

**SELECTED TITLES FROM
THE DIGEST: PT.
I. MANDATI VEL
CONTRA. DIGEST XVII. I.**

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BRYAN WALKER

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FROM

THE DIGEST

PART I.

MANDATI VEL CONTRA.

DIGEST XVII. I.

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PREFACE.

IN works on Jurisprudence and Roman Law references are so frequently made to the *Digest*, and a knowledge of its contents is so often taken for granted, that lawyers engaged in active work, and not having leisure to grapple with the difficulties of Law Latin, may possibly find an edition of its more interesting parts of some service. Indeed, when Dr Abdy and I were engaged on behalf of the Cambridge University Press, from 1870 to 1876, upon our editions of *Gaius*, *Ulpian* and *Justinian's Institutes*, it was suggested to us by several lawyers of repute that we should do well to take in hand, after the completion of the aforementioned works, a translation of the *Digest*, or, at any rate, of such Titles of it as treat of topics wherein the English Law is considerably indebted to the Roman. Dr Abdy's appointment to be Judge of County Courts has deprived me of his valuable assistance, but for some years past I have been collecting materials for a work of the description suggested to us when we were fellow-labourers, and I hope before long to publish an annotated translation of several Books of the *Digest*, if the present small instalment is received with favour.

The particular Title of Mandate is not perhaps the most interesting which could have been chosen for a beginning, but having it ready, I put it forward first, because it happens to be the selected topic for the Cambridge Law Tripos Examination of 1879; and therefore it will, I trust, supply an immediate want, and enable me also to ascertain whether the desire to have the *Digest* translated into English is entertained by any considerable circle of readers.

The Title *Pro Socio* will at any rate be published shortly, whether other Titles follow or not, in order to complete an edition of Book XVII.



INTRODUCTION.

MANDATE is a contract in which one person at the request of another undertakes to transact some business without reward.

Mandate differs from **negotiorum gestio** or **defensio**, because it is upon request. It differs from **locatio-conductio operarum**, because it is **gratuitous**.

Mandate is usually accounted one of the consensual contracts, and yet it differs from the rest of them in two most important particulars, viz. 1st, that it is gratuitous, whereas the others are upon valuable consideration; 2nd, that simple consent does not create the obligation of mandate, for either party can withdraw from his engagement **re integra**: and by **re integra** is denoted not merely that performance has not yet commenced, but further, that non-performance is not yet detrimental to either contractor.

In Roman Law a contract may be defined to be an agreement which the law enforces because of its being accompanied by **causa**. And by **causa** is understood something which the law regards as binding; whether a solemnity, as in the old-fashioned **nexum**, in **stipulatio** and in **expensilatio**; or delivery or performance by one of the parties, as in the real contracts; or the mere nature of the transaction, as in **emptio-venditio**, **locatio-conductio** and **societas**. In **mandatum** this **causa**, or binding fact, is the nature of the agreement, coupled with the springing up of an interest in its being executed, and this interest may be either on the side of the **mandator** or the **mandatarius**. Hence **mandatum** is something intermediate in character between the real and the consensual contracts. It is not a mere consensual contract, because it is not binding simply because of its own nature and the consent of the parties. It is not a real contract; or at any rate, if real, it is real in a different sense from the contracts usually so designated: for in these the **causa** is

invariably the delivery of an article by the **creditor**, or the performance of an act by the **creditor**, with the intent of imposing on the **debtor** a duty which the latter agrees to undertake. But in **mandatum**, if the inchoate obligation is made final by any **res**, i.e. by any delivery or act, (for that is the sense of **res** in a Roman **real** contract,) the **res** proceeds from the **debtor**: and moreover the **mandatum** may be made final by what is no **res** at all in the Roman sense, viz. by the accident of performance by the **mandatarius** becoming necessary to save the **mandator** from loss or inconvenience.

If the principal or **mandator** does not revoke his mandate before the agent or **mandatarius** has begun performance, the mandate becomes final, for the **mandatarius** has now an interest in its being carried on to completion. If the **mandatarius** has not yet taken any steps, still he cannot renounce, if it is to the interest of the **mandator** that he should proceed to execute what he undertook to do. Hence if mandate is to be called a **real** contract, we must note that it is real in a very peculiar sense: the binding **res** being either an act, not on the part of the **creditor**, but of the **debtor**: or a forbearance, **instead of an act**, on the part of the **creditor**: for although it is impossible to agree with the dictum of Professor Hunter, in his admirable "Exposition of Roman Law," that "the principal has an action against the agent **only** when he has suffered injury by trusting to his promise and thereby forbearing to take the steps he would otherwise have taken to protect his interests:" yet this statement is entirely correct if the word "only" be omitted from it¹.

Mandate, then, is a contract **sui generis** as to its **causa**; lying between the real and consensual contracts: enforceable by action when to the fact of consent of the parties is super-added the springing up on either side of an interest in the fulfilment of what has been entrusted and undertaken.

Mandatum in the Roman Law might be either general or special: express or tacit²: for "semper qui non prohibet pro se intervenire mandare creditur"³; and moreover ratification of the proceedings of a **negotiorum gestor** turns him into a **mandatarius**, so far as to give rise to the **actiones mandati directa et contraria**.⁴

A mandate might also be conditional, future or **post mortem mandatoris**.⁵

¹ Hunter's *Roman Law*, p. 361.

² *D. A. L.* 6. 2: 18: 22. 10: 40.

³ *D. 50. 17. 60.*

⁴ *D. A. L.* 1. 3: 27. 1.

Mandate was not only useful, but in certain cases an absolute necessity: for although corporeal property could be so transferred as to vest in the transferee all the rights of the transferor, it was not so with rights, or "things incorporeal," an inheritance, for instance, an usufruct, an obligation or a right of action. Hence, the transfer of property of this character could only be effected by empowering the transferee to sue in the name of the transferor; and thus mandate was the method of constituting the former **procurator in rem suam**, "agent for his own benefit," till Antoninus allowed the **emptor hereditatis** to bring an **utilis actio** in his own name¹, and subsequent emperors extended the privilege to other transferees of mere rights².

A mandate might be (1) for the benefit of the **mandator** alone, (2) or of the **mandator** and **mandatarius**, (3) or of a stranger alone, (4) or of the **mandator** and a stranger, (5) or of the **mandator**, **mandatarius** and a stranger³. But with regard to the third variety of mandate the difficulty meets us, that no man can bring an action unless he has an interest to defend. How then can a **mandator** who gives a mandate **aliena tantum gratia** be entitled to sue the **mandatarius** for non-performance or faulty performance of that wherein he, the **mandator**, is not interested? In other words, how are we to reconcile the apparently conflicting statements of 6. 4 and 8. 6, *A. 1. 7*? The answer is that a mandate at the time it is given may be **aliena tantum gratia**, but that it must become **mandantis gratia** also, before it can be sued upon. And it may become **mandantis gratia** in two ways. In the first place, this may be the result of the **mandatarius** beginning to act, for he thus turns his **mandator** into a **negotiorum gestor** of the benefited party, i. e. he makes him an unsolicited intermeddler with another's affairs; and a **negotiorum gestor** is answerable to the stranger for any mismanagement or loss. Hence, from the moment the **mandatarius** begins to act, the **mandator**, by reason of his own liability to the stranger, has an interest sufficient to found a right of action against the **mandatarius**. Secondly, the stranger, because of his knowledge of the mandate having been given, supposing he hears of it, may abstain from executing his own business, so that the non-performance or faulty performance of the mandate may do

¹ D. 2. 14. 16.² C. 4. 10. 1. 2: C. 4. 10. 2: C. 4. 10. 20: C. 4. 39. 7: C. 6. 37. 18:

C. 8. 54. 33.

³ D. A. 1. 2. 1—5.