

“HE’S ONE WHO MINDS THE BOSS’S BUSINESS ...”

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1 Introduction

The title of this article derives from Plautus’ *Menaechmi*.¹ Messenio, a slave, tells himself that a good slave takes care of his master’s business, organises it, thinks about it, and in his master’s absence attends to his affairs as diligently as if he were present, or even more so. This, then, was the normal state of affairs in Rome, since Roman law never developed the idea of direct representation.

In this article, the following will be discussed: why the Romans did not know agency; the position of slaves and children in the *paterfamilias*’ power who acted as “agents”; the praetorian actions that made commerce possible; *institores* and *exercitores* who acted as independent “agents”; and the *peculium*.

2 Why did the Romans not know agency?

Roman law did not have a general concept of agency.² Agency was not to be found in any part of ancient Roman law, for example in the formal modes of conveying

1 See *Menaechmi* 967-969.

2 See William M Gordon “Agency and Roman law” in *Roman Law, Scots Law and Legal History. Selected Essays* (Edinburgh, 2007) 54-60 at 54; Reinhard Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996) at 47. See, also, Alan Watson *Roman Slave Law* (Baltimore, Md, 1987) at 90.

3 Cf WA Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* 4 ed (Holmes Beach, Fla, 1992) at 609.

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property.³ This was obviously because of the formal nature of certain transactions. The Romans believed that a person who had not participated in one of these solemn legal acts, in other words had not taken part in the ceremonies, nor repeated any of the ceremonial words or performed any act during the formal ceremony could not benefit from them. No duties or rights conferred by these ceremonies attached to such a person.⁴ In addition, Roman lawyers continued to apply the *alteri stipulari nemo potest*-principle, and this obviously impeded the development of agency or contract in favour of a third party.⁵

Roman law consequently did not recognize representation in legal acts.⁶ Only the parties to a legal act were affected by it, and a third party could therefore not act on behalf of someone else. This did, however, cause problems once primitive Roman society started developing. In practice, people could not always act on their own behalf, and gradually it became obvious that some kind of representation was required. Thus the eventual recognition of some forms of representation was based purely on necessity and utility.

In principle, it was unthinkable that an agent might conclude a contract with a third party that would give rise to compulsory rights and obligations between a third party and the principal. In Roman law, a contract concluded by a representative always imposed a liability on the contracting party, not on the person represented.⁷

The Romans therefore did not accept the idea that third-party beneficiaries could derive rights from contracts they themselves had not concluded.⁸ It was a basic rule of Roman law that a contract in favour of a third person had no effect; not even for the contracting parties. Another rule of Roman law, namely *per extraneam personam nihil adquiri posse*, provided that nothing could be acquired through a third person unless that person was a slave or child under paternal control.⁹

3 If not agency, what then?

3.1 Sons and slaves

From the time of the Punic Wars onwards, financial and social life in Rome was dictated by trade and finance, and the economy was growing. The flourishing

4 See Max Kaser *Das Römische Privatrecht* vol 1 2 ed (München, 1971) at 260; Hunter (n 3) at 610.

5 See Fritz Schulz *Principles of Roman Law* trl M Wolff (Oxford, 1936) at 83ff.

6 See D 44 7 11: “et ideo neque stipulari neque emere vendere contrahere, ut alter suo nomine recte agat, possumus.”

7 Rudolph Sohm *The Institutes. A Textbook of the History and System of Roman Private Law* trl JC Ledlie 3 ed (Oxford, 1935) at 432.

8 Jan Hallebeek “Contracts for a third-party beneficiary: A brief sketch from the *Corpus Iuris* to present-day civil law” in (2007) 13(2) *Fundamina* 11-32 at 12.

9 Inst 2 9 5: “Et hoc est quod dicitur, per extraneam personam nihil adquiri posse.”

economy of that time may largely be ascribed to the way in which the Roman family unit was organised and functioned.

Although there was obviously a dire need for an institution such as agency in Roman law,¹⁰ the Romans succeeded in conducting their commercial life without it, since slaves and children subject to power could acquire rights for their masters or fathers, regardless of whether they stipulated on behalf of these persons or themselves.¹¹ Slaves and sons were quite active in commercial affairs and entered freely into contractual relations. They had no separately recognised legal identity and could therefore not enter into transactions that were legally binding on their owner or father as the case might be.¹² Since they did not have proprietary rights, everything they acquired became the property of the owner or father. Whether they had acted in their own names or not was irrelevant; neither did it normally matter whether the *paterfamilias* knew of such acts or ordered or wished them to be performed.¹³ The *paterfamilias* therefore acted through the children in his power and through his slaves.¹⁴

In this regard, no distinction was drawn between slaves, persons under *potestas*, wives *in manu*, and free persons *in mancipio*. All rights they acquired belonged to the person in whose power they were.¹⁵ The owner could sue, but they could not. Furthermore, such rights were acquired through the operation of law, even if the *paterfamilias* did not know of the transaction or had not authorised it, or had expressly forbidden it.¹⁶ The slave was merely the master’s voice.¹⁷

Obligation was a personal matter. At civil and praetorian law, a slave was *pro nullo*, but *iure naturali* he was a man like another, hence the rule: *servi ex contractu civiliter non obligantur; naturaliter obligant et obligantur*.¹⁸ About property, civil law reached the point of declaring that a slave’s contract created a so-called “natural obligation”. According to the classical jurists, he could even incur a contractual

10 Agency may be defined as the relationship between one person or party (the principal) and another, which originates when he engages another person to act for him. The law of agency thus governs the legal relationship that arises when the agent deals with a third party on behalf of the principal.

11 Cf Dennis P Kehoe “Law, agency and growth in the Roman economy” in Paul J du Plessis (ed) *New Frontiers. Law and Society in the Roman World* (Edinburgh, 2013) 177-191 at 177-178.

12 Watson (n 2) at 90.

13 Gaius 2 86ff.

14 See Zimmermann (n 2) at 51. Further, JA Crook *Law and Life in Rome* (London, 1967) at 241 states that in Roman law a human could only be a “conduit-pipe” if he was a slave or a *filiusfamilias*. Cf Gaius 2 94 according to which a person could possess and acquire something through a slave whom he *bona fide* possessed; further, see Gaius 2 95 and 3 103.

15 Hunter (n 3) at 610.

16 *Idem* at 611. See D 45 1 62.

17 D 45 1 45pr.

18 See WW Buckland *The Roman Law of Slavery* (New York, 1969) at 167.

19 *Idem* at 165.

obligation, but only a “natural” one, so that the creditor could not institute an action against him.¹⁹

At a very early stage, therefore, a slave or another member of the *familia* could act in a representative capacity. The reasoning behind the recognition of such types of representation was that the *familia* formed a unit, and its members acted not so much as representatives as members of the unit. In fact, the *paterfamilias* may be seen as a member of the *familia*, although he was the head of the unit and therefore all rights vested in him and he incurred most duties.²⁰

He could consequently obtain both ownership and possession through members of his family: sons and slaves, people whom he held in usufruct, and people who thought that they were his slaves, but really belonged to another or were free.²¹ The capacity given a slave to represent his master in certain juristic acts – and thus to borrow, so to say, his master’s personality so that the latter could acquire property or become a creditor – represents the first significant change to the view that a slave was a mere thing. In this respect, the slave was considered not merely as property, but as the instrument of a juristic act. However, the slave was allowed to act only in the interests of the owner, and by way of “involuntary” agency, and his capacity to do so was strictly limited. As far as the relevant members of the *paterfamilias*’ family are concerned, anything acquired by a *filius* or a slave immediately vested in his *pater* or *dominus* even if the latter had not consented to the acquisition.²² Although the slave or *filius* could provide the corpus of possession, the head of the family acquired complete ownership only when he agreed to the transaction, and so created the *animus* of possession; though such consent could be given either in advance or by ratification.²³

Thus the *paterfamilias* conducted business through his slaves or dependent sons, who were seen not as agents, but as mere “extensions” of himself. In this manner, the Romans succeeded in carrying on their intensive and far-reaching commercial activities without a developed concept of agency.²⁴ Since slaves and sons were not bound by contractual bonds of agency and representation to the people they served, the Roman *familia* was a significant source of non-contractual agents.

One of the main purposes of slavery was that the slave had to improve the master’s economic standing.²⁵ There were various legal rules that enabled a slave

20 Gaius 2 86, 94 and 95; Gaius 4 75; Inst 2 9*pr* and 3-4; Inst 3 17*pr*-1; Inst 3 28*pr*-2; D 41 1 10*pr*-5; D 41 1 53.

21 JAC Thomas *Textbook of Roman Law* (Amsterdam, 1981) at 185.

22 D 41 1 32.

23 D 41 2 34 2; D 41 2 48; D 41 3 31 3.

24 See Aaron Kirschenbaum *Sons, Slaves and Freedmen in Roman Commerce* (Jerusalem, 1987) at 2.

25 Cf Watson (n 2) at 102; Jane F Gardner “Slavery and Roman law” in Keith Bradley & Paul Cartledge (eds) *The Cambridge World History of Slavery* vol 1 *The Ancient Mediterranean World* (Cambridge, 2011) 414-437 at 419.

(or a son) to do so. With regard to acquisition through slaves and sons in classical law, Gaius states as follows: “Therefore, whatever children in our power and slaves in our ownership receive by *mancipatio* or obtain by delivery, and whatever rights they stipulate for or acquire by any other title, they acquire for us. For a person in our power can have nothing of his own.”²⁶ From this, as well as the rest of the text, it is apparent that slaves and sons played an extremely important role in commercial and other acquisitions.

Binding contracts could only be entered into between two principals.²⁷ Because of the wide prevalence of slavery, there was no real need for a true relationship of agency. Owners could both sue and be sued on contracts made by their slaves, but had no direct right of action on contracts made by an outsider on their behalf. Ulpian stated that because they profited from the acts of their business managers, it was only fair that they should be held liable and could be sued on the contracts they entered into.²⁸

3.2 Praetorian actions

Usually, when the *filiusfamilias* or slave had incurred an obligation, the *paterfamilias* was not bound.²⁹ The creditor’s position was weak: slaves could not be parties to a lawsuit, and execution was not possible against children subject to the power of the *paterfamilias*, as long as they did not have proprietary capacity.³⁰ In classical law, these obligations of persons subject to the power of the *paterfamilias* were regarded as *obligationes naturales*³¹ and consequently were void or could not be enforced against them directly.³² It was therefore not desirable to enter into contracts with such persons, since such contracts involved serious risks and obviously hampered financial enterprises. Early in the second century BC the praetor, in an attempt to encourage financial activity, interceded and permitted some legal actions to be instituted against the *paterfamilias* in clearly defined circumstances.³³

26 Gaius 2 87ff.

27 See Gaius 2 95.

28 D 14 3 1.

29 See Zimmermann (n 2) at 52. Cf. further, Barry Nicholas *An Introduction to Roman Law* (Oxford, 1965) at 201; D 50 17 133 according to which, under civil law, the rights but not the obligations arising from a slave’s contracts vested in the master.

30 Zimmermann (n 2) at 52.

31 D 44 7 14: “ex contractibus autem civiliter quidam non obligantur, sed naturaliter et obligantur et obligant.”

32 PJ du Plessis *Borkowski’s Textbook of Roman Law* (Oxford, 2015) at 290.

33 See D 14 1 5 2: “[H]oc enim edicto non transfertur actio, sed adicitur.”

34 The praetorian action therefore “supplemented” the civil law action: “non transfertur actio, sed adjicitur.”

35 Du Plessis (n 32) at 290.

These actions, known as *actiones adiecticiae qualitatis* (an *actio adiecticiae qualitatis* was a particular kind of *actio utilis*),³⁴ enabled parties who had contracted with slaves acting as business agents, to sue them directly.³⁵ They created an exceptional liability for the *paterfamilias* since they were all founded on a “debt” incurred by the slave (or son) acting as a business agent on behalf of the *paterfamilias*. The praetor granted these actions against the *dominus*, the *paterfamilias* and the principal. This resulted in both persons being liable to the creditor. The agent – that is, the person who had concluded the contract – was liable by the civil law, and could be sued by means of an *actio directa*.³⁶ The *dominus negotii* was liable by praetorian law, and could be sued by the *actio utilis*.³⁷ This important reform originated in the praetor’s edict. Previously civil law permitted the slave to acquire property for his master, but not to incur debt on his behalf. Promulgation of the edict created a situation where masters could become not only creditors but also debtors, through their slaves’ actions. In terms of praetorian law, a slave who had acted with his master’s consent could henceforth bind his master.

A number of actions, all arising out of transactions entered into by subordinate members of the family, were of special benefit to creditors since they could be instituted where a slave had acted with the master’s knowledge. The *actio quod iussu* could be instituted when the slave was treated as an agent who could bind his master.³⁸ This action lay against a *dominus* or *paterfamilias* when he had authorised or ratified a contract entered into by his slave or son in power.³⁹ The *iussus* was directed to the third party and not to the slave or son, and the creditor could institute an *actio quod iussu* against the master for the whole amount (*in solidum*).

The *actio de peculio et in rem verso* lay, independently of authorisation or ratification, when a slave or son with a *peculium* had bound himself by contract. It was instituted against the master or father, who was held liable to the amount of the *peculium* (*de peculio*) or to the extent to which he had derived a profit from the transaction (*de in rem verso*) regardless of which was the greater.⁴⁰ The action for the profit (*actio de in rem verso*) was instituted only together with the action for the *peculium*, and the master was liable not only for the amount currently in the *peculium* but also for as much of the *peculium* as had been spent for his benefit.⁴¹ It was

36 Sohm (n 7) at 431-432.

37 *Idem* at 432.

38 See D 15 4 and especially D 15 4 1 1. Cf, too, Gaius 4 69-70; Inst 4 7.

39 D 15 4 1.

40 See RW Lee *The Elements of Roman Law* 4 ed (London, 1956) at 359-360.

41 See D 15 3 3.

42 See D 15 3. The *actio de in rem verso* was the equivalent of the *actio negotiorum gestorum*; it lay whenever the slave, an unauthorised agent, had acted in effect for the benefit of his master’s property: see D 15 3 3 2. In D 15 3 *pr* Ulpian (book 29) states that if the *peculium* of the slave who is subject to the power of another is empty or not sufficient to pay the debt in full, and the person who has *potestas* has materially benefited from the performance rendered, that person is liable, as if he himself had been party to the transaction.

instituted where a slave had used the benefits obtained from commercial transactions to enrich the estate of the *paterfamilias*.⁴² Where the slave had used the *peculium* or any part of it to trade with the master’s knowledge, though not necessarily with his authorisation, any creditor could demand that the *peculium* be divided among the creditors.

If the master tried to defraud the creditors, the *actio tributoria* could be instituted against him. This action had limited application since it was available only when a slave or a son had been using his *peculium* to trade, his master or father had known about this, and the slave or son had run up debts exceeding the value of the *peculium*.⁴³ The praetor could then compel the *paterfamilias* to liquidate the assets of the *peculium* and divide the proceeds amongst the creditors.

The action on the *peculium*, the *actio de peculio*,⁴⁴ could be instituted where the master had not known about or authorised the transaction. It was used when slaves with the requisite skills were given a *peculium* to enable them to become economically active.⁴⁵ Creditors could then institute this action, which was based on the existence of the *peculium*.⁴⁶

In cases where the *actio quod iussu* or the *actio de in rem verso* lay, the son or slave was really an “agent”: he acted either with explicit or implicit authorisation, and the master or father alone could sue or be sued on the contracts.⁴⁷ A master who authorised the slave’s contract was liable for the full sum involved.⁴⁸ Authorisation (to the other contracting party) could take any form, and subsequent ratification was sufficient.⁴⁹ However, since it was more convenient for masters to leave their slaves to conduct business without their constant supervision, other actions were introduced, in terms of which the extent of the master’s liability for his slave’s dealings was defined.⁵⁰ These were applicable only to the dealings of persons in the *potestas* of the principal; and two of them protected the owner of a slave from the potentially disastrous consequences of the slave’s unsupervised dealings.

Two other actions particularly benefited creditors, since they could be instituted where the slave had acted with the master’s knowledge. A kind of semi-agency was recognised in respect of freemen, as well as slaves and *filiifamilias*, in two instances where there was a great need for a law of agency.⁵¹ The master or captain of a ship

43 See D 14 4; Inst 4 7 3. See Du Plessis (n 32) at 291.

44 D 15 1.

45 See D 15 2.

46 See Inst 4 7 4. Cf Du Plessis (n 32) at 290.

47 See Hunter (n 3) at 617.

48 See Gaius 4 70: “In primis itaque, si iussu patris dominiue negotium gestum erit, in solidum praetor actionem in patrem dominumue comparauit; et recte, quia, qui ita negotium gerit, magis patris dominiue quam filii seruiue fidem sequitur.”

49 Watson (n 2) at 93.

50 D 15 1 1.

51 Hunter (n 3) at 617.

52 D 14 1pr.

(*exercitor*), whether a freedman or a slave,⁵² was an agent whose legal acts bound the owner. If a man had appointed his son or slave as master (*magister navis*),⁵³ thus conferring on him full authority to execute the duties of a ship's captain, any third party contracting with the son or slave in his capacity of captain (eg for the carriage of goods), could institute the *actio exercitoria* against the owner of the ship for the whole amount of his claim.⁵⁴ The *exercitor* could generally enter into contracts relating to the ship, its seaworthiness and freight.⁵⁵ Since the contracts seem to have been entered into in accordance with the desires of the father or master, the praetor deemed it appropriate to allow an action for the entire amount.⁵⁶ In terms of the *actio exercitoria*, the owner of a ship was therefore fully responsible for commercial debts incurred by slaves or workers employed on a ship provided they were carrying out their duties.⁵⁷

Furthermore, if a master had appointed his slave to act as an *institor* (ie as his authorised representative in any other kind of business, eg as a waiter, clerk or shopkeeper⁵⁸), any person contracting with the slave in his capacity of *institor* or general business manager could institute the *actio institoria* against the master for the whole amount due under the contract.⁵⁹ According to Ulpian, a manager was called an *institor* because the business transaction was at his instance. Whether he was a shopkeeper or ran some other kind of business was irrelevant.⁶⁰ The *actio institoria* could be instituted in respect of dealings by both free representatives and slaves, and in each case the principal had unlimited liability for dealings on his behalf. It was consequently an action relating to the business manager's conduct, binding his principal.⁶¹ Slave owners had come to rely heavily on certain slaves in matters of

53 See D 14 1 1 1: "Magistrum navis accipere debemus, cui totius navis cura mandata est."

54 See D 14 1 *pr.*

55 D 14 1 in general, and especially D 14 1 1 7.

56 Gaius 4 71; D 14 1 *pr.*

57 See Du Plessis (n 32) at 292. See, further, Gaius 4 71; Inst 4 7 2 1.

58 D 14 3 5 4. The word *institor* has also been applied to pedlars, and other people to whom pedlars and cloth merchants entrusted clothes to hawk, deliver and sell.

59 See D 14 3 in general, and especially D 14 3 3-5. See, also, D 14 3 5 1-2; D 14 3 5 5; D 14 3 5 12. Further Du Plessis (n 32) at 292; and Kirschenbaum (n 24) at 90-94.

60 D 14 3 deals with the contractual liability of those who appointed agents to conduct business for them. Any number of enterprises could thus be in the hands of slaves: managing farms; buying houses, cattle or slaves; shop keeping and inn keeping; banking and money lending; as well as all kinds of trading and contracting. See, further, Keith Bradley *Slavery and Society at Rome* (Cambridge, 1994) at 75.

61 See Gardner (n 25) at 421; Kirschenbaum (n 24) at 90-121. The master could be held responsible for the contracts of his *institor* only if these fell within the scope of the business entrusted to him.

62 It should be kept in mind that commercial activities were not limited to slaves: "Si dominus, qui seruum institorem apud mensam pecuniis accipiendis habuit, post libertatem quoque datam idem per libertum negotium exercuit, uarietate status non mutabitur periculi causa" (D 14 3 19 1).

63 Hunter (n 3) at 619.

trade and commerce.⁶² The *institor* had some of the attributes of a real agent, the most important being that his business transactions had to have been authorised by his principal.⁶³

In the law of agency, the exercitorian and institorian formulas therefore allowed third parties to bring actions against slave owners for arrangements made by slaves who were their agents in trade and enterprises at sea and on land.⁶⁴ Slaves engaged in shipping and shop keeping had many opportunities for personal gain as well as for everyday physical mobility and independence of activity and judgement. During the age of the classical lawyers, Roman commerce was mainly in the hands of such slaves.⁶⁵

The rule that only the *institor* or *exercitor* (son in power, slave, or freedman) could acquire rights for his principal was based on an even more fundamental rule of the Roman law of contract, namely that a contract creates a personal bond between parties.⁶⁶ We are therefore dealing with cases where a freedman, son in power or slave was able to create an obligation for a third party who had authorised him to do business on his behalf. The introduction of these actions, in terms of which someone contracting with a person in charge of a ship or business could proceed against that person’s principal, clearly represented a shift in civil law and introduced something that did resemble agency. During most of the period of classical law, the actions were not, however, of general application.

The common denominator of all these actions was the tacit or express, general or specific authority given to the person subject to power to act on behalf of the *paterfamilias*. It therefore seems as if agency originated within the family circle. In the last two such actions, however, the same consequences ensued when a person unconnected with the family of the principal was appointed to manage a business or be master of a ship. Although this marked a step closer to agency, it was limited to these two cases.⁶⁷

Business agents and managers (*actores* or *institores*) conducted much of the daily business of commerce. Because they were not juridical *personae* they could, in contracting, represent their owners vicariously in a way that free persons, even freedmen, employed in the same capacities, could not.⁶⁸ Within a legal system that did not recognise a concept of direct representation, free persons, having their own juridical identities, were personally responsible for contracts they entered into, and for work they did. This severely detracted from their usefulness as business agents: if an *institor* was not the principal’s slave, the principal in a contract had no action against a third party, but could be sued by one. Dealing with free persons at the level at which most *institores* operated, meant engaging directly in commerce, whereas

64 See Keith Bradley “Slavery in the Roman Republic” in Bradley & Cartledge (n 25) 241-264 at 260. See, too, Gaius 4 71; D 14 1 1 9; D 14 5 1.

65 Buckland (n 18) at 131.

66 See D 14 3 1-2.

67 Lee (n 40) at 360.

68 John Bodel “Slave labour and Roman society” in Bradley & Cartledge (n 25) 311-336 at 316.

conducting business through slaves or freedmen enabled a slave owner to maintain a respectable distance from the sordid business of trade, while yet retaining full control over profits.

3.3 *Peculium*

As stated above, slaves acting as agents on behalf of their owners or even conducting business on their own account through the legal fiction of the *peculium*, played an important role in business and commerce. This gave rise to problems of legal liability and responsibility.⁶⁹

A *peculium* was a fund⁷⁰ given to a slave by his *paterfamilias* in order to conclude juristic acts and conduct business, which greatly added to his usefulness. Although the master allocated the *peculium* to a separate account, it remained his property. If something was acquired through such a *peculium*, the *paterfamilias* was held to acquire it even without being informed about the transaction.

The slave usually managed the *peculium* independently, but on occasion also had to carry out his master's instructions. When the slave conducted business on his own account the master could be sued by the *actio de peculio* in respect of any contract the slave had concluded and the *paterfamilias* was held liable to the extent of the *peculium*.⁷¹

The praetor gave a certain legal validity to the *peculium* by granting the slave the right to contract with a third party to the limit of his *peculium*. An action could therefore be instituted against the master himself in respect of the slave's contracts, limited to the amount of the *peculium*. The *peculium* was conceived in the interests of both the master himself and those who wanted protection when they contracted with slaves. Thus the praetor expanded the slave's independence and individual status in the eyes of the law.

Since only indirect agency was allowed, the principal on whose behalf a legal transaction was performed received the benefit of the transaction only after it had been assigned to him.⁷² Similarly, he was not bound by it immediately. Any action against him had to be assigned to the other contracting party. The "agent" was personally liable to the party with whom he had contracted. The principal and the other contracting party were at risk if the "agent" became insolvent and there was the inconvenience of making the necessary assignments of actions to the principal and the other contracting party.

The last step in the process of development was taken when the principle of these actions was extended to other cases of independent persons acting as agents.⁷³

69 See Neville Morley "Slavery under the Principate" in Bradley & Cartledge (n 25) 265-286 at 278.

70 This *peculium* comprised objects, livestock, money, houses, fields, etc.

71 See Sohm (n 7) at 165, 428-429; Gardner (n 25) at 415.

72 Gordon (n 2) at 57.

73 Lee (n 40) at 360-361.

This was the work not of the praetor but of the jurists. Papinian advised that when a principal had given his procurator authority to raise loans, the lender could maintain an *utilis actio* based on the analogy of the *institoria*.⁷⁴ The situation was similar if the procurator wished to sell a mandate.⁷⁵ In practice, cases of mandate to perform a particular act may also have been included. If so, the third party could hold the principal liable in every case in respect of a contract entered into by an agent in the principal’s name and within the scope of the agent’s authority. However, the agent remained liable.⁷⁶

Such activities may have overlapped with the slave’s use of the funds that had been given to him as *peculium*. Slaves were used as agents either on a permanent basis or for particular tasks.⁷⁷ This practice also functioned as a form of limited liability, since the owner could be held liable for no more than the original sum of the *peculium*, regardless of the size of the debt that his slave had run up. In general, the Romans preferred conducting business through their dependants, including family members, rather than through salaried employees. Consequently, slaves who were *institores* and procurators, with privileged access to capital compared with the majority of the freeborn, became quite wealthy and even obtained some kind of status in Roman society.

4 Conclusion

It emerges from the above discussion that Roman jurists failed to recognise direct agency (a well-known institution in Roman public law) in private law, even when it became quite obvious that there was a dire need for such an institution. According to Schulz, this failure may be ascribed to the Romans’ so-called “isolation” and adherence to tradition.⁷⁸

The strictly binding nature of an agreed contract of obligation was, in addition, characteristic of Roman fidelity.⁷⁹ A contract continued to be binding once it had been concluded, which may be because it was always entered into with a person who was physically present, but also because fidelity was a generally accepted principle of Roman life, a principle which included being bound by one’s word.⁸⁰ A number of particularly characteristic features of Roman law stem from the principle of fidelity: the early recognition of the informal act-in-law was significant; *fides* demanded that

74 D 14 3 19pr: “utilis ad exemplum institoriae dabitur actio.”

75 D 19 1 13 25.

76 D 14 1 1 17: “est autem nobis electio, utrum exercitorem an magistrum conuenire uelimus.”

77 Morley (n 69) at 279.

78 Schulz (n 5) at 25, 30, 96 and 98.

79 *Idem* at 225.

80 “fit quod dicitur”: see Cicero *de Off* 1 7 23.

a man kept his word, no matter in what form it was given;⁸¹ and an agreed contract was of a strictly binding nature.

Roman civil law permitted acquisitions by sons and slaves for their masters and fathers, which reduced the need to develop the concept of agency. In addition, the *actiones adiectitiae qualitatis* bound them by praetorian law.⁸² Although Roman law did not recognise agency as it is known today, through their practice the pragmatic Romans obtained results that were as satisfactory in all respects as modern agency. In respect of the interests of all parties involved, failure to recognise agency did not really matter and never had a negative impact on commerce.

It follows that slaves (and sons) were highly visible in the workplace, and actively involved in commercial enterprises. They participated in every aspect of Roman economic life, particularly in everyday commercial activities such as shop keeping, trading, banking, and acting as owners, managers and agents with a great degree of latitude and independence.

The *actiones exercitoria* and *institoria* seem to have been introduced for the benefit of the masters of slaves. The advantage of these actions was that in certain cases slaves could be implied agents where it would have been impossible to prove that the particular contract had been authorised (*quod iussu*) by the master. The master was bound to pay the whole debt, and could not escape by merely surrendering the *peculium*. This was because if slaves could not be trusted, the foundation of commerce, which was gradually becoming more important, would fall away. Without agents, commerce would have been limited to masters, which would have seriously impeded commerce in Rome and the Roman world.

It also seems that while slaves and children under *potestas* could be agents who imposed duties on their father or master, freedmen could become partial agents in two cases only. Both the *institor* and the *exercitor* were agents only to the extent that the persons with whom they contracted could sue their principals directly.

This discussion shows that Roman law was gradually adapting to increasing commercial needs and approaching full recognition of agency in contracts. The Romans were so pragmatic that one may well ask why, given the pressure of business demands, Roman law never allowed or even recognised the true doctrine of agency? The answer to this question may probably be that in the commercial world the considerable and effective use made of slaves and sons subject to power, as well as the *de facto* agency exercised by *institores* and *exercitores* (which was the closest the Romans ever got to real agency), were regarded as quite sufficient. These actions, however, fell short of true agency (1) in that they did not exonerate the agent from liability; and (2) in that they enabled the principal to be sued directly, but did not enable him to sue directly the persons contracting with his agent. They were nevertheless the closest approach by the Romans to a law of agency.

81 Schulz (n 5) at 224.

82 Gordon (n 2) at 55.

ABSTRACT

This article deals mainly with the question why the Romans did not know agency and how they successfully managed to cope without it. Various relevant matters are discussed, such as the position of slaves and children in the *paterfamilias*'s power, the praetorian actions that made commerce possible despite the lack of an institution such as agency, and the *peculium*. Although Roman law never really developed an institution of direct representation, it gradually adapted to the increasing commercial needs and approached recognition of agency in contracts. Factors that contributed to this, were firstly the considerable use of slaves and sons subject to power, and secondly the *de facto* agency exercised by *institores* and *exercitores*.