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CALLISTUS'S CASE
SOME LEGAL ASPECTS OF ROMAN BUSINESS ACTIVITIES

By
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Introduction

Sometime in 222 a certain Callistus consulted the young emperor Alexander Severus about his legal position. He had contracted with a slave and wanted to sue the owner. The owner contended that his liability was limited to the amount of the working capital, *peculium*, at the disposal of his slave. Callistus wanted to know if, and – if so – on what ground, he could sue the owner for the surplus.[1] His question goes to the heart of what we now know as 'business law'; it touches upon the question of limited liability and business law, as we know it, is all about limited liability. Yet Roman law had to do without the legal devices that modern law has come up with in order to achieve that end. There was, in fact, nothing even remotely resembling modern company law in the law of Rome.[2] But there were devices serving the same needs as modern company law purports to do.

In order to understand the scope of this assessment, it is worth while to draw attention to the origin of modern company law. As every lawyer knows, it is a fairly recent development and, unlike most of modern continental-European commercial law, it was not inspired by the law of Rome. Modern company-law originated in Amsterdam, where, in 1602, the Dutch East India Company, the first joint-stock company in the history of law, was patented. As I see it, there were three motives resulting in the development of that legal device:

- limiting the liability of the directors of the company,
- limiting the liability of the participants in the company,
- raising capital, otherwise not available on the capital market.

The Dutch East India Company was established primarily because of a relative shortness of supply of venture capital on the market. Very few banks and individual entrepreneurs in the Netherlands were prepared to risk the investment of the enormous sums of money involved at such uncertain odds. It is here that we touch upon an important difference between the Roman

[1] C J 4 25 2 (Alexander), for the text see n 48 *infra*
[2] M I Finley, *The Ancient Economy* (Berkeley 1973), 141 *ff*

economy and the Dutch economy of the late sixteenth and early seventeenth century. It is the difference between what has been called the first modern economy[3] and an economy that was all but modern. Take, for example, the capital market. There was no such thing in Rome. There was a money market, but no capital market in the modern sense of that concept.

Raising capital

One of the first things that strike a modern lawyer as rather odd when contemplating the broader aspects of the Roman credit system as handed down to us in Justinian's *Corpus Iuris Civilis*, is the fact that credit institutions, financing companies and banks, are practically absent from the scene. True as it may be that there are indeed (a few) references to *nummularii*, *tabularii* and *argentarii*, they seem to have lost their way in a world that was largely dominated by other players. This impression is confirmed by some of the very good work that has been done recently on the history of Roman banking, such as Jean Andreau's important book on Roman financial institutions[4] and Christopher Howgego's inspiring article on the supply and use of money in the Roman world.[5] Both scholars emphasise that Roman 'bankers' merely offered short-term credit for a particular kind of transactions (especially auctions) to a fairly modest public. The elite, senators and *equites*, did not 'bank with the bankers'. Long term credit for large amounts of money seems to have been above the means of Roman 'bankers'. It was only to be had from private individuals, from enterprising *equites* and senators. They must have had enormous hoards at their disposal, more often than not stashed in temples and *horrei*.

Howgego has stressed the importance of the velocity of circulation of money for the working of a monetary economy. He is right, but one should be very much aware of the fact that in Rome money circulated at a pace much slower than we are accustomed to. One should not be too impressed by a 'monetary' economy that had no need for cheques and bills of exchange.[6] We know Assyrian traders

[3] J. de Vries & A. van der Woude, *The First Modern Economy* (Cambridge 1997).

[4] *La vie financière dans le monde Romain (les métiers de manieurs d'argent)* (Rome 1987). See also his *Banking and Business in the Roman World* (Cambridge 1999) and A.Bürge, 'Fiktion und Wirklichkeit: soziale und rechtliche Strukturen des römischen Bankwesens' in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (ZSS) 104 (1987), 465 ff.

[5] *Journal of Roman Studies* 82 (1992), 1-31.

[6] This point is also stressed by Fr. de Martino, *Wirtschaftsgeschichte des alten Rom* (Munich 1991), 365.

> used those, relatively simple, legal devices almost a thousand years before the apogee of the Roman economy. The fact that they were unknown to Roman law should have some meaning in determining questions relating to the use of money in the Roman empire. Roman law was unable to think of money in other terms than 'real money', that is ready cash as opposed to e.g. the right to receive cash. This inability reflects a pre-capitalistic, if indeed not a rather primitive state of mind that makes the use of the term 'monetary economy' in a description of the Roman economy very misleading.

The Roman upper classes of the Principate, senators and *equites*, have been criticised for not investing their huge fortunes in trade and industry by spending it on luxury goods and the acquisition of land[7], but they may not have been as irresponsible as is suggested.

'*Quaestus omnis patribus indecorus*', says Livy.[8] This attitude, as well as the well-known prohibition on owning ships[9], seems to have left senators with few other opportunities than aggrandising their already considerable holdings in real estate[10] and, indeed, the supply of monetary credit. Not taking into account the popular *fenus nauticum*, exempted from the 12% ceiling on interest rates[11], the latter was not attractive. It has been established that in the first century A.D. an investment in Italian vineyards secured an average profit of 7-10%[12], whereas the average return on a well-secured long term loan was 4–6%[13] and in the age of the Antonines even as low as 3-5%.[14] No wonder therefore that the younger Pliny had invested practically all

[7] A H M Jones, *The Roman Economy* (ed by P A Brunt, Oxford 1974), 124

[8] 21 63 4

[9] *Dig* 50 5 3 (Scaevola)

[10] A M Andermahr, *Totus in praediis (senatorischer Grundbesitz in Italien in der fruhen und hohen Kaiserzeit)* (Bonn 1998), 1 'Ein derartiges Wirtschatsgebaren – Festlegung nahezu des gesamten Vermögens in Grundbesitz bei gleichzeitigem Mangel an flüssigen Geldmitteln – war freilich keine wunderliche Eigenart des Plinius, sondern dürfte für Angehörige der römischen Oberschicht typisch gewesen sein'

[11] The *centesimae usurae* was fixed at a maximum of 12 % *per annum* since the end of the Republic until it was changed by Justinian in 528 Paulus, *Sententiae* 2 14 2-4, C Th 2 33 2 and C J 4 32 26 2 See for the origin of the *centesimae usurae* M Kaser, *Das romische Privatrecht* I (Munich 1971), 497 (with further literature) On the exceptional position of the *fenus nauticum* see C J 4 33 2 (Diocletianus)

[12] R Duncan-Jones, *The Economy of the Roman Empire* (Cambridge 1974), 59

[13] G Billeter, *Geschichte des Zinsfusses im griechisch-romischen Altertum bis auf Justinian* (Leipzig 1898), 180

[14] G Billeter, op cit (n 13), 211 *ff*

his money in real estate and only a little in bonds.[15] There was no market where venture capital was put at the disposal of business enterprises: 'apparently no influential men were interested in industry'[16], whereas the necessary funds were never at the disposal of the all but influential Roman *argentarii*. Consequently, Roman industry never developed into great concerns: there was no capital available for such enterprises. But, one would venture to observe, neither was there in the Netherlands in the sixteenth century and so Dutch entrepreneurs and their legal council invented the joint-stock company as a means of raising capital. So why did Roman lawyers fail to contrive a financing device like that?

A Roman partnership, *societas*, is not a legal arrangement suited to serve as a financing mechanism.[17] A *societas* was (and is) contracted between partners having in mind the specific qualities of each one of them. It was (and is) essentially a contract obliging the partners to co-operate for a specific purpose, mostly (not always) the pursuit of profit. The emphasis was (and is) on collaboration, rather than contribution. Consequently, the relation between the contracting parties was (and is) of a highly personal nature. Death and bankruptcy of, as well as unilateral renunciation by one of the partners terminated the partnership.[18] Of course, a partner was also unable to transfer his share in the partnership to a third party.[19] The latter aspect is important. A share in a modern joint stock company is, as a rule, an assignable property right. The assignability of bonds and equities is the most essential element of modern company law and of the modern economy as such: the stock exchange, where equities are sold and transferred all over the world every minute of the day, is the symbol of our modern economy. As we have just seen, Roman law did not provide for the assignability of a partnership in a *societas* and neither did it acknowledge the assignability of a common bond.[20] True as it may be that an ingenuous device (powers of

[15] *Epistulae* 3.19.8: 'Sum quidem prope totus in praediis, aliquid tamen fenero, nec molestum erit mutuari'.

[16] M. Rostovtzeff, *The Social and Economic History of the Roman Empire* (Oxford 1927), 165.

[17] This point is also stressed by R.W. Goldsmith, *Premodern Financial Systems* (Cambridge 1987), 36.

[18] See Kaser, op.cit. (n. 11) I, 575. In all cases the partnership was also dissolved as far as the remaining partners were concerned. When they decided to continue the partnership, it was regarded as a new *societas*. See Kaser, l.c. and R. Zimmermann, *The Law of Obligations* (Cape Town 1990), 455-456.

[19] The only thing a partner could do was to share his share in a new (sub-) partnership with an outsider. In such a case there was no relation between that third party and the partners of his partner on account of the maxim 'socii mei socius meus socius non est' (*Dig.* 17.2.20 [Ulp.]).

[20] Gaius, *Institutiones* 2.38 and *Dig.* 41.1.43.1 (Gaius).

attorney) was conceived in order to circumvent the rule against alienability of choses in action, the doctrine of assignment of choses in action was never as central to Roman commercial law as it is in modern law.[21] I believe all this largely accounts for the absence of a genuine capital market in the Roman econo-my. In early modern history, and certainly in the Netherlands at the turn of the sixteenth and seventeenth century, choses in action were assignable as a matter of course.[22] Consequently, bills of exchange, bonds and shares in the East India Company were freely traded in another institution of fairly recent origin, the Amsterdam Exchange, the 'Beurs', and the Amsterdam Exchange Bank, established in 1609. Since then – after, that is, the rise of modern capitalism - our perception of what an 'economy' is has fundamentally changed. The Roman 'economy' was different, not the least on account of the structural mobilisation of slave labour in *all* levels of economic activity.

Limiting liabilities

Whenever Roman capitalists wanted to engage in entrepreneurial activities without incurring full liability, they could – and would – use their slaves. I am convinced that senators and *equites* rarely – if ever – engaged in activities of this kind without deploying slaves. No senator or distinguished *eques* would demean himself to personally venture into this kind of activities, nor were they inclined to advance money to that end to outsiders, but they were keen to exploit the talents of their slaves and to invest money into their enterprises. In doing so, they avoided liabilities they would have incurred if they had entered into this kind of business themselves and gained considerably higher profits on their investment than would have been gained by giving credit to outsiders. In order to understand the full impact of these assessments, it is necessary to emphasise a basic rule of the Roman law of slavery.

As a matter of course, a slave-owner is never liable for his slave's contracts.[23] A slave has no legal capacity and consequently he cannot engage in legal activities on his own right.[24] His contracts do, however, bind his master if he has acted on authority (*iussum*) to engage in a contract on behalf

[21] On the development of the doctrine of assignment of choses in action see R Zimmermann, op cit (n 18), 60 ff (with further literature)

[22] On this see H Coing, *Europaisches Privatrecht I (Alteres gemeines Recht)* (Munich 1985), 445 ff

[23] Masters were only liable for damages caused by tortuous conduct of their slaves, on the same basis as their liability for damages caused by animals in their *potestas* See Kaser, op cit (n 11) I, 163 *ff*

[24] Gaius, *Institutiones* 3 104

of his master.[25] In this case, the master is fully (*in solidum*) liable for his slave's engagements:

> 'merito ex iussu domini in solidum adversus eum iudicium datur, nam quodammodo cum eo contrahitur qui iubet'.[26]

There was a way to avoid *in solidum* liability for the engagements of a slave acting on behalf of his master. Whenever a master had provided his slave with a working capital (*peculium*) in order to enable the latter to pursue an enterprise, the liability of the master for the engagements of his slave was limited to the amount advanced to the latter.[27] In granting a *peculium*, the master raised the status of his slave considerably. The slave *cum peculio* was not a free man, but he had ceased to be a mere commodity in the eyes of the law, for in assessing the scope of the *peculium*, the law took notice of 'liabilities' of the master to his slave and vice versa.

The factual separation of the estate of the master and the 'equitable' estate of the slave *cum peculio* became apparent at the latter's bankruptcy. In order to establish the assets available for distribution among the creditors, all the liabilities of the slave to his master had to be deduced from the *peculium*.[28] Consequently, the master was a *de facto* preferential creditor in his own slave's bankruptcy. The rule on *paritas creditorum* did not apply in the case of a bankrupt *peculium*, so Gaius's maxim '*in actione de peculio occupantis melior est condicio*'[29] implied that there was usually very little left after the master had been satisfied.

Though formally and technically still a part of the estate of the master, in fact and even at law the *peculium* had become a special fund separated from the rest of the estate of the master. In doing so, the law had created a

[25] Gaius 4.70.

[26] *Dig.* 15.4.1 pr. (Ulpianus, *libro vicensimo nono ad edictum*). According to A. Kirschenbaum, *Sons, slaves and freedman in Roman commerce* (Jerusalem 1987), the fact that many business-men were in fact slaves largely explains why Roman law failed to develop a 'law of agency'. There was no urgency, because more often than not a principal could be sued on account of a *iussum* to his slave .

[27] On *peculium* generally see A. Kirschenbaum, op.cit. (n. 26); J.J. Brinkhof, *Een studie over het peculium in het klassieke Romeinse recht* (Meppel 1978), containing a resumé in German, and I. Zeber, *A study of the peculium of a slave in pre-classical and classical Roman law* (Wroclaw 1981).

[28] Gaius 4.73 and Tubero's definition in *Dig.* 15.1.5.4 (Ulpianus): 'peculium autem Tubero quidem sic definit, ut Celsus libro sexto digestorum refert, quod servus domini permissu separatum a rationibus dominicis habet, deducto inde si quid domino debetur'.

[29] *Dig.* 15.1.10.

new person, albeit a fictitious person. The Roman lawyers were aware of this: *peculium simile homini*, says Papirius Fronto.[30] It is not unlike a modern corporation, which is also essentially a complex of property rights and liabilities treated by the law as a person capable of participating in commercial activities. The analogy with modern company law goes even further than that, for it should be stressed that it was the *peculium* that was treated as a separate legal identity, not the slave acting on behalf of it. In other words, the *peculium*, not the slave *cum peculio*, was the bearer of property rights and responsibilities. So the slave was not liable at all, whereas his master was merely liable on account of the fact that it was only through him, as the legal representative of the *peculium*, that a creditor could lay his hands on it. In this way Roman law met the same needs as those underlying modern company law, where the liability of a shareholder in a company is limited to his duty (to the company) to pay up for his shares in full. No wonder, therefore, that many Roman business enterprises – banks, factories, shops and even schools – were run by slaves acting as grantees of a *peculium*.[31]

It was not unusual, even normal, for a slave to pay for his manumission out of his *peculium*.[32] The agreement to that end (*pactum libertatis*)[33] was even actionable on the part of the slave: if his master failed to set him free on being offered the prize agreed upon, the slave could file a complaint with the *praefectus urbi* or the *praeses provinciae*.[34] At first sight, the arrangement seems rather odd from a legal perspective. A slave could not own property so the master was paid for the manumission of his slave out of his own pocket. 'Whenever we say that a slave buys his freedom *suis nummis*', says Ulpian, 'we do so by closing our eyes to the fact that a slave cannot own property'.[35] But it was not out of the master's estate that the slave paid for his freedom, but out of his *peculium*. There was a nice distinction between the grant of a

[30] *Dig* 15 1 40 (Marcianus) 'Peculium nascitur crescit decrescit moritur, et ideo eleganter Papirius Fronto dicebat peculium simile esse homini'

[31] Of course, slaves *cum peculio* were entitled to leave the administration of part of their *peculium* to slaves that were part of the original *peculium* (*servi vicarii*) So a slave could 'own' his own slaves, thus making his master a genuine 'holding company' On *peculium vicarii* see *e g* *Dig* 15 1 6, 7 4 and W Buckland, *The Roman Law of Slavery* (Cambridge 1908 (2nd ed , 1970)), 246 ff

[32] M Kaser, op cit (n 11), 288, Brinkhof, op cit (n 27),133 ff, Zeber, op cit (n 27), 72, Kirschenbaum, op cit (n 26), 35 and, of course, Buckland, op cit (n 31), 640 ff

[33] See, for an example, *Dig* 44 5 2 2 (Paulus) The agreement may not have been actionable in the Republic, but there are frequent references to it in Plautus's plays See, for example, *Rudens* 929 ff

[34] *Dig* 40 1 5 (Marcianus)

[35] *Dig* 40 1 4 1

peculium and the delivery of some money to a slave *ad negotiandum.*[36] By granting a *peculium* to his slave, the master had, for all practical purposes, segregated his own estate from the *peculium* of his slave. Of course Roman lawyers were aware of the fact that the concept of a separate 'estate' belonging to a slave is, at best, rather tortuous. At law (*iure civili*), a slave cannot own things, neither can he be a creditor or a debtor.[37] Nevertheless, Paul emphasises that in order to establish a separate fund in his estate the mere will of the master that it should be so was insufficient. There had to be a genuine transfer of the elements of the *peculium* to the slave.[38] There is a striking resemblance to the creation of an '*inter vivos* trust' in modern Anglo-American law: in order to establish a *peculium*, the master had to transfer certain specified elements of his estate to a slave with the unequivocal intention to create a *peculium*. An English or American lawyer will immediately recognise the 'certainties' of modern 'trust'-law.[39]

Be this as it may, the creation of the *peculium* was to the mutual benefit of master and slave, for as a freedman the latter was allowed to take the entire *peculium* or a part of it with him unless it was expressly reserved.[40] This accounts for the presence of so many rich freedmen among the merchants and shopkeepers of Italy in the age of the Antonines.[41] It was a very profitable investment for the owner, for all the profits were his, whereas his liability was limited to the amount of the *peculium* advanced to his slave. If he had invested in monetary credit, he would have been merely awarded

[36] *Dig.* 40.7.39.2 (Iavolenus).

[37] See *Dig.* 15.1 41 (Ulpianus, *libro quadragensimo tertio ad Sabinum*)): 'nec servus quicquam debere potest nec servo potest deberi, sed cum eo verbo abutimur, factum magis demonstramus quam ad ius civile referimus obligationem. itaque quod servo debetur, ab extraneis dominus recte petet, quod servus ipse debet, eo nomine in peculium et si quid inde in rem domini versum est in dominum actio datur'.

[38] *Dig.* 15.1.8 (Paulus, *libro quarto ad Sabinum*): 'Non statim quod dominus voluit ex re sua peculii esse, peculium fecit, sed si tradidit aut, cum apud eum esset, pro tradito habuit: desiderat enim res naturalem dationem'.

[39] Paul's ruling that a genuine transfer of the elements of the *peculium* was required in order to create a *peculium* and that a mere declaration to that purpose was insufficient, has its counterpart in modern 'trust'-law: 'the Court will not hold the *intended* transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust' (*Milroy v. Lord* (1862) 4 De G.F. & J. 264 at 274 (Lord Turner)).

[40] *Dig.* 15.1.53 (Paulus) and 23.3.39 pr. (Ulpianus). See also *Fragmenta Vaticana* § 261, where it is made clear that the rule only held with *inter vivos* manumissions. It is, therefore, hardly surprising to find freedmen carrying on the same kind of business after their manumission as they had been running while still slaves. See, for example, *Dig.* 37.14.18 (Scaevola, *libro quarto responsorum*): 'quaero, an libertus prohiberi potest a patrono in eadem colonia, in qua ipse negotiatur, idem genus negotii exercere. Scaevola respondit non posse prohiberi'.

[41] Cp. Rostovtzeff, op.cit. (n. 16), 99 and 176-177.

with a fixed income, whereas the advancement of a peculium to an enterprising slave gave him a profit easily exceeding the interest rate. There were, however, some setbacks bringing us back to Callistus's case.

Callistus's case

As we have seen, the acquisitions of a slave *cum peculio* were not treated as belonging to his master, but to the slave, or rather to his *peculium*. They belonged, as it were, to the 'equitable estate' of the slave. Consequently, acquisitions of a slave *cum peculio* did not enrich the master as a matter of course. To hold differently would have been '*aperte falsum*' according to Tryphoninus.[42] So a genuine *versio in rem domini* was required in order to enrich the estate of the master. If this had occurred, the master's estate was enriched. As a consequence, he was not allowed to hide behind the peculium of his slave and his liability was extended to the amount of his enrichment. This is what Callistus was given to understand by the imperial chancery. Still, the master's liability was not full (*in solidum*) liability, for the master of a slave cum peculio was only liable on condition and *to the extent* of his enrichment.

> As has been observed above, *in solidum* liability for the acts of a slave was based on the master's explicit authority (*iussum*). There was no doctrine of apparent authority, but for two instances: the case of a slave acting as business manager (*institor*) on behalf of his master and the slave acting as captain (*exercitor*) on one of his master's ships.[43] The former were shopkeepers or little business-men in charge of a shop or a business *not* belonging to their *peculium*, but to the master's own estate. If the owners put slaves in charge to run them on their behalf, they were holding them out as acting on ostensible authority and were consequently held liable for all contracts concluded in the course of that particular business. The problem was what should be held whenever an *institor* was acting *ultra vires*. Normally the master could not be held accountable as the slave acted without his authority. There were, however, circumstances allowing for an imputation of *ultra vires* contracts. A

[42] *Dig* 15 3 6

[43] On the *actiones institoriae* and *exercitoriae* see Kaser, op cit (n 11) I, 605 ff The imperial chancery advised Callistus that, apart from a *iussum* to that end, *in solidum* liability of the master could only be had if Callistus had contracted with an *institor*, adding explicitly 'ex causa cui praepositus fuit' See infra n 48

famous example, even among historians[44], is the case of the runaway slave reported by Paul in the first book of his *Decreta*.[45] His master had put him in charge of an enterprise in the money-lending business. As it happened, the slave turned to other forms of financial services as well, in the course of which he incurred liabilities. One day the slave absconded (taking all the cash with him) and his master was held liable for his slave's *ultra vires* contracts. On appeal from the *praefectus annonae*, the lawyers in the imperial *consilium* held that the master was not liable, as there was no authority to engage in other contracts than providing loans on security. Severus, however, decided differently. He upheld the sentence of the *praefectus annonae* by holding the master liable for all the debts incurred by his slave. Clearly, because the master was estopped to plead want of authority on the part of his slave by allowing him to go on with his illicit practices for a considerable time. The emperor (himself a lawyer) must have thought that this was a case of ostensible authority if ever there was one. This is a case involving a slave without a *peculium*, but acting as his master's *institor*, for whom the master takes full responsibility; he had been given money *ad negotiandum*, not by way of a *peculium*. Had the master granted a peculium, he would not have been held fully (*in solidum*) liable for the debts incurred by his slave.

Even in antiquity, the relation of the *actio de in rem verso* to the *actio de peculio* was the subject of some controversy as the *praetor* proposed them in one provision of his Edict.[46] Julianus, however, emphasised that an *actio de in rem verso* could still be brought on account of any enrichment exceeding the amount of the *peculium* even after the *actio de peculio* had been brought successfully.[47] The imperial chancery seems to have elaborated on this in Callistus's case.[48] However, assessing enrichment surpassing the amount of the *peculium* implied a difficult burden of proof as is exemplified by the subtle decisions on the question as to what amounted to a *versio in rem*

[44] See, e g., F. Millar, *The Emperor in the Roman World* (London 1992, 2nd ed.), 238.
[45] *Dig*. 14.5.8.
[46] Gaius 4. 74a: 'eadem formula et de peculio et de in rem verso agitur'.
[47] *Dig* 15 3.1 2 (Ulpianus).
[48] C.J. 4.25.2 (Imp. Alexander A. Callisto): 'Ex contractibus servorum quamvis de peculio dumtaxat domini teneantur, de eo tamen, quod in rem eorum versum est vel cum institore ex causa cui praepositus fuit contractum est, in solidum conveniri posse dubium non est'. PP. iii k. mai. Alexandro A. cons. (A.D. 222)

domini and what not. It was, for example, held that an outright gift by a slave *cum peculio* from his *peculium* into the estate of his master was not a versio in rem domini.[49] It was, however, if a slave *cum peculio* had borrowed money in order to pay a debt of his master without expecting to be reimbursed by him.[50] Another example concerns the prize of freedom. The money paid to the master by the slave on account of his manumission was not regarded as an enrichment of the master.[51] If, however, the slave had lent money from a third party and paid it to his master in order to procure his freedom, the master was enriched and could be sued *de in rem verso* by that third party if the slave was worth less than the prize that was paid to the master.[52] We may leave the casuistry aside, as it suffices to observe that there was one overriding principle deciding them all: '*melior condicio nostra per servos fieri potest, deterior fieri non potest*'.[53]

Conclusion

Slaves carrying on business as grantees of a *peculium* were the Roman equivalent of modern companies, certainly so when it is realised that a slave *cum peculio* could be owned by a group of investors.[54] The slave was not responsible for his acts, his master was under a limited liability and there were strong commercial and speculative motives behind the creation of a *peculium*, as can be shown by what happened on the slave's manumission. It was then that the master (or masters) capitalised on his (or their) investment; accounts had to be settled and there had to be decided what the slave could keep and what not. The legal title to all the elements of the *peculium* that the slave was to keep had to be transferred to him on his manumission; a mere letter of intent to that purpose has been held insufficient.[55] Of course, there

[49] *Dig* 15 3 7 pr (Ulpianus, *libro vicensimo nono ad edictum*) 'si donaverit servus domino rem peculiarem, actio de in rem verso cessabit'

[50] *Dig* 15 3 7 1 (Ulpianus) 'si mutuum servus acceperit et donandi animo solvit, dum non vult eum debitorem facere peculiarem, de in rem verso actio est' See on the difficulties arising here G Mandry, *Das gemeine Familiengüterrecht* II (Tübingen 1876), 500 ff and Buckland, op cit (n 31), 180

[51] *Dig* 15 3 2 (Iavolenus)

[52] *Dig* 15 3 3 pr (Ulpianus)

[53] *Dig* 50 17 133 (Gaius, *libro octavo ad edictum provinciale*)

[54] Co-ownership of slaves *cum peculio* caused numerous notoriously difficult questions, especially in as far as their manumission was concerned The law on this matter was reformed by Justinian in C J 7 7 (*De servo communi manumisso*)

[55] On the exigency of a formal transfer of title to the *libertinus* see the interesting case reported by Scaevola in *Dig* 39 5 35 pr, where a former slave lost a considerable share in the debts that were owed to his former *peculium* on account of the fact that his former master (a well-meaning slob) had neglected to transfer them formally The master's letter of intent was held to be insufficient to vest the interest in the *libertinus*

was not only a prize for the grant of freedom, but also for the surrender of the *peculium*. In many cases, this was the end of the master's financial involvement in the enterprises of his slaves *cum peculio*.[56] The arrangement, allowing for a limited liability of what was in fact the sleeping partner in the enterprise and the total exclusion of all liability on the part of the director (the slave), had come to an end. Of course, enterprising freedmen applied the same device in employing the commercial capabilities of their own slaves, more often than not former *vicarii*. So, to sum up a long story in a few words, there were indeed devices in Roman law answering to the same needs as modern company law tries to meet in another society at another time. It was not the institution of slavery as such that served the purpose, but a very 'peculiar' device allowing a slave to participate in commercial activities as if he were a freeman. A part of his master's estate was, as it were, 'incorporated' in the slave's *peculium*. Notions of *humanitas* had very little to do with this. On the contrary: it was a *bellissima machinatio* originating from the hard and cynical legal minds of the likes of Cato, who perceived that the prospect of liberty by industry is one of the strongest incentives of human ingenuity and resourcefulness.

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[56] It was not unusual that the master stipulated for a share in the future profits of his freedman's enterprises as his partner (*socius*).