

# THE ROMAN LAW OF SLAVERY

THE CONDITION OF THE SLAVE IN PRIVATE  
LAW FROM AUGUSTUS TO JUSTINIAN

BY

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## PREFACE

THE following chapters are an attempt to state, in systematic form, the most characteristic part of the most characteristic intellectual product of Rome. There is scarcely a problem which can present itself, in any branch of the law, the solution of which may not be affected by the fact that one of the parties to the transaction is a slave, and, outside the region of procedure, there are few branches of the law in which the slave does not prominently appear. Yet, important as the subject is, for the light it might be expected to throw on legal conceptions, there does not exist, so far as I know, any book which aims at stating the principles of the Roman Law of slavery as a whole. Wallon's well-known book covers so much ground that it cannot treat this subject with fulness, and indeed it is clear that his interest is not mainly in the law of the matter. The same is true of Blair's somewhat antiquated but still readable little book.

But though there exists no general account, there is a large amount of valuable literature, mostly foreign. Much of this I have been unable to see, but without the help of continental writers, chiefly German, I could not possibly have written this book. Indeed there are branches of the subject in which my chapters are little more than compilation. I have endeavoured to acknowledge my indebtedness in footnotes, but in some cases more than this is required. It is perhaps otiose to speak of Mommsen, Karlowa, Pernice among those we have lost, or of Gradenwitz, Krüger, Lenel among the living, for to these all students of the Roman Law owe a heavy debt, but I must mention here my special obligations to Erman, Girard, Mandry, Salkowski and Sell, whose valuable monographs on branches of the Law of Slavery have been of the greatest possible service. Where it has been necessary to touch on

subjects not directly connected with Slavery I have made free use of Girard's "Manuel" and Roby's "Roman Private Law." I greatly regret that the second edition of Lenel's "Edictum Perpetuum" and the first volume of Mitteis' "Römisches Privatrecht" appeared too late to be utilised except in the later chapters of the book.

In dealing with the many problems of detail which have presented themselves, I have, of course, here and there, had occasion to differ from views expressed by one or other of these writers, whose authority is so much greater than my own. I have done so with extreme diffidence, mindful of a certain couplet which speaks of

"What Tully wrote and what Justinian,  
And what was Pufendorf's opinion."

I have not dealt, except incidentally, with early law or with the law affecting *libertini*. The book is already too large, and only the severest compression has kept it within its present limits. To have included these topics would have made it unmanageable. It was my original intention not to deal with matter of procedure, but at an early stage I found this to be impracticable, and I fear that the only result of that intention is perfunctory treatment of very difficult questions.

Technical terms, necessarily of very frequent occurrence in a book of this kind, I have usually left in the original Latin, but I have not thought it necessary to be at any great pains to secure consistency in this matter. In one case, that of the terms *Iussum* and *Iussus*, I have felt great difficulty. I was not able to satisfy myself from the texts as to whether the difference of form did or did not express a difference of meaning. In order to avoid appearing to accept either view on the matter I have used only the form *Iussum*, but I am not sure that in so doing I may not seem to have implied an opinion on the very question I desired not to raise.

I have attempted no bibliography: for this purpose a list confined to books and articles dealing, *ex professo*, with slave law would be misleadingly incomplete, but anything more comprehensive could be little less than a bibliography of Roman Law in general. I have accordingly cited only such books as I have been able to use, with a very few clearly indicated exceptions.

To Mr H. J. Roby of St John's College, to Mr Henry Bond of Trinity Hall, to Mr P. Giles of Emmanuel College, and to Mr J. B. Moyle of New College, Oxford, I am much indebted for many valuable suggestions and criticisms. I desire to express my sincere thanks to the Syndics of the Cambridge University Press for their liberality in undertaking the publication of the book, to Mr R. T. Wright and Mr A. R. Waller, the Secretaries of the Syndicate, for their unfailing kindness, and to the Staff of the Press for the care which they have bestowed on the production of the book.

This book, begun at the suggestion of a beloved and revered Scholar, now dead, had, so long as he lived, his constant encouragement. I hope to be excused for quoting and applying to him some words which he wrote of another distinguished teacher: "What encouragement was like when it came from him his pupils are now sorrowfully remembering."

W. W. B.

*September 2nd, 1908.*

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## ERRATA ET ADDENDA

- p. 7, n. 4. For 32. 60. 1. 99. 2 read 32. 60. 1, 99. 2.  
p. 9, n. 6. For der Juden read den Juden.  
p. 12, n. 4. For 5. 1. 20 read 6. 1. 20.  
p. 18, n. 9. For xxiv. read xxv.  
,, n. 10. Add In. 1. 20. 10.  
p. 32, n. 3. For *op. cit.* read Inst. Jurid.  
p. 68, n. 9. Add See also D. 8. 4. 13.  
p. 100, n. 4. Add But see Naber, *Mélanges Gerardin*, 467.  
p. 108, n. 5. For 9. 4. 3. 3 read 9. 4. 4. 3.  
p. 129, n. 7. For P. 2. 31. 37 read P. 2. 31, 37.  
p. 130, n. 13. Add See also *post*, pp. 338, 666.  
p. 156, n. 3. For 44. 3. 46. 3 read 44. 3; 46. 3.  
p. 215, l. 16. For *sponsis* read *sponsio*.  
p. 248, n. 7. For mere read is mere.  
p. 291, n. 8. Add See on the whole subject, Marchand, *Du Captif Romain*.  
p. 318, n. 1. For Mommsen read Mommsen, *Staatsr.* (3) 2. 2. 998 sqq.  
Add See, however, now, as to the relations and nomenclature of all these funds, Mitteis, *Röm. Privatr.*, 1. 349 sqq.  
p. 322, n. 5. For Mommsen read Mommsen, *Staatsr.* (3) 2. 2. 1000 sqq.  
p. 324, n. 3. For Mommsen read Mommsen, *Staatsr.* (3) 2. 2. 836.  
p. 354, n. 10. For Eisele, *Z. S. S.* 7. read Appleton, *H. Interpolations*, 65.  
p. 403, n. 2. For congruent read congruunt.  
p. 422, n. 6. Add A study of this institution by Bonfante, *Mélanges Fadda*, was not available when this chapter was printed.

## LIST OF PRINCIPAL ABBREVIATIONS

In. = Institutiones Iustiniani.

D. = Digesta „

C. = Codex „

N. = Novellae „

Numeral references with no initial letter are to the Digest.

C. Th. = Codex Theodosianus.

G. = Gai institutiones.

U. or Ulp. = Ulpiani Regulae.

P. = Pauli Sententiae.

Fr. D. or Fr. Dos. = Fragmenta Dositheiana.

Fr. V. or Fr. Vat. = „ Vaticana.

Coll. = Mosaicarum et Romanarum legum collatio.

Citations of the Corpus Iuris Civilis are from the stereotyped edition of Krüger, Mommsen, Schoell and Kroll.

Citations of the Codex Theodosianus are from Mommsen's edition.

Citations of earlier juristic writings are from the *Collectio librorum iuris antejustiniani*.

Z.S.S. = Zeitschrift der Savigny Stiftung für Rechtsgeschichte.

N.R.H. = Nouvelle Revue Historique de Droit français et étranger.

## PART I.

### CONDITION OF THE SLAVE.

#### CHAPTER I.

##### DEFINITION AND GENERAL CHARACTERISTICS.

THE Institutes tell us that all men are either slaves or free<sup>1</sup>, and both liberty and slavery are defined by Justinian in terms borrowed from Florentinus. "Libertas," he tells us, "est naturalis facultas eius quod cuique facere libet nisi si quid vi aut iure prohibetur<sup>2</sup>." No one has defined liberty well: of this definition, which, literally understood, would make everyone free, the only thing to be said at present for our purpose is that it assumes a state of liberty to be "natural."

"Servitus," he says, "est constitutio iuris gentium qua quis dominio alieno contra naturam subicitur<sup>3</sup>." Upon this definition two remarks may be made<sup>4</sup>.

i. Slavery is the only case in which, in the extant sources of Roman law, a conflict is declared to exist between the *Ius Gentium* and the *Ius Naturale*. It is of course inconsistent with that universal equality of man which Roman speculations on the Law of Nature assume<sup>5</sup>, and we are repeatedly told that it is a part of the *Ius Gentium*, since it originates in war<sup>6</sup>. Captives, it is said, may be slain: to make them slaves is to save their lives; hence they are called *servi, ut servati*<sup>7</sup>, and thus both names, *servus* and *mancipium*, are derived from capture in war<sup>8</sup>.

<sup>1</sup> In. 1. 3. *pr.*

<sup>2</sup> In. 1. 3. 1; D. 1. 1. 4. *pr.*; 1. 5. 4. *pr.*

<sup>3</sup> In. 1. 3. 2; D. 1. 5. 4. 1; D. 12. 6. 64.

<sup>4</sup> Girard, *Manuel*, Bk 2, Ch. 1, gives an excellent account of these matters.

<sup>5</sup> See the texts cited in the previous notes.

<sup>6</sup> In. 1. 5. *pr.*; D. 1. 1. 4; 1. 5. 4.

<sup>7</sup> 50. 16. 139. 1.

<sup>8</sup> 1. 5. 4. For the purpose of statement of the Roman view, the value of the historical, moral and etymological theories involved in these propositions is not material.

ii. The definition appears to regard subjection to a *dominus* as the essential fact in slavery. It is easy to shew that this conception of slavery is inaccurate, since Roman Law at various times recognised types of slaves without owners. Such were

(a) The slave abandoned by his owner. He was a *res nullius*. He could be acquired by *usucapio*, and freed by his new owner<sup>1</sup>.

(b) *Servi Poenae*. Till Justinian's changes, convicts or some types of them were *servi*: they were strictly *sine domino*; neither *Populi* nor *Caesaris*<sup>2</sup>.

(c) Slaves manumitted by their owner while some other person had a right in them<sup>3</sup>.

(d) A freeman who allowed a usufruct of himself to be given by a fraudulent vendor to an innocent buyer. He was a *servus sine domino* while the usufruct lasted<sup>4</sup>.

It would seem then that the distinguishing mark of slavery in Rome is something else, and modern writers have found it in rightlessness. A slave is a man without rights, i.e. without the power of setting the law in motion for his own protection<sup>5</sup>. It may be doubted whether this is any better, since, like the definition which it purports to replace, it does not exactly fit the facts. Indeed, it is still less exact. At the time when Florentinus wrote, Antoninus Pius had provided that slaves ill treated by their owner might lodge a complaint, and if this proved well founded, the magistrate must take certain protective steps<sup>6</sup>. So far as it goes, this is a right. *Servi publici Populi Romani* had very definite rights in relation to their *peculia*<sup>7</sup>. In fact this definition is not strictly true for any but *servi poenae*<sup>8</sup>. Nor does it serve, so far as our authorities go, to differentiate between slaves and alien enemies under arms. But even if it were true and distinctive, it would still be inadmissible, for it has a defect of the gravest kind. It looks at the institution from an entirely non-Roman point of view. The Roman law of slavery, as we know it, was developed by a succession of practical lawyers who were not great philosophers, and as the main purpose of our definition is to help in the elucidation of their writings, it seems unwise to base it on a highly abstract conception which they would hardly have understood and with which they certainly never worked<sup>9</sup>. Modern writers on jurisprudence usually make the conception of a right the basis of

<sup>1</sup> 41. 7. 8.

<sup>2</sup> *Post*, Ch. xii.

<sup>3</sup> Fr. Dosith. 11; Ulp. 1. 19; C. 7. 15. 1. 2; *post*, Ch. xxv.

<sup>4</sup> 40. 12. 23. *pr.*; *post*, Ch. xviii.

<sup>5</sup> Warnkoenig, *Inst. Rom. Jur. priv.* § 121; Moyle, *ad Inst.* 1. 3. 2; Accarias, *Précis de Dr. Rom.* 1, p. 89.

<sup>6</sup> G. 1. 53; *post*, p. 37 where an earlier right of the same kind is mentioned.

<sup>7</sup> *Post*, Ch. xv.

<sup>8</sup> Other equivocal cases may be noted; 2. 4. 9; 5. 1. 53; 48. 10. 7.

<sup>9</sup> See however 50. 17. 32.

their arrangement of legal doctrines<sup>1</sup>. The Romans did not, though they were, of course, fully aware of the characteristic of a slave's position on which this definition rests. "Servile caput," says Paul, "nullum ius habet<sup>2</sup>." But they recognised another characteristic of the slave which was not less important. Over a wide range of law the slave was not only rightless, he was also duteless. "In personam servilem nulla cadit obligatio<sup>3</sup>." Judgment against a slave was a nullity: it did not bind him or his master<sup>4</sup>. In the same spirit we are told that slavery is akin to death<sup>5</sup>. If a man be enslaved his debts cease to bind him, and his liability does not revive if he is manumitted<sup>6</sup>. The same thing is expressed in the saying that a slave is *pro nullo*<sup>7</sup>. All this is much better put in the Roman definition. The point which struck them, (and modern writers also do not fail to note it,) was that a slave was a *Res*, and, for the classical lawyers, the only human *Res*. This is the meaning of Florentinus' definition. *Dominus* and *dominium* are different words. The statement that slaves as such are subject to *dominium* does not imply that every slave is always owned<sup>8</sup>. Chattels are the subject of ownership: it is immaterial that a slave or other chattel is at the moment a *res nullius*<sup>9</sup>.

From the fact that a slave is a *Res*, it is inferred, apparently as a necessary deduction<sup>10</sup>, that he cannot be a person. Indeed the Roman slave did not possess the attributes which modern analysis regards as essential to personality. Of these, capacity for rights is one<sup>11</sup>, and this the Roman slave had not, for though the shadowy rights already mentioned constitute one of several objections to the definition of slaves as "rightless men," it is true that rights could not in general vest in slaves. But many writers push the inference further, and lay it down that a slave was not regarded as a person by the Roman lawyers<sup>12</sup>. This view seems to rest on a misconception, not of the position of the slave, but of the meaning attached by the Roman lawyers to the word *persona*. Few legal terms retain their significance unchanged for ever, and this particular term certainly has not done so. All modern writers agree, it seems, in requiring capacity for right. The most recent philosophy seems indeed to go near divorcing the idea of personality from its human elements. For this is the effect of the theory which sees in the Corporation a real, and not a fictitious

<sup>1</sup> Hearn (*Legal Duties and Rights*) alone among recent English writers bases his scheme on Duties. But this is no better from the Roman point of view.

<sup>2</sup> 5. 3. 1.

<sup>3</sup> 50. 17. 22. *pr.*

<sup>4</sup> 5. 1. 44. 1.

<sup>5</sup> 50. 17. 209. Nov. 22. 9; G. 3. 101.

<sup>6</sup> 44. 7. 30.

<sup>7</sup> 28. 8. 1. *pr.*

<sup>8</sup> Justinian swept away nearly all the exceptional cases. C. 7. 15. 1. 2b; Nov. 22. 8; 22. 12.

<sup>9</sup> The objection, that slavery is an "absolute," not a "relative," status, is thus of no force against the Roman definition.

<sup>10</sup> Girard, *Manuel*, p. 92.

<sup>11</sup> Girard, *op. cit.* p. 90, "L'aptitude à être le sujet de droits et devoirs légaux."

<sup>12</sup> Girard, *loc. cit.*; Moyle, *op. cit.* *Introd.* to Bk 1; etc.

person<sup>1</sup>. If, now, we turn to the Roman texts, we find a very different conception. A large number of texts speak of slaves as persons<sup>2</sup>. There does not seem to be a single text in the whole Corpus Iuris Civilis, or in the Codex Theodosianus, or in the surviving classical legal literature which denies personality to a slave. It is clear that the Roman lawyers called a slave a person, and this means that, for them, "persona" meant human being<sup>3</sup>.

It must however be borne in mind that the word has more than one meaning. Its primary meaning is not the man, but the part he plays, and thus a number of texts, including many of those above cited, speak not of the man, but of the *persona* of the man. The distinction is not material, but it may have suggested a further distinction made in modern books. It is the usage of some writers to speak of two senses in which the word is used: one technical, in which it means "man capable of rights"; the other wide, in which it means simply "man<sup>4</sup>." But if the texts be examined on which this distinction is based, it will be found that, so far as Roman law is concerned, this means no more than that in some texts the topic in question is such that rights are necessarily contemplated, while in others this is not the case.

A doctrine which purports to be really Roman law must necessarily be somehow rested on the texts. It is desirable to note what sort of authority has been found for the view that a slave was not a person for the Roman lawyers. One group of texts may be shortly disposed of: they are the texts which say that a slave is *pro nullo*, and that slavery is akin to death<sup>5</sup>. These are, as they profess to be, mere analogies: they shew, indeed, that from some points of view a slave was of no legal importance, but to treat them as shewing that *persona* means someone of legal importance is a plain begging of the question. The others are more serious. There is a text in the Novellae of Theodosius<sup>6</sup>, (not reproduced in Justinian's Code,) which explains the slave's incapacity to take part in legal procedure

<sup>1</sup> See Maitland, Political Theories of the Middle Age (Gierke), Introd. p. xxxiv.

<sup>2</sup> G. 1. 120; 1. 121; 3. 189; 4. 135. Vat. Fr. 75. 2, 75. 5, 82 (drawing legal inferences from his personality); C. Th. 14. 7. 2 (rejected by Mommsen); C. 4. 36. 1. *pr.*; C. 7. 32. 121; Inst. 1. 8. *pr.*; 3. 17. 2; 4. 4. 7 (all independent of each other and of Gaius); D. 7. 1. 6. 2; 7. 2. 1. 1; 9. 4. 29; 11. 1. 20. *pr.*; 30. 86. 2 (twice); 31. 82. 2; 39. 6. 23; 45. 3. 1. 4; 47. 10. 15. 44; 47. 10. 17. 3; 48. 19. 10. *pr.*; 48. 19. 16. 3; 50. 16. 2. 215; 50. 17. 22. *pr.* See also Bas. 44. 1. 11, and Sell, Noxalrecht, p. 28, n. 2.

<sup>3</sup> It would not be surprising if there were some looseness, since a slave, while on the one hand an important conscious agent is on the other hand a mere thing. But the practice is unvarying. It is commonly said that the personality of the slave was gradually recognised in the course of the Empire. What were recognised were the claims of humanity, cp. 21. 1. 35. To call it a recognition of personality (Pernice, Labeo, 1. pp. 113 *sqq.*, and many others) is to use the word personality in yet another sense, for it still remained substantially true that the slave was incapable of legal rights.

<sup>4</sup> See Brissouius, De Verb. Sign., sub v. *persona*.

<sup>5</sup> nn. 4, 5, 6 on p. 3.

<sup>6</sup> Nov. Theod. 17. 1. 2: *quasi nec personam habentes*.

by the fact that he has no *persona*. This seems weighty, as it draws legal consequences from the absence of a *persona*. But it must be noted that similar language is elsewhere used about young people without curators<sup>1</sup>, and the true significance of these words is shewn by a text which observes that a slave is not a *persona qui in ius vocari potest*<sup>2</sup>. A text in the Vatican Fragments (also in the Digest<sup>3</sup>) says that a *servus hereditarius* cannot stipulate for a usufruct because *usufructus sine persona constitui non potest*. This is nearer to classical authority, but in fact does not deny personality to a slave. That is immaterial: the usufruct could never vest in him. The point is that a *hereditas iacens* is not a *persona*, though, for certain purposes, *personae vicem sustinet*<sup>4</sup>. Thus in another text the same language is used on similar facts, but the case put is that of *filius vel servus*<sup>5</sup>. A text of Cassiodorus<sup>6</sup> has exactly the same significance<sup>7</sup>. There are however two texts of Theophilus<sup>8</sup> (reproducing and commenting on texts of the Institutes) in which a slave is definitely denied a *persona*. He explains the fact that a slave has only a derivative power of contracting or of being instituted heir by the fact that he has no *persona*. The reason is his own: it shews that in the sixth century the modern technical meaning was developing. But to read it into the earlier sources is to misinterpret them: *persona*, standing alone, did not mean *persona civilis*<sup>9</sup>.

Slavery has of course meant different things at different times and places<sup>10</sup>. In Rome it did not necessarily imply any difference of race or language. Any citizen might conceivably become a slave: almost any slave might become a citizen. Slaves were, it would seem, indistinguishable from freemen, except so far as some enactments of late date slightly restricted their liberty of dress<sup>11</sup>. The fact that all the civil degrees known to the law contained persons of the same speech, race, physical habit and language, caused a prominence of rules dealing with the results of errors of Status, such as would otherwise be unaccountable. Such are the rules as to *erroris causae probatio*<sup>12</sup>, as to the freeman who lets himself be sold as a slave<sup>13</sup>, as to error in status

<sup>1</sup> C. Th. 3. 17. 1; C. 5. 34. 11.

<sup>2</sup> 2. 7. 3. *pr.*

<sup>3</sup> 45. 3. 26; V. Fr. 55.

<sup>4</sup> 9. 2. 13. 2; In. 3. 17. *pr.*

<sup>5</sup> 36. 2. 9. It was only in case of legacy, not of stipulation, that the usufruct depended in any way on the life of the slave, *post*, Ch. vi.

<sup>6</sup> Var. 6. 8. 2.

<sup>7</sup> 36. 1. 57. 1 (Papinian) may be understood as denying personality, but it is really of the same type: *rescriptum non esse repraesentandam hereditatis restitutionem quando persona non est cui restitui potest*.

<sup>8</sup> Ad In. 2. 14. 2; 3. 17. *pr.*

<sup>9</sup> A correct decision on this matter is necessary before we can say what Gaius meant by *Ius quod ad personas pertinet*.

<sup>10</sup> Wallon, Histoire de l'Esclavage; Winter, Stellung der Sklaven bei d. Juden; Cobb, Slavery (in America).

<sup>11</sup> C. Th. 14. 10. 1; 14. 10. 4. As to the cautious abstention from such restrictions in earlier law, see Seneca, De Clementia, 1. 24; Lampridius, Alex. Severus, 27. 1.

<sup>12</sup> G. 1. 67-75; Ulp. 7. 4.

<sup>13</sup> In. 1. 3. 4, *post*, Ch. xviii.

of the witness of a will<sup>1</sup>, and other well known cases<sup>2</sup>. There was also a rule that where a man, who afterwards turned out to be a slave, had given security *iudicatum solvi*, there was *restitutio in integrum*<sup>3</sup>. To the same cause are expressly set down the rules as to acquisition through a *liber homo bona fide serviens*<sup>4</sup>, and the rule that the *bona fide* sale of a freeman as a slave was valid, as a contract, *quia difficile potest dignosci liber homo a servo*<sup>5</sup>. The well-known rule that *error communis facit ius* had more striking illustrations than those already mentioned. Thus, though a slave could not validly be appointed to decide an arbitration<sup>6</sup>, yet an arbitral decision by one apparently free was declared to be valid though he ultimately proved to be a slave<sup>7</sup>. And where a fugitive slave was appointed Praetor, his official acts were declared by Ulpian to be valid<sup>8</sup>.

Slavery did not necessarily mean manual labour: the various services involved in the maintenance of an establishment in town or country were all rendered by troops of slaves, having their appropriate official names, derived from the nature of their service. It is not necessary to recite these names: numbers of them will be found in the texts dealing with the interpretation of legacies and contracts<sup>9</sup>. A broad distinction is repeatedly drawn between Urban and Rustic slaves, as it was customary to make legacies of the one or the other class generally, probably with other property. *Mancipia rustica* were, broadly, those engaged in the cultivation of land and other rural pursuits, *urbana* were those whom *pater familias circum se ipsius sui cultus causa habet*<sup>10</sup>, elsewhere defined as *quae totius suppellectilis notitiam gerunt*<sup>11</sup>. The cook and the philosopher were alike urban, the land-agent (*villicus*) and the labourer were alike rustic. The distinction is founded partly on mode and place of maintenance, partly on nature of service, and partly on direct statement in the owner's register of slaves<sup>12</sup>. Indeed in the construction of legacies, as the testator's intention was the point to be determined, this register was conclusive where it was available<sup>13</sup>. Place of residence was not conclusive, *non loco sed usus genere dis-*

<sup>1</sup> In 2 10 7

<sup>2</sup> The person *de statu suo incertus* (Ulp 20 11 etc.), institution of *servus alienus* as a freeman (the case of Parthenius) *post* Ch vi position of child of *ancilla* supposed to be free, *post* Ch xxvii. There are other cases in the title *De iure dotum*, e.g. 23 3 59 2

<sup>3</sup> 2 8 8 2      <sup>4</sup> 40 3 34

<sup>5</sup> 18 1 4 5 6, 34 2 70. As often the rule was severer in stipulation. Here the agreement was void for impossibility 44 7 1 9 40 1 83 5 103. In 18 2 14 3 we are told that sale to *servus alienus* thought free was valid while one to my own slave was in any case void *post*, Ch xxix

<sup>6</sup> 4 8 9 p

<sup>7</sup> C 7 45 2 *Post*, p 84

<sup>8</sup> 1 14 3. This extreme view may be peculiar to Ulpian. Cp Dio Cassius 48 34. In England analogous cases have needed express legislation. See e.g. 51 & 52 Vict c 28

<sup>9</sup> 32 61, 33 7 8 12 *sqg*, P 3 6 35 *sqg*, Wallon *op cit* Bk 2 Ch III, Blan. Slavery in Rome 151

<sup>11</sup> C 5 37 22 2

<sup>12</sup> 32 99 *pr* 33 7 27 1

<sup>13</sup> 50 16 166

*tinguuntur*<sup>1</sup>. Residence might be temporary: a child put out to nurse in the country was not on that account rustic<sup>2</sup>. Even nature of service was not conclusive. Some forms of service were equivocal, e.g. those of *venatores* and *aucupes*<sup>3</sup>, *agasones* or *muliones*<sup>4</sup>, or even *dispensatores*, who, if they were managing town properties were urban, but if they were in charge of a farm were rustic, differing little from *villici*<sup>5</sup>.

For many of their employments special skill and training were necessary, and a slave so trained (*arte praeditus*) acquired, of course, an added value, especially if he had several *artificia*<sup>6</sup>. In some texts a distinction is drawn, in this connexion, between *officium* and *artificium*<sup>7</sup>. The language of Marcian suggests, as do other applications of the word, that an *officium* was an occupation having reference to the person or personal enjoyments of the *dominus*<sup>8</sup>. The distinction is not prominent and was probably of no legal importance, except in the construction of legacies and the like.

Work of the most responsible kinds was left in the hands of slaves. Among the more important functions may be mentioned those of *negotiator*, *librarius*, *medicus*, *actor*, *dispensator*, *villicus*, *paedagogus*, *actuarius*<sup>9</sup>. They managed businesses of all kinds<sup>10</sup>. We find a slave carrying on the trade of a banker without express orders<sup>11</sup>. A slave rents a farm and cultivates it as tenant, not as a mere steward<sup>12</sup>. Aulus Gellius<sup>13</sup> gives a list of philosophers who were slaves among the Greeks and Romans. Broadly, it may be said that in private life there was scarcely an occupation in which a slave might not be employed: almost any industry in which freemen are now engaged might be carried on in Rome by slaves. It must however be remembered that all this is not true in the greater part of the Republican period. In that period the evidence shews that slaves were relatively few and unimportant<sup>14</sup>. And in the decline of the Empire there was a tendency to exclude slaves from responsible classes of employment, and to leave these in the hands of freemen<sup>15</sup>.

It is obvious that slaves so differently endowed would differ greatly in value. It is improbable that the increase in number involved any

<sup>1</sup> 33 7 12, 33 10 12 etc

<sup>2</sup> 50 16 210

<sup>3</sup> 32 99 1, P 3 6 71

<sup>4</sup> 32 60 1 99 2, P 3 6 72

<sup>5</sup> 50 16 166

<sup>6</sup> 32 65 2 C 5 37 22. Teaching slaves *artes* was among *utiles impensae* for the purpose of *Dos* 25 1 6

<sup>7</sup> 32 65 1, 40 4 24, 50 15 4 5 etc

<sup>8</sup> 32 65 1. See Brissomius *De Verb Sign* sub v *officium*

<sup>9</sup> 9 2 22 32 64, 38 1 25 *h t* 49 40 5 41 6, 40 7 1 21 *pr* 40 12 44 2, P 3 6 70, G 1 19 39 etc

<sup>10</sup> 14 3 5 7. See Marquardt *Vie privée des Romains*, 1 Ch iv

<sup>11</sup> 2 13 4 3      <sup>12</sup> 33 7 12 3 20 1 Cp 33 7 18 4

<sup>13</sup> Noct Att 2 18. For further ref see Girard *Manuel*, 93 *sqg*

<sup>14</sup> For further details as to the number of slaves at different epochs and as to their varied and independent employments see Wallon, *op cit* n Ch III. Sell Noxalrecht pp 129 *sqg*, Friedlaender *Sittengesch* n 228 (ed 7), Voigt *Rom R G* 1 118 *sqg*, Marquardt *loc cit*, Blair *State of Slavery among the Romans* Ch vi

<sup>15</sup> *Post*, Ch xiv

diminution in exchange value of individual similarly qualified slaves, for it was accompanied by a great increase in quantity of other forms of convertible wealth. Changes in economic conditions and repeated alterations in the intrinsic value of coins called by a particular name, make the task of tracing the changes in value of slaves too difficult to be attempted here. It is clear however that they were of considerable value. In A.D. 139 a female child of six years of age was sold for 205 *denarii*<sup>1</sup>. This seems a high price, and the presence in the contract note of the unexplained expression, "sportellaria empta," leads Mommsen<sup>2</sup> to suppose that she was thrown in, "sportulae causa," in the purchase of her mother. But the price seems too low for this. In general, in classical times, the prices for ordinary slaves seem to have varied from 200 to 600 *denarii*<sup>3</sup>. These are ordinary commercial prices. Of course, for slaves with special gifts, very much higher prices might be given, and occasional enormous prices are recorded by the classical writers<sup>4</sup>. The prices in Justinian's time seem a little, but not much, higher. Two enactments of his fix judicial valuations, one for application in case of dispute where there is a joint legacy of *Optio Servi*, the other for the case of manumission of common slaves<sup>5</sup>, and they are almost identical. The prices range from 10 *solidi* for ordinary children to 70 for slaves with special skill who were also eunuchs. From another enactment of his it appears that 15 *solidi* was a rather high price<sup>6</sup>. Other prices are recorded in the Digest<sup>7</sup>, ranging from 2 to 100 *solidi*. But these are of little use: nearly all are imaginary cases, and even if we can regard them as rough approximations to value, we cannot tell whether the figures are of the age of Justinian or were in the original text. Another indication of price is contained in the fact that 20 *solidi* was taken as about the mean value of a slave by legislation of the classical age<sup>8</sup>.

It may be well to make some mention of the more important terms which are used as equivalent to *servus*, or to describe particular classes of slaves, in the sources. *Servus* appears to be used generally, without reference to the point of view from which the man is regarded. *Mancipium* is usually confined to cases in which the slave is regarded as a chattel. Thus it is common in such titles as that on the Aedilician Edict<sup>9</sup>, but not in such as that on the *Actio de peculio*<sup>10</sup>. *Ancilla* is

<sup>1</sup> Bruns, *Fontes* i. 289.

<sup>2</sup> C. I. L. 3. 937.

<sup>3</sup> See the documents in Bruns, *op. cit.* 288. 29, 315—317, 325. See also Girard, *Textes*, 806 *sqq.* For the manumission of an adult woman 2200 *drachmae* were paid in Egypt in A.D. 221. Girard, *op. cit.* Append.

<sup>4</sup> Marquardt, *Vie privée*, i. Ch. iv.

<sup>5</sup> C. 6. 43. 3; 7. 7. 1.

<sup>6</sup> C. 6. 47. 6.

<sup>7</sup> See for some of them, Marquardt, *loc. cit.*

<sup>8</sup> For these and other details as to the price of slaves at various times, see Wallon, *op. cit.* Bk 2, Ch. iv.; Sell, *Noxalrecht*, 147.

<sup>9</sup> D. 21. 1. E.g., *h. t.* 51. *pr. mancipium vitiosum...servus emat.*

<sup>10</sup> 15. 1.

the usual term for an adult female slave, though *mulier* is of course found, and *serva* more rarely<sup>1</sup>. Children are called *puer* and *puella*. *Puer*, for an adult, though it is common in general literature, is found only occasionally in the legal texts<sup>2</sup>. *Puella* seems never to be used there without the implication of youth. A *verna* is a slave born and reared in the house of his master, and occupies a somewhat privileged position, but in law his position is not different from that of any other slave. A *novicius*<sup>3</sup> is an untrained slave, as opposed to a *veterator*, an experienced hand, or, more exactly, a man trained for a particular function. The edict of the Aediles contained a provision that a *veterator* was not to be sold as a *novicius*, the point apparently being that, at least for certain purchasers, a man not trained to a particular kind of work was more valuable, as being more readily trained to the work for which the purchaser wanted him. The provision seems to be mentioned only twice<sup>4</sup>: the surviving contract notes shew that it was not necessary to state which he was; indeed, in none of them is the slave's employment mentioned. It was a secondary provision of the edict<sup>5</sup>; in fact it seems to have been found necessary to declare that the statement that a man was untrained was a warranty, because, while it was plain that to sell, as a trained man, one who was untrained, was a fraud, it was not so obvious that any material wrong was done in the converse case.

The morality of slaves is not within our scope. It is clear on the literary tradition that they had notoriously a bad reputation. The special legislation which we shall have to notice will sufficiently shew the state of things at Rome. But we need not go into details to prove for Rome what is likely to be a concomitant of all slavery<sup>6</sup>.

<sup>1</sup> E.g. P. 2. 24. 1; D. 11. 3. 1. *pr.* (the words of the Edict); 23. 3. 39; 48. 5. 6. *pr.* *Homo* is of course common. *Famulus* is rare in legal texts.

<sup>2</sup> E.g. 32. 81. *pr.*; 50. 16. 204.

<sup>3</sup> Brissonius, *op. cit.* sub v. *Novicius*.

<sup>4</sup> 21. 1. 37; *h. t.* 65. 2. The latter text tells us that a liberal education did not necessarily make him a *veterator*. *Post*, p. 57. *Veteranus* in 39. 4. 16. 3 seems not to mean quite the same thing. For the purpose of *professio* (*post*, p. 38) *novicius* is one who has served for less than a year.

<sup>5</sup> Lenel, *E. Perp.*, p. 443.

<sup>6</sup> See for instance, Wallon, *op. cit.* Bk 2, Ch. vii.; Winter, *Stellung der Sklaven bei der Juden*, pp. 59—61. Cobb, *Slavery*, pp. 49—52, takes a different view, as to negro slavery. He is a determined apologist of the "peculiar institution" in America. He says at the beginning of his introduction, "No organized government has been so barbarous as not to introduce it," (i.e. Slavery.) "among its customs."



























































































































































the *dominus* would not assent to such redelivery<sup>1</sup>, and doubtless this must be generalised. Payment to a slave is not satisfaction of a condition of payment to the master unless the latter consent<sup>2</sup>. A similar idea governs the rule that if A owes B a *res* under a will, and C gives B's slave the thing, the right under the will is unaffected. There is here, however, another point: *alioquin consequens erit ut etiam si tu ipse servo meo eam donaveris, invito me libereris. quod nullo modo recipiendum est, quando ne solutione quidem invito me facto libereris*<sup>3</sup>. There is no *solutio* without consent of the person entitled<sup>4</sup>: he may be in *mora* for refusing a proper tender, but till he has accepted it there is no *solutio*.

There is not much authority as to acknowledgements and receipts given by slaves apart from *peculium*. We learn that they can novate, by order or with ratification<sup>5</sup>, but not without any authority: in that case they acquire a new right to the master, without, *ipso iure*, destroying the old<sup>6</sup>. This is so, whether it was the slave's or the master's contract: in the former case one might have thought that as *solutio* could be made to him, so might *novatio*. But *novatio* is not in fact *solutio* and it requires that the obligation should be in some way altered, and this would be to bind the master, and might prejudice him. Conversely we are told by Gaius that if a slave promises, *novandi animo*, this is a mere nullity: it is as if the stipulation had been *a nullo* and the old obligation is unaffected<sup>7</sup>. This is said quite generally and seems to exclude even the case of *iussum*, and the titles in the Digest and Code<sup>8</sup> dealing with novation do not mention a novatory promise by a slave. The explanation is to be found in the character attributed to promises by slaves, shortly to be considered<sup>9</sup>. In a similar way, though he can take an *acceptilatio*<sup>10</sup>, he cannot give one, even *iussu domini*<sup>11</sup>.

A slave can give a good receipt for money paid to him<sup>12</sup>, at least if he lent the money under authority both to lend and to receive<sup>13</sup>, and we may assume, in view of the texts above cited, that the first implies the second, unless the contrary appears.

Thus, apart from special authority, a slave cannot release or vary in any way an obligation he has acquired to his master: *a fortiori*, an obligation not acquired through him<sup>14</sup>. A gave B's slave a mandate to

<sup>1</sup> 16. 3. 11.

<sup>2</sup> 35. 1. 44. *pr.*—3. If a man undertakes to pay to A or the slave of T, the payment may not be to T. So a condition of payment to the *heres* is not satisfied by paying his master.

<sup>3</sup> 30. 108. 1.

<sup>4</sup> *Ibid.*; C. 8. 42. 19.

<sup>5</sup> 46. 2. 16.

<sup>6</sup> G. 3. 176. 9; In. 3. 29. 3.

<sup>7</sup> P. 5. 8.

<sup>8</sup> *Post*, p. 165.

<sup>9</sup> 46. 4. 11. 1.

<sup>10</sup> 46. 3; C. 8. 41.

<sup>11</sup> 46. 3. 102. 2.

<sup>12</sup> C. 8. 42. 19.

<sup>13</sup> 46. 4. 22.

<sup>14</sup> Where A's slave, B, made a contract of maritime loan with X, and X desired a release from some of the obligations, a release or variation agreed to by C, another slave of A, who was to be with X on the voyage, having certain duties, but no contractual powers, was a mere nullity, 45. 1. 122. 1.

pay money which A owed to B. He borrowed it from X. In B's accounts the slave put it down as received from A. X had not lent the money with any special reference to A. A was not released and B had not acquired an *actio mandati* against A through the slave. If it had been expressly lent for the purpose of paying A's debt A would have been released, but would have been liable *ex mandato*<sup>1</sup>. The point is that if the loan was not in pursuance of the mandate it can give no *actio mandati*. At the time the money was attributed to A's debt, it was already the property of the creditor, and though the transaction be, as this probably was, within the slave's general authority, this does not entitle him to give what is essentially a fictitious receipt.

Under what circumstances did a slave's contract bind his master, apart from *peculium*? Obligation was a personal matter. Agency in the modern sense was unknown to the civil law. We know that at civil and praetorian law a slave was *pro nullo*, but that *iure naturali* he was a man like another<sup>2</sup>. Hence the rule: *servi ex contractu civiliter non obligantur, naturaliter obligant et obligantur*<sup>3</sup>. Thus his promise creates a *naturalis obligatio*, but this *obligatio* which, as we shall see later, survives manumission, affects only himself, not his master<sup>4</sup>. Here we are concerned only with the master's liability to action.

Broadly the slave's contract did not bind the master apart from the *peculium* unless it came within certain categories for which the Praetor established actions, *i.e.* unless it was made under *iussum*, or as *magister navis*, or as *institor*, or the master profited. There were, however, some exceptions at least apparent.

(i) In all *bonae fidei* transactions, of the slave, the master was liable *in solidum* for his own personal *dolus*<sup>5</sup>. The rule in *stricti iuris* transactions is not easily made out, owing to the comparative rarity of references to promises by slaves: there is some obscurity as to the effect of *dolus* of the promisor, in general. It is sometimes said that a promise by a slave could not have any specifically civil law effects, and was thus in no way different, at least as far as civil law was concerned, from a mere pact<sup>6</sup>. Upon the texts it seems that, in classical law, the only remedy for *dolus* by the master in such a case was an *actio doli*, the point being that it was the slave's contract and another man's misconduct. In later law an *actio utilis* was, it seems, given against the master<sup>7</sup>.

<sup>1</sup> 17. 1. 22. 8.

<sup>2</sup> *Ante*, p. 73. Their nullity at praetorian law is only as to their own capacity for right.

<sup>3</sup> 44. 7. 14.

<sup>4</sup> *Post*, Ch. xxix.

<sup>5</sup> 15. 1. 36; 13. 6. 3. 5. Lenel shows that this did not need a special clause in ordinary *bonae fidei* actions, though it did in *actio fiduciae*. Ed. Perp. § 107.

<sup>6</sup> Accarias, Précis, § 506.

<sup>7</sup> 4. 3. 20. *pr.* (*hortatu tuo* is not *iussu tuo*); 45. 1. 49. *pr.* The present point is not noted by Lenel in his remarks on this *utilis actio*. Ed. Perp. § 102.





































































































































perhaps the right solution is that classical law allowed marriage without consent, and Justinian allowed it only after three years of captivity, unless the person was one to whom no exception could be taken by the father<sup>1</sup>

If the person captured was a slave old rights in him cease to exist, subject of course, to *postliminium*.<sup>2</sup> Thus if he has been pledged, the pledge does not exist for the time<sup>3</sup>. Ownership is gone—he is for the time a *servus hostium*.<sup>4</sup> Usufruct in him is gone, though it may be restored by *postliminium*.<sup>5</sup> If in the meantime the period of nonuser has passed, it would seem that some form of *restitutio in integrum* may be necessary since usufruct needs positive enjoyment to its retention, not, like *dominium*, mere absence of adverse possession. But the text seems to negative this requirement, and the Edict does not mention this case. The slave loses for the time his old characteristics. He becomes incapable of possessing<sup>6</sup>. He ceases to be a *servus poenae*, if he was one before<sup>7</sup>, and if he has been from any cause incapable of manumission, the defect does not apply to him till *postliminium*.<sup>7</sup> But several texts bring out the suspensive and provisional character of these rules. The slave still exists. Thus an *actio de peculio* on his account does not become *annalis* so long as he can possibly return with *postliminium*. A legacy of him, made before or after he was captured is good, and the heir must give security, not for his value but for his delivery on his return.<sup>8</sup>

The situation is of course completely changed if the captive dies *apud hostes*. The matters in suspense are now decided, and the nature of the settlement calls for a good deal of discussion. Matters are in general adjusted as if there had been no captivity.<sup>9</sup> The captive's children become *sui iuris* and though for Gaius it is doubtful from what date their independence is regarded as beginning<sup>10</sup>, he stands alone in this doubt. Ulpian indeed says merely that they become *sui iuris*.<sup>11</sup> But the Digest is quite explicit, and the texts do not seem to be interpolated. Tryphoninus says that on the death of a *captivus* his children are *sui iuris* as from the day of capture.<sup>12</sup> Julian lays it down

<sup>1</sup> See Accarias Precis § 84. Karlowa thinks (R R G 2 121 following Bruns) that in the text of Julian a 'non' has dropped out. The three years rule is classical for captives (hence Paul's doubt as to absence), the compilers extended it to *absentes* and Julian's allusion to these is an interpolation. He remarks however that Bechmann reverses this. It may be noticed that if a *non* is inserted in Julian's text, the resulting rule is so severe as to give little relief and that all Karlowa's argument is equally in favour of the more complete interpolation.

<sup>2</sup> 35 2 43, C 8 50 10 12, etc.

<sup>3</sup> 49 15 12 12

<sup>4</sup> 40 7 6 1, 49 15 5 2

<sup>5</sup> 7 4 26

<sup>6</sup> 41 3 11

<sup>7</sup> 49 15 12 16

<sup>8</sup> 30 47 2. A legacy of A or B where B is a *captivus* is treated like one in which he is a *fugitivus ante* p 271.

<sup>9</sup> 24 1 32 14 *in fin.*, 24 3 10 *pr.* 38 16 1 4, 2 *pr.*, 38 17 2 7, C 8 50 4

<sup>10</sup> G 1 129

<sup>11</sup> U 10 4

<sup>12</sup> 49 15 12 1, and thus can have a *hereditas*, 38 16 15

that what a son of a captive stipulates for, or otherwise acquires, is his own if his father dies still a captive<sup>1</sup>. And it is repeatedly laid down generally that in all parts of the law the effect of the death is the same as if it had occurred at the moment of capture<sup>2</sup>. So, on his death, since (as we shall shortly see) his will operates, he is restored to his place in his father's succession, and thus the other representatives, even his own children, may be excluded<sup>3</sup>. Papinian discusses the case of a son or slave, of a captive, who stipulates in the name of the father or master, and considers the effect if the captive die in captivity<sup>4</sup>. He observes that though, in a simple stipulation, the effect would be different in each case, since the slave would benefit the heir of the *dominus*, and the son would benefit himself alone, yet here they are on the same level. Both are bad. In the case of the son this is because he stipulates *alibi, non sibi*—it is in fact for a non-existent person. In the case of the slave it is a stipulation for his dead master, which, as we have seen, is void<sup>5</sup>. One case is peculiar. We are told by implication, by Paul<sup>6</sup>, that where a slave is *captus*, the *actio de peculio* on his account becomes *annalis* on his death, but it is evident that the year is not counted from the capture.

It is in connexion with the succession to the dead captive that the most difficult questions arise. The man dies a slave and cannot in strictness have any will or indeed any inheritance<sup>7</sup>. We are told explicitly by Ulpian that his will becomes *irritum* on his capture<sup>8</sup>. As he is a slave he cannot make a will in captivity<sup>9</sup>, and though as we shall see there is relief against the destruction of a previously made will, codicils made during captivity are not confirmed by it—they are not valid even for the purpose of creating *fideicommissa*, since at the time of making them he had not *testamenti factus*<sup>9</sup>. Whether, in very early law, succession to such a person did not exist at all cannot be said. Perhaps the relief developed *pari passu* with the notion that a captive suffered *captus deminutio maxima*<sup>10</sup>. However that may be, it was provided, directly or indirectly, by a certain *lex Cornelia*<sup>11</sup>, that the succession to such a person should be regulated as if he had died *in civitate*<sup>12</sup>. The exact nature and scope of this provision cannot be clearly made out from the texts. The rule is sometimes stated as a direct

<sup>1</sup> 49 15 22 2 2a

<sup>2</sup> 49 15 18 22, C 8 50 1, etc. A legacy to a captive is null if he dies still a captive (30 101 1), but if his slave is instituted the gift is good and goes if the captive dies *apud hostes* to the person who takes his inheritance, 28 5 32 1, 49 15 22 1

<sup>3</sup> 38 16 1 4. The text is rather obscure. As to the case of *postumi* 28 2 29 6. So if my son is captured while my father is alive and dies *apud hostes* after I am a *paterfamilias* his children take his place in succession to me, 38 16 1 5 and see *post.* p 301

<sup>4</sup> 45 3 18 2

<sup>5</sup> *Ante* p 260

<sup>6</sup> 15 2 2 1

<sup>7</sup> 50 16 3 1

<sup>8</sup> 28 3 6 2

<sup>9</sup> P 3 4a 8. In 2 12 5, D 49 15 12 5

<sup>11</sup> Sulla? Karlowa R R G 2 124

<sup>10</sup> Cuj. Institutions, 1 573

<sup>12</sup> U 23 5, etc.















































































is barred against one and not against the other. Paul seems to say it is barred altogether. The most commonly accepted view is that this is an analogous extension of the rule in the *actio de peculio* to that *de in rem verso*, in the case in which *de peculio* is no longer available against the owner who benefited by the *versio*<sup>1</sup>, since this enables the creditor to recover by one action instead of compelling him to bring two<sup>2</sup>. This explanation requires, what is not impossible, that Paul and Marcellus ignore the rule that as between common owners, in view of the fact that all the *peculium* comes into account, an owner can be sued *de peculio* even though there is no *peculium* in respect of him<sup>3</sup>.

In the case of the *actio tributoria*, all the *domini* who knew of the trading must bring their debts into *tributio*: what is due to one who did not know is to be deducted *in solidum*<sup>4</sup>.

In the *actio de peculio* the matter is complicated by the fact that a slave may have *peculium* with one owner and not with the other<sup>5</sup>, and the *peculium* may be either a joint fund or in distinct funds<sup>6</sup>. The general rule is that the *actio de peculio* may be brought against any one of the owners on the basis of the whole of the *peculium*<sup>7</sup>. As the owner sued is liable over the whole fund, he is entitled to deduct debts due to other *domini*<sup>8</sup>, and the liabilities may be finally adjusted by *communi dividundo*<sup>9</sup>. The enlarged liability depends on the existence of this right<sup>10</sup>. But an owner in respect of whom there is no *peculium*, though he can be sued *de peculio*<sup>11</sup>, cannot be made to bear any part of the burden in the ultimate distribution<sup>12</sup>. The action for contribution can be brought immediately on condemnation *de peculio*: it is not necessary to have actually paid<sup>13</sup>. We are not told expressly the basis of adjustment, but several texts<sup>14</sup> shew that it was not determined by the fate of the acquisition, but that the liability was borne in proportion to the shares in the *peculium*, the reason assigned being that the payment has released the non-payer from an obligation<sup>15</sup>. If the *peculium* does not suffice to pay all, the action can be brought again<sup>16</sup>, and as in the case of

<sup>1</sup> Von Tuhr, *De in rem verso*, 240 *sqq.* He cites other explanations.

<sup>2</sup> *i.e.* *de peculio* against one owner followed by *de in rem verso* against the other.

<sup>3</sup> 15. 1. 12. This text is Julian's, and shews that the present rule as thus explained, cannot be due, as Von Tuhr supposes, to him. It is possible that some part of the hypothesis of Marcellus has dropped out. See Von Tuhr, *loc. cit.*

<sup>4</sup> 14. 4. 3. *pr.*, 5. 10.

<sup>5</sup> 15. 1. 7. 1; 45. 3. 1. 2; and for several cases, 15. 1. 16.

<sup>6</sup> 15. 1. 15.

<sup>7</sup> 10. 3. 8. 4, 9, 15, 25; 14. 4. 3. *pr.*; 15. 1. 11. 9, 27. 8, 51.

<sup>8</sup> 14. 4. 3. *pr.*; 15. 1. 11. 9, 15.

<sup>9</sup> 10. 3. 8. 4, 15; 15. 1. 27. 8.

<sup>10</sup> 15. 1. 51. A and B have common property including a slave. A sells his share of the slave to C. A creditor sues C *de peculio*. C is not liable to the extent of A's *peculium*, as he has no means of redressing the balance. If the creditor sues B within the *annus utilis*, B is liable to the extent of A's *peculium*, since A is liable *de peculio* and, as they have common property, the matter can be adjusted. If the year is up, A's *peculium* is not reckoned in any case, *h. t.* 37. 2.

<sup>11</sup> 15. 1. 12.

<sup>12</sup> 15. 1. 27. 8.

<sup>13</sup> 10. 3. 15.

<sup>14</sup> 10. 3. 8. 4, 25; 15. 1. 27. 8.

<sup>15</sup> It must be remembered that acquisitions were common: there might however be a further adjustment, *post*, p. 386.

<sup>16</sup> *Post*, App. II.

vendor and buyer, no doubt the creditor having sued one owner is not in practice barred from suing another. As the comprehensive liability is due to the right of regress against the others, the *peculium* in their hands is not valued at its full amount, but deduction is made for cost and delay involved in recovering it, and as in similar cases, cession of the action against the other owner will discharge<sup>1</sup>.

If the co-owner dies without representatives there is in strictness no longer any *peculium* of his, and accordingly, Julian tells us that in that case, the owner sued should be condemned only in the amount of actual *peculium*, and what can be recovered out of the *bona* of the deceased<sup>2</sup>.

The right to claim contribution being completed by the condemnation to the "peculiar" creditor, it is not affected by subsequent loss or destruction of the *peculium* in the hands of the other owner, since, the *peculium* being a common fund, it is not fair that the loss should fall wholly on him who has to pay in the *actio de peculio*<sup>3</sup>.

The liability may be complicated by the existence of a right to the *actio tributoria*. If the owner who knew of the trading is sued thus, all that is due to the other owner may be deducted, and if that other is sued *de peculio*, what is due to either is deducted<sup>4</sup>.

The common liability extending over the whole, with the right of contribution, rests on the fact that it is a common fund, all the destinies of which ought to be common<sup>5</sup>: if therefore the *peculia* are not held as common but are kept distinct by the respective owners, then no owner can be sued for more than his own share, he can deduct only debts due to himself, and there is no occasion for contribution<sup>6</sup>.

It remains to be said that if the creditor is himself a co-owner there is no *actio de peculio*: the rights are adjusted by means of *iudicium communi dividundo*<sup>7</sup>.

The law as to acquisition through common slaves is rather complex<sup>8</sup>: the general rule is that acquisitions are common, *pro parte*, whether *inter vivos* or on death<sup>9</sup>, and even where they are *ex re unius ex dominis*, though here they have to be accounted for<sup>10</sup>. So if I promise two things to a common slave, each owner is entitled to half of each, unless they are "fungibles<sup>11</sup>." This community of acquisitions could be avoided by the

<sup>1</sup> 15. 1. 51. *Ante*, p. 220.

<sup>2</sup> 15. 1. 28.

<sup>3</sup> 10. 3. 9.

<sup>4</sup> 14. 4. 3. *pr.*

<sup>5</sup> 10. 3. 9.

<sup>6</sup> 15. 1. 15.

<sup>7</sup> *h. t.* 19. 2, 20.

<sup>8</sup> Elaborately worked out by Salkowski, *op. cit.* Ch. I. Most of the following remarks are based on this book.

<sup>9</sup> G. 3. 59, 167; In. 3. 28. 3; D. 16. 3. 1. 31; 30. 50. *pr.*; 41. 1. 45; 45. 3. 5, 27. In 12. 1. 13. 2 the money must be common.

<sup>10</sup> In *communi dividundo*, 10. 3. 24; 41. 1. 45.

<sup>11</sup> 46. 3. 29. A common slave could stipulate for what none of the owners could, *e.g.* a right of way to a common farm, 8. 3. 19. See Zur Nieden, *Miteigentumsverhältniss*, 33.









himself, he would acquire for me not for himself. On the other hand, Julian<sup>1</sup>, dealing with a hypothesis which differs only in that the common owner has certainly given previous authorisation to the intending donor to deliver the thing to the common slave, says that if the slave takes it intending it to be for Titius, nobody acquires, and if the slave intended it to be common the transfer would be void as to half. And he says that in like case, if a procurator took it for himself there would be no transfer of ownership. It is clear on these texts that the deliverer names his intended beneficiary. But this has no relation to acquisition *nominatim*, for it is perfectly clear on the texts that in that case the *nominatio* proceeds from the slave. All the texts assume this and one expresses it very strongly<sup>2</sup>.

Our two texts have been discussed and explained from time immemorial. None of the explanations has been accepted as solving the problem<sup>3</sup>. Only a few remarks will be made here, and those with little confidence. There are two questions: (1) Why was the acquisition, apart from the intent of the slave, not common? (2) Why was the slave's intent material? The intervention of a slave in a transaction may occur in three ways. He may be employed merely as a messenger to take the thing to his owner. In this case the delivery is not complete till the master has it: there can be no question of the personality of the slave<sup>4</sup>. He may be the party to the whole transaction or to the conveyance which completes it. In that case acquisition is through him, and in the circumstances of these texts the acquisition would on the face of it be common. For there is no *iussum* or *nominatio* and it is clear, from the earlier law as to *donatio* to a *bona fide serviens*, that the express intention of the donor to benefit the holder does not prevent acquisition to the owner<sup>5</sup>. But the slave's intervention may take a third form. If I direct my vendor to throw the thing in the sea, or in any way to dispose of it, and he does so, that is a valid *traditio* to me. The same is true if he delivers it to some other person for me, and it is immaterial who that person is: the acquisition is to me, if, for instance, the thing is delivered to a slave I have hired, who is to work on it. The slave is a mere receiver: there is no real question of acquisition through him<sup>6</sup>. This seems to be the present hypothesis and the acquisition is direct to the master who directed delivery to the slave. This makes Julian's text orthodox, as to the first point<sup>7</sup>.

<sup>1</sup> 41. 1. 37. 6.

<sup>2</sup> 45. 3. 28. 3. So also it is not *iussu*, for the slave does not receive any *iussum*.

<sup>3</sup> See Salkowski, *op. cit.* 56 *sqq.* for explanation and references to literature.

<sup>4</sup> Salkowski, *loc. cit.*

<sup>5</sup> *Ante*, p. 344.

<sup>6</sup> See, e.g., 15. 4. 5. *pr.*; C. 4. 26. 4.

<sup>7</sup> Ulpian says nothing of authority to deliver to the slave, but as S. shews (*op. cit.* 57) the structure of his argument requires it.

Is the slave's intent material? No, says Ulpian, but, according to Julian, the transfer is effective only in so far as the slave takes with the intent of receiving for the intended donee. It may be that Julian is guided by precisely the consideration that the slave is not the agent who acquires, but a mere receiver who cannot be such in so far as he refuses to act as such<sup>1</sup>.

Both texts treat of *donatio*, and Salkowski holds<sup>2</sup> that the rule applies only to that case. If the above account is correct, it must apply equally to any case in which the transaction is essentially the master's altogether. But if a sale had been chosen, it would have been necessary to distinguish according to the circumstances of the previous contract. In *donatio* this is not the case. The declaration of intent to give is not itself a transaction and has no legal force. Whether it be made to the slave or direct to the master it is at once the master's transaction when it is communicated to him and he directs delivery to the slave.

There are cases in which, independently of *nominatio* or *iussum*, one of the common owners acquires to the exclusion of the other. They all turn on the general rule, adopted on practical grounds of convenience, that what cannot be acquired to one of the common owners goes to the other<sup>3</sup>. The rule is consistent with the principle that each owner, being owner, is potentially capable of acquiring *in solidum*. The cases discussed in the texts are the following.

(a) If a common slave stipulates for a servitude, it will be acquired only to such of his owners as have tenements to which it can attach. Those who have such tenements will acquire, each *in solidum*<sup>4</sup>. If he mentions the land to which it is to belong, then it attaches to the owner of that land, wholly and alone<sup>5</sup>.

(b) Where one owner is about to marry and *dos* is promised to the common slave. Here the rule can apply only if the words used, or the circumstances, shew what marriage was in view<sup>6</sup>.

(c) A thing promised to a common slave by a third party belongs already to one master. Whether the stipulation was *sine nomine*, or to all by name, the whole will go to those of his masters to whom it did not belong<sup>7</sup>.

(d) A slave of A stipulates with C for a performance to a common slave of A and B. Here so far as the common slave belongs to B, he is *servus alienus*. But, says Julian, the rule applies that what one owner

<sup>1</sup> This may be the explanation of Paul's anomalous view in 41. 2. 1. 19, *ante*, p. 133.

<sup>2</sup> *op. cit.* 61.

<sup>3</sup> Salkowski shews (*op. cit.* 99) that the rule is one of great antiquity (26. 8. 12). It is stated many times (In. 3. 17. 3; D. 41. 1. 23. 3; 45. 3. 7. 1, 19, *etc.*). The following remarks are mainly from Salkowski.

<sup>4</sup> 45. 3. 17.

<sup>5</sup> 45. 3. 7. 1.

<sup>6</sup> 45. 3. 8.

<sup>7</sup> Though it be a part of himself, 45. 3. 18. 1.









of a female slave is a slave, whatever be the *status* of the father, and conversely, if the mother is free the child is free, whatever the *status* of the father. This, says Gaius, is the rule of the *ius gentium*<sup>1</sup>—the general rule that where there is no *conubium* the child takes the *status* of the mother, *i.e.* her *status* at the time of the birth<sup>2</sup>. It may be added that the slave issue belongs to the owner of the mother at the time of birth, not at the time of conception<sup>3</sup>.

This, however, is only the general rule. Cases may present themselves in which a freewoman has a slave child, and conversely, in which a slave woman gives birth to an *ingenuus*. In relation to them there arise questions of some difficulty.

Cases in which the child of a freewoman is a slave. There appear to be only three.

(a) By the *Sc. Claudianum* (A.D. 53) it was provided that if a freewoman cohabited with a slave to the knowledge of his *dominus* the child might, by agreement between her and the *dominus*, be a slave. This rule, which was abolished by Hadrian, will be discussed later in connexion with other provisions of this enactment and of legislation which arose out of it. It is hardly possible to isolate this provision for the purpose of discussion<sup>4</sup>.

(b) Gaius observes that if a freewoman cohabited with a slave, whom she knew to be one, the issue was a slave. This rule, operative in the time of Gaius, but of earlier origin<sup>5</sup>, is credited by him to a certain *lex*, the name of which is lost. It is difficult to see why Hadrian abolished the rule last mentioned without destroying this similar *inelegantia*. Accordingly Huschke<sup>6</sup> suggests that a hiatus in the manuscript should be filled by the words *e lege Latina*. His conjecture starts from the idea that the law was not a Roman law, but local, a view which gets some support from Gaius' allusion to those *apud quos talis lex non est*<sup>7</sup>. Huschke adds that any such general rule as this would render meaningless the above provision of the *Sc. Claudianum*. The suggestion *Latina*, as opposed to any other people, is due to the fact that Vespasian, who, as Gaius says, abolished one provision of this law, is known to have innovated largely in the law of Latinity<sup>8</sup>. There is little trace of the rule in later times, a circumstance which further

supports the view that it was not a general law. What may be traces of it are found in two or three texts. Thus it is said by Papinian that an enquiry into the *status* of a child may prejudice that of his deceased father<sup>1</sup>. So in A.D. 215 a woman who has married a slave thinking him free is informed that her child is *ingenuus*<sup>2</sup>. There must have been some reason for the enquiry, and both these texts are after Hadrian's repeal of the rule in the case last discussed. But, as we shall see shortly, there survived other rules under the *Sc.* which would account for the remarks<sup>3</sup>.

(c) In A.D. 468 Anthemius<sup>4</sup> enacted that any woman marrying her own *libertus* was liable to deportation, the issue to be slaves, and to belong to the Fisc.

Cases in which the child of an *ancilla* is free. There are several.

(a) Among the many rules introduced, we are told, *favore libertatis*<sup>5</sup>, was one that if the mother were free at any moment between conception and birth, the child is free<sup>6</sup>. The rule seems to have begun in an isolated humane decision of Hadrian<sup>7</sup>, adopted in practice as a general rule. So far as the rule is concerned that the child is free if the mother is free at the time of the birth, there is no *favor libertatis*: it is common law<sup>8</sup>. It may not indeed be necessary to appeal to *favor libertatis* in any case. There is a rule of much wider application that a child in the womb is to be regarded as already born so far as this makes to his own advantage, but not for the advantage of other people or to his own detriment<sup>9</sup>. But the present may well be its earliest application, as it is assuredly its most important, so that this wider rule may be only a further generalisation. It is repeatedly laid down in relation to the case we are discussing. *Media tempora libertati prodesse, non nocere possunt*<sup>10</sup>. *Non debet calamitas matris nocere ei qui in ventre est*<sup>11</sup>. It must be noted that Gaius<sup>12</sup> cites a current opinion which would in part except from this rule the case of a *civis Romana* who was enslaved *ex Sc. Claudiano*. A child of which she was already pregnant was on this view a slave if *volgo conceptus*, free if *ex iustis nuptiis*.

(b) The principle was carried still further in the interest of the child. If the mother was a *statulibera* and the child is born after

<sup>1</sup> 40. 15. 2. *pr.* This was a puzzle to the Glossators, Haenel, Diss. Domm. 185.

<sup>2</sup> C. 5. 18. 3. <sup>3</sup> *Post*, pp. 412 *sqq.*

<sup>4</sup> Nov. Anthem., 1. No trace of this rule in Justinian's law.

<sup>5</sup> P. 2. 24. 2. <sup>6</sup> In. 1. 4. *pr.*; C. 9. 47. 4.

<sup>7</sup> 1. 5. 18; Girard, Manuel, p. 99. <sup>8</sup> G. 1. 39.

<sup>9</sup> 1. 5. 7, 26; 38. 17. 2. 3; 50. 16. 231. <sup>10</sup> P. 2. 24. 3.

<sup>11</sup> 1. 5. 5. 2. 3. Specially illustrated in the case of *captiva* and *serva poenae*, 1. 5. 18; 38. 17. 2. 3; 48. 23. 4. A *condemnata* is kept till her child is born: he is then *ingenuus*, C. 9. 47. 4. She may not even be tortured, 48. 19. 3; P. 1. 12. 5.

<sup>12</sup> G. 1. 91. The epitomator of Gaius states it as law, G. Ep. 1. 4. 9. See *post*, p. 414. For another exception in the case of *libertae ingratae*, *post*, p. 427.

<sup>1</sup> G. 1. 32; cp. In. 1. 3. 4; D. 50. 2. 9. *pr.*; C. 7. 14. 9.

<sup>2</sup> Ulp. 5. 9—10; Greg. Wis. 6. 3; C. 3. 32. 7; D. 1. 5. 24. A *statulibera* was to be free on having three children. She had one and then three at a birth. It is a question of fact which of these was born last and so is *ingenuus*, 1. 5. 15, 16.

<sup>3</sup> 13. 7. 18. 2; 41. 1. 66; C. 3. 32. 12.

<sup>4</sup> *Post*, p. 412.

<sup>5</sup> G. 1. 85, 86. Older than Vespasian.

<sup>6</sup> The hiatus is very small and the words are clearly an insertion, as H. says. Most editors insert something. Böcking, "*e lege Aelia Sentia*."

<sup>7</sup> G. 1. 86.

<sup>8</sup> Reff., Huschke, *loc. cit.*













































































































































































































































































*veniente*, the effect is to bar me from any claim. The case is given as an illustration of the rule that one is barred by a judgment which is the result of his assent whether he is an actual party or not. In what capacity the patron is contemplated as intervening does not appear: it may be that he is *adsertor*.

We have seen that the claimant of the man may appear by *procurator*. There is here some risk, since *res iudicata* against a *procurator* is not necessarily so against his principal. And as there is virtually a claim of ownership in all cases, the security *de rato* is always exacted, though in general it is given only by the plaintiff's *procurator*<sup>1</sup>.

The barring effect is only that of an ordinary judgment, and thus no one is barred who would not be barred by a judgment, and the bar applies only to claims under the old title, and not to a new title acquired from a third person, in no way affected by the judgment. Where judgment had been given for the slave, and the real owner of the slave, after the judgment, made the defeated litigant his *heres*, it was clear on the authority of Labeo and Iavolenus, that the old judgment was no bar<sup>2</sup>.

(b) Case in which the judgment was against the person claiming liberty. Merely bringing a claim, and abandoning it, has no effect on status either way<sup>3</sup>. Texts dealing with the effect of judgment are few and are in at least apparent conflict. Gaius says that sometimes a claim may be renewed *ex integro*, as, for instance, where a condition is now satisfied which was not so at the first hearing<sup>4</sup>. The nature of the illustration shews that in the opinion of the writer, the decision was final between the parties. On the other hand Cicero says<sup>5</sup> that where the Decemviri had decided wrongly on such a case it could be renewed as often as was desired—a solitary exception to the general rule as to *res iudicata*, based on the view that none could lose his liberty without his own consent. Quintilian in one text speaks of *adsertio secunda*, the case having been heard before<sup>6</sup>, and in another of *secunda adsertio*, tried before other *judices*<sup>7</sup>. Martial<sup>8</sup> speaks loosely and allusively of a third or fourth hearing which is to have a decisive effect. Finally Justinian in his constitution<sup>9</sup> by which he abolishes the need of *adsertores*, declares that the *leges* which formerly required such cases to be examined a second and third time are for the future to be out of application. He adds that the requirement was due to the absence of an appeal which he has now provided, and which, in turn, *ad secundam inquisitionem minime deducetur*, by colour of the aforesaid laws. With this collection

<sup>1</sup> 3. 3. 39. 5. For the remedy where the alleged *dominus* does not ratify the intervention of a *procurator* on his behalf, so that he can again claim, see 46. 8. 8. 2.

<sup>2</sup> 40. 12. 42. It should be noted that a judgment, *eum ingenuum esse (ante, p. 665)*, has the advantage that thereafter he is in *possessione ingenuitatis*.

<sup>3</sup> C. 7. 14. 7.

<sup>4</sup> 40. 12. 25. 1.

<sup>5</sup> Cicero, de domo, 29. 78.

<sup>6</sup> Quintil. Inst. Orat. 5. 2. 1.

<sup>7</sup> Id. 11. 1. 78.

<sup>8</sup> Martial, Epig. 1. 52.

<sup>9</sup> C. 7. 17. 1. pr.

of statements telling a similar story, but differing in details, it is not easy to say what the law really was. One hypothesis is that up to the time of Justinian there was a right in the defeated claimant of liberty to bring the matter up again, either as often as he liked, or for a limited number of times, and that Justinian provided a regular system of appeal, and suppressed the rule, inserting the text of Gaius in a modified form so as to make it represent the current law<sup>1</sup>. Schlossmann<sup>2</sup> observes, with reason, that the text of Gaius looks perfectly genuine, and he distinguishes. He thinks that Justinian, Cicero, and Quintilian, are considering a claim *e libertate*, and laying down the rule that this case could be brought up again if the decision was against liberty, while Gaius is certainly dealing with one *e servitute*. But there are some difficulties in this, perhaps in any, solution. It is not advisable to attach much weight to Cicero's text<sup>3</sup>. He bases his rule on the ancient tradition that *civitas* could not be taken away, but if lost at all was always voluntarily resigned, a principle of which little is left in the Empire. His allusion is to a rule which differs materially in substance from that suggested by the other texts. He speaks of a privilege by which one who has, so to speak, become a slave by judgment, may yet repeatedly make his claim to liberty and *civitas*. Justinian bases the rule he is abolishing on certain *leges*<sup>4</sup>, and the language of Martial<sup>5</sup>, Quintilian<sup>6</sup> and Justinian seems rather to refer to a necessary precautionary repetition which every *adsertio* had to go through, and none of these texts contains any hint that the rule was confined to the case in which the alleged slave had been defeated. Moreover Justinian's abolition of a rule which gave an alleged slave several chances, if that is what he did, is an odd provision to call a *clementior terminus*. This all points to a conjecture that there was a rule, of which the source is now lost, requiring all *adsertoriae lites* to be gone through twice (or more) before different *iudices*<sup>7</sup>, before a decision was come to. The whole thing would be one trial, and would amount to *res iudicata* whichever lost<sup>8</sup>. Such a rule would be a natural descendant of the principle invoked by Cicero. It avoids the apparent conflict created by the text of Gaius, and it gets rid of another difficulty observed by Schlossmann<sup>9</sup>. Constantine, in his enactment as to *circumductio*<sup>10</sup>, provided that the slave handed over to the claimant by decree of the magistrate, for lack of an *adsertor*, could renew his claim if he ever found an *adsertor*. There is little point in

<sup>1</sup> 40. 12. 25. 1. So Bethmann-Hollweg, cited Schlossmann, Z. S. S. 13. 228.

<sup>2</sup> *loc. cit.*

<sup>3</sup> Cicero, de domo, 29. 78.

<sup>4</sup> C. 7. 17. 1. pr. Probably not the XII Tables; see his similar language in C. 3. 22. 6.

<sup>5</sup> Epig. 1. 52.

<sup>6</sup> Inst. Orat. 5. 2. 1; 11. 1. 78.

<sup>7</sup> See Quint. Inst. Orat. 11. 1. 78. *Parte victa* in this text does not imply defeat of the *adsertor*.

<sup>8</sup> C. 7. 14. 5 appears to refer to a case not proceeded with.

<sup>9</sup> *loc. cit.*

<sup>10</sup> C. Th. 4. 8. 5; *ante*, p. 655. It is possible that the repetition was not required in all cases.

































































