Thinking Property at Rome - Symposium on the Law of Slavery: Comparative Law and Slavery

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THINKING PROPERTY AT ROME

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It is a commonplace among writers on slavery that there is an inherent contradiction or a necessary confusion in regarding slaves as both human beings and things. In law there is no such contradiction or confusion. Slaves are both property and human beings. Their humanity is not denied but (in general) they are refused legal personality, a very different matter.

Things as property may be classed in various ways, and the classification may then have an impact on owners' rights and duties. A thing may be corporeal or incorporeal, immoveable or moveable. Some moveables may be classed as res se moventes, things that move of their own accord, animate beings, such as horses and cattle; others, again, as inanimate property. A sub-division of res se moventes might be in Aristotle's term---"thinking property," that is, human beings. And the ownership of thinking property may in the eyes of the law create rights and duties that are somewhat different from those arising from the ownership of other res se moventes.

This Paper is devoted to an examination of some problems that occur when slaves are considered as "thinking property." I will not deal with the rather different issues that arise when slaves are to some extent accorded legal personality, such as when they may appear as witnesses, create a legally valid marriage, or be prosecuted for crime. The subject, therefore, concerns issues such as whether a person is liable for injuries caused by the negligence of a fellow worker to a slave whom he had hired, and whether a hirer of a slave is liable if he permitted the slave to do work forbidden by the contract, and the slave was injured.3

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I am grateful to John L. Barton for his helpful criticisms. Many of the issues in this Paper concern the contract of mandate which was the subject of my D. Phil. thesis. While writing that, I also received much aid and advice from John. For that and for many years of friendship, I wish to dedicate this paper to him. I also must thank Paul Finkelman for much advice.

1. ARISTOTLE, POLITICS 1.4-6.


This Paper is restricted to Rome because it was there that the law of thinking property was most developed. I will deal with only five examples, chosen because I have not examined them before, and because I think I have something new to say.4

I. A Slave Gives A Mandate to Buy Himself

A first issue will be selected from mandate, which was the contract that came into being when one person asked another to do something for him gratuitously, and the latter agreed.5 When a slave made a contract, all the rights under it accrued to his owner. In early law no liability attached to the owner, and the slave, not having legal personality, could not be sued. By the last century of the republic, a slave’s contract could make his owner liable in some cases to some extent. Most commonly, the owner’s liability was restricted to the amount of the slave’s peculium—a fund that belonged to the owner but which he allowed the slave to use as if it were his own—and the extent to which the owner had benefitted.

If my slave gave a mandate for the purchase of himself so that he might be redeemed, Pomponius elegantly discusses whether he who redeemed the slave can sue the seller to take the slave back, since the action on mandate is reciprocal. But Pomponius says it would be most unfair that I should be forced, through his own act, to take back my slave whom I wanted to alienate in perpetuity; nor should I in this case be more liable on mandate than that I sell him to you.6

Ulpian was a jurist and imperial bureaucrat who was murdered in 223 A.D.; Pomponius was a jurist active in the mid-second century. The text is not quite in proper form. “He who redeemed the slave” (is, qui servum redemerit) must mean “he who bought the slave to redeem him” because the slave has obviously not been redeemed. Otherwise, since he would now be free, he could not be returned as a slave to his former owner. If Aulus is the first owner of the slave, and Balbus is the purchaser, then


4. Thus, of necessity, I will not deal with any text from the republic or any of the standard cases, since these are covered by my five volumes: ALAN WATSON, THE LAW IN THE LATER ROMAN REPUBLIC (1965-1974); ALAN WATSON, THE CONTRACT OF MANDATE IN ROMAN LAW (1961) [hereinafter MANDATE]; ALAN WATSON, ROMAN SLAVE LAW (1987) [hereinafter ROMAN SLAVE LAW].

5. See generally, VINCENZO ARANGIO-RUIZ, IL MANDATO IN DIRITTO ROMANO (1949); WATSON, MANDATE, supra note 4.

6. DIG. 17.1.19 (Ulpian, Ad Sabinum 43). The Digest of Justinian was part of the codification of Roman law issued by the Byzantine emperor, Justinian I, with the force of statute, and which much later came to be called the Corpus Juris Civilis. The Digest, published in 533, is a huge collection of excerpts from writings of jurists who lived between the first and mid-third centuries A.D.
there are two contracts between Aulus and Balbus. First, there is a mandate from Aulus to Balbus to buy the slave, let us call him Pamphilus, with subsequent redemption. In mandate the "principal" has to indemnify the "agent" for any loss he suffers, and the "agent" is liable for fraud but usually not for negligence. Second, there is a contract of sale for the slave, Aulus being the seller, Balbus the purchaser.

The slave has been delivered to Balbus, but Balbus has repented of his agreement. He no longer wants to free the slave, but to return him to Aulus. Balbus seems not to have an action on the contract of sale which is perfectly valid and seems irreproachable, but what about mandate since the action is reciprocal? Balbus should not suffer loss from executing Aulus' mandate, so can he recoup by returning the slave and getting back the purchase price?

If Aulus personally, not the slave, had given Balbus a mandate to buy the slave and then free him, and Balbus bought but did not free Pamphilus, Aulus would have an action on mandate against Balbus to the extent of his interest. Balbus should go through with the mandate, but would be entitled to reimbursement from Aulus. But in actuality, the initiative was the slave's and the mandate was by the slave. We are not even told whether Aulus knew of the mandate. To what extent, the problem is, has the slave, Pamphilus, made his owner, Aulus, liable?

There is no reasonable, principled, answer in the absence of fraud and the issue of fraud is not raised. Balbus should, perhaps, go through with freeing the slave, and then sue Aulus on the mandate up to the level of the slave's peculium. But Balbus is unwilling to do so, possibly because there are insufficient funds in the peculium. And Aulus obviously has no burning desire that the slave be freed, and is not pressing Balbus to fulfill the mandate. The desire that the mandate be carried out is that of the slave. Balbus is in a difficult legal position. A mandatary may withdraw from the contract so long as nothing has been done on it, but thereafter he is liable to the mandator if he does not go through with it. Balbus has wilfully left the mandate incomplete, so he has no real title to sue Aulus.

Pomponius' solution is simply to hold that in the circumstances Aulus' liability to Balbus on mandate was restricted to selling the slave, Pamphilus, to Balbus. That is to say, the mandate was valid but Balbus,

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7. Any action on mandate to Balbus would in fact be for recompense in money, not to compel Aulus to take back the slave.
8. Perhaps, for some reason, it would have been more appropriate for Balbus to be the ex-slave's patron.
9. On the sale of a slave the peculium remained with the seller, unless otherwise agreed.
the mandatory, has no action against Aulus. Ulpian describes Pomponius’ discussion as elegant. So, in the event, is his solution.\textsuperscript{10} It would, indeed, have been unjust that a mandate between the slave and Balbus, primarily and obviously in the interest of the slave, would have put the burden on Aulus when Balbus was unwilling to complete the mandate. Pomponius, it should be stressed, claimed “it would be most unfair . . .”: a policy argument. Policy arguments are very uncommon in Roman law; but here no solution could otherwise be found.\textsuperscript{11}

A different approach to the problem or a related one was taken by the most famous of the Roman jurists, Papinian, who was executed in 212 A.D.: When a slave gives a mandate to a third party to buy him, the mandate is void. But if the mandate was to this end that the slave be manumitted, and the purchaser did not manumit him, the owner will both recover the price as seller, and also there will be an action on mandate on account of affection: suppose the son was his natural son or brother (for the jurists have agreed that in actions on good faith account is to be taken of affection). But if the buyer gave the price from his own money (nor can he otherwise be released by the action on sale), the question is frequently asked whether he can validly bring an action on account of the \textit{peculium}. And it seems more correct and expedient to hold that the praetor had not contemplated contracts of this kind by which slaves might take themselves away from their owners by bad cause.\textsuperscript{12}

Again Papinian is considering the situation where the slave took the initiative in giving a mandate to Balbus. A simple mandate by Pamphilus to Balbus to buy him is, he says, void. This would not, of itself, affect the validity of the subsequent purchase. If the slave’s mandate to Balbus was both that Balbus buy him and manumit him, and Balbus buys but does not free the slave, then Papinian holds both that the contract of sale is valid and Aulus has an action for the price, and also that the mandate is valid and Aulus will have an action on it. The mandator’s action lies for his interest in having the mandate carried out.\textsuperscript{13} Hence, since he has recovered the money due to him by the \textit{actio venditi}, the action on sale, we are expressly told that the \textit{actio mandati} will lie on account of affection. (Incidentally the text shows that in an action of good faith, the award which will always be in money may be for more than the plaintiff’s financial loss.)

\textsuperscript{10} It is noticeable that he does not say that the mandate to Balbus was only to buy the slave, but that Aulus’ liability on mandate was only to sell the slave.


\textsuperscript{12} \textsc{Dig.} 17.1.54.pr. (Papinium, Questionum 27).

\textsuperscript{13} See, \textit{e.g.}, Watson, \textit{Mandate}, supra note 4, at 111-24.
Papinian next turns his attention to the issue of a remedy to Balbus to the extent of the slave's peculium. This action cannot relate to the contract of sale since that was properly carried out. Thus, the mandate must have been performed by Balbus. Hence, presumably the slave was manumitted by Balbus, and the question is whether Balbus can bring the action on mandate against Aulus for his expenditure in fulfilling the mandate (the purchase price), restricted to the amount of the peculium. So this is not now the situation discussed by Pomponius. Papinian's solution is crude but effective. Balbus has no actio mandati because the praetorian remedies designed to give some protection to third parties contracting with slaves were not envisaged for cases where a slave was wrongfully removing himself from his owner. There is no principle here: in other situations where a slave acted wrongfully in making a contract the owner could be liable up to the amount of the peculium.

If we consider together the opinions of Pomponius and Papinian, whether or not we think their views are consistent with one another, the following picture emerges.

For Papinian, a slave's mandate to a third party simply to buy him is null. This is reasonable as a result, because either party can freely withdraw from the mandate until there is some performance or reliance on it. Performance is in fact the making of the contract of sale, and thereafter all issues between the parties can be resolved by rights under that contract. There is no need to discuss particular issues such as whether a slave can legally bind his owner by such a mandate. But the slave's mandate might be more extensive: that Balbus buy him, and then free him. For Pomponius, if Balbus bought and did not free, there was a valid mandate. Aulus was liable to Balbus on mandate, but in the absence of complete performance by Balbus, Aulus' liability was restricted to the sale. The result seems equitable, but no legal principle is discover-

14. The praetors were among the highest of the elected Roman officers of state, and among their duties was control of the main courts. At the beginning of his year of office, a praetor issued an Edict setting out the types of actions he would allow. Technically, this was not legislation, but in practice, the Edict was a most powerful source of law. The praetor (as here) could grant new actions, or change the scope of existing remedies. Praetors took over most of the Edict of their predecessors.

15. A more complex and principled explanation is provided by a rescript:
If a slave gave an outsider a mandate to buy himself, an action is thought to exist although neither from the person of the slave (because a free person could not give this mandate) nor from the person of the owner (since whoever gives a mandate that something be bought from him gives a mandate in vain), and this for the very best reason because the point is not that the action arises from the mandate itself, but that on account of the mandate the action arises on a different contract. It is settled that an action is acquired for the owner. CODE J. 4.36.1.pr. (Diocletian & Maximian 293). The remainder of the rescript seems rather confused but the action in question seems to arise from the subsequent sale.

The Code is that part of Justinian's codification that contained the rulings of the emperors.
able for the precise extent of liability on mandate. On similar facts Papinian discussed only Balbus’ liability to Aulus. Aulus had both the action on the sale for payment of the price and the action on mandate for any further interest in performance of the mandate, based on a personal affection for the slave. This would seem to be in accord with standard legal principles. Where Balbus both bought and freed the slave, Papinian held that the mandate was valid, but would refuse Balbus an action on that contract against Aulus because that was not the kind of slave’s contract that praetors had envisaged would make an owner liable to third parties. This is again a policy argument, such as, I have said, is found very rarely in Roman law, but no principle seems to exist that could determine the issue. I tend to believe, though cannot prove, that the policy argument appears simply because there was no principle.

II. A Slave’s Contract for His Prisoner-of-War Owner

A second issue concerns a contract of stipulation taken by a slave from a third party. The *stipulatio* was a formal, unilateral, verbal contract of strict law where one party asked the other if he promised to give or do something, and the other immediately responded, necessarily using the same verb. The promisor was very much bound by the wording of the stipulation; and it was a basic rule that one could not make a stipulation on behalf of another, except on behalf of the person in whose power one was. Since neither a person in power nor a slave could acquire anything, a *stipulatio* taken by a son or daughter in power or a slave immediately accrued in normal circumstances to the *paterfamilias* or the owner. But there could be problems, for example if a slave had two owners, or if he were the object of a usufruct. Thus:

A slave whose owner had been captured by the enemy stipulated for something to be given to the owner. Although whatever he had simply stipulated for or received from another would belong to the heir of the prisoner and the law is otherwise in the case of a son [of a prisoner-of-war] since he was neither in power at the time he took the stipulation


At Rome, a person was in paternal power so long as his or her father, or more remote paternal ancestor, was alive unless he or she had been formally released from power. Only persons, male or female, free from paternal power could own property. Hence, when a person in paternal power made a contract, all the rights and benefits under it went to the father.

17. See, e.g., Dig. 41.1.37.4-6 (Julian, Digestorum 44); 41.1.43.pr., 2 (Gaius, Ad Edictum Provinciale 7); 41.1.45 (Gaius, Ad Edictum Provinciale 7). For issues that could arise from ownership of a common slave see, e.g., Mario Bretone, *Servus Communis* (1958). Perhaps my favorite example is in Dig. 45.3.9.1: a slave owned in common by Titius and Maevius took a stipulation “for Titius or Maevius.” Cassius who is followed by Julian, and approved by Ulpian, held that the stipulation was ineffective. The slave cannot be creditor; and, since it does not appear whether Titius or Maevius is the creditor, neither can sue.
nor would he later (like the slave) be included in the inheritance, yet in the present case the question may be raised whether the heir acquired nothing from this stipulation, just as where a slave forming part of the inheritance stipulated on behalf of the deceased or of the future heir. But in this case the slave will be equated with the son. For even if a son of a captive took a stipulation for his father, the matter will be in suspense, and if the father died among the enemy, the stipulation will be seen to be without effect, because he stipulated for another, not for himself.

A Roman who was captured by the enemy immediately lost his citizenship and, indeed, was regarded as a slave of the enemy. If he died in captivity, then for succession purposes—only for succession purposes—he was regarded as having died at the moment of captivity so that (never having lost his citizenship) his succession would open up in the usual way. If he returned from the enemy in an honorable way, then he returned with postliminium. Postliminium is perhaps the subtlest part of Roman legal science. The former prisoner's rights were treated in different ways: thus, marriage (with two exceptions) was dissolved by capture and did not revive by postliminium; guardianship (tutela) that he exercised was ended by captivity, revived by postliminium, but not retroactively; patria potestas, obligations and property rights were suspended by captivity but if the captive returned with postliminium they were revived as if he had never been a prisoner.

The main issues in our text concern a stipulatio taken by a slave whose owner (Aulus, again) has been captured by the enemy. If the wording was: "Do you promise to give to me?" "I promise," then there was no real problem. The slave acquires the rights for his owner even if who the owner is cannot be determined at the moment. Thus, if Aulus returned with postliminium his property rights revived retroactively, and Aulus was entitled under his slave's stipulatio. If Aulus died in captivity, he was regarded for succession purposes as dead from the moment of capture, hence at the time of the stipulatio the slave belonged to the inheritance, and the rights under the stipulatio went to the heir when one was recognized.

The problem arises when the wording was "Do you promise to give

18. A slave, being property, would on his owner's death be part of the inheritance. In contrast, a son would on the death of his father become free from paternal power (unless there was a more remote male ancestor) and, indeed, would usually be one of the heirs.
19. Dig. 45.3.18.2 (Papinian, Quaestionum 27).
22. We need not go into details but it should be noted that, except for slaves of the deceased or persons who became free of paternal power on that death, Romans did not become heirs either on intestacy or under a will until they accepted the inheritance.
to Aulus?” "I promise.” If Aulus returned with postliminium, then his property and contractual rights revived retroactively, and the stipulatio was validly in his favor. But what if he had died in captivity? Then in at least one sense the slave had made the stipulation for an outsider—indeed, a non-person—in whose power he was not. But ought the heir be allowed to have right under the contract?

To help with the problem Papinian had recourse to the effect of a stipulation made by a filius familias, a son-in-power. Where the stipulatio is framed in the simple form (simpliciter) by the son, the result is not the same because, we are told “he was neither in power at the time he took the stipulation nor would he later (like the slave) be included in the inheritance.” This does not give a direct answer to the fate of the stipulation, and there is something not quite right with the first alternative.23 As the text makes plain further down, and as is confirmed by other texts, the effect of the stipulation is in suspense: if the father returns with postliminium, the stipulation is valid in his favor.24 Hence patria potestas must, for Papinian, have been restored retroactively. Where the father did not return, then since the son could not be regarded as part of the inheritance the stipulation would be valid for the benefit of the son.

But the real issue arises when the stipulation was taken “for Aulus.” Until the mortal fate of Aulus is sealed the matter is in suspense. When the promisee was the son and the father returned with postliminium, then the stipulation is valid and accrues to Aulus; if the father died in captivity, the stipulation was for a third party and is void. Papinian adds—actually very lamely—that here a slave can be equiparated to the son. Accordingly, if Aulus does not return, his inheritance does not acquire right to the stipulation, because when the stipulation was made, it was made for the benefit of a third person and so is void. Papinian does not further disclose his reasoning to that decision.

The text seems rather confused, but the author's thought process can be recovered. The question at issue is the status of a stipulation by a slave made expressly in the name of his owner when the owner has become a prisoner-of-war. The difficult case is where the owner dies in captivity. Papinian has no answer that can be reached by straightforward legal principle. So he takes two standard approaches together. By one, he proceeds from the simpler case—the stipulation simpliciter—to

23. Indeed, interpolations are suspected in the text: cf. AMIRANTE, supra note 21, at 93. As the remainder of this section of this paper will show, I treat the text as genuine. But the suggested interpolations do not affect the basic argument.

24. See, e.g., Dig. 45.1.11 (Paul, Ad Sabinum 2); 46.4.11.3 (Paul, Ad Sabinum 12); G. Inst. 1.129. The Institutes of Gaius are an elementary students' textbook, written around 161 A.D.
the one that concerns him. By the other he tries the approach by analogy: in many, though not all, ways, a master’s rights from a slave’s transaction are the same as a father-of-a-family’s rights from a son’s transaction.

But in this instance neither of these two approaches turns out to be fruitful. The simpler case provides no guidance for the difficult alternative in the more complex case. The analogy with the son also breaks down in the simpler case: this time the result of the stipulatio would differ according to whether it was made by a slave or son. So now Papinian has a real dilemma: no help from the simpler case or by analogy. So he cuts the Gordian knot by an assertion: that the analogy does work for the complex case even when the owner died a prisoner! But he can produce no convincing argument for the approach.

The text is thus very revealing. Papinian was faced with a tricky issue which he had real difficulty in resolving. He should, indeed, then have cut out his discussion of the simpler case and the analogy with the son, but they had been part of his mental workings, and they were retained. He might have used a more direct approach for the difficult alternative, which would have been at least as persuasive and would have given the same result. When Titius died in captivity his inheritance was treated as passing at the moment of capture. Hence when the stipulation was made “for Titius” at the time when he was a captive, it was, Papinian might have argued, made after his death, and was not part of the inheritance.

III. A Slave’s Compromise With a Villain

My third example of bargains made by “thinking property” relates to transactio, compromise. Transactio was a compromise (that involved no formalities) of a legal dispute, whether the action was pending, running its course, or even—if an appeal was possible—already decided. It was the abandoning of a claim in return for something given or promised, or the abandoning of a particular defense in return for some other concession.25

If my slave who had free administration of his peculium made an agreement not on account of a gift with a person who stole a thing from the peculium, this seems a valid compromise. For although the action on theft is procured (quaeratur) for the owner, nonetheless still the matter concerns the slave’s peculium. But even if the whole double penalty of theft was paid to the slave there is no doubt the thief would

25. Dig. 2.15; Code J.2.4. See also Buckland, supra note 16, at 525; Max Kaser, Das römische Privatrecht 642 (2d ed. 1971).
be released. It is in harmony (consequens est) with this that if it happened that the slave received from the thief what appears satisfactory on that account, there seems to be a real compromise.\textsuperscript{26}

The limits of a slave's administration of his \textit{peculium} were precisely those set by his owner, except that even if he were granted full powers of administration (libera administratio) he could not make a valid gift.\textsuperscript{27}

The text concerns a very particular type of issue, and this accounts for the emphasis in the text. \textit{Sed et si}, "But even if," introduces a more extreme case. \textit{Cui consequens est}, "It is in harmony with this," then proffers a decision that is now easy given the previous case. But why is payment to the slave of the full double damages for a theft a more difficult case for the release of the thief's liability than a compromise made to the slave?

The situation is this. Someone stole a thing from the \textit{peculium} of a slave (Pamphilus) whose owner (Aulus) had granted him free administration of it. The private law action on theft (actio furti) for double the value of what was stolen was in the air, was pending, otherwise a \textit{transactio} could not be involved. This action could be brought only by the owner. Ulpian emphasizes that the action was procured, "was created for," the owner. At this stage, Pamphilus makes a deal with the thief (Gnaeus); a deal in which the slave does not intend to make a gift. The issue is whether this is a valid \textit{transactio}, because if it is, the result is that Aulus' action is barred. Ulpian holds the \textit{transactio} valid.

"But even if"—introducing the more extreme case—the slave had received the full amount that the owner would have been awarded in the \textit{actio furti} the arrangement would have been valid. The point is that if the \textit{actio furti} had gone to fruition the award would have gone directly to Aulus, and would only fall into the \textit{peculium} if Aulus so wished. Indeed, the money would not form part of the \textit{peculium} until it was actually delivered to the slave by the owner.\textsuperscript{28} In contrast, where on account of the theft the thief paid the double value—the amount that would have been awarded if there had been an \textit{actio furti}—to the slave, the money would automatically be in the \textit{peculium}. Since the full amount of the claim was paid, a technical \textit{transactio} is not involved. The arrangement simply wipes out the owner's action automatically.

The slave's \textit{peculium} is in the ownership of his owner. But it may make a huge difference to the slave's owner, both in terms of law and of

\textsuperscript{26} Dig. 47.2.52.26 (Ulpian, Ad Edictum 37).

\textsuperscript{27} Dig. 2.14.28.2 (Gaius, Ad Edictum Provinciale 1).

\textsuperscript{28} For the nature of the \textit{peculium}, and acquisitions to it, see above all, W.W. Buckland, \textit{The Roman Law of Slavery} 187-206 (1908).
practical life, whether a sum of money is in the *peculium* of the slave or not. In terms of law, between master and slave the owner can arbitrarily strip the slave of all or part of the *peculium*. But the owner's position with regard to outsiders is very different. He cannot arbitrarily withdraw anything from the *peculium* in a way that would deprive a creditor of any recovery on the slave's contract or delict. 29 Hence, if some other party had an action against the owner because of a contract with the slave, he might well receive much more if the money from the thief had gone into the *peculium* than if it had not. In terms of practical life, the master would be affected if, for example, he had agreed with the slave to free him on payment of a fixed sum from the *peculium*. Such an agreement would seem to be common—it would be good for the slave's morale and encourage him to work harder, and the owner could use the money to buy a replacement. 30 The agreement, of course, would have no legal effect, but most owners would not depart from it lightly or arbitrarily. Such behavior would make not only that slave less tractable but the others also. So in practical terms here, it is much better for the owner that this money, not earned by the slave, not go into the *peculium*, but that the slave earn more and so build up the *peculium*.

It is in this sense that an arrangement is more extreme where Pamphilus receives all that might have been won in an *actio furti* than where he made a compromise. It is also more extreme in the sense that even where there is no technical compromise, *transactio*, but only a single payment of what might have been recoverable in Aulus' action, Pamphilus' behavior excludes the possibility of Aulus bringing a lawsuit.

For modern scholars with their interest in recovering the classical law of Ulpian from any subsequent manipulation up to and including its inclusion in the Byzantine *Digest of Justinian* there is more to the text. The substance of the text is thought by some scholars to have been altered. Above all, *non donationis causa*, “not on account of a gift,” is said to be suspect. 31 H.F. Jolowicz claims: “Only Byzantine subjectivism could make the validity of a compromise depend on the slave's intention; a classical lawyer would compare the amount received under the compromise with the value of the claim and decide accordingly whether there

29. We need not go into details, but for such remedies, the *actio de peculio, actio tributoria*, and the *vocatio in tributum* see Buckland, supra note 16, at 533-34.


31. I agree that one would expect it to have appeared before, not after, *cum eo*. But apart from doubts I might have about consistent elegance in Ulpian's style, a scribal slip cannot be excluded. It is not easy, in my view, to explain why an interpolationist would misplace the phrase.
was a gift or not."

The argument seems quite misguided. First, there is no independent evidence that Byzantine jurists were more interested in the subjective state of a party's mind than were the Roman classical jurists. Second, there are just too many situations—all of which could fruitfully have been studied for this paper—where a slave's state of mind is considered relevant, for one to think they are all the result of interpolation. Third, Ulpian is not stressing Pamphilus' state of mind. He is simply stating only that a gift was not intended: if a gift was involved, the problem would have been other. Fourth, the issue that interested Ulpian was something quite different: could an act by a slave bar his owner's action when the result was that anything obtained went into the peculium and not, as would otherwise have been the case, directly to the owner? Fifth, for a classical lawyer, as for most other lawyers, the validity of the compromise would not depend on the amount received compared with the value of the claim, but on the reasonableness of the compromise. That reasonableness could depend on the financial state of the thief, and the chances of recovery. That in the circumstances the compromise is to be regarded as reasonable is indicated by non donationis causa.

IV. A MANDATE TO A SLAVE TO PAY A DEBT TO HIS OWNER

A fourth example may again be chosen from the contract of mandate:

[I]f I gave a mandate to your slave that he should pay on my behalf what I owe you, Neratius writes that although the slave, having obtained a loan entered it into your account books as received from me, nonetheless if he did not take the money from the creditor expressly to give it on my behalf, neither am I released nor can you bring the action on mandate against me. But if he had borrowed expressly that he would give on my behalf, in both cases the answer is the opposite. Nor does it matter whether someone else or the same slave received in your name what was paid on my behalf. And this is the more correct view because as often as the creditor receives his own money the debtor is not released.

Paul was a junior colleague of Papinian in the imperial service, and Neratius was consul in 97 A.D. There are several situations discussed in the text—though I will deal only with the first two. The unifying factor is

32. HERBERT F. JOLOWICZ, DIGEST XLVII.2: DE FURTIS 79 n.26 (1940). See that note also for other suggestions of interpolation.
33. See, e.g., DIG. 18.1.12 (Pomponius, Ad Quintum Mucium 31); 41.1.37.4, 5, 6 (Julian, Digestorum 44); 41.2.1.10, 19 (Paul, Ad Edictum 54).
34. DIG. 17.1.22.8 (Paul, Ad Edictum 32).
the reason given in the last sentence: a debtor is not released when the 
money received by the creditor for the debt is already the creditor’s own.

It is important to note that although the mandatary, the agent, must 
act for free there is no legal difficulty in accepting that a slave may bind 
himself to act gratuitously under a mandate for another. He may thus 
make his owner liable to an actio mandati (up to the limit of the 
peculium).

The simplest situation is the second one: Marcus owes Aulus 
money, and he gives Aulus’ slave a mandate to pay his debt to Aulus. 
The slave, Pamphilus, to fulfill the mandate, borrows the money from 
Cornelius expressly in the name of Marcus. Since Cornelius delivers the 
money to Pamphilus expressly on behalf of Marcus, Cornelius does not, 
as otherwise would have been the case, make Aulus the owner on deliv-
ery. It is not Cornelius’ intention to make Aulus owner of the money. 
The slave delivers the money to Aulus and marks off in Aulus’ account 
books the payment of Marcus’ debt. Paul holds that Marcus’ debt is 
extinguished and that Aulus has an action on mandate against Marcus. 
The actio mandati lies for any loss falling to Aulus on account of the 
mandate, that is to say, because of any liability to Cornelius on the loan. 
The legal status of the loan is not simple. There is no legal relationship 
between Marcus and Cornelius! When X gives a mandate to Y to buy 
from Z, and Y acts, there is a contract of mandate between X and Y, and 
a contract of sale between Y and Z, but no contract between X and Z 
since in general Roman law did not recognize direct agency. Nor in 
this case can there be an action in rem of any kind to Cornelius against 
Marcus. A third person generally cannot acquire ownership through de-

delivery to himself for another person unless he is the general agent, procu-

rator, or in the power of that other. But as I said, the slave has not 
acquired ownership of the money for his owner Aulus, since Cornelius 
had no intention of giving to Aulus. Hence there is no contract of loan 
for consumption, mutuum, between Aulus and Cornelius since that con-

tract required transfer of ownership to the borrower. Rather, so long 
as the actual coins received by the slave can be identified, Cornelius will 
have the action claiming ownership, the vindicatio; thereafter Cornelius 
will have the general remedy of the condictio against Aulus, claiming that 
Aulus acquired something of which restitution ought to be made. Aulus’ 
actio mandati against Marcus is in respect to Aulus’ liability to Cornelius

35. See, e.g., Buckland, supra note 16, at 533-36; Aaron Kirschenbaum, Sons, Slaves 
36. See, e.g., Watson, supra note 20, at 109-29. 
37. See, e.g., Buckland, supra note 16, at 468-69.
under a *vindicatio* or *condictio* as a result of Marcus’ mandate to Aulus’ slave.

The first situation in the text now becomes simpler. When Pamphilus receives the money from Cornelius, without specifying that he is receiving it on behalf of Marcus, he receives ownership automatically for his owner, Aulus. There is thus a *mutuum* between Cornelius and Aulus, and Aulus will be liable up to the limit of the slave’s *peculium*. Even though Pamphilus marks off in Aulus’ account books that Marcus’ debt is paid, Marcus is not released, because in fact the debt has not been paid. Since Pamphilus did not expressly receive the loan on behalf of Marcus, he is not regarded as having acted on the mandate, hence his owner Aulus, cannot bring the *actio mandati* against Marcus.

**V. A RUNAWAY SLAVE’S PURCHASE OF SLAVES**

Mandate also provides us with a final example. The text in question, which is the first one printed below, presents some very odd features.

My runaway slave, when he was in the hands of a thief, acquired money, and procured slaves with it, and Titius received them by delivery\(^{38}\) from the seller. Mela says that by the action on mandate I would obtain that Titius restore them to me because my slave seemed to have given Titius a mandate to take by delivery, provided he had done this at the request of the slave. But if the seller had delivered to Titius without his request then I would bring the action on sale that the seller deliver them to me, and the seller would recover from Titius by a *condictio*, if he had delivered slaves to Titius which he did not owe, when he thought he owed them.\(^{39}\)

Mela was a jurist of the very early Empire. The first oddity is that on the text as it stands the legal decision is quite straightforward, and the facts seem unworthy of the seriousness of the treatment. A second oddity is that we are given facts that are irrelevant to the decision, for Roman juristic texts normally only give details that are in point for the case.\(^{40}\) Thus, on the facts stated, it is quite irrelevant for the decision that the slave acquired the money after he ran away, and not before. Third, if the slave bought the others and did not give the seller a mandate to deliver them to Titius, it is strange that the seller did so deliver them *under the*

\(^{38}\) All the references in the text to acquisition of ownership by delivery, *traditio*, would in Paul’s original have referred to *mancipatio*, a formal ceremony which then was needed for the transfer of slaves.

\(^{39}\) *Dig. 17.1.22.9* (Paul, Ad Edictum 32). Roman actions always lay for money. It is shorthand to write that the action was for the slaves.

impression that he was bound to deliver them to Titius. So many oddities cry out for an explanation.

But first we should take the text at face value. We are not told whether the money involved was part of the peculium, nor does it matter. A slave who ran away forfeited any right to administer the peculium. Strangely, a runaway slave was regarded as still in the possession of his owner, but even if that were not so, the important point is that the acquisitions of a runaway slave (like those of other slaves in most circumstances) became the property of his owner. Certainly when the slave was in the hands of a thief—even someone who subsequently took the slave—this was the case. The money used to buy the slaves was the money of the runaway slave's owner. If Titius received the slaves from the seller at the request of the runaway, Pamphilus, he would be acting on Pamphilus' mandate. A contract of mandate would thus exist between Titius and the slave's owner, Aulus. If delivery had been made in proper form with the required ceremony of mancipatio, Titius would have become owner. The reference in the second alternative to a condictio shows that in the situation envisaged, Titius had become owner of the slaves, because the seller had clearly ceased to be such. Where the slaves were delivered to Titius without Pamphilus' approval, no contract of mandate existed between Titius and the runaway's owner, Aulus, but the latter could have recourse to the contract of sale made by Pamphilus and the seller, on account of the failure to deliver the slaves. That seller, in his turn, can bring a condictio against Titius for indebiti solutio, the payment of a debt that was not owed.

There is nothing difficult or surprising or particularly subtle in all this, as a glance at two other texts will show:

If a runaway slave lent you money, the question is raised whether the owner has a condictio against you. And, indeed, if my slave who had been granted administration of his peculium lent to you, there will be a mutuum. But a runaway or another slave, lending against the wishes of his owner, by lending does not make the recipient owner. What therefore is the position? A vindicatio can be brought for the coins if they still exist; or if they have ceased to be possessed because of fraud an actio ad exhibendum (action for production) is available. But if you have used them up without fraud I will be able to sue you by condictio.43

In ignorance and good faith I bought your slave from a thief. He, with his peculium which belonged to you, acquired a man who was deliv-

41. See, e.g., Dig. 12.1.11.2 (Ulpian, Ad Edictum 26).
42. See, e.g., Buckland, supra note 28, at 269-70.
43. Dig. 12.1.11.2 (Ulpian, Ad Edictum 26).
ered to me. Sabinus and Cassius think you can bring a *condictio* against me for the man, but if I were out of pocket for the transaction your slave has made, I have in turn an action against you. This is correct...

Sabinus and Cassius were jurists of the early Empire.

Thus, to return to *Digest* 7.1.22.9. The rulings and discussion are banal if we take the text as it stands. After examination the unnecessary details and oddities appear still odder. But an explanation is perhaps at hand: in the transmission of the text a detail has possibly been lost. I should like to suggest that Titius is the person with whom the runaway slave has been living.

Such a suggestion would explain why the seller, without a mandate from the runaway, delivered the slaves to Titius, thinking he was bound to do so: he thought, mistakenly, that Titius was the runaway's owner. This would also explain why we are told that the runaway was in the hands of a thief: that is the relationship between the runaway and Titius. It then also becomes interesting, if eventually not legally relevant, that the runaway acquired the money in question when he was in Titius' hands.

So the legal issues become what are Aulus' legal rights when his runaway slave, Pamphilus, in the hands of Titius buys slaves with money that he acquired when he was with Titius, and the seller delivered the slaves to Titius?

The short answer is that Aulus' rights under any contracts made by his slave, even with Titius, are unaffected by the fact that Titius is regarded as the thief of Pamphilus. Thus, if the bought slaves were delivered to Titius at the request of Pamphilus, a contract of mandate exists between Aulus and Titius, and he can bring the *actio mandati* against Titius on account of the delivered slaves. It is perhaps because in the end Aulus' contractual rights are unaffected by the situation in theft between Titius and Aulus that Titius' position as thief has fallen from the text.

That the issue of rights between the thief of a slave and his owner

44. Again, references in the text to *traditio* would originally have concerned *mancipatio*.
46. *See supra* note 39 and accompanying text.
47. The position of Titius is not that of an American abolitionist. Rogues would help slaves to run away, taking with them valuables of the owner. The bargain was that the rogues, in return for payment to them by the slaves of their owners' valuables, would secure freedom for the slaves. The machinations and the law were complicated, with law usually trying to catch up with the villains' latest ingenuity. The classic discussion is DAVID DAUBE, *Slave Catching*, in *Collected Studies in Roman Law* 1, 501-13 (1991). A slave who ran away committed theft of himself (though he could not be sued by his owner), and anyone who helped him became an accomplice, liable in full to the standard action on theft, *actio furti*. 

was of interest to the jurists is well illustrated by the *Digest*: It is settled that, when a stolen slave steals from the thief, the thief will have on that account an action against the owner so that wrongful deeds of such slaves not only do not go unpunished but also are not a source of profits to the owners.\(^4\) Celsus was active at the beginning of the second century A.D. Buckland’s observation on this text is well-known and acceptable.\(^4\)

His claim was that this is “a grotesque case, but correct in principle.”\(^5\) Likewise it is grotesque but correct in principle that a runaway slave in the hands of a thief can put the thief under an obligation to his owner on mandate, the contract founded on “duty and friendship.”\(^5\)

In conclusion it should be noted that there was very little Roman law that was specific to slavery. In some areas a slave was treated as a human being; in these his legal position was very much akin to that of a son in paternal power. In others he was treated as property; in these his legal position was not much different from that of cattle.\(^5\)

Yet, still, as ‘thinking property,’ slaves in some areas caused the law to be very complex. This complexity was avoided in English-speaking America.

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48. *Dig.* 47.2.68.4 (Celsus Digestorum 12).
49. *See, e.g.*, *Jolowicz*, *supra* note 32, at 106 n.4; *Watson, Roman Slave Law*, *supra* note 4, at 59.