Four

The Slave as Thing

Though a successful slave might have manumission and citizenship as his goal, he always remained for the Roman, firmly and realistically, corporeal property whose value could be measured in monetary terms. This chapter is devoted to one aspect of the slave as property, namely, the treatment of the slave as a thing. Nonetheless, the human qualities of the slave will continually emerge. In this regard one significant change of attitude—which will be examined later in the chapter—deserves mention at the outset. At the time of the Twelve Tables of around 450 B.C., the breaking of a slave's bone gave rise to a fixed penalty that was estimated at 50 percent of such an injury to a free man; the slave is treated as a human, though of inferior status. By the time of the *lex Aquilia,* whose final version is probably to be dated to 287 B.C., though relevant portions are older, the killing of, and injuries to, slaves are classed along with the killing of, and injuries to, herd animals.

Though in law a slave could be treated as a thing, the law also stressed his humanity. Indeed, as will emerge continually in the three chapters succeeding this one, in many regards the legal position of a slave was very similar to that of a son—of whatever age—in paternal power. Certainly a free Roman who was still in the

power of the father could contract a civil law marriage (with the appropriate consent), whereas a slave was incapable of marriage, but otherwise at private law their positions were very similar. Thus, neither could own any property of any kind,[1] the fund called peculium given for their use by the father or master operated in law irrespective of whether the holder was slave or free, their contracts benefited and bound the father or master to exactly the same extent in exactly the same way, the master acquired property or property rights through them in the same way, and the master was liable at private law for their wrongdoing in the same way (even to the extent that where he could surrender a slave to the victim to exclude his further liability there, he could equally surrender a son). It goes without saying that in practice sons and slaves would be treated very differently. And sons had full public law rights and could hold the highest offices. Slaves also could not be parties in civil law suits.[2]

The Romans divided property into *res mancipi* and *res nec mancipi* until Justinian abolished the distinction. Slaves were classified as res mancipi:

> G.2.14a. There is a further[3] division of things: for they are either *mancipi* or *nec mancipi. Mancipi* are, for instance, land on Italian soil, likewise buildings on Italian soil, likewise slaves and those animals that are commonly broken in for draught or burden, such as oxen, horses, mules, asses. Likewise, rustic praedial servitudes, for urban praedial servitudes are *nec mancipi.*

Speaking generally we can say that res mancipi represented the more important class of property in an early agricultural society: the stress is obviously laid on what was useful for farmers.[4] The classification was early ossified, and in historic times no additions were made to the list.

The significant feature of the classification is that, whereas corporeal res nec mancipi required actual physical delivery but no formalities for transfer of ownership, res manicipi could only be transferred by a formal ceremony called *mancipatio* or by an adaptation of a legal process called *cessio in iure:*

> G.1.119. Now *mancipatio,* as I said above, is a sort of imaginary sale and it, too, is an institution peculiar to Roman citizens. It is performed as follows: When not less than five Roman citizens above the age of puberty

> are assembled together, with in addition another of the same status who holds the bronze scales and is called the *libripens* (holder of the scales), the person who takes in *mancipatio* speaks thus while holding the bronze: "I declare this slave is mine in accordance with the law of the Roman citizens, and let him have been bought by me with this bronze and with this bronze scale." Then he strikes the scales with the bronze, and he gives the bronze to the person transferring by *mancipatio*, as if it were in place of the price.

Clearly before the introduction of coined money the ceremony was an actual sale, and the purchase price, a specified weight of bronze, was actually weighed out. The ceremony also required the presence of the property to be transferred.[5]

If res mancipi were delivered with the intention of transferring ownership but without a mancipatio, then civil law ownership did not pass. But as a result of the praetor's Edict, the *actio publiciana* was introduced not later than the first century A.D.[6] The wording of this action, as addressed to the judge, ran:[7]

> If Aulus Agerius (the standard name for a plaintiff) bought a slave in good faith and he was delivered to him, then if the slave who is the subject of this action would have been his according to the law of the Roman citizens if he had possessed him for a year, and this is the subject matter of this action, if restitution is not made to Aulus Agerius, condemn Numerius Negidius (the standard name for a defendant) in so much money as the issue is worth. If it does not so appear, absolve him.

The action was also available with respect to other res mancipi, and the period of the prescription for moveables was one year. Thus, when informal delivery and not mancipatio was made to the buyer following a sale, the judge in any action brought by the buyer was to proceed as if the period of prescription had run, and if this would have given the buyer ownership, the judge was to condemn the defendant in whatever would have been due to the owner.

The slave could be the subject matter of a contract such as sale or hire in a way that is basically no different from the sale or hire and so on of other chattels. One or two special features in sale may be noted.

The contract of sale which could be validly formed simply by the agreement of the parties, without fixed formalities, is very much a

Roman invention and is probably to be dated to the third century B.C. Like most great legal inventions, it was not perfect at the outset, and it suffered for a long time from two major defects, namely, that there was no inherent warranty of title or of the buyer's right to undisturbed possession and no inherent warranty against latent defects. The seller's duties were satisfied if he acted in good faith and if he made actual physical delivery of the object sold and had shown proper care until delivery.[8] The buyer was to be protected in two ways, with regard to latent defects and the right to undisturbed possession.

First, the curule aediles—the aediles were the magistrates who had control over the streets and marketplaces—issued an edict relating to the sale of slaves in the Roman market. The earliest version, probably of the early second century B.C., ran:[9]

> See to it that the label of each slave be so written that it can rightly be understood what are the diseases or defects of each, who is a runaway or given to wandering off, or is liable to noxal surrender.[10]

There is no indication in the edict that it gave the buyer a direct remedy against the seller. But this edict was replaced during the Republic by:

> *D.*21.1.1.1 (Ulpian, book 1 on the *Edict of the Curule Aediles*). The aediles declare: "Let those who sell slaves inform the purchasers what are the diseases and defects of each, who is a runaway or given to wandering off or who is liable to noxal surrender. And when the slaves are sold, let them declare all these matters openly and correctly. But if a slave is sold contrary to these provisions or contrary to what was said or promised when he was sold, in respect of which a legal duty is alleged,[11] we will grant to the buyer and to all whom the matter concerns an action for the redhibition of the slave (within six months of the time when it first became possible to bring an action on that account). But if the slave is made worse after the sale and delivery by the work of the buyer or his household or his procurator, or if anything is born to or acquired by the slave after the sale, and if anything went with the slave as an accessory in the sale, let him make full restitution. Likewise let the seller recover any accessories that he provided. Likewise let sellers declare at the time of sale if the slave had committed a capital crime or had attempted suicide or had been sent into the arena to fight with wild beasts. For we will give an action on such matters. All the more will we give an action if anyone is said to have sold fraudulently, knowingly contrary to these provisions.

Another clause of the edict dealt with the sale of animals in the market. Thus the seller in the market had to declare particular defects, and he was liable if he failed to make the declaration or if he made a false declaration. Fraud or negligence on the seller's part was not needed. Nonetheless, the seller could avoid liability if he made it clear that he was undertaking no guarantees, and this was done by having the slave who was sold wear the pilleus, the cap of liberty.[12] An alternative action that could be brought within one year on the same facts as for the *actio redhibitoria* was the *actio quanto minoris* for the difference between the price paid and a realistic price; later the time periods were two months for the actio redhibitoria, six months for the actio quanto minoris.[13]

The second means of protection for the buyer was to take express guarantees by *stipulatio* from the seller against eviction and against latent defects. These guarantees were traditional, usually, with regard to defects, had much the same scope as the provisions of the aedilician edict, and were at some stage made inherent in the contract of sale, while the provisions of the aedilician edict were generalized to relate to the sale of things, and to all sales, whether made in the market or elsewhere.

There was, of course, considerable controversy as to what counted as *morbus*, disease, and as *vitium*, defect, and the dividing line between them. A few texts will serve as sufficient illustration.

> *D.*21.1.1.7. But it is to be noted that Sabinus defines disease as an unnatural state of the body, which impairs its usefulness for the purpose for which nature gave us bodily health. He says it may sometimes affect the whole body, sometimes only a part (for a disease of the whole body is, for instance, tuberculosis or fever; that of a part, for instance, blindness, even if the slave is so born). He says there is a great deal of difference between a defect and a disease; for instance, if a person stutters he seems more to have a defect than be diseased. But I think the aediles, in order to remove doubt, said the same thing twice, so that no doubt would remain. 8. And thus, if there is any disease or defect which hinders the use and services of the slave, it will give rise to redhibition provided we remember that a very trivial fault will not cause him to be diseased or defective. Thus, it is not a fault not to have declared a light fever or old malaria which can now be disregarded or a minor wound. Therefore, let us give examples of who are really diseased or defective. 9. In the writings of Vivianus the question is raised. If a slave does not

> always shout his head off among fanatics and somehow prophesies, is he nonetheless to be considered healthy? And Vivianus says he is nonetheless healthy, for we ought not to consider persons unhealthy because of a defect of the mind, because otherwise it would be the case that we could deny that many were healthy by sophisticated reasoning, for instance that he was lightminded, superstitious, irritable, stubborn, or had other similar defects of character. The guarantee is given rather on account of the health of the body than of defects of the mind. Sometimes, however, a bodily defect reaches the mind and deranges it such as happens to a lunatic as a result of fever. What then is the position? If a defect of the mind is such that an exception of it should be made by the seller, and the seller had said nothing though he was aware of it, he could be liable to the action in the contract of sale.

> *D.*21.1.4.2 (Ulpian, book 1 on the *Edict of the Curule Aediles*). Likewise Pomponius says he gave a reply that gamblers and wine drinkers are not covered by the edict, just as greedy or deceitful or begging or quarrelsome slaves are not covered. 3. Pomponius also says that although a seller is not bound to provide a very intelligent slave, nonetheless if he sells one so silly or moronic that no use can be made of him then there is a defect. But the law seems to be that the terms *disease* and *defect* apply only to the body. The seller will make good a defect of the mind only if he gave an express promise, and otherwise not. That is why the edict expressly refers to wanderers and runaways, since that is a defect of the mind, not of the body. . . . 4. In short, if there is only a defect of the mind, there can be no redhibition unless it was said to be absent and it was not. But an action can be brought on the contract of sale if knowingly he was silent about a defect of the mind.

> *D.*21.1.6 (Ulpian, book 1 on the *Edict of the Curule Aediles*). Pomponius rightly says this edict relates not only to permanent but also to temporary disease. 1. Trebatius says a slave with impetigo is not diseased if he can make equally good use of the limb which has the impetigo. And the opinion of Trebatius seems to me to be correct. 2. It seems to me the more correct view that a male slave who lacks generative power is neither diseased nor defective, just as is the case with a slave who has one testicle but is capable of procreating.

> *D.*21.1.7 (Paul, book 11 on *Sabinus*). But if a person is a eunuch to the extent that such a necessary part of the body is lacking then he is diseased.

> *D.*21.1.9 (Ulpian, book 44 on *Sabinus*). Sabinus says one who is dumb is diseased; and it appears that a dumb person is one who has no voice. But one who speaks with difficulty is not diseased, nor is one who speaks

indistinctly. Of course, one who speaks unintelligibly is indeed diseased.

*D.*21.1.11.3 (Ulpian, book 1 on the *Edict of the Curule Aediles*). Caelius says Trebatius drew a distinction in the case of sterility so that if a woman was sterile by nature she was healthy; if as a defect of the body, she was not.[14]

As for the other defects that had to be declared, it is more appropriate to deal with liability to noxal surrender and exactly who was a runaway later in this volume, but we have an important text for the definition of a wanderer, and wandering off was one of the faults that had to be declared under the edict:

*D.*21.1.17.14 (Ulpian, book 1 on the *Edict of the Curule Aediles*). Labeo defines a wanderer thus, as a cowardly runaway, and, conversely, a runaway as a great wanderer. But we appropriately define a wanderer thus: a person who indeed does not run away, but who frequently wanders without cause and having spent his time in unprofitable pursuits, returns home late.

Slaves might be sold subject to conditions that could have no real application for other goods. A short *Digest* title, 18.7, is dedicated to the subject. Thus, for example:

*D.*18.7.1 (Ulpian, book 32 on the *Edict*). If a slave was sold under the condition that he not remain in a particular place, the seller is in the position to remit the condition, even to remain in Rome. Papinianus replies the same in book three. For, he says, the condition is observed for the security of the master, so that he is not exposed to danger.

Such a condition, that a slave be exported, was usually protected by a penalty imposed on the buyer in case of breach.

*D.*18.7.3 (Paul, book 50 on the *Edict*). If a slave is sold under this condition, that he be manumitted within a certain time, then he becomes free if he is not manumitted, provided the seller persevered in his intention. The wishes of an heir are not to be examined.

*D.*18.7.4 (Marcellus, book 24 of *Digest*). If a person under twenty sold and delivered to you a slave on the understanding that you would manumit him, the delivery is of no effect, even although he delivered with the intention that you would manumit when he became twenty. It makes little difference that he postponed the grant of liberty, for the law

stands firm against his intention, which is treated as insufficiently strong.

This text has to be read in the context of the provision of the lex Aelia Sentia that masters under the age of twenty were not permitted to manumit except vindicta and with adequate reason for the manumission shown before a council. Another condition that could have no application to other things was that a sold slave woman not be prostituted.[15]

A slave might also be treated as a thing in a different way and be the object of a legacy. Little need be said about this subject, since it is very much an ordinary part of the law of succession and reveals nothing important about slavery. Thus if a specific slave is the object of the legacy, the heir is to give him as he is. Should the heir by mistake make a promise of quality, the promise is ineffective.[16] The position is rather different when the legacy is simply of a slave to be chosen by the heir:

*D.*30.110 (Africanus, book 8 of *Questions*). If an heir, instructed generally to give a slave whom he selected, knowingly gave a thief and he stole from the legatee, Julian said the action for fraud could be brought. But, since the true position is that the heir is bound in this that he not give a very bad slave, he must provide another slave and leave the former in noxal surrender.

But though the heir must not give a very bad slave, he need not give a very good one, and hence he is not bound to give a warranty of quality, though he must guarantee that the slave is not subject to noxal surrender.[17] (This handing over of a wrongdoing slave will be discussed in the next chapter.) The slave who was the object of a legacy could belong to the testator, the heir, or an outsider. If he belonged to the heir and after the testator's death the heir freed him or transferred him to someone who freed him, then the heir had to pay the legatee the value of the slave, even if he had been unaware of the legacy.[18] But when the impossibility of performance of a legacy could not be ascribed to the heir, he was freed from the obligation of performance, and so this was the case where the owner of the slave was an outsider and he had freed the slave. Other aspects of the legacy of a slave may here be ignored.

More significantly, a slave was treated as a thing in that an injury might be done with respect to him, and any right of action would accrue to the master, not to the slave. Slaves had no right to sue. The three principal wrongs in respect of a slave may be said to involve his killing or physical injury, his theft, and assault, physical or verbal, on him. We will treat these in order.

The Twelve Tables of around the mid-fifth century B.C. contained three provisions on physical injury, which may be translated only with difficulty. Thus:

> *Twelve Tables,* 8.2. If a person has burst a part of another person's body (*si membrum rupsit*), let there be retaliation in kind unless he makes agreement for composition with him.[19] 8.3. If with hand or club he has broken a freeman's bone (*si os fregit*), let him undergo a penalty of 300 pieces; if a slave's, 150.[20] 8.4. If he has done simple harm to another, let the penalty be 25 pieces.[21]

How these three provisions relate to one another and together cover the field of physical injury (assuming that they did), and in particular the nature of the distinction between "bursting a part of the body" and "breaking a bone," has long been a matter of dispute. Suggestions include the idea that *Twelve Tables,* 8.2, refers to the use of a cutting instrument, or that that provision relates to the total destruction of a limb. My view is that *Twelve Tables,* 8.2, is a general clause for assaults that involve a deterioration of the body, and hence would include the breaking of a bone, and that the function of 8.3 is simply to set out the minimum penalty when a bone is broken. *Twelve Tables,* 8.4, then, refers to physical assaults where no deterioration occurs.[22] The precise scope of each provision is of less importance for us than the fact that *Twelve Tables,* 8.3, the sole one expressly to mention slaves, clearly treats the slave as a human being, though one of lesser stature than a free person. This was all to be changed by the lex Aquilia, of which the final redaction is traditionally dated by modern jurists to 287 B.C.,[23] though chapter 1[24] is almost certainly earlier:

> *D.*9.2.2.pr. (Gaius, book 7 on the *Provincial Edict*). The *lex Aquilia* provides in its first chapter: "Whoever wrongfully killed another's male or female slave or four-footed herd animal, let him be condemned to pay to the owner whatever was the highest value in the past year."

In this chapter and again in chapter 3, slaves are classed with domestic animals:

> *D.*9.2.13.pr. (Ulpian, book 18 on the *Edict*). A free man has on his own account a praetorian action modeled on the *lex Aquilia*. He has not the direct action since no one is regarded as the owner of his own limbs.

A few texts illustrative of the working of chapter 1 of the lex Aquilia are also relevant for our understanding of the position of slaves.

> *D.*9.2.22.1 (Paul, book 22 on the *Edict*). Likewise, elements of value attaching to the body are taken into account if one kills one of a team of actors or singers or of twins or of a chariot team or of a pair of mules: a valuation must be made not only of the body that was destroyed, but account must also be taken of the amount by which other bodies are depreciated.

Thus, the killing of one of a team of slaves is put on exactly the same level as the killing of one of a pair of mules.

> *D.*9.2.23.pr. (Ulpian, book 18 on the *Edict*). Hence Neratius writes that if a slave who is instituted heir is killed, the value of the inheritance is also counted. 3. Julian likewise writes that the valuation of the slave killed is made at the time when he was worth most in the past year. Hence if the thumb of a valuable painter was cut off and within a year of the injury he was killed, the owner can bring the Aquilian action and the slave will be valued at the value he had before he lost his skill along with his thumb. 4. But even if a slave was killed who had committed serious frauds in my accounts, and whom I had destined for torture to extract from him the names of his associates, Labeo correctly writes that he is to be valued at the amount of my interest in discovering the slave's frauds, that is, of those committed through him, not at the value of the harm done by him.

> *D.*9.2.33.pr. (Paul, book 2 on *Plautius*). If you killed my slave, I do not think that personal feelings should be estimated in financial terms; for instance, if someone killed your natural son whom you would have bought at a high price, but only for what he was worth to everybody. Sextus Pedius indeed writes that the prices of things are to be taken generally and not from the feelings of, or usefulness for, individuals. Thus, a person who possesses his natural son is not richer because he would have bought him for a higher figure if someone else possessed him, nor does one who possesses another's son have as much as he could sell him for to the father. For in the *lex Aquilia* we recover the financial

loss; and we are said to have lost either what we could have gained or were forced to pay out.

The basic decision, that damages should be in terms of what the object would generally be reckoned to be worth and not what one individual might pay, is reasonable. Yet the argument of Paul at the end of the text is unconvincing.

D.9.2.11.pr. (Ulpian, book 18 on the *Edict*). Again, Mela writes: If, when persons were playing with a ball, one of them hit the ball too hard and knocked it against the hands of a barber, and thus the throat of a slave whom the barber was shaving was cut by the razor being jerked against it; in such a case whoever of them is negligent is liable under the *lex Aquilia*. Proculus says the negligence is the barber's; and certainly he is at fault if he was shaving where people habitually played or where the traffic was heavy: nonetheless it is reasonably said that if a person entrusted himself to a barber who had his chair in a dangerous place, he has himself to blame.

D.9.2.7.4 (Ulpian, book 18 on the *Edict*). If one kills another in wrestling or in the *pancratium* or in boxing, if one kills the other in a public contest, the Aquilian action does not lie, because the damage is thought to have been in the cause of glory and valor, not in the cause of wrongdoing. But this does not apply in the case of a slave, because it is customary only for freeborn persons to enter the contest. But it does apply if a son is injured. Of course if one wounds someone who is giving in, the Aquilian action will lie, or if he kills a slave who is not a party to the contest except where it happens when the master put the slave up to fight: For then the Aquilian action does not lie.[25]

Pancratium was a form of boxing and wrestling combined with kicking and strangling. Biting and gouging were prohibited, but not much else, and it was a highly dangerous sport.

Chapter two concerned a type of fraudulent behavior in contract, but chapter three is again relevant.

D.9.2.27.5 (Ulpian, book 18 on the *Edict*). The *lex Aquilia* says in the third chapter: "In respect of other things, apart from slaves and herd animals killed, if anyone causes another financial loss because he burnt, broke, or burst (*quod usserit, fregerit, ruperit*) wrongfully, let him be condemned to pay as much to the owner as the matter will appear to be in the next thirty days.

How far this text gives the original wording is disputed, as is the original scope of the chapter. But the best opinion is probably that originally the main purpose was to give an action for the wounding of slaves and four-footed herd animals.[26] The recurrence here of the verbs *rumpere* and *frangere*, found in the Twelve Tables' provisions, would seem to indicate that the chapter was to replace them. Certainly for all periods where we have direct information, the chapter covered injuries to slaves and animals of all types (as well as inaminate things). No text on the lex Aquilia turns on the meaning of frangere, and rumpere has a general significance of causing injury.

D.9.2.27.17. We accept that the term *rumpere* applies to one who injures with a rod or with a fist or a weapon or anything else so as to cut the slave's body or raise a bruise, but only provided financial loss is wrongfully caused. But if he did not make the slave worse or reduce his price, the Aquilian action will not lie and one will have recourse only to the *actio iniuriarum*. For the Aquilian action pursues only such cases of *rumpere* as cause financial loss. Therefore, even if the value of the slave is not reduced but expenses are incurred in his health and cure, it seems to me that loss is caused and therefore one can sue by the *lex Aquilia*. 28. And if someone castrates a slave boy and makes him more valuable, Vivianus says the Aquilian action does not lie, but an *actio iniuriarum* is to be brought, or one under the aedilician edict or for fourfold.

Not every killing or wounding of a slave gave rise to an Aquilian action, only those done "wrongfully." The relevant term, *iniuria*, was originally taken to mean "without right," but it came to be understood usually as "negligently or maliciously." But, especially when the victim was a slave, the old understanding often retained its force.

D.9.2.30 (Paul, book 22 on the *Edict*). A person who kills another's slave caught in adultery is not liable under this statute.

D.9.2.4 (Gaius, book 7 on the *Provincial Edict*). And so if I kill your slave lying in wait to rob me, I shall be safe; for against danger natural reason permits a person to defend himself. 1. The law of the Twelve Tables permits one to kill a thief caught at night, provided he give notice with a shout; a person caught by day, the law allows to be killed if he defends himself with a weapon; in this case, too, notice must be given with a shout.

By the time of Ulpian (and perhaps earlier) it came to be accepted that if in circumstances like those described by Gaius a person preferred to kill than make an arrest he would be liable civilly under the lex Aquilia and criminally for murder of the slave by the lex Cornelia.[27] Paragraph 1 of Gaius seems in the *Digest* to be a historical reminiscence.

Theft was treated primarily as a civil wrong, and a private law action was available to the victim. Slaves, like other property, could be stolen, but two factual peculiarities arise from the human nature of slaves: first, the slave might wish to be stolen, and even assist in his theft; second, the wrongdoer's motive need not simply be financial gain. The two issues are intertwined. There is some conflict in the texts on both issues, and it is tempting to think that the law was not entirely settled or stable.

> *D.*47.2.36 (Ulpian, book 41 on *Sabinus*). A person who persuaded a slave to run away is not a thief; for a person who gives bad advice does not commit theft, no more than if he persuaded the slave to hurl himself from a height or do himself violence: for these grounds do not give rise to an action for theft. But if one person persuaded him to flee in order that he be seized by another, the former will be liable on the action for theft as if the theft had been committed by his aid and advice. Pomponius further writes that a persuader, even although he is not liable for theft in the meantime, then begins to be liable for theft when anyone becomes the thief of the runaway, the theft being regarded as if it had been by his aid and advice.

The view of Pomponius is, as the wording of the text indicates, more extreme than the opinion expressed in the preceding part of the text, and this can only be the case if he actually held, as he seems to have, that if one person does nothing more than persuade the slave to run away, and the slave does so, and then at some later stage a complete outsider steals the slave, then by a sort of fictional notion the person who persuaded the slave to run away is treated as a thief by complicity. This view, which might be generalized as a claim that, if by one person's deliberate wrongdoing, a factual situation is created which enables another person to steal, then the first person is regarded as an accomplice, seems to appear in other texts but was by no means universally held by the jurists.[28]

An even greater conflict of opinion emerges when we bring *D.*47.2.61 (Africanus, book 7 of *Questions*) into consideration:

> Just as a runaway female slave is understood to commit theft of herself, so she makes her offspring stolen property by handling it.

Theft is committed by wrongful handling—not necessarily taking away—and the interest of the situation for Africanus is that stolen property cannot be usucapted even in good faith until the property has been returned to the owner. For us it is more interesting to note that if it had been established law that a runaway slave was a thief of himself, then Ulpian, in the text we previously looked at, would have to have held that a person who persuaded the slave to run away was always liable to the action on theft.

Probably in the context of a willing slave victim should be placed *D.*47.2.68.4 (Celsus, book 12 of *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 profit to their owners.

Buckland observes that this is "a grotesque case, but correct in principle."[29] The reasoning is that a person who had an honest interest in a thing not being stolen was entitled to bring the action on theft, and he did not lose his entitlement simply because he was otherwise dishonest. Thus, in this text the original thief did have an honest interest in the safety of his property, so he could sue the slave's owner for the theft. By the same principle, if an owner steals an object he had given in pledge and it is then stolen from him, he does have an action on theft by virtue of his title as owner.[30] Of course, in our text the slave must have reverted to the control of his master, because actions on account of wrongdoing by a slave lie against the person who has control over him at the time the suit is brought. The master in his turn also had right to sue the thief by the action in theft for the stealing of his slave. Still, the decision seems "grotesque" because the slave was enabled to steal as a result of the plaintiff's own theftuous activity, and the defendant master was entirely innocent and was not in control of the slave at the time of theft. Yet it is entirely in accord with principle.

On the second peculiarity arising from theft because of the human nature of slaves there are four main texts:

> *D.*4.3.7.7 (Ulpian, book 11 on the *Edict*). Likewise Labeo asks, If you released a slave of mine in chains in order that he flee, should an action in fraud be given? And Quintus, in a note on him, says: "If you did this when you were not guided by pity you are liable to an action for theft; if you were guided by pity, a praetorian action should be given on the facts."

The action on fraud was available only where no other established action was available; hence the very fact that Labeo poses the question in the way he does shows that he excludes the possibility that the action on theft was available. This presumably means he considered that a runaway slave did not steal himself, and hence the person who released him could not be an accomplice in theft. For Quintus the legal position was different. If the motivation for the release was pity, then no action on fraud would be given but simply a remedy on the facts. Otherwise Quintus would allow an action on theft. His opinion is not entirely clear. He could either have considered that the runaway stole himself and therefore the releaser was an accomplice or have held that an intention to make a gain was not needed for theft and that any deliberate conduct inspired by unworthy motives which deprived someone of his property was theft.

The other three puzzling texts should be looked at together:

> *D.*47.2.83.2 (Paul, book 2 of *Opinions*). A person who, because of lust, carried off a slave woman who was not a prostitute is liable to the action on theft; and; if he keeps her hidden, he is liable to the penalty of the *lex Fabia.*

> *P.S.*2.31.12. A person who, because of lust, carried off and concealed a prostitute is also, it is settled, liable to the action on theft.

> *D.*47.2.39 (Ulpian, book 41 on *Sabinus*). It is good law that if a person seized or hid another person's female slave who was a prostitute there is no theft. For we look to the cause of the act, not the act itself; and the cause of the act here was lust, not theft. And therefore, likewise, a person is not liable to the action for theft who, to gratify his lust, broke down the doors of a prostitute's house, and thieves entered who were not led in by him but were acting independently. But would a person who concealed a whore to gratify his lust be liable under the *lex Fabia?* I do not think he would, and I gave that opinion on an actual case. His behavior is worse than that of a man who steals, but he can set against his disgrace that he is certainly not a thief.

These three texts concern an aspect of the more general problem of whether an intention to make a gain was essential to theft. It should be said that many texts imply that there was such a requirement, but if so, then these others suggest that the requirement could at times be loosely interpreted.[31]

Of the three texts, two survive in Justinian's *Digest,* and they do not actually conflict, though it is difficult to understand why it was theft to carry off a nonprostitute slave to gratify one's lust but not theft to carry off a prostitute slave for the same reason. Nonetheless, that would seem to have been the law in the sixth century. Two texts appear to come from the same book of Paul's *Opinions* and, again, they do not actually conflict, though often doubt has been expressed whether both could have been written by the same author in the same work. There is, of course, total conflict between Paul in *P.S.*2.31.12 and Ulpian in *D.*47.2.39, a conflict made worse by Paul's claim that the law is settled and Ulpian's statement that the contrary is good law. Perhaps one text, more likely that of Paul, does not give the thought of the classical jurist. Or Ulpian was deciding against the common opinion: that may be why his discussion is fuller than is usual. The *lex Fabia,* which is mentioned in two of the texts, was the law that was concerned with kidnapping.

The third major type of wrong where a slave might be the object of the wrong was iniuria, which covered defamation or physical assault of a kind (where slaves were concerned) that did not reduce the slave's value or cause the owner financial expenditure. The praetors issued a number of edicts on iniuria, of which one was expressly concerned with iniuria to slaves:

> *D.*47.10.15.34 (Ulpian, book 77 on the *Edict*). The praetor says: "Whoever is said to have beaten another's slave contrary to good morals or to have put him to examination by torture without authorization of the master, against him I will grant an action. Likewise if anything else is said to have been done [*something here seems to be missing from the text*] I will grant an action after investigation of the facts."

Thus, the edict is really in two parts: where the allegation is that the slave was beaten contrary to good morals or was put to torture without the master's authorization, the praetor will give the action without further ado; where the allegation is of something else, the praetor will grant the action only after consideration of the facts.[32] The text of Ulpian proceeds to elaborate the first part of the edict:

> 38. The edict adds "contrary to good morals" to show that it is not everyone who beats who is liable but one who beats contrary to good morals. If anyone does beat a slave but with the intention of correcting or reforming him, he is not liable. 39. Hence Labeo asks, if a municipal magistrate whips my slave, can I bring the action against him on the charge that he beat him contrary to good morals? And he replies that the judge should investigate what my slave was doing that caused the beating; for the magistrate should not be liable if he struck a slave who impudently sneered at his dignity or badge of office. 40. "To have beaten" is not properly used of someone who struck with his fists. 41. By "examination by torture" we understand torment and bodily pain applied to extract the truth. Therefore mere interrogation or moderate use of terror does not come under this edict. What are called "the bad quarters" are included in the terms "examination by torture." Therefore when any examination is conducted with violence and torment, then "examination by torture is understood."

The actio iniuriarum, of course, could only be brought by the owner, and any award would go to him, but the action might be brought *suo nomine,* on his own account—that is, the master's—or *servi nomine,* on the slave's account. On the former hypothesis the insult was regarded as being to the master, in the latter it was enough that the injury was to the slave. Thus, actions servi nomine would be restricted to the more serious cases, and any action brought under the first part of the edict could be servi nomine. Of course, even when the action was brought on the slave's account the plaintiff would be the owner, since slaves had no legal standing.

> *D.*47.10.15.35. If anyone does an injury to a slave which is also an injury to the master I believe the master can bring the *actio iniuriarum* on his own account. But even if he did not act with the intention of insulting the master, injury inflicted on the slave should not go unpunished by the praetor, especially if it were done by beating or by examination under torture; for it is clear that the slave also would feel this.

Cases of the action's being brought suo nomine would be when the wrongdoer's behavior constituted an invasion of the master's proprietary rights, as in *D.*9.2.27.28, where a slave boy was castrated without authority, or when the wrongdoer's intention was to insult the master through the vehicle of the slave. Thus:

> *D.*47.10.15.45. Sometimes the injury done to a slave rebounds to the master, sometimes not. For Mela writes that I cannot sue a person for injury to me if he would not have struck a slave had he known he was mine; a slave, that is, who was behaving like a free man or whom he thought was another's rather than mine.[33]

When the action was servi nomine under the second part of the edict, the injury must not have been too slight:

> *D.*47.10.15.44. Thus the praetor does not promise an *actio iniuriarum* on account of the slave in all instances. For if he was only lightly struck or not grossly abused verbally he will not give an action. But if the slave was defamed by an act or by scurrilous verses I think the praetor's investigation of the facts should be extended to the quality of the slave: for it makes a great deal of difference what kind of slave he is, whether he was a frugal, methodical household steward or in fact very ordinary or a drudge or some such. And what if he was chained, or known to be of bad character, or even branded? Thus the praetor will take account both of the nature of the alleged injury and of the person of the slave alleged to be injured, and so he will permit or refuse the action.

There were, of course, other minor instances in which a master had an action for an injury to him when a slave was the object. The most important is probably the edict for making a slave worse:

> *D.*11.3.1.pr. (Ulpian, book 23 on the *Edict*). The Praetor says: "Whoever is said to have with deliberate wrongful intention taken in another's male or female slave or persuaded him or her to do something which made him or her worse, against him I will give an action for double the matter in issue."

The edict then apparently went on to state that a noxal action would be given when the wrongdoer was a male or female slave.[34] The action lay whether the slave was made physically or morally worse, and damages were not restricted to a diminution in the value of the slave:

> D.11.3.16 (Alfenus Varus, book 2 of *Digest*). A master freed a slave who was his household superintendant and then received the accounts from him. When the accounts were not in order he discovered that the slave had spent the money with a certain little woman. The question was raised whether he could bring the action for making a slave worse against that woman, since the slave was now free. I replied that he could, but he could also sue on theft for the money that the slave had brought her.

I have reserved for the end of the chapter a topic of consuming social and legal interest which might have been dealt with under theft but wherein the slave, although the object, can scarcely be thought a victim. I refer to the law of the sale of runaway slaves.[35] What was in issue was, from the point of view of the masters and the authorities, a wicked racket. A slave who wished to get himself owned by a particular new master or, more likely, wanted to obtain his freedom would run away, taking with him his peculium or property belonging directly to his master. He would then contact a slave catcher (slave catching was a profession that existed from quite early in the Republic), and a deal would be worked out. The slave catcher would approach the master, persuade him to sell to him the runaway at a fraction of his value, as a speculation. The slave catcher would then "find" the runaway and, in consideration of property given him by the slave, would either transfer the slave to another owner or manumit him. (Manumission, as we saw in chapter 2, would give the slave full citizenship if it occurred one year after he was possessed by the slave catcher.) How was the law to cope with this and similar situations?

A first step that might have been of some service was the lex Fabia of the late Republic[36] which, among other provisions, prohibited the buying and selling of another's slave without the owner's knowledge and established the high penalty of fifty thousand sesterces. This penalty against both buyer and seller was then extended by a senatus consultum to any buying or selling of a runaway slave who had not been recaptured.[37] Consequently, an owner who accepted the slave catcher's offer could find himself in serious trouble; and, at that, all the more easily since the action was *popularis*, that is, it could be brought by anyone. The sale, moreover, would be void.[38] The senatus consultum contained a reasonable minor exception, and the exception, together with one response of the slave catchers to the senatus consultum, is revealed by a rescript of the emperors Diocletian and Maximian of the year A.D. 287 addressed to a woman called Marciana:

> C.9.20.6. It is settled that it is not permitted to sell or make a gift of a slave in flight. From this you will understand you are in breach of the law which laid down for such wrongs a certain penalty to be paid to the imperial treasury; except that it is permitted to coheirs and partners in dividing the common property to make an auction among themselves. It is permitted to sell a runaway, on the terms that only then is the sale effective, when he had been recovered and demanded by the buyer.

Thus, the senatus consultum refused the action with a penalty when the sale of the runaway slave was made by coheirs and partners wishing to divide the property, provided the sale was to the highest bidder among coheirs or partners themselves. One response to the senatus consultum, it seems, was to make a gift of the runaway slave, and it seems a fair hypothesis that the gift would be met with a disguised return from the slave catcher. Daube rightly points out that the gift, to be complete, would have to be by mancipatio, and only around the third century could absent property validly be mancipated; hence, to judge from C.9.20.6, legislators had caught up with the device fairly quickly.[39] Even earlier, another device had been adopted which seems to have had innocent beginnings:

> D.18.1.35.3 (Gaius, book 18 on the *Provincial Edict*). If someone gave a mandate to a friend going abroad to look for his runaway slave and, if he found him, to sell him, he does not offend against the senatus consultum because he did not sell, nor does his friend because he sold a slave who was present. Moreover, the buyer who bought the slave who was not absent is understood to have acted properly.

When this decision became a general rule[40] it was open to abuse, and the friend would be replaced by rogue slave catchers. A variant dodge is also described as valid by Ulpian:

> D.48.15.2.2 (book 9 on the *Duties of the Proconsul*). It must further be said that, if someone gave a mandate to Titius to catch his runaway slave

> on the condition that if he caught him he had bought him, the *senatus consultum* does not apply.

Thus, the slave catcher is given a mandate to find, plus a conditional sale to him if the slave is caught; for all practical purposes the senatus consultum was circumvented.

Final victory on this issue between slave catchers and the law was achieved by the law by a rule attacking the problem from a different angle:

> *P.S.*1.6a.1. A slave bought by a slave catcher cannot be manumitted within ten years without the consent of his former owner.[41]

Slaves might still run away and still steal from their owners, but they could have no hope of acquiring freedom and citizenship through the intervention of a slave catcher.

Five

The Slave as Man: Noncommercial Relations

As we have seen, a slave might be the object of a wrong regarded legally as done to his master, but the slave might also be the wrongdoer. The scope for mischief was wide, since slaves could be found in many walks of life, and very many slaves were not confined to working the large estates. The law is particularly interesting with regard to the master's liability. No action at private law could be brought against a slave, because a slave had no legal standing. Much use was made at Rome of private actions—though criminal prosecutions were also possible—where we would instinctively think only of criminal sanctions. This is true not only for theft, but also even for the deliberate wounding or killing of slaves, who were regarded as property.

The basic rule when a slave committed a civil wrong and an action was brought against the person who had control of the slave when the action was brought, was that the defendant had the choice either of paying the amount of condemnation, which was the same as if a free person had committed the delict, or of surrendering the slave to the plaintiff. In effect this was an early system of limited liability.

> *D.*9.4.1 (Gaius, book 2 on the *Provincial Edict*). Those actions are called noxal actions which arise not from contract but which are brought