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SOME NOTES ON THE ROMAN SLAVE IN EARLY TIMES

A COMPARATIVE SOCIOLOGICAL STUDY

BY

C. W. WESTRUP

København 1956
i kommission hos Ejnar Munksgaard

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In memoriam
H. F. Jolowicz

1.

Slavery was certainly a common institution from the earliest times among the various Aryan-speaking peoples.[1] Slavery developed, as now widely assumed, in primitive societies with a settled agricultural culture when it was seen that prisoners taken in war could be profitably utilized. In a warlike economy, warrior and agricultural slave-worker were complementary. The principal cause of slavery was in origin no doubt the war. Slaves were at first acquired as spoils by *occupatio bellica*. In the field of Greek law we have the ancient Homeric term for a slave, δμώς. The word is by some scholars, probably rightly, supposed to be related to δαμάζω (δαμάω) "vanquish" (Lat. *domo*).[2] The word would then originally have meant a person "taken in war". Possibly the general Greek term for a slave, δοῦλος, if it may be derived from δέω "bind" (δεύω, δόλος)[3], has a similar basic meaning. To this linguistic evidence may be added the evidence of literary tradition. The Sicilian historian Timaeus (died about 260 B. C.) relates that the ancient Greeks did not make use of slaves acquired by purchase.[4] We are no doubt from this justified in drawing the conclusion a contrario that the main causes of slavery were in the earliest times in Greece capture in war or kidnapping by piracy.[5] In the Homeric poems the prisoners

[1] Herodotus VI 137, indeed, relates of the Greeks in the earliest times that they had no slaves. Cf. Athenaeus VI 267 c. However, these assertions were probably nothing but reflections of poetic ideas of a golden age. In the Homeric poems we find slavery fully established. Cf. L. Beauchet, *Histoire du droit privé de la république athénienne* II (1892) 395 f. and the lit. quoted there. See, however, Schrader-Nehring, *Reallexikon der indogerm. Altertumskunde*[2] II (1929) Art. "Stände" 458.

[2] Liddell and Scott, *Greek Etym. Lexikon* (1945) v° δμώς. Boisacq, *Dict. étym. de la langue grecque* (1907) v° δμώς, however, connects δμώς with δόμος (Lat. *domus*).

[3] *Etymologeum magnum* (Oxf. 1848). Cf. Beauchet 401.

[4] Timaeus, fragm. 67. Edit. Didot. 207.

[5] Fustel de Coulanges, *Nouvelles recherches* (1891) 46[1]. See further Heraklitus fragm. 44 Byw: πόλεμος ... τοὺς μὲν δούλους ἐποίησε ... τοὺς δὲ ἐλευθέρους.

taken in war were retained as slaves, or sold or held at ransom by the captor.[1] In the Odyssey we certainly read that Laertes with his wealth had bought Eurycleia, but it is expressly stated about Eumaius that he was kidnapped by pirates and sold.[2]

The original cause of slavery among the ancient Teutons, too, was capture. In Old Northern law the term for a slave was *hærtakin* ("captive of war").[3] An analogy of *hærtakin* is probably to be found in the ancient Roman term for a slave, *mancipium*, no doubt originally denoting not proprietary right but the mode of acquisition of property (*mancipatio*), then the object of the *mancipium*, primarily and especially the slave, and then expressing the idea of the power acquired through the formal act of the mancipation.[4] *Mancipium* (*manu-capium*) from *manu capio* (*cupo*), possibly to be traced back to the unilateral *occupatio*, no doubt the earliest mode of acquisition of ownership, i. e. "by grasping with the hand to take possession of a thing," was perhaps at first used about the slave captured with the hand (*manu*) from the enemy (*ex hostibus*).[5]

The derivation of the general Latin term for a slave, *servus*, is uncertain. It has often been assumed that the word was cognate with *servare* "guard": *Servus* then was the "guardian" (of the herd of cattle).[6] Other scholars have supposed that *servus* is really related to Homeric εἴρερος "captivity" and the verb εἴρω with which the Latin word *ser-o* ("bind, fetter") is to be connected: *Servus* was "the (war) captive."[7] The Romans themselves seemed

[1] *Iliad.* XXIV 752. VI 327.

[2] *Odyssey* I 429 ff. XV 385 ff.

[3] Grimm, *Deutsche Rechtsaltertümer* I[4] (1899) 418 f. K. Lehmann, Hoops' *Reallexikon der germ. Altertumskunde* IV (1918—19) 275.—Fr. Olivier Martin, *Précis d'Histoire du droit français*[4] (1945) n[0] 128: "The slave, that is to say the man vanquished in war".

[4] Cf. my paper "Notes sur la *sponsio* et le *nexum* dans l'ancien droit romain", Hist. Filol. Medd. Dan. Vid. Selsk. **31**, no. 2 (1947) 12.

[5] Florentinus, *Dig.* I, 5 4 § 3: *Mancipia vero dicta, quod ab hostibus manu capiantur.* Cf. Gai. *Inst.* II 69. IV 16 *i. f.* Edit. F. De. Zulueta 1946.—Cf. my *Introduction to Early Roman Law* II (1934) 48 f., 158 ff.—Comp. the Greek term χείριος from χείρ "hand", "in the power of", and Cymric *caeth* (= Lat. *captus*). Ernout et Meillet, *Dict. étym. lat.* (1939) v[0] *capio.*

[6] Bréal-Bailly, *Dictionaire étymologique lat.*[8] (1914) v[0] *servus.* Ernout et Meillet, *Dict.* v[0] *servus.*

[7] Schrader-Nehring, *Reallexikon* II 461. Cf. Liddell and Scott, *Greek Etym. Lexikon* v[0] εἴρω. Lat. *ser-o, serui.*—Benveniste, "Le nom de l'esclave à Rome" in *Rev. des. étym. lat.* 1932 p. 429 ff. supposes that the word *servus* is of Etruscan origin. Cf. R. Henrion, "Des origines du mot familia", *L'antiquité classique* 1942 p. 283[3].

to have traced the origins of slavery back to the war. The classical Roman jurists would even connect the basic meaning of the word *servus* with such an original cause of slavery. The victors were justified in killing the captives taken in war. But they used to "grant" (*servare*) them their lives in order to employ them profitably.[1]

Originally slaves were no doubt generally acquired as spoils of war.[2] The slave was consequently a foreigner, Lat. *peregrinus*.[3] In ancient Roman language the *peregrinus* was first, as the fundamental meaning of the word plainly indicates, a citizen of a "country *peregre*", i. e. *per agros*, "outside the *ager Romanus*".[4] In other words the *peregrini* were in origin the population living in the neighbouring countries of Rome—*trans Tiberim*.[5] These neighbouring *peregrini* were in ancient times termed *hostes*.[6] The word did not mean, as later, that they were enemies. The ancient term for an enemy was *perduellis*.[7] The *hostes* were simply foreigners.[8] However, when taken as prisoners of war (*capti*), they became slaves in Rome.[9]

[1] *Inst. Just.* I 3, 3: *Serui ex eo appellati sunt quod imperatores seruos uendere iubent, ac per hos seruare, nec occidere, solent. Dig.* I 5, 4 § 2. This derivation was adopted by Ihering.

[2] Thus already R. von Ihering, *Geist des römischen Rechts* II I² 162 ff. Otto Karlowa, *Römische Rechtsgeschichte* II (1901 114. P. F. Girard, *Manuel élément. de droit romain*⁸ (by F. Senn) 1929, 102 f. H. Lévy-Bruhl, "Esquisse d'une théorie sociologique de l'esclavage à Rome" in *Rev. général de droit* 1931 p. 8: "La seule source originaire véritable de l'esclavage est la guerre ou la piraterie, ce qui revient à dire que les esclaves ne peuvent être que des non-Romains". Cf. p. 4 ff.

[3] In Israel "the slaves were generally of foreign birth and acquired in war or by purchase". Johs. Pedersen, *Israel* I—II (1926) 43.

[4] Cf. Ernout et Meillet, *Dict.* v⁰ *ager*.

[5] The term *trans Tiberim peregre* in *Leges* XII *tab.* III 5 implies that the Tiber was still Rome's boundary and thus testifies to the authenticity of the clause.

[6] Cf. Fest v⁰ *Status dies*: *Status dies* ⟨*cum hoste*⟩ ("a day agreed upon with a foreigner") *vocatur, qui iudici causa est constitutus cum peregrino*; *eius enim generis ab antiquis "hostes" appelabantur, quod erant pari iure cum populo Romano, atque "hostiri" ponebatur pro "aequare"* ("equal to"). Cf. Cic. *Off.* I 12, 37. *Leges* XII *tab.* II 2. Bruns-Mommsen, *Fontes iuris romani antiqui*⁷ (1909) II 40. I 20.

[7] Varro, *de ling. Lat.* V 3: *hostis ... tum eo verbo dicebant peregrinum, qui suis legibus uteretur, nunc dicunt eum, quem tum dicebant perduellem.* Fest. v⁰ *Hostis*: *Hostis apud antiquos "peregrinus" dicebatur, et qui nunc hostis, "perduellio".* Cf. above Fest. v⁰ *Status dies*. *Fontes iuris romani antiqui* II 51, 11. Ernout et Meillet, *Dict.* v⁰ *hostis*.

[8] *Leges* XII *tab.* III 7: *Adversus hostem* ("foreigner") *aeterna auctoritas* ("guarantee for alienation") *esto*. *Fontes* I 21. Most recently F. De Visscher, *Rev. international des droits de l'antiquité* 3ᵉ Série II (1955) 409 f.

[9] In later historical times the prisoner of war became a *servus publicus* (*servus populi Romani*). But the slave owned by the Roman people was sold publicly *sub hasta* (sign of lawful ownership) *vel sub corona* (symbol of victory). Liv. VI 4. Dion. IV 24, 2. Fest. v⁰ *Sub corona*. *Fontes* II 10. 41.

The assumption that in early Rome, too, any slave was a foreigner may be confirmed by the principle probably established from ancient times, that no Roman citizen could be made a slave in Rome.[1] The *fur manifestus* was certainly not by the *addictio*, the decree of the magistrate, made a slave, but was placed in the position of a judgment debtor (*adjudicati loco*, i. e. *in causa mancipii*).[2] The *nexus*, the (plebeian) borrower, who by the *nexum*-engagement guaranteed his debt, was in the definite stage without doubt no more enslaved in the proper sense of the word. He was placed in a position analogous with servitude. He was *servi loco*. In the last resort the creditor could have his insolvent debtor killed or sell him as a slave to foreign countries ("beyond the Tiber", *trans Tiberim*).[3] The same no doubt also applied to the *aeris confessus* or the *judicatus*.[4] In other words, a Roman citizen could in ancient times in no case be enslaved within the boundaries of Rome.

An analogy to this ancient sublime Roman principle is probably to be found among the Teutonic peoples. Tacitus tells of the Teutons[5] that they practise gambling with such recklessness in winning or losing that, when all else has failed, they stake their personal liberty on the last and final throw. The loser (*victus*) faces voluntary slavery; though he be the younger and stronger man, he suffers himself to be bound and sold (*adligari se ac venire*).[6] It says further that slaves so acquired they trade (*per commercia tradunt*) in order to deliver themselves, as well as the slave, from the humilation involved in such victory (*ut se quoque pudore victoriae exsolvant*) ⟨that is to say that a Teuton should become enslaved within his own country⟩. From the context and especially from the motives for selling the *victus* alleged by Tacitus, it appears that the term *per commercia tradere* means "sell to a foreign country", corresponding to the Roman *vendere trans Tiberim* in the clause of the XII Tables. Tacitus

[1] My *Introduction to Early Roman Law* IV (1950) 159[3]. Cf. GIRARD, *Droit romain* 111.

[2] *Leges XII tab.* VIII 14. *Introduction* IV 163 f.

[3] *Leges XII tab.* VI 1. III 3. 5. See my paper "Notes sur la *sponsio* et le *nexum* dans l'ancien droit romain", Hist. Filol. Medd. Dan. Vid. Selsk. **41**, no. 2 (1947) 18 ff.

[4] *Introduction* IV 155 ff.

[5] TACITUS, *Germania* 24. Edit. MAURICE HUTTON 1914.

[6] *Venio*, from *venum eo* "go to the sale", is the passive of *vendo* from *venum do*.

does not expressly state that among the Teutons, as among the Romans, it was a general rule that no citizen could be made a slave of another citizen. However, from the context it is evident that in the case mentioned by Tacitus it is only a question of a particular application of a general principle.[1] It is no doubt the same ancient idea which survives in Greece in the Papyrus I 219, where it is said, that "an Alexandrian citizen cannot become a slave of an Alexandrian".[2]

According to the current doctrine slavery was among the various Aryan-speaking peoples from the earliest times a legal institution founded on a mere material proprietary right. In other words, the slave was from of old, although a human being, legally considered a *thing* in the proper sense of the word, i. e. without any legal personality.[3] He had consequently no rights. But this theory is no doubt altogether wrong. It is founded on a historically erroneous approach to the problem. It rests in substance on quite an arbitrary regressive induction from the well-known view of the legal position of the slave in much later historical times. The slave certainly from olden days had no rights. But originally the reason was simply that he was a **foreigner** (Lat. *peregrinus*) and consequently a *non-citizen*.

That the slave was regarded in some respects as belonging to the *things* (Lat. *res*)[4], surely cannot be contested. No doubt at first mainly acquired as a booty, later also by purchase, the slave was evidently often grouped with the cattle. This would seem to be indicated by Sanskr. *dvipada* ("two-footed (cattle))", Gr. ἀνδράποδον "human-footed (cattle),"[5] and O. H. Germ. *manahoubit* "human-headed (cattle)".[6] But this cannot be conclusive.

[1] Stephan Brassloff, *Hermes* LVII (1922) 472 ff.—Cf. Caesar, *De bello Gallico* IV 15. Cf. L. A. Constan's edition 1926 p. 106 note 2.

[2] Brassloff *l. c.* 472.—Compare further in Israelite law: "The law of Holiness does not acknowledge the serfdom of an Israelite". Johs. Pedersen, *Israel* 43.

[3] See, however, Max Kaser, *Römische Rechtsgeschichte* (1950) 22 f. Cf. already Ihering, *Geist des römischen Rechts* II 1[4] 162 ff.—Georges Cornil, *Ancien droit romain* (1930) 42 f.

[4] Greek κτῆμα "the acquired property". Cf. Aristotle, *Politica* I 3, 4 1253[b]: ὁ δοῦλος κτῆμά τι ἔμψυχον. Edit. B. Jowett 1952. Arist., *Oeconomica* I 5, 1344[a]. Edit. E. S. Forster 1952. Cf. Beauchet I 401. 432.—Sanskrit *bhuktam*. *Visnu* V 186: "Slaves, animals, inanimated objects are means to enjoyment (*bhuktam*)."—Gai. II 13. (*res*).

[5] Schrader-Nehring, *Reallexikon* II art. "Stände" 462.

[6] Karl von Amira, in Paul's *Grundriss der germ. Philologie*[2] (1897) 89. H. Brunner, *Deutsche Rechtsgeschichte* I[2] (1906) 140 f.

In itself it need not mean anything but that the slave formally had been acquired in the same way in which things were often acquired, and that consequently in later arrangements as regards the working power of the slave the same legal rules were applied as in transactions as regards a *thing*. And as lawfully acquired for the family, the *house*, the slave—along with the other working power of the household, the wife and the children—in Aristotle's words was a "kind of tool" (ὥσπερ ὄργανον) for the use of the house-holder in management of the family estate.[1] But it did not mean that the slave was without any individual personality.

2.

Originally the slave was regarded as belonging to the family, the *house*, of his master. To Gr. (hom.) οἰκεύς (later οἰκέτης) "house slave", from οἶκος "house", belonging to the οἰκία "family", corresponds the ancient Lat. *familiaris* "belonging to the family", and *famulus*[2], from which derives *familia* "household".[3] And the in field of Germanic language the O. Engl. term for a slave *hīwan* (pl.), of the same root as OHG. *hīwiski*, OE. *hīwisce* "family", originally means "belonging to the household"[4], It is evidently the close connection with the *house* which is expressed here, not the concept of a *proprietary right*. A reminiscence of this among the Romans is probably also to be found in the use of *puer* "boy" in Old Latin proper names for slaves: *Marci-por* "Marcus' slave", *Luci-por* "Lucius' slave".[5]

[1] Aristotle, *Politica* I 4, 1253[b]. Beauchet I 401.

[2] Seneca, *Epist.* XLVII 14: (*maiores nostri*) *dominum patrem familiae appellaverunt, servos, quod etiam in mimis adhuc durat, familiares.* Macrob. *Sat.* I 11, 11. Plautus, *Amph.* I 1 v. 359: "I'm a member of the household here (*familia*)". Edit. Paul. Nixon 1950. *Epidicus* I, 1 v. 2 (*familiaris*). Cf. Blümner, *Die röm. Privataltertümer* (1911) 288. Cic. *de leg.* II 11 27: *cum dominis tum famulis.* Cato in Plin. *nat. hist.* XIX 8. Cato, *De agri cultura* V 2 (*familia* "the slaves").

[3] *Introduction* II 17 ff. Ernout et Meillet, *Dict.* v⁰ *famulus*. Cf. most recently Henrion *l. c.* 253 ff.

[4] Cf. Brunner I² 141. Schrader-Nehring I 292. II 464. Cf. above Boisacq, *Dict.* v⁰ δμώς connects δμώς with δόμος. (Lat. *domus*).

[5] Plin. *nat. hist.* XXXIII 26: *Aliter apud antiquos singuli Marcipores Lucipores dominorum gentiles omnem victum in promiscuo habebant nec ulla* . . . Cf. Festus v⁰ *Quintipor.* Edit. Lindsay 1913. Val. Max. IV 4, 11.—Cp. in Greek the corresponding use of πᾶις about the slave. Beauchet 402. See further in Germanic law the transition in meaning: Goth. *magus* "Knabe". O. Icel. *mögr* "boy" and Ir. *mog*, *mug* "slave". Feist, *Etym. got. Wörterbuch*² 184 f. Comp. in Israelite law: The slave is the "son of the house". Johs. Pedersen, *Israel* 64.

Moreover, Lat. *manus* seems originally to have denoted the power of the head of the house, not only over all its free members, but also over the slaves. The release of the slave from the power of his master was termed *manumissio*. The O.Ir. term for a slave is *gilla* from *gel* "hand"[1], i. e. "he who is subject to the "hand" (Lat. *manus*) of the paterfamilias".[2] As a designation for *servitus* we further find in O.Ir. *muinteras* from *muntar*, the root of which recurs in Lat. *manus* and German *munt*, and the primary sense of which is also "what is under the *manus* of the head of the house".[3] From of old the Roman slave was subject to the same domestic power, *potestas*, to use a term of relatively later Roman terminology, as the "free working power" (*liberi* "the children") of the house.[4] And in the concept of *potestas* itself—in contrast to the *dominium* "ownership", to use the Roman terminology from the end of the Republic—is surely implied the exercise of authority over a personality recognized as an individual (*persona*).

The very scant positive and reliable literary evidence agrees with this linguistic evidence. In the Odyssey Eurycleia and Eumaeus are described as intimate friends of the family.

> On Eurycleia, who had been the nurse of Odysseus and Telemachus, and whose father and grandfather are expressly mentioned by name, it says that Laertes honoured her even as he honoured his faithful wife in his halls. And the swineherd Eumaeus tells that Laertes' wedded wife herself had brought him up with long-robed Ctimene, her noble daughter, whom she bore as her youngest child. With her he was brought up, and the mother honoured him little less than her own children. Penelope had reared and cherished Melantho, a slavechild, as her own child, and gave her playthings to her heart's desire. And we see the old Laertes in the day's work sharing the conditions of the slave. The principal slaves often enjoyed the confidence of their masters and had important duties entrusted to them.[5]

[1] *Gel* of the same root as Gr. χείρ "hand". *Gel-fine* ("hand-family"). Cf. my *Introduction* III 153 ff. "A Near-Kin within the Kin". A comparative Study. Hist. Filol. Medd. Dan. Vid. Selsk. *33*, no. 4 (1952) 8 f.

[2] Cp. the with O. Ir. *gilla*, possibly also linguistically, cognate Gr. χείριος from χείρ "hand", "who is under the hand" (Lat. *man-cipium*).

[3] Cp. *cet-muntar* "wedded wife". *Cétmuntar* = **kintu-manutera* "the first" within the *muntar* "family", i. e. "the circle of persons under the hand (*manus*, *munt*) of the head of the house".—H. D'ARBOIS DE JOUBAINVILLE, *La famille celtique* (1905) 3 ff. 100 ff. Cf. ERNOUT ET MEILLET, v[is] *manus* and *mando*.

[4] GAI. I 52: *In potestate itaque sunt servi dominorum*. Cf. I 48 ff. Edit. F. DE ZULUETA 1946.

[5] ODYSSEY I 431 sqq. (Cf. XX 148)—XV 363 sqq.—XVIII 321 sqq.—XXIV 226 sqq.—XIV 64 sqq. Edit. A. T. MURRAY 1945—46.

Of the ancient Teutons Tacitus says that in everyday life they made no distinction between free born children and unfree. *Inter eadem pecora, in eadem humo degunt.*[1] In Iceland the bondman often occupied a position of great trust. And of the Roman family in olden times Plutarch says that the Romans in those days treated their slaves with great kindness, because they worked and even ate with them themselves, and were therefore more familiar and gentle with them.[2] The slave was a member of the family. Everything that was requisite for supporting life (*omnem victum*) was, says Plinius, common to all. It was not necessary in the common household to take precautions against those that belonged to the house (*domestici*).[3] Every night, when the day's work was over, the whole household gathered by the hearth in the *atrium* for the common meal which the mistress of the house had prepared, a custom which the elder Cato still observed.[4] The house-servant took part in the domestic festivals (*feriae*).[5] On festival days he was exempted from all work (*opera et labores*).[6]

The slave was originally regarded as belonging to the family, the *house* (Lat. *domesticus*). According to ancient religious conceptions, however, a stranger could not without any further formality be admitted into the family. The *house* was not only an economic, but also an exclusive sacral community. And among the Greeks and the Germanic peoples we have in fact positive evidence that the admission of the slave into the household involved ceremonies expressing that from now on he was associated with the family and participated in the domestic cult. Among the Greeks the slave was solemnly admitted into the family and initiated in its cult at the hearth of the *house* in the presence of the domestic divinities with certain symbolic acts καταχύσματα[7],

[1] Tacitus, *Germania* 20: "Nor can master be recognized from servant by any flummery in their respective bringing up (*educationis deliciis*)", that is the children were all brought up without distinction, and without cosseting and pampering for the better born. Edit. Maurice Hutton 1914.

[2] Plut. *Coriol.* XXIV 4. — Edit. B. Perrin 1916. Cf. Varro, *De re rust.* I 17, 4sqq. Edit. W. D. Hooper—Harrison Boyd Ash. 1954.

[3] Cf. Plin. *nat. hist.* XXXIII 26: "*nec ulla domi a domesticis custodia opus erat*".

[4] Plut. *Cato mai.* III: "Cato ate and drank the same coarse victuals as his slaves".

[5] Cic. *de leg.* II 8, 19: *Ferias in famulis habento.*

[6] Cic. *de leg.* II 12, 29.—Relics of the old Roman customs persisted in the *Saturnalia.* Blümner 288.

[7] καταχύσματα (pl.): "handfuls of nuts, figs, etc., showered over the slave". Beauchet I 395[1]. Ernst Samter, *Familienfeste der Römer und Griechen* (1901) 1 ff.

somewhat similar to the religious ceremonies by which the bride and the adopted son were taken into the family.[1] And among the Germanic peoples we meet with relics of a kindred rite of admission in the ceremony "um das Hel leiten". Like the bride, the new slave was led three times round the altar of the *house*.[2]

In early Rome, too, the slave (*domesticus*) shared in the domestic *sacra*.[3] On certain festival days in the family the slave assisted in offering up prayers to the household gods.[4] The old domestic cult of the *lar familiaris*, no doubt derived from the ancestral cult[5], included both the slave and the master.[6] In certain instances the slave could even perform the cult acts (*rem divinam facere*) in the name of the paterfamilias[7]. Sacrifices were made to the *manes* of the slave. (Hence the slave had a "soul"). And his tomb—in the burial place of the family?—was *locus religiosus*.[8]

That the slave, the house-servant, should in the earliest times legally have been regarded and treated simply as a *thing* is quite an unsubstantiated assertion. In the *jus sacrum* he was recog-

[1] Cf. Aeschyl. *Agam.* 1035 ff: "Get thee within, thou too, Cassandra; since in no unkindness hath Zeus appointed thee a partaker in the holy water of a house where thou mayest take thy stand, with many another slave, at the altar of the god who guards its wealth". Edit. Herbert Weir Smyth 1926.

Aristotle, *Oeconomica* I 5: "One ought to provide sacrifices and pleasures more for the sake of slaves than for freemen". Edit. E. S. Forster 1952.—Fustel de Coulanges, *La Cité antique*[25] 1919 127.

[2] Samter 30 f. Cp. Gr. ἀμφιδρόμια. Samter 59 ff.

[3] Cf. Cato, *De agri cult.* 143, 1: "Let her (the *vilica*) remember (*scito*) that the master attends to the devotions (*dominum divinam rem facere*) for the whole household (*pro tota familia*)". Edit. W. D. Hooper—Harrison Boyd Ash. 1954. *Familia* appears here no doubt in the narrower meaning of the term denoting all the servants in a household, in particular the slaves. Cp. the meaning of *familia* in Cato *l. c.* V 2 and in Cato in Varro *l. c.* I 18, 1.3.—Diana was the patron deity of the slaves. Georg Wissowa, *Religion und Kultus der Römer* (1912) 250.

[4] "The *vilica* must not engage in religious worship herself . . . (*rem divinam facere*) without the orders of the master or the mistress." Cato *l. c.* 143, 1.

[5] See my paper *Succession primitive devant l'histoire comparative* (1928) 18 f.

[6] Cic. *de leg.* II 11, 27: *neque ea, quae a maioribus prodita est, quom dominis tum famulis, religio Larum . . . repudianda est.* T. Eitrem, *Beiträge zur griech. Religionsgesch.* III (1920) 42 f. M. Boulard, *La religion domestique dans la colonie italienne de Délos* (1926) 75 f.

[7] Cato, *De agri cult.* V 3: "The vilicus must perform no religious rites (*rem divinam facere*), except on the occasion of the *Compitalia* (the festival held annually) at the cross-roads, or before the hearth (in honour of the *Lares Compitales*"). 83: "Perform the vow for the health of the cattle (*votum pro bubus uti valeant*)". Cf. Dion. IV 14, 3.

[8] Varro, *De ling. Lat.* VI 24 speaks of *dii manes serviles.* Cf. Aristo in Ulp. *Dig.* XI 7, 2 *pr.* A. Pernice, *Zum röm. Sakralrecht, Ber. der Berl. Akad. d. Wiss.* LI (1886) 1179 ff.—Cp. for Greek law Beauchet II 424.

nized as an individual personality. This is incontestable at any rate as regards Rome in early historical times. He was able to act personally. The slave could by *vota* binding on him assume obligations. And he could take an oath.[1] But in secular law, too, a certain legal personality was surely assigned to him. Clear evidence of this is met with in ancient Roman law in the important provision of the *XII Tables*: MANU FUSTIVE SI OS FREGIT LIBERO, CCC, SI SERVO, CL POENAM SUBITO [SESTERTIORUM].[2] Physical violation of a slave was not regarded as damage to a thing, but as a physical injury to a person. Merely the fine was only half the amount when the individual violated was a slave. Only with the *lex Aquilia de damno* from the second half of the third century B. C. the murder and physical violation of a slave appear to have been treated as damage to a thing.[3] This alteration of the law assuredly is a characteristic feature of a beginning change of the view of the slave.[4]

The fact itself that the slave could, from early times, through a kind of *manumissio* become a free man may, indeed, also indicate that the slave was per se something entirely unlike a mere *thing*. The slave bore the germ of an individual personality (*persona*) which a manumission some day might bring forth.

In ancient law, already at the time of Plautus, the slave could "be set free by lawful and statutory (*iusta ac legitima*) manumission, that is *uindicta* or by the census or by will".[5] The slave could through the release from the power (*manus*) of his master, i. e. through "giving (full) freedom (*datio libertatis*)", become *sui juris* and a Roman citizen, except in certain specific cases in which his liberty was somewhat limited[5]. That these three ancient lawful forms of manumission which even made the

[1] He might also—in historical times—with the consent of his master become a member of a religious association. CIC. in *Piso* IV 9. C. I. L. II 2229.—PERNICE *l. c.* 1173 ff. BRASSLOFF, *Socialpolitische Motive in der röm. Rechtsentwicklung* (1933) 30 f.—Cp. The Gortyn Laws: Col. II 11 ff. BEAUCHET II 427[1].

[2] *Leges XII tab.* VIII 3. (Mommsen's restoration). BRUNS, *Fontes* I[7] 29.

[3] *Lex Aquilia de damno. Fontes* I 45 sq. Restoration: JÖRS-KUNKEL-WENGER, *Römisches Recht*[3] (1949) 66. 256 f.

[4] In *summa divisio* ("the principal division") *de iure personarum* in GAI. I 9 (cf. I 48 sqq. *Inst.* I 3 *pr.*) *personae* are divided into *liberi* and *servi*. (In GAI. I 120. 123. III 163. 189 we meet with the term *persona servi*.) But in these definitions we are surely not justified in seeing relics of an ancient Roman conception, but only philosophical pronouncements reflecting the doctrine posited by the later *jus naturale*, that all human beings are born free, *i. e. personae*.

[5] GAI. I 16 sqq. 138 sqq. Cf. PLAUT. *Casina* II 8 v. 504 (*tribus libertatibus*). Edit. PAUL NIXON 1917. CIC. *Top.* II 10: *si neque censu nec vindicta nec testamento liber factus est, non est liber.*

manumitted slave a Roman citizen should go back to the earliest times of Rome, when slavery, in the last resort, no doubt mainly arose out of *occupatio bellica*, is not, however, very likely.[1] This would have implied that through manumission a foreigner ipso facto acquired Roman citizenship (*civitas*), which was by no means always the case in historical times. Originally the slave without doubt did not become a citizen. Only under the later Republic, we do not know with certainty when he acquired (a limited) citizenship. And originally the slave became not fully free.[2] He remained the client of his master. His liberty was limited by the *jus patronatus* of the manumitter. The freedman (*libertus*) had certain duties towards his former master.[3]

In the partriarchal family of early times manumission was certainly not of frequent occurrence. However, the master has, we may assume, freely, in his own interest, in order to incite the house-slave to diligent work, sometimes as a reward for meritorious service, held out the prospect of manumission. At the time of the Laws of the XII Tables a kind of the probably oldest form of manumission, the *manumissio testamento*, seems, indeed, already to have been a recognized institution. In an ancient provision referred by Ulpian to the XII Tables a slave could be manumitted in a testament by this master upon the suspensive condition "that he paid a certain sum to the heir (*si decem milia heredi dederit*)". Such a slave was later on, whilst the condition was pending (*pendente condicione*), called *statuliber*. The traditional formula was probably "I order that my slave X be free (*liberum esse iubeo*)".[4] The liberty of a slave thus manumitted became effective only when the condition was fulfilled. During the period of suspense the slave remained a slave. Immediately after fulfilling the condition the slave became free.[5]

[1] About the order of age and the historical origin of these three ancient modes of manumission we can only set up uncertain conjectures. Otto Karlowa *Römische Rechtsgeschichte* II (1901) 130 ff. Jörs-Kunkel-Wenger, *Römisches Recht*[3] 68 f. 400. Max Kaser, *Römische Rechtsgeschichte* 23.

[2] Th. Mommsen, *Römisches Staatsrecht* III 427: Even as late as the second century B. C. the manumitted slave, the freedman (*libertinus*), was termed *servus*. Cf. Ch. Appleton, *Mélanges Fournier* (1929) 4 ff.

[3] See most recently A. Berger, *Encyclopedic Dictionary of Roman Law* 1953, the items *manumissio*, etc., *patronus* and the lit. quoted there.

[4] Ulp. *Reg.* II 4. *Leges* XII *tab.* VII 12: *Sub hac condicione liber esse iussus. Fontes* I 28. *Fest.* v° *Statuliber: iubetur esse liber. Fontes* II 40. Gai. II 200. Edit. F. de Zulueta 1946. Cf. Dion. IV 24, 6.

[5] Most recently M. Bartošek, *Revue internationale des droits de l'antiquité* II (1949) 32 ff.

According to the XII Tables the master of a slave was personally liable for the delictual offences of the slave done to another, a liability sustained through an *actio noxalis*, just as a father for the delictual offences of a *filiusfamilias*.[1] This maxim, however, reveals no evidence with regard to a certain legal personality assigned to the slave, since the XII Tables has an analogous provision concerning the noxal liability of the owner of a domestic four-footed animal (*quadrupes*) which has caused damage (*pauperies* from *pauper*) to another, a liability sustained through an *actio de pauperie*.[2] The liability of *dominus* and *pater*, like the liability of the owner of the animal, was alternative, originally either to surrender the slave, the *filius* or the animal to the person injured (*noxae dedere*) or to compensate for the damage done.[3]

In the latest centuries of the Republic, when the ancient Roman notion of *iniuria* had become more complex, embracing not only bodily injuries, appears, indeed, particularly in the praetorian law[4], an efficient legal protection of the slave from outrages done, by according a special action. An *actio iniuriarum* was granted the master of a slave for *iniuria* done to the slave, just as that given to a father for an injury done to a son under his *patria potestas*.[5]

[1] *Leges* XII *Tab.* XII 2ª. 2ᵇ. *Fontes* I 39. (Bonfante VIII 6.) *Si servus furtum faxit noxiamve noxit* ("or other outrage"). Celsus in Ulp. l. 18 *ad ed. Dig.* IX 4, 2 § 1. Cf. Fest. v⁰ *Noxia. Fontes* II 17.—Gai. IV 75 sq. "Wrongdoing by sons or slaves . . . has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender (*noxae dedere*). Noxal actions have been established in some cases by statute (*legibus*), in others by the praetor's Edict: by statute, for example for theft by the Law of the XII Tables". Cf. I 140 *i. f.* Most recently Daube, *Nocere and noxa*, *Cambridge Law Journal* VII (1939), 23 ff. F. de Visscher, *Le régime Romain de la noxalité* 1947. Max Kaser, *Das altröm. Ius* (1949) 223 ff.

[2] *Leges XII Tab. VIII* 6. *Fontes* I 30. (Bonfante VIII 7). Ulp. l. 18 *ad. ed. Dig.* IX 1, 1 *pr.*: *Si quadrupes pauperiem fecisse dicetur, . . . lex* (*XII Tab.*) *voluit aut dari id quod nocuit* (*noxae dedere*) *. . . aut aestimationem noxiae offerri* ("or pay the value of the damage done"). Inst. IV 9 *pr.* Fest. v⁰ *Pauperies*: *pauperies damnum dicitur quod quadrupes fecit.* Edit. W. M. Lindsay (1913) 246. Kerr Wylie, *Studi Riccobono* IV (1936) 461 ff. Condanari-Michler, *Festschr. Wenger* I (1944) 236 ff.—Jörs-Kunkel-Wenger, *Röm. Rechtsgeschichte* 269 f.

[3] As to the *dominus* and the *pater* (and probably the owner of an animal, too) the purpose of the handing over of the slave or the *filius* (or the animal) was no doubt originally to satisfy the desire for private revenge of the person injured. Private revenge and retaliation (*talio*) goes back to the earliest times. The institution is still recognized in the XII Tables as sanction in the case of *membrum ruptum*. Table VIII 2. Cf. my *Introduction to Early Roman Law* IV (1950) 166 f. See further my *Introduction* IV 149 f. cf. 115. 122, 161 ff. Cf. H. F. Jolowicz, "The Assessment of Penalties in Primitive Law", *Cambridge Legal Essays* (1926) 203 ff. Cornil, *Ancien droit romain* 78 ff. Daube, *Cambridge Law Journal* VI (398 ff. (XII Tables). Genzmer, *Zeitschrift der Sav.-Stift.* 62 (1942) 122 ff. (Classical law).

[4] The idea of such a kind of insult is found already in Plaut. *Asinaria* II 4 v. 488. (*Contumelia* from *contemnere*). Edit. Paul Nixon 1950.

[5] *Inst.* IV 4. *Dig. de iniuriis* XLVII 10. Cf. Gai. III 222: "A slave is not con-

Furthermore, the slave by no means seems to have been denied all economic capacity. Incontestably the slave could not exercise Roman ownership according to the principles of the *jus civile*, the *dominium ex iure Quiritium*, to use the term appearing for the first time at the end of the Republic. In the earliest times this maxim was a simple consequence of the fact that—according to the no doubt ancient Roman principle that only a *peregrinus* could become a slave in Rome—the *servus* was always a foreigner. And as a *non-civis* he was without legal personality (*persona*) in the proper sense of the word, i. e. without the civil status of a Roman citizen (*caput*): The slave could have nothing of his own *jure civili*. The maxim *nihil suum habere potest*, "because a person *in potestate*"[1], applied to the *servus* as well as to the *filiusfamilias* in later historical Roman law with its *solum dominium* for the *paterfamilias*.[2] But the social and legal reasons were assuredly essentially different in the two cases. The inability of the slave to own property was—in early times—, one might say, primarily motivated by public law, that of *filius* simply by civil law.

3.

Just as was the case with the Roman "house-son", probably from olden days, so also the house slave, though a *non-civis*, for the quite early times though a foreigner, however, could have a share of what he produced, have a so-called *peculium*, separated from the house-property, at his free disposal and fructification. This peculiar kind of a small separate property, *quasi pusilla pecunia sive patrimonium pusillum*, as it says in late republican law[3], seems already to have been implied in the Laws of the XII Tables.[4] When according to the ancient provision of the XII

sidered personally to suffer outrage (*iniuria*), but an outrage is held to be committed through him on his owner."—Cuq, *Manuel des institutions juridiques des Romains*[2] (1928) 557 ff. Cf. Kaser, *Das altröm. Ius* 37, 207.

[1] Gai. II 86 sqq.—Comparative law: Taubenschlag, *Zeitschr. der Sav.-Stift.* L 156 f.

[2] Otherwise the economic position of the *filius* in the primitive community of property between father and son. *Introduction* II 67 ff.

[3] Tubero in Ulp. *Dig.* XV 1, 5 § 3 sq.

[4] *Odyssey* XIV 64 shows slaves after lengthened and meritorious service in possession of a house and property of their own.—Of the ancient Teutons Tacitus *Germania* 25 says that "Each (of the slaves) remains master of (*regit*) his own house and home (*penates*)". Edit. Maurice Hutton 1914. Cp. O. Icel. *orka*.

Tables a slave, as we have seen, could be manumitted in a testament by his master on condition that he paid the heir a certain sum[1], this rule must, provided it be authentic, imply that a kind of *peculium* for the slave was already known at the period before the XII Tables. At the time of Plautus the *peculium* was an old established, virtually regulated Roman institution.[2]

Where required by the economic needs of practical life, the *paterfamilias*, in the common interest of the *house*, granted for the use of the slave, certainly in particular the married slave, a plot of land with some cattle. And, indeed, among a hard-working agricultural people of farmers like the ancient Romans, where all possible business activity to support the subsistence of the household had to be utilized, this institution quite probably dates back to early times when property principally consisted of herds of cattle. Hence the term *peculium* from *pecus*.[3] Varro's advice to the paterfamilias in respect of the married slave (*praefectus*) "to graze some cattle of their own on the farm (*ut peculiare aliquid in fundo pascere liceat*)"[4], surely reflects ancient Roman ideas and customs.[5]

The particular Roman instituiton of *peculium*, certainly in its origin on essential points of its structure common to the "house-son" and the "house-servant" (*famulus*), is in its rise and later legal development one of the most remarkable constructions of republican law which throws light on the highly peculiar economic developmental history of the family in early Rome. And in the slave *peculium* we possibly have, granting the age of the institution, the first fairly solid starting-point of a historico-sociological investigation of the economico-social condition of the slave in early Roman law.[6] Even though we should be unable to

[1] Cf. above Ulpian, *Reg.* II 4. *Leges* XII *tab.* VII 12. *Fontes* I 28.

[2] Otto Karlowa, *Römische Rechtsgeschichte* II (1901) 112.

[3] Varro, *De ling. Lat.* V 95. *Fontes* II 53. Fest. v⁰ *Peculium*. *Fontes* II 22.

[4] Varro, *De re rust. I 17, 7*. Cf. 5: *dandaque opera* ("to be made more zealous by rewards and care") *ut habeant peculium. De ling. Lat.* V 19. Plaut. *Asin.* III 1 v. 540: *aliquam habet peculiarem.*

[5] In contrast to this is Greek (Athenian) law, where the *peculium* probably did not include land. Guiraud, *Propriété financiere en Grèce* (1893) 143 f. Cf. Beauchet II 445 f. Cp. the Gortyn Laws. Col. III 40 IV 36. (Foikeos).

[6] This must be subjected to a special investigation. Here only some few factors will be pointed out. A fundamental investigation of the position of the slave in private law in the capitalistic society during the period from Augustus to Justinian has been given by W. W. Buckland, *The Roman Law of Slavery*, Cambridge 1908. B. W. Barrow, *Slaves in the Roman Empire* 1928.

reconstruct in more detail the norms which according to the nature of the case may have regulated the management of the *peculium*, the fact itself that already in olden times a separate property could be granted by a master to his slave—to some extent—for his own use must of necessity indicate a certain economic independence and accordingly a certain legal personality.

The slave in consequence of being without legal capacity according to the *jus civile*, was assuredly not capable to conclude transactions *jure civili* in respect of the property given to him for his disposal. But already at Plautus' time, as would seem to be shown by his plays which here no doubt depict Roman manners[1], the slave (*servus peculiosus*) with the *peculium* was able to enter into contracts with his master. The master could have claims against the slave as the slave against the master.[2] The slave could purchase his liberty with his *peculium* by agreement with his master.[3] The *peculium* was in fact regarded as the property of the slave.[4] And this primitive slave property[5], probably not always merely a collection of things occasionally granted to the slave, but no doubt often assigned to him for a particular economic or personal purpose, and possibly—already in early times—in concrete cases intended to serve as a working capital for an independent domestic existence (*separata oeconomia*), which again of practical necessity may have required a more extensive economic independence, must, indeed, have been a virtually regulated institution. There must have existed specific, definitely formulated rules governing the economic relation between the master of the *house* and the slave as well as—later on—the transactions of the slave concluded with third persons, however the juristic nature of such a system of law may be characterized. To say that these norms were merely *de facto* rules of conduct in reality makes as little sense as to determine them, more positively, as mere moral norms[6].

[1] Wilh. Kroll, *Die Kultur der ciceronischen Zeit* II (1933) 91.

[2] Plautus, *Pseudolus* IV 6 v. 7. Cf. II 4 v. 44.

[3] Plaut. *Stichus* V Sc. 5. Stichus: Bang go my ... savings (*peculium*)! I'm a ruin!—Sangarimus: Freedom says ... good bye to poor me! Edit. Nixon 1938.

[4] Cf. Plaut. *Pseudolus* IV 1 v. 92 sq. Karlowa, *Röm. Rechtsgeschichte* 112.

[5] It was only the worthless slave (*servus ni[hi]li atque improbus*), it says in Plautus, who had not such a small, saved-up capital. *Casina* II 3 v. 258 *sq.*

[6] The current distinction between the condition of the slave in relation to

The point is not, here either, to give formal definitions of the nature of the actually regulating norms, in view of the juristically developed and formulated law of a later time and its dogmatically formed legal concepts, but simply to try to find out their virtually binding character. Were the spontaneously, by the real facts created rules for the house-slave's economic position in those days *socially* recognized in such a way that though without legal force according to the *jus civile* they had that force which in fact made them rules of general application, made them laws binding upon master and slave?[1] Were the agreements of the slave, though not made in the forms of the *jus civile*, governed by that reciprocal confidence, (*bona*) *fides*—to use the terminology of a later time—, which demanded that "what has been agreed upon be done" according to, one might say, a natural reason? In other words, had the obligations contracted by a slave towards his master or a third person, though not enforceable by an action according to the *jus civile*, in virtue of the actual facts themselves—to use likewise the language of classical law—, a kind of *obligationes naturales* as opposed to the *obligationes civiles* and on the other hand in contrast with the mere moral obligations,—the analogous legal effect that they were to be fulfilled?[2] To be sure, we know

fas and in relation to *jus* is only valid for the earliest time if *jus* is to be identified with *jus civile*. See, however, my *Introduction* IV (1950) 40. Cf. Max Kaser, *Das altrömische Ius* 1949. *Römische Rechtsgeschichte* 50 ff.

[1] Cf. in Ulp. *Dig.* XV 1, 41 the expression *factum magis* as opposed to *ad jus civile*.

[2] In classical law it was established that the slave was *civiliter obligatus* (obligated according to *jus civile*) for his wrong-doings (*delicta*) against his master or a third person. This appears clearly from Ulp. *Dig.* XLIV 7 § 14. Otherwise with *obligationes ex contractibus*: obligations arising from contracts concluded by the slave towards *dominus* or a third person. The obligation was called *obligatio naturalis*. The slave was not *jure civili* but *naturaliter* ("by nature") *obligatus*. Ulp. *Dig. l. c.* The obligation was not enforceable by an action at all: The debtor could not be enforced to pay his debt. The *obligatio naturalis* was not, however, without legal effects. The most important was that the payment made by the slave was valid and consequently could not be claimed back by him through an action for the recovery of the payment, *condictio indebiti*, because, as it says, an *obligatio naturalis* was after all a *debitum* (a debt) and not an *indebitum*) (a non-existing debt). About the date of the legal recognition of an *obligatio naturalis*, certainly to a very limited extent *ab initio*, that is to say in the case of obligations contracted by a slave, no doubt already known in late republican law, we are unable to say anything with certainty. Probably towards the middle of the last century B.C. Cf. the definition of the *peculium* given by Tubero in Ulp. *Dig.* XV 1, 5 § 4 (cf. below) and Servius Sulpicius (Tubero's father-in-law) in Ulp. *Dig.* XV 1, 9 § 2 sq: *Peculium autem deducto quod domino debetur, computandum esse.*—On the *obligatio naturalis*, see recently G. E. Longo, *Studia et documenta historiae et iuris* XVI (1950) 86 ff.

nothing for certain. But we cannot exclude the possibility. There is in reality no alternative.

When in classical law *servitus* is designated as a *constitutio iuris gentium* so as to support the opinion that slavery, though at variance with the ideal *jus naturale*, in accordance with Aristotle and the early *Stoa*, was an economic and social necessity, it is in this connection merely meant to establish that it was an institution found among all nations (*gentes*).[1] By *jus gentium* the classical jurisconsults, and before them Cicero, generally meant precisely what is expressed by the term of *jus gentium*, a system of law common to all peoples (*gentes*), especially the law common to *cives* and *peregrini*, a positive *Natural Law*, one might say, different from, yet related to, the ideal *jus gentium* linked with the ideal *jus naturale*.[2]

The slave *peculium* of pre-classical Roman law is fairly well-known to us. An old institution established by usage had from the last centuries of the Republic with the incipient capitalistic development of the Roman community, been utilized in order to serve the particular economic interests of the *paterfamilias*. The flourishing of town life through trade and industry along with the formation of the large estates (*latifundia*) owned by the rich nobility had gradually essentially changed the social and economic conditions. And the number of slaves frequently coming from the remotest parts of the empire, had been constantly augmented by the great conquests of the Romans.[3] The slave, living mainly outside the master's house, had generally no more direct intimate connection with his master. He was merely considered an article of commerce. Slavery had acquired a steadily increasing economic significance and had become an important social institution. The needs of practical life required the institution of *peculium* to be incorporated in the field of civil law.

Varro says "that in purchase of slaves, it was customary for the *peculium* to go with the slave".[4] Already by the time of Plautus such a transaction seems to have been common[5]. Moreover, there

[1] Gai. I 52 cf. 1. Florent. *Dig.* I 5, 4 § 1 *Inst.* I 4, 2.

[2] Cf. my paper "*La notion du droit*", *Rev. d'Histoire du droit* (Harlem) XI (1931) 6 f. See recently A. Berger, *Encyclopedic Dictionary of Roman Law* (1953) *v*[is] *Ius gentium and Jus naturale* and the lit. quoted there.

[3] On the recruiting of the slaves from the end of the Republic, see Kroll, *Die Kultur der ciceronischen Zeit* II 82 ff. 171 ff.

[4] Varro, *De re rust.* II 10, 5 (*solet accedere peculium*).

[5] Cf. Plaut. *Trinummus* II 4 v. 31 sqq. (*cum suo peculio*).

is no reason to doubt that the legacy of a slave's *peculium*, *legatum peculii*, together with the slave or without him, goes back to the period prior to the introduction of the *actio de peculio*.[1] Later on, the praetorian law established that the master was liable for obligations contracted by the slave in transactions concluded with third persons. The creditors of the *peculium* were allowed to prosecute the master as far as the pecuniary value of the *peculium* might be sufficient (*dumtaxat de peculio*). So in practice arose the important legal questions: as to the definition of the *peculium* itself and as to its composition, especially as to decide whether the *peculium* ought to comprehend the claims of the slave on his master and whether the debts of the slave to his master ought to be deducted. And as for the third person, who had concluded transactions with the slave, what was his position on the whole in the relation to the master of the slave? These matters required to be legally settled through the *juris prudentes*[2]. The *peculium* became juristically formed and regulated in the *jus civile*. But through this legal treatment its character in all probability was in substance transformed.

From of old, no doubt, it was customary that the slave had to pay a rent to his master and that the *peculium* fell to the master upon the death of the slave. Based on these customs the maxims that the *peculium* remained legally the property of the master and that the master could consequently at any time demand its restitution, became—through the praetorian law—the principle that dominated the institution. Only by the constant threat of losing the *peculium* in case of bad management the slave could be incited to careful *gestio*, and the master therefore count upon the stipulated revenue from the activity of the slave. Juristically conceived and particularly developed and formed in favour of

[1] Plaut. *Pseudolus* II 4 v. 44. Karlowa, *Röm. Rechtsgeschichte* II 112 f.— The actual juristic development of the *peculium* must probably be assigned to the end of the Republic after the introduction of the *actio de peculio* through the praetorian law.

[2] At the time of Cicero, the historian Q. Aelius Tubero, who was a disciple of the great jurist A. Ofilius of the famous Servius Sulpicius' School, and who was himself a learned lawyer (cf. my *Introduction* V (1954) 40.50.59), gave the first precise definition of the *peculium*. Celsus in Ulp. *Dig.* XV 1, 5 § 4: *Peculium autem Tubero sic definit, ut Celsus libro sexto Digestorum refert, quod servus domini permissu seperatum a rationibus dominicis habet, deducto inde, si quid domino debetur* ("after deduction of whatever he owed to his master"). Cf. Gai. IV 73 (= *Inst.* IV 7, 4 c).

the master, the institution became in the *jus civile* a pure relation of management (*administratio*) based on a special concession (*concessio peculii*)[1]. The *peculium*, as time passed, completely lost its primitive character of property simply granted to the slave for his free disposal in the common interest of the house.

The economic independence of the slave, in origin factually socially recognized to that extent to which the general state of the economic culture and the situation in the concrete case naturally required, in the course of time—as a consequence of the successive social development—more and more comprehensive to form the basis of *separata oeconomia*, had in the *jus civile* become substantially modified and restricted for the safeguarding of the master's own economic interests.[2] The rules created by custom and usage for the protection of the slave in the relation between master and slave, and in fact regulating that relation, had lost their binding force. What the house-servant in virtue of the nature of the case surely had had in olden times of socially recognized individual personality, had in the *jus civile* resulted in his having no rights. *Servus nullum caput habet.*[3]

4.

If in ancient Roman texts the slave is called *homo*[4], this surely was not meant to assert that he was a human being in contrast to a mere thing (*res*), but probably was intended to express that certainly he was not a free man, or that as *non-civis* he certainly was without legal personality *jure civili*, but still he was simply

[1] Cf. above QUINTUS AELIUS TUBERO's definition in ULP. *Dig.* XV 1, 5 § 4 (*domini permissu*).

[2] With regard to the delicate question as to what transactions concerning the *peculium* the slave in early times was able to conclude (sale of part of the *peculium*, etc.), a reference to A. PERNICE, *M. Antistius Labeo* I (1873) 134 ff. must suffice here. Cf. KARLOWA, *Röm. Rechtsgesch.* II 113 cf. 1133 ff. See further POUL NØRLUND, *Det romerske Slavesamfund under Afvikling* (1920) 46. 243 f. MICOLIER, *Pécule et capacité patrimoniale.* Thèse Lyon 1932. KASER, *Zeitschr. der Sav.-Stift.* LIV 392 ff.

[3] *Inst. Iust.* 1 16, 4. PAUL. *Dig.* IV 5, 3 § 1: *servile caput nullum ius habet.* ULP. *Dig.* L 17 l. 32: *Quod attinet ad ius civile, servi pro nullis habentur.* Cf. l. 209 *eod*: *servitutem mortalitati fere comparamus.* ULP. *Dig.* XXXV 1, 59 § 2: *quia servitus morti adsimilatur.*

[4] PLAUT. *Asin.* II 4 v. 489: *Tam ego homo sum quam tu* ("I'm as much of a man as you are").—Gai. I 9 (*summa divisio*). Cf. GAI. II 13: *corporales* (*res*) *hae sunt quae tangi* ("tangible things") *possunt velut ... homo.*

a human being, a man, *homo*. As a *homo peregrinus*, as the man "from abroad" (*per egre* "from outside the *ager Romanus*") the slave was, to be sure, outside the Roman laws, was without the civil status of a Roman citizen, but he was, nevertheless, a human being. And as such he was in olden times, in economic matters as well as personally, surely recognized as an individual.

The probably very ancient principle of Roman law that the slave in certain cases, so to speak "borrowing the personality of the master" (*ex persona domini*) could appear on behalf of the master and in his name conclude legal transactions in the interest of the master, that is make him proprietor and creditor *jure civili*[1], evidently also implies a recognition of the slave as a kind of legal personality.

The slave could in historical times be appointed heir by some one in a will. It is true that what the slave acquired by the will went to his master, provided that the latter had the capacity to be instituted heir in a testament (*testamenti factio passiva*). And the acceptance (*cretio, aditio*) which was a condition of obtaining the inheritance, could only be performed by the slave with the sanction of the master (*iussu domini*). But the *aditio* of the slave was required. The master could not perform the act himself. If the slave died, before the acceptance was made, the master therefore lost the inheritance.[2] Moreover, it is worth nothing that, according to the famous jurist of the early first century A. D. Masurius Sabinus, the slave could "in ancient times" *a domino per praetorem dari in adoptionem*, and that several *iuris veteris auctores* had admitted the validity of such an act.[3]

The slave could not, being a *non-civis*, conclude a legally valid marriage (*justae nuptiae*) with the consequent *patria potestas* over wife and children.[4] A marriage-like union between slaves —even though lasting and monogamic—was *jure civili* merely a

[1] Gai. I 52: *Quodcumque per servum adquiritur id domino adquiritur.* Cf. Gai. in *Dig.* L 17 l. 133: *Melior condicio nostra per servos fieri potest, deterior fieri non potest.*

[2] Gai. II 185 sqq. Cf. III 212. Ulp. *Reg.* XXII 7 sqq.

[3] Gellius V 19, 13. Edit. Hosius I (1903) 237. Cf. *Inst. Just.* I 11, 12. (Cato fr. 4 a I p. 21 Br.).

[4] That the slave could not possess *patria potestas* followed, indeed, from the fact that, as belonging to the house (*domesticus*), he himself was *in potestate*.

natural conjunction (*contubernium*).[1] Blood tie created through a servile union (*cognatio servilis*) was certainly only later on regarded in civil law as an impediment to a marriage in case of a manumission.[2] But it does not follow that the marriage of the slave was in earlier law without any socially recognised legal effect, was a mere *de facto* existing union.[3] From the prologue to Plautus' *Casina*[4], where "slave weddings" (*serviles nuptiae*) are mentioned, no inference at all can be drawn in support of this. The reading of the text is quite uncertain.[5] That such a marriage-like union, however, had a certain legal character might seem to appear from the fact that in certain cases (*vilicus*) it was recommended to the slaves by their masters[6], even though, which is not strictly necessary, such advice could be regarded as given principally in the master's own interest. That the children of a female slave (*partus ancillae*) were not legally considered proceeds (*fructus*)[7] was possibly not definitively established until late republican times under the influence of Greek humane philosophy.[8] But this does not in itself prove anything as to the social conception of the slave-child in early Rome either.

As belonging to the house (*domesticus*), the slave was of course subject to the domestic discipline. The head of the house

[1] Cf. below Columella I 8, 5. (*contubernalis mulier*).

[2] *Inst. Just.* I 10 § 10.

[3] Altogether we must perhaps begin to familiarise ourselves with the idea that the primitive law of antiquity by no means drew deep dividing lines, as has so far been generally supposed, between a "fully valid marriage" and other forms of married life. Cf. for the present my paper *Mariage par usus* (1926) 27 f.

[4] Plaut. *Casina*, *Prologus* 68 sqq. Edit. Nixon 1917.

[5] Cf. Beauchet, *Histoire du droit privé de la République athénienne.* II 451 f. In Plaut. *Miles gloriosus* IV v. 1007, a slave talks about his *desponsa* and his future *uxor*. Edit. Nixon 1924. In Cato, *De re rust.* 143, 1 the woman is designated as *uxor* (*vilici*): "If the master has given her (*vilica*) to you as wife, keep yourself only to her". In Varro, *De re rust.* I 17, 5 the woman of a slave is termed *coniuncta conserva*. II 10, 6 (*mulier*). In later epigraphs: *coniux*, *maritus*. Marquardt-Mau, *Privatleben der Römer* (1886) 176[10]. But what does it mean?

[6] Varro l. e. I 17, 5 (*praefecti*). II 10, 6 (*pastores*). Cf. Columella I 8, 5: *Qualicumque vilico contubernalis mulier assignanda est.*

[7] On this doctrine of M. Junius Brutus disputed by M'Manilius and P. Mucius Scaevola (cos. 133 B. C.), see Cic. *de fin.* I 4, 12. Ulp. *Dig.* VII 68 pr.: *neque enim in fructu hominis homo esse potest.* Brini, *Mem. Bologna* IV (1909—10). V. Basanoff, *Partus ancillae.* Thèse Paris 1929. Cf. Kaden, *Zeitschr. der Sav. Stift.* LI 532 ff. Carcaterra, *Ann. dell'Università di Camerino* XII 2 (1938) 51 ff.

[8] Gai. *Dig.* XXII 1, 28 § 1. Cf. Ulp. *Dig.* V 3, 27 *pr.* Interpolation? Cf. Buckland, *Roman Law of Slavery* 21.—Fritz Schulz, *Prinzipien des röm. Rechts* (1934) 147 f.

had *potestas* over the house-servant as over the *filiusfamilias*. How it was actually exercised in early times we do not know.[1] But nothing in the tradition would seem to indicate, far less compels us to assume, that the power of the *paterfamilias* in relation to *famulus*—any more than in relation to the house-son—was legally unlimited. Certainly no text has been handed down which shows that the Roman slave, like the Greek[2], was by positive legal precepts protected from abuse of his master's power and could not have severe punishment imposed upon him without a preceding trial and sentence. But, particularly for the quite early times, when religion (morals, "customs and manners") and law were not yet, or only to a small degree, differentiated, this cannot, indeed, be conclusive. As a *non-civis*, for the earliest times as a foreigner, the slave was not protected by the laws of the country, neither in relation to the surrounding world nor in relation to his master. But he was surely protected from arbitrariness and harshness by sacred binding precepts[3] and inherited custom and usage. A kind of judgment may even in certain cases have been required.[4]

About the legal position of the slave within the family in quite early times we can only put forward extremely uncertain conjectures. But so much at least it seems possible to deduce, directly and indirectly, from the literary sources in connection with linguistic evidence and logical conclusions, that with regard to the slave (*famulus*), too, there is no compelling reason either —with the current doctrine—to regard the *potestas* of the master

[1] Hesiod. *Opera et dies* 605 recommends the masters to treat their slave with kindness.—Tac. *Germ.* 25: *Verberare servum ac vinculis et opere coërcere rarum. Occidere solent, non disciplina et severitate* ("it is not usual to preserve rigorous (domestic) discipline") *sed impetu et ira.* See further Ibn Dustah's account (c. 912) of the heathen Volga "Russians" in Vilh. Thomsen, *The Relations between Ancient Russia and Scandinavia and the Origin of the Russian State* 1877 p. 26 f.—Torture (*tormentum*) as a penalty for crimes committed by slaves in early times in all probability was not applied. No allusion to torture is found in the Laws of the XII Tables. A. Erhardt, art. *Tormenta*, Pauly-Wissowa, *Realencycl. der classischen Altertumswiss.* VI A. col. 1775 ff.—Seneca, *Epist.* XLVII 3 praises the days of old with the intimate intercourse between master and slave.

[2] Beauchet II 435 ff. cf. 428 ff.

[3] Later by the disciplinary *notae* of the praetor in case of abuse. Dion. XX 13, 2.—In Aeschyl., *Agamemnon* 951 sq. we read, that God from afar looks graciously upon a gentle master. Edit. Herbert Weir Smyth 1926. Paul Mazon 1926.

[4] Girard, *Droit Romain* 105. On the milder legislation arising with the humanitarian movement from the beginning of the imperial age, see Cuq 80 f. Buckland 36 ff.

of the *house* as a mere display of power, arbitrary in its essence[1], simply founded on a material proprietary right.[2]

With the simple conditions of life in olden times, no sharp social distinction and consequently no sharp legal discrimination between free and unfree could certainly arise. The number of slaves kept in the primitive patriarchal *large* family living on a small plot of land must have been extremely limited. A single male and a single female slave was probably the usual.[3] From the field of Roman law we have evidence to that effect in the old custom of merely naming the slave Marcus' or Lucius' slave (*Marcipor, Lucipor*).[4] Free and unfree together took part in the domestic work and the tillage of the land. Originally, as we have seen, slaves were no doubt generally acquired as spoils of war. Frequently he was of a closely related tribe with the same religious ideas. Often the slave might socially be by birth of equal rank with his master. All classes were, as Grote suggests, much on a level in taste, sentiments, and instruction.[5] Who became slave and who master often depended merely on the fortunes of intertribal war. But fate might soon change and make the master slave. *Tam tu illum liberum videre potest quam ille te servum.*[6]

[1] Gai. I 52: *dominis in servos vitae necisque potestas.*

[2] See my *Introduction* III (1939) 162 ff.; cf. 148 ff.

[3] *Od.* XV 363 sq. Cf. Athenaeus VI 264 c. (Greece in olden times). VI 265[b]: Kios is mentioned as the first Greek city where "purchased slaves" (ἀργυρώνητοι δοῦλοι) were known in greater numbers.

[4] Plin. *nat. hist.* XXXIII 26: *Aliter apud antiquos singuli Marcipores Luciporesue dominorum (gentiles omnem victum in promiscuo habebant nec ulla . . .).* VII 104. Cf. Fest. v[o] *Quintipor.* Edit. Lindsay 1913. Val. *Max.* IV 4, 11. Blümner, *Die röm. Privatalterl.* 281. Comp. the later name-giving: *Hermodorus, Marci Tullii Ciceronis (servus)*: the individual name of the slave followed by the master's name in the genitive with or without the term *servus.*

[5] Liv. II 22, 6: Former slaves associate with their former masters and draw close ties of guest-friendship. Cf. Columella I 8, 5, who favours a certain friendliness and familiarity in one's intercourse with his former slaves.

[6] Macrob. *Sat.* I 11, 7.

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