerta*[11]: in other words, what we use to call *agere praescriptis verbis*.

In the case described by the text it was uncertain which transaction had been chosen by the parties, i.e. whether the owner of the cargo was the hirer of the ship (and therefore had to be called *conductor*) or rather the client of a carriage-by-sea contract (and therefore *locator*). The problem for the plaintiff was perhaps that if he had chosen, for example, an *actio conducti*, and the judge would have thought that he rather needed an *actio locati*, he would have lost the trial. In this case, Labeo suggests, an *agere praescriptis verbis* may help: and he advises it, probably because the *praescripta verba*, being 'written before' the *formula*, were not binding for the judge, and could therefore just describe the bargain without any specific qualification.

In the fragment, as we can see, there is no mention of a *novum negotium*[12]: there is no doubt that the transaction is a *locatio conductio*, i.e. a specific contract, and the only uncertainty is about the kind of *locatio* the parties have chosen. This proves, I think, that, as Alfred Pernice had noted more than a century ago, we cannot deduce, by the reference to an *actio praescriptis verbis*, that the bargain is an innominate contract[13]: the application of the non-specific action was wider than that of the non-specific contracts.

2.4. A second fragment deals with a conditional contract:

> Lab. ad ed. fr. 36 Palingenesia = D. 18.1.50 Ulp. 11 ad ed. *Labeo scribit, si mihi bibliothecam ita vendideris, si decuriones Campani locum mihi*

10 M. Talamanca, La tipicità dei contratti romani fra conventio e stipulatio fino a Labeone, in: 'Contractus' e 'pactum'. Tipicità e libertà negoziale nell'esperienza tardorepubblicana (Atti Copanello 1988), Napoli, 1990, 100 n. 250; P. Gröschler, Actiones in factum, Berlin 2002, 13–14.

11 See for all F. Gallo, Synallagma e conventio nel contratto. Ricerca degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne, I, Torino 1992, 237; Gröschler (note 10) 19.

12 As it is often said: R. Santoro, Il contratto nel pensiero di Labeone, ASGP 37 (1983) 102; A. Burdese, Sul concetto di contratto e i contratti innominati in Labeone, in: Atti del Seminario sulla problematica contrattuale in diritto romano (Milano 1987), I, Milano 1988, 15 ff. (= Le dottrine del contratto nella giurisprudenza romana, A. Burdese (ed.), Padova 2006, 111 ff., 129); see now *contra* Fiori (note 7) 128–131; C. A. Cannata, L'actio in factum civilis, IURA 57 (2008/2009) 16.

13 Pernice (note 9) 252–253: "wenn man das Wesen der *actiones in factum civiles* festzustellen versuchen will, so muss man das *agere praescriptis verbis* und den Synallagmabegriff genau von einander scheiden. Beiden decken sich ganz und gar nicht und haben in ihrem Ursprunge nichts mit einander gemein. Die Verkennung dieser einfachen Thatsache hat dazu geführt, dass man überall wo *praescr. v.* geklagt werden durfte, einen Innominatvertrag annahm, also auch da, wo eine Sache unter Abrede der Rückgewähr, zur Ansicht, zur Probe hingegeben war"; cf. also *ibid.*, 256, about Mauricianus in D. 2.14.7.2 Ulp. 4 ad ed. Cf. Talamanca (note 10) 105 n. 270.

> *vendidissent, in quo eam ponerem, et per me stet, quo minus id a Campanis impetrem, non esse dubitandum, quin praescriptis verbis agi possit. ego etiam ex vendito agi posse puto quasi impleta condicione, cum per emptorem stet, quo minus impleatur.*
> 'Put the case that you sell me a library, if the Capua council sell me a site on which to house it and, through my own fault, I do not seek a site from the council; Labeo says that without question, an *actio praescriptis verbis* will lie against me. Personally, I think that the action on sale will lie, the condition being treated as satisfied, since it is the purchaser's fault that, in fact, it is not'.

Here the sale of a library was conditional subject to a second sale from a third party to the (first) emptor. The condition had a mixed nature[14], because the event was not completely outside the control of the parties, being also subject to the will of the emptor. Therefore, if the condition precedent was not satisfied because of the purchaser's inactivity, the emptor had to bear the liability for the contract becoming ineffective.

This is a case that in modern Civil law systems would be referred to as infringement of good faith during the pendency of the condition: even if the primary obligation is suspended and temporarily ineffective, a secondary binding obligation to a fair conduct continues to exist. It is likely that also in the case discussed by Labeo the basis for this duty was good faith[15], since in the contract of sale the *oportere* is *ex fide bona*. Nevertheless, unlike Ulpian, Labeo does not grant the *actio venditi* : in his days the fiction of satisfaction against the party who acted against the fulfillment of the condition had not yet been created[16]; rather, he prefers to allow an *agere praescriptis verbis*.

This choice does not imply, of course, that he sees the transaction as an innominate contract[17]: a conditional sale, even if void, does not become a *novum negotium*[18]. But the duty protected is, so to say, 'naked': not in the sense of the *nuda*

14 Gallo (note 11) 194: "una condizione mista, della quale nel testo è preso in considerazione il momento potestativo". According to Burdese (note 12) 129 and M. Artner, Agere praescriptis verbis. Atypische Geschäftsinhalte und klassisches Formularverfahren, Berlin 2002, 72 and n. 32, the condition is promissory, but to this cannot be referred a "fiction of satisfaction".

15 See also Artner (note 14) 79.

16 D. 50.17.161 Ulp. 77 ad ed., on which Gallo (note 11) 194–195.

17 This is instead the opinion of Burdese (note 12) 130; C.A. Cannata, Contratto e causa nel diritto romano, in: Causa e contratto nella prospettiva storico-comparatistica (Atti Palermo 1995), L. Vacca (ed.), Padova 1997, 35 ff. (= Le dottrine del contratto nella giurisprudenza romana, A. Burdese (ed.), Padova 2006, 194–195).

18 Gallo (note 11) 194.

pactio which Ulpian describes in his commentary to the *edictum de pactis*[19], because the agreement was corresponding to a *nomen contractus*; but rather because the obligation is protected in itself, without a necessary reference to a specific contract.

2.5. – Other fragments deal with the giving of estimated things:

> Lab. ad ed. fr. 99 Palingenesia = D. 19.5.17.1Ulp. 28 ad ed. *Si margarita tibi aestimata dedero, ut aut eadem mihi adferres aut pretium eorum, deinde haec perierint ante venditionem, cuius periculum sit? Et ait Labeo, quod et Pomponius scripsit, si quidem ego te venditor rogavi, meum esse periculum: si tu me, tuum: si neuter nostrum, sed dumtaxat consensimus, teneri te hactenus, ut dolum et culpam mihi praestes. actio autem ex hac causa utique erit praescriptis verbis.*
> 'If I gave you pearls 'on appraisal' with you to return to me either the same pearls or their price, but they are then destroyed before a sale [is arranged], who bears the risk? Labeo says, and Pomponius wrote the same, that the risk is mine if I as seller asked you [to inspect them], but yours if you asked me. If neither of us [asked the other], but we merely agreed, you are liable to the extent of being responsible to me for your fraud and fault. For the bargain will be granted, in any event, an *actio praescriptis verbis*.'

The ratio adopted by Labeo for the allocation of risk is the interest in the bargain: the risk is borne by the one who took the initiative to the contract; if none of them took it and the parties simply agreed, the purchaser can only be liable for fraud or fault. In both cases an *actio praescriptis verbis* must be granted.

We can qualify the transaction either as an *aestimatum*[20] or as an *emptio venditio* with a clause of satisfaction (*pactum displicentiae*)[21] – this issue need not detain us here. It is enough for us to remember that the *actio aestimatoria* was created to remove the doubts about the (special) action to be used – *venditi, locati, conducti, mandati* – in cases when an estimated thing was given to be returned or sold[22]. And that if we think of an *emptio venditio*, we must repeat again that a

19 D. 2.14.7.4 Ulp. 4 ad ed.

20 E. Betti, Sul valore dogmatico della categoria contrahere in giuristi proculeiani e sabiniani, BIDR 28 (1915) 31; P. Voci, La dottrina romana del contratto, Milano 1946, 257; L. Lombardi, L'actio aestimatoria e i bonae fidei iudicia, BIDR 63 (1960) 135; Talamanca (note 10) 90; Gallo (note 10) 198–199.

21 Cf. Santoro (note 12) 119; Burdese (note 12) 130; Artner (note 14) 201–202 (with literature at n. 133).

22 Cf. also Cannata (note 12) 21–22.

conditional contract of sale cannot be regarded, even if ineffective, as an innominate contract[23].

Once again, for the Roman jurists it seems to be a matter of good faith: even if the case deals with the allocation of risk, in the formula of the *actio praescriptis verbis* it was asked to condemn the defendant to pay 'whatever is due according to good faith'.

The same can be said of another text:

> Lab. inc. fr. 296 Palingenesia = D. 19.5.20 pr. Ulp. 32 ad ed. *Apud Labeonem quaeritur, si tibi equos venales experiendos dedero, ut, si in tri duo displicuissent, redderes, tuque desultor in his cucurreris et viceris, deinde emere nolueris, an sit adversus te ex vendito actio. et puto verius esse praescriptis verbis agendum: nam inter nos hoc actum, ut experimentum gratuitum acciperes, non ut etiam certares.*
> 'In Labeo there is this problem: If my horses are for sale and I give them to you with the condition that you return them if within three days you are not satisfied and you then ride them in an acrobatic contest and win but then decide not to buy them, is there an action on sale against you? I think the more correct view is that action must be brought *praescriptis verbis*; for we arranged that you receive a free trial, not that you also compete [with them].'

It seems that Labeo doubted whether such a bargain could be called 'sale', and – considering the fragments already cited – we could be induced to suppose that he would have granted an *agere praescriptis verbis*. But we are not informed about the solution that he eventually preferred: textual interference by the compilers here seems highly probable[24]. We only know that Ulpian found more correct that one should use the general action: a formulation which is not in contrast to the possibility that also Labeo agreed on granting the *actio praescriptis verbis*[25].

2.6. – Much more complex is a fragment that in Ulpian's commentary *ad edictum* was probably under the heading *de aestimato*[26]:

23 As it is instead generally held: Santoro (note 12) 120; Burdese (note 12) 129f; R. Cardilli, L'obbligazione di praestare e la responsabilità contrattuale in diritto romano (II sec. a.C.–II sec. d.C.), Milano 1995, 377–382.

24 Talamanca (note 10) 89.

25 Santoro (note 12) 132–133; Talamanca (note 10) 88–89; Burdese (note 12) 130. It is less likely that Labeo thought of an *actio de dolo*, as proposed by M. Sargenti, Labeone e la nascita dell'idea di contratto nel pensiero giuridicoromano, IURA 38 (1987) 62–64; M. Sargenti, Actio civilis in factum e actio praescriptis verbis, SDHI 72 (2006) 253; Gallo (note 11) 206.

26 O. Lenel, Palingenesia iuris civilis, I, Leipzig 1889, 514; *contra* Betti (note 20) 31–32.

> Lab. ad ed. fr. 100 Palingenesia = D. 19.5.19 pr. Ulp. 31 ad ed. *Rogasti me, ut tibi nummos mutuos darem: ego cum non haberem, dedi tibi rem vendendam, ut pretio utereris. si non vendidisti aut vendidisti quidem, pecuniam autem non accepisti mutuam, tutius est ita agere, ut Labeo ait, praescriptis verbis, quasi negotio quodam inter nos gesto proprii contractus.*
> 'You asked me to give you money on loan; I did not have the money, but gave you an object for you to sell and use the price of. If you did not sell it or did sell it but did not take the money as a loan, it is safer, as Labeo says, to bring an actio praescriptis verbis, as if a single transaction had occurred between us.'

As we can see, the case is more complex than a simple *aestimatum*. It seems that the parties attempted to obtain the economic result they wanted through two different contracts:

a) the first contract, that coincides with the final aim of the transactions, is a loan – and this is in accordance with what we know happened in similar cases[27];

b) with the second contract, instrumental to the second, one party entrusted the other with the task of selling the thing. This contract can be alternatively regarded as a mandate[28] or as an *aestimatum* similar to a mandate: since the *nummi* are a pecuniary yardstick for the choice of the thing to be sold, the *aestimatum* is in some sense implied in the transaction[29].

The bargain is however complicated by the fact that no loan came into being, either because the thing was not sold, or because the *vendor* did not want to take the money as borrowed[30]. Which protection, then, for the owner of the thing?

Labeo's answer does not take into account if the thing has been sold or not, since in both cases the same actions can be used:

a) if the thing has not been sold, one could think of a breach of the mandate (or of the similar *aestimatum*) and of a protection through *actio mandati* or *agere praescriptis verbis* : in any case, the condemnation would be comprehensive of the interests on the sum that would have been gained by the sale; and if the owner just

27 Cf. D. 12.1.11 pr. Ulp. 26 ad ed.; on the connection between the texts see Santoro (note 12) 136–137; Artner (note 14) 82–83nn. 81 and 87; see also A. Saccoccio, Si certum petetur. Dalla condictio dei veteres alle condictiones dei giustinianei, Milano 2002, 408 (*ibid.*, 392–410 on the different solution in D. 17.1.34 pr. Afr. 8 quaest.).

28 Talamanca (note 10) 87 and 98; Artner (note 14) 83; Sargenti, Actio civilis (note 25) 252. Even if, in this case, since the sale is aimed to the loan in behalf of *Tu*, it could also be reckoned the invalidity of the mandate, because *tua gratia*.

29 I think this reflection can overcome the doubts of Santoro (note 12) 137–138.

30 There is no need to think of an interpolation of *mutuam* (see Santoro (note 12) 135 n. 171; Artner (note 14) 81 n. 76).

wants to have the thing back, he could employ a *condictio certae rei*, i.e. a general action that could be used even without an existing loan;

b) if instead the thing has been sold, but no loan comes into being, no breach of the mandate (or of the *similar aestimatum*) occurs, but it is hard to think that no interest was due on the sum by the mandatary, since the *utilitas* of the bargain was his[31]. The mandator could therefore use an *actio mandati* or an *agere praescriptis verbis*, or again a *condictio certae rei*, if he just wanted to get the sum obtained by the sale[32].

Labeo however says he prefers the *agere praescriptis verbis*: he does not dismiss the possibility of other actions, but thinks safer to bring an action that did not need to qualify such a complex transaction. Since he apparently admits the possibility of other (necessarily specific) actions, these words do not seem to imply that he saw the bargain as an innominate contract. Neither are significant the words quasi *negotio quodam inter nos gesto proprii contractus*, opposed as they are to the contracts of mandate and loan:

– if we translate *proprius* as 'specific'[33], and the sentence 'as if something similar[34] to a specific contract occurred between us', no opposition to the specific contracts would be left, and we would be led to assume as proven what we still must demonstrate, i.e. that Labeo saw the whole contract as innominate;

– on the other side, if we enhance the opposition with the specific contracts by translating *proprius* as 'non-specific' and the sentence 'as if something similar to an innominate contract occurred between us'[35], we are left with no opposition at all, since a contract which is not innominate must necessarily be specific.

So, in the end, I think that *proprius* should be translated as 'consistent in itself'[36]: Labeo wanted to say that one should deal with this complex transaction as if it was 'unitary', i.e. as if the contract was a single one. And we should not forget that in similar cases, when a loan actually occurred between the parties, it ab-

31 A different case in Lab. fr. 96 Palingenesia = D. 17.1.10.8 Ulp. 31 ad ed.: see R. Cardilli, Il periculum e le usurae nei giudizi di buona fede, in: L'usura ieri e oggi (Atti Foggia 1995), S. Tafaro (ed.), Bari 1997, 19–22.

32 The object of the *condictio* is the thing (i.e., in the *intentio* the reference is to the thing) when still existing, even if sold to a third, and even if the owner will just obtain the *pretium* (i.e. the pecuniary value of the thing, as indicated *per relationem* in the *condemnatio*); it is only when the thing is no more existent, that the *intentio* will speak of the *pretium* (cf. for ex. D. 12.1.23 Afr. 2 quaest.; D. 12.6.65.6 Paul. 17 ad Plaut.).

33 Gallo (note 11) 181.

34 To understand the text, we must not split the *quasi* and the *quodam* (like Santoro (note 12) 140–141, who discuss the sentence without the *quasi*; Sargenti, Actio civilis (note 25) 251, probably for a typographical mistake, deletes the *quodam*: the two words together mark an important nuance of meaning, the will to soften the strenght of a comparison.

35 Santoro (note 12) 141.

36 As for this value of *proprius* see I. Hajdú, v. proprius, in: Thesaurus linguae Latinae, X.2, München/Leipzig 2004, 2108–2109.

sorbed the entrusting of the task without leaving traces[37], so that the complexity of the transaction would be reduced to a single and simple contract.

The issue of the innominate contracts seems therefore to be completely outside the interest of the jurist: he uses the word 'contract' without peculiar qualifications, being not particularly worried by the opposition between innominate and specific contracts.

Actually, here as in the other cases we have discussed, the absence of a specific contract does not necessarily imply the existence of an innominate contract. To have a *novum negotium*, the parties must agree from the beginning to a bargain that cannot be related to a specific contract, whereas in all the contracts we have dealt with until now, the parties agreed to specific contracts that, for some reasons, did not come into being or were ineffective.

So, against the general opinion, we must conclude that Labeo never mentioned innominate contracts[38].

3. The second change: the closure of the contractual system and the birth of the innominate contracts

3.1. The fact that in the age of Labeo we still do not have any evidence of innominate contracts does not mean, of course, that the economy of the time was completely unfamiliar with transactions such as *permutatio* or exchange of *res utendae fruendae*: only, these bargains were probably not perceived as innominate contracts and were protected by the specific actions of sale and hire. It is also possible that the *formulae* with *demonstratio* still had that loose formulation that we have suspected for the origins and which paid more attention to the description of the bargain than to its legal qualification (§ 2.1).

As for our sources, a proper discussion on the problem of a distinction among specific contracts and, hence, about the feasibility of innominate contracts, starts only in the debates between Sabinians and Proculians, particularly about the two 'twin' bilateral contracts, sale and hire, and their relationship with the *nova negotia*.

It is well known that the Sabinians included the *permutatio* into the *emptio venditio*, and the exchange of *res utendae fruendae* into the *locatio conductio*, whereas the Proculians spoke, for both these bargains, of *nova negotia*. At the basis of the Proculian doctrine is the fact that in a contract where the performances of the parties are exactly the same, no clear distinction can be drawn between

37 D. 12.1.11 pr Ulp. 26 ad ed.

38 We have no certainty about the meaning of *aliud genus contractus* in D. 18.1.80.3 Lab. 5 post. a Iav. epit., which can be as well related to a specific contract (cf. Fiori (note 7) 177ff).

vendor and buyer or lessor and lessee, and therefore no choice is possible between the *actio empti* or *venditi*, or between the *actio locati* or *conducti*[39].

Other features cause the Sabinians to be more strict than the Proculians: they exclude from the specific contracts of sale and hire those bargains where the *pretium* or the *merces* are not fixed, whereas their adversaries include them in the specific contracts.

3.2. However, one of the most striking novelties in these discussions is the role of the passing of ownership in the distinction between sale and hire. As we have said before, Q. Mucius and Servius allowed a transfer of property in a *locatio conductio*. Sabinus and his school, on the other hand, maintained that whenever the *dominium* of a res passes, the bargain cannot be qualified as hire but, in case, as sale. The leading case in this subject is a *responsum* by Sabinus preserved by Pomponius:

> Sab. fr. 82 Palingenesia = D. 18.1.20 Pomp. 9 ad Sab. *Sabinus respondit, si quam rem nobis fieri velimus etiam, veluti statuam vel vas aliquod seu vestem, ut nihil aliud quam pecuniam daremus, emptionem videri, nec posse ullam locationem esse, ubi corpus ipsum non detur ab eo cui id fieret: aliter atque si aream darem, ubi insulam aedificares, quoniam tunc a me substantia proficiscitur.*
> 'It is the view of Sabinus that if I ask that something be made for me, a statue, say, or some vessel or garment, I doing nothing except pay money, the contract is one of purchase and that there can be no question of letting and hiring where the corpus itself is not provided from the one in whose interest the thing is to be made; it would be a different matter if I provided the site on which a building is to be erected, because then the *substantia* does come from me.'

I do not want to enter into a detailed discussion of this fragment, that I have already studied some years ago[40]. I would only like to underline the vocabulary used by Sabinus.

He employs the word *substantia* – that the Roman jurisprudence had until then only used in the meaning of 'wealth'[41] – in a different sense: he says that if for the producing of a work we do not give the *corpus*, but only money, the contract is sale and not hire; whereas if for the building of a house we provide the ground, the

39 As for sale, the point is clearly stated in D. 18.1.1.1 Paul. 33 ad ed.; cf. also D. 19.4.1 pr Paul. 32 ad ed.

40 Fiori (note 7) 190–206.

41 D. 35.1.27 Alf. 5 dig.

contract is hire even if we do not supply the materials, since we are giving the *substantia*.

In the second example, *substantia* plays the same role of *corpus* in the first: for the Roman jurists the area is a part of the building, and moreover the *maxima pars*[42]: so if we provide the ground it cannot be said that for the building we're only giving money. This use of the term is consistent with other Sabinus fragments[43], where *substantia* signify the material that composes a thing, the subject matter that apparently remains the same notwithstanding the work of the maker of the final object: exactly the value that *corpus* has in our text.

This use is very interesting, because it is also in accordance with the philosophical usage of the term, particularly by Seneca. Latin *substantia* is clearly modelled on Greek *hypokeímenon*, a word that already in Aristotle meant the part of a thing or being that remains the same regardless of changes and transformations. But as it is known, the Latin word was also used to translate Greek *ousía*, i.e. the whole thing composed by *forma* (*eídos*) and *materia* (*hýlē*). This ambiguous usage was particularly pursued by Seneca who, probably on the ground of Stoic doctrine, identified *substantia* and *corpus*; but it can also be found in Sabinus, who employs the words both for the *materia* modelled by the *forma* to create the *res*[44], and for the *res* itself[45].

It is in my opinion highly probable that on this doctrine of the boundaries between sale and hire, a role was played by the parallel theory of *specificatio*, whose Stoic influences have been pointed out for a long time. As we have said, for the Republican jurists it made no difference who was the owner of the materials, since a transfer of ownership was allowed *in locatio conductio* too. This was also the position of the Proculians, whose doctrine of *specificatio* ascribed to the maker the ownership of the final product, so that – regardless of the ownership of the materials – a passing of property was always necessary from the maker to the customer. On the other hand, according to the Sabinians, a transfer of ownership occurred only when the customer had not supplied the materials, because they thought that the ownership of the thing belonged to the owner of the materials: they thought that, notwithstanding the changes, the res remained the same because of the same *substantia*.

42 D. 8.2.20.2 Paul. 5 ad Sab.: *area pars est aedificii* ; D. 46.3.98.8 Paul 15 quaest.: *pars enim insulae area est et quidem maxima, cui etiam superficies cedit*; D. 13.7.21 Paul. 6 brev.: *domo pignori data et area eius tenebitur: est enim pars eius.*

43 D. 50.16.14 pr Paul. 7 ad ed. (for Sabinus' role in this fragment, see Fiori (note 7) 194 n. 33); Sab. fr. 181 Palingenesia = Gai. 2.79.

44 See previous note.

45 D. 17.2.83 Paul. 1 manual.; D. 10.4.9.3 Ulp. 24 ad ed. (for Sabinus' role, see Fiori (note 7) 195 n. 34).

3.3. The closure of the system of specific contracts was therefore produced by a variety of reasons, some strictly legal and some philosophical: we must not forget that, for the ancients, philosophy was not a simple branch of human knowledge, but included 'hard sciences' like physics and biology, so that the jurist who wanted to rely on science to solve legal problems related to the structure and identity of things and beings, had to ask the philosopher, just like today we refer to scientists in matters like, for example, bio-ethics.

In any case, we recognise here another change in the history of contractual paradigms.

The specificity of contracts, that we have suspected was less influential in the formulae with *demonstratio*, becomes more rigid, and we find that the strictest solutions are always those which tend to prevail: even if during the classical period disputes do not end, the *permutatio* and the exchange of *res utendae fruendae* are gradually excluded from the *emptio venditio* and the *locatio conductio*, and the same happens to the bargains without a fixed *pretium* or *merces*.

However, this should not lead us to think that the system became a dogmatic structure regardless of the needs of economy and trade. The solution adopted by the jurists was simply a shift in the use of the existing remedies, and in this matter the *agere praescriptis verbis* played an important role.

4. The third change: the use of the *actio praescriptis verbis* for the protection of the innominate contracts.

4.1. – That this shift occurred only during the 2nd century AD is proved by a text of Ulpian:

> D. 2.14.7.2 Ulp. 4 ad ed. *...si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem. Ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc* συνάλλαγμα *esse et hinc nasci civilem obligationem <actionem>. Et ideo puto recte Iulianum a Mauriciano reprehensum in hoc: dedi tibi Stichum ut Pamphilum manumittas: manumissisti: evictus est Stichus. Iulianus scribit in factum actionem a praetore dandam: ille ait civilem incerti actionem, id est praescriptis verbis sufficere: esse enim contractum, quod Aristo* συνάλλαγμα *dicit, unde haec nascitur actio(...).*
>
> '... even if the transaction does not fall under the head of another contract, and yet a ground (*causa*) exists, Aristo in an apt reply to Celsus states that there is an obligation. Where, for example, I gave a thing to you so that you may give another to me, or I gave so that you may do something, this is, Aristo says, a *συνάλλαγμα* and hence a civil obligation <action> arises. And, therefore, I think that Julian was rightly reproved by Mauricianus in

> the following case. I gave Stichus to you so that you would manumit Pamphilus; you have manumitted; Stichus is then evicted. Julian writes that an *actio in factum* is to be given by the praetor. But Mauricianus says that a civil action for an uncertain amount, that is, *praescriptis verbis*, is enough. For (he writes) this is a contract, the one which Aristo calls *συνάλλαγμα*, and hence this action arises (...).'

This is another very complex and famous fragment. It is not only important in the history of the Roman idea of contract, but it also poses the issue of the difference between Julian's *actio in factum* and Mauricianus' *actio civilis incerti* – two remedies that may both hint at different forms of *agere praescriptis verbis*[46]. However, a detailed analysis of the text would lead us too far. It is enough for us to note that for the use of the *actio praescriptis verbis* for the protection of innominate contracts Ulpian makes no reference to Labeo or to jurists prior to the 2nd century AD.

If we accept the emendation of *civilem obligationem* in *civilem actionem*, as proposed by some scholars[47], and we read this words as a reference to the *agere praescriptis verbis*, Aristo's response would be our first evidence for the use of the remedy in connection with the innominate contracts.

If, on the other hand, we do not accept this emendation, our first evidence would be a text by Neratius, who was a few years younger than Aristo:

> D. 19.5.6 Nerat. 1 resp. *Insulam hoc modo, ut aliam insulam reficeres, vendidi. respondit nullam esse venditionem, sed civili intentione incerti agendum est.*
> 'I sold a building in the following manner: that you repair another building. He responded that there is no sale, but that action must be brought with a civil-law *intentio* for an indefinite sum.'

In either case, I think it is highly improbable that the problem of the protection of the innominate contracts has not been disputed earlier than the 2nd century AD.

4.2. Our sources compel us to reject the widely accepted idea that the *agere praescriptis verbis* was born to grant a protection to the innominate contracts, otherwise unenforceable. In my opinion, it was rather a general remedy that could be employed every time one party had suffered a loss by the infringement of an obligation and no specific action could be granted, had the contract a 'name' or not.

46 On which see for all A. Burdese, Osservazioni in tema di cd. contratti innominati, in: Estudios J. Iglesias, J. Roset (ed.), I, Madrid 1988, 127–155 (with literature).

47 Cf. Santoro (note 12) 217–218 and n. 142, with literature.

It was perhaps Labeo who first created it[48] by the simple transfer of the *demonstratio* outside the *formula*, once that the *demonstratio* had lost its initial vagueness. But Labeo employed it only to give enforceability to those specific contracts that for whatever reason remained ineffective, even though one party suffered a loss of some kind. In his time, the boundaries of the contracts protected by formulae with a *demonstratio* were still open to all the bilateral transactions that one could call, broadly speaking, *emere vendere* or *locare conducere*, so that no problem of innominate contracts had yet arisen.

It was only when Sabinians and Proculians began to dispute about the demarcation of this two contracts that a problem of enforceability arose for all the bargains that were left outside the system of specific contracts. According to Ulpian, it was Aristo who first stated that from these bargains an obligation arose when one of the performances had been fulfilled, and the discussions about the enforceability of the claims to the counter-performances took place in the 2nd century AD.

This was, I think, a third change in the history of contracts. It was not a complete fall of the specificity of contracts, but a substantial neutralisation of the rule. It is true, of course, that in specific bilateral contracts (i.e. sale and hire), since the obligation arose from simple agreement, the protection was wider because no previous performance was needed. But at least for the most serious loss a party could suffer, i.e. for having performed his obligation without a counter-performance, an action was granted.

In the end, the strict specificity of contracts that the disputes between Sabinians and Proculians had built, had a short life or no life at all.

The reasons for this last change are obviously to be found in economy: the complex entwining of the commercial trades in the Imperial period could not be forced into the schemes of a closed system of contracts. Immediately after, or even at the same time the boundaries of the specific contracts were more strictly fixed, the Roman jurisprudence found the way to fill again those gaps that could be created by the new doctrine.

5. The last change: a history to be written

There is a last change we should speak of, but unfortunately we are not able to do it.

It is the change that started when the *cognitio extra ordinem*, the new form of civil trial, took the place of the formulary trial, and continued during the post-classical period. From this moment on, the specific actions were replaced by a general claim that was directly bound to the substantive law and could be refined during

48 On the *actio in factum* in D. 19.5.23 Alf. 3 dig. a Paul. epit. as an *actio in factum legis Aquiliae*, see convincingly Artner (note 14) 66–68.

the procedure. And even the well-known Justinian classicism did not change this state of things in its substance[49].

In this new scenario, the distinction among specific contracts became necessarily blurred, and we can trace the beginnings of this process already in the difficulties encountered by the jurisprudence of the late classical period in tracing the boundaries among *locatio conductio* and other long-term contracts such as *mandatum*, *depositum*, *commodatum* etc. that were losing their initial gratuitousness[50].

But as I said before, we do not have enough studies on this subject yet, and we must limit ourselves to pose the problem. The history of this last change is still to be written.

49 M. Kaser, K. Hackl, Das römische Zivilprozessrecht, München 1996^2, 485–486, 577–581.
50 Fiori (note 7) 261–281.