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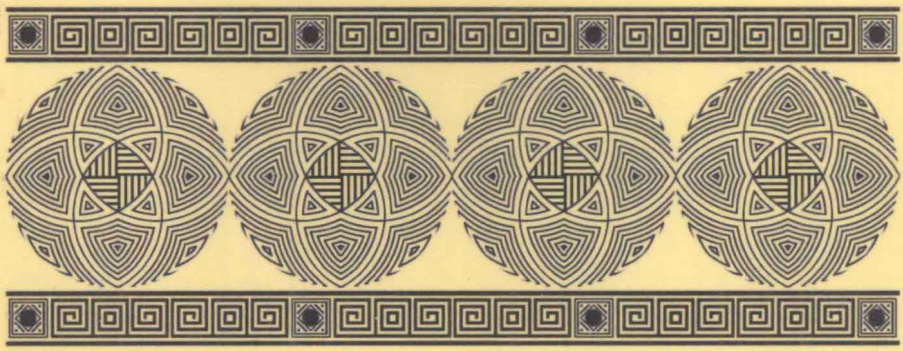
THE ROMAN LAW OF SLAVERY

The Condition of the Slave in Private Law from Augustus to Justinian

William Warwick Buckland



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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.

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 anteiustiniani.

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

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

TABLE OF CONTENTS

PART II.

ENSLAVEMENT AND RELEASE FROM SLAVERY.

PART I.

CONDITION OF THE SLAVE.

CHAPTER I.

DEFINITION AND GENERAL CHARACTERISTICS.

THE Institutes tell us that all men are either slaves or free[1], 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[2]." 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[3]." Upon this definition two remarks may be made[4].

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[5], and we are repeatedly told that it is a part of the *Ius Gentium*, since it originates in war[6]. Captives, it is said, may be slain: to make them slaves is to save their lives; hence they are called *servi, ut servati*[7], and thus both names, *servus* and *mancipium*, are derived from capture in war[8].

[1] In. 1. 3. *pr.* [2] In. 1. 3. 1; D. 1. 1. 4. *pr.*; 1. 5. 4. *pr.*
[3] In. 1. 3. 2; D. 1. 5. 4. 1; D. 12. 6. 64.
[4] Girard, Manuel, Bk 2, Ch. I. gives an excellent account of these matters.
[5] See the texts cited in the previous notes. [6] In. 1. 5. *pr.*; D. 1. 1. 4; 1. 5. 4.
[7] 50. 16. 139. 1.
[8] 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[1].

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

(*c*) Slaves manumitted by their owner while some other person had a right in them[3].

(*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[4].

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[5]. 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[6]. So far as it goes, this is a right. *Servi publici Populi Romani* had very definite rights in relation to their *peculia*[7]. In fact this definition is not strictly true for any but *servi poenae*[8]. 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[9]. Modern writers on jurisprudence usually make the conception of a right the basis of

[1] 41. 7. 8. [2] *Post*, Ch. XII.
[3] Fr. Dosith. 11; Ulp. 1. 19; C. 7. 15. 1. 2; *post*, Ch. XXV.
[4] 40. 12. 23. *pr.*; *post*, Ch. XVIII.
[5] Warnkoenig, Inst. Rom. Jur. priv. § 121; Moyle, *ad* Inst. 1. 3. 2; Accarias, Précis de Dr. Rom. 1, p. 89.
[6] G. 1. 53; *post*, p. 37 where an earlier right of the same kind is mentioned.
[7] *Post*, Ch. XV.
[8] Other equivocal cases may be noted; 2. 4. 9; 5. 1. 53; 48. 10. 7.
[9] See however 50. 17. 32.

their arrangement of legal doctrines[1]. 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[2]." 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 dutiless. "In personam servilem nulla cadit obligatio[3]." Judgment against a slave was a nullity: it did not bind him or his master[4]. In the same spirit we are told that slavery is akin to death[5]. If a man be enslaved his debts cease to bind him, and his liability does not revive if he is manumitted[6]. The same thing is expressed in the saying that a slave is *pro nullo*[7]. 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[8]. Chattels are the subject of ownership: it is immaterial that a slave or other chattel is at the moment a *res nullius*[9].

From the fact that a slave is a *Res*, it is inferred, apparently as a necessary deduction[10], 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[11], 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[12]. 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

[1] 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.
[2] 5. 3. 1. [3] 50. 17. 22. *pr.* [4] 5. 1. 44. 1.
[5] 50. 17. 209. Nov. 22. 9; G. 3. 101. [6] 44. 7. 30. [7] 28. 8. 1. *pr.*
[8] Justinian swept away nearly all the exceptional cases. C. 7. 15. 1. 2b; Nov. 22. 8; 22. 12.
[9] The objection, that slavery is an "absolute," not a "relative," status, is thus of no force against the Roman definition.
[10] Girard, Manuel, p. 92.
[11] Girard, *op. cit.* p. 90, "L'aptitude à être le sujet de droits et devoirs légaux."
[12] Girard, *loc. cit.*; Moyle, *op. cit.* Introd. to Bk 1; etc.

person[1]. If, now, we turn to the Roman texts, we find a very different conception. A large number of texts speak of slaves as persons[2]. 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[3].

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[4]." 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[5]. 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[6], (not reproduced in Justinian's Code,) which explains the slave's incapacity to take part in legal procedure

[1] See Maitland, Political Theories of the Middle Age (Gierke), Introd. p. xxxiv.

[2] G. 1. 190; 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. 62. 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.

[3] 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.

[4] See Brissonius, De Verb. Sign., sub v. *persona*.

[5] nn. 4, 5, 6 on p. 3.

[6] 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[1], 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*[2]. A text in the Vatican Fragments (also in the Digest[3]) says that a *servus hereditarius* cannot stipulate for a usufruct because *ususfructus 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*[4]. Thus in another text the same language is used on similar facts, but the case put is that of *filius vel servus*[5]. A text of Cassiodorus[6] has exactly the same significance[7]. There are however two texts of Theophilus[8] (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*[9].

Slavery has of course meant different things at different times and places[10]. 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[11]. 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*[12], as to the freeman who lets himself be sold as a slave[13], as to error in status

[1] C. Th. 3. 17. 1; C. 5. 34. 11. [2] 2. 7. 3. *pr.* [3] 45. 3. 26; V. Fr. 55.

[4] 9. 2. 13. 2; In. 3. 17. *pr.*

[5] 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. [6] Var. 6. 8. 2.

[7] 36. 1. 57. 1 (Papinian) may be understood as denying personality, but it is really of the same type: *rescripsit non esse repraesentandam hereditatis restitutionem quando persona non est cui restitui potest*. [8] *Ad* In. 2. 14. 2; 3. 17. *pr.*

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

[10] Wallon, Histoire de l'Esclavage; Winter, Stellung der Sklaven bei d. Juden; Cobb, Slavery (in America).

[11] 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.

[12] G. 1. 67–75; Ulp. 7. 4. [13] In. 1. 3. 4, *post*, Ch. XVIII.