

A GENERAL OUTLOOK ON THE ISSUE OF TRADE RESTRICTIONS IN ROMAN LAW*

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Abstract

The legal sources of Roman law, mainly face trade restrictions in the context of the relationship between patron and freedman (libertus). It is no coincidence that, the issue arose in that particular context. Before slaves were set free, they would often acquire special knowledge and skills from working in the masters' businesses. If a slave was set free to administer, the estate of his former master as procurator (a representative in terms of a general power of attorney), his livelihood was secured. In other cases, he had to establish his own occupation to survive after his manumission. His obvious choice would have been the occupation he had learned under his former master and present patron. For example, the freedman of a medical doctor could become a doctor himself and the freedman of a slave-dealer did not begin agitate for the abolition of slavery, but became a slave-dealer himself.

Keywords

Restraints of trade, patronus, libertus, servus, liberae operae

ROMA HUKUKUNDA TİCARET SINIRLANDIRMALARI KONUSUNA GENEL BİR BAKIŞ

Öz

Roma hukuku kaynakları, ticaretin sınırlandırılması meselesi ile, esas olarak efendi ve azatlı (libertus) arasındaki ilişki bağlamında, ilgilenmektedirler.

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Bu bağlamda sorunun ortaya çıkması tesadüf değildir. Köleler serbest bırakılmadan önce, genellikle, efendilerinin işlerinde çalışarak özel bilgi ve beceri kazanırlardı. Eğer bir köle, idare edilmek üzere serbest bırakılırsa, eski ustasının mülk sahibi (genel bir vekalet açısından bir temsilci) olarak mülkü, geçim sağlandı. Diğer durumlarda, görevinden sonra hayatta kalmak için kendi melseğini kurması gerekiyordu. Onun bariz tercihi, eski ustası ve mevcut patronu tarafından öğrenmiş olduğu meslek olurdu. Örneğin, tıp doktorunun serbest bırakıcısı bir doktor olabilir ve bir köle bayisinin serbest bırakımı köleliğin kaldırılması için harekete geçmemiştir, ancak bir köle satıcısı haline gelmiştir.

Anahtar Kelimeler

Ticaret sınırlandırmaları, patronus, libertus, servus, liberae operae

Introduction

Roman law had no distinction between civil and commercial law as have the modern systems, so one must extract commercial law from the subject matter of civil law. It was not a separate body of law and was embedded in the basic Roman civil law. As for that, Roman private law supports the making of markets through the laws of property and obligations¹.

The origin of clauses in restraint of trade can be traced to the time of the Romans. This article therefore begins with restraint of trade in the context of state control and afterwards a brief discussion of Roman patrons, freedmen and the relationship between them and it follows as restraint of trade in the context of patrons-slaves relation and finally examined the restraint of trade by the way of servitude. These all, will be followed by an examination of the remaining texts dealing with agreements in restraint of trade in Roman law.

I. Restraints of trade in the context of state control (by public law steps)

The combination of edictal law and jurisprudence, and the occasional adoption of international or local norms, certainly facilitated the development of commerce by providing the business community with adequate legal instruments and protection. However, there is another side to coin, reflecting social and political concerns and fiscal necessities. This is where public law steps in².

The private economic activity of Ancient Rome can only be defined as the *laissez-faire* economy³, which aims to produce only a limited amount of

¹ Roman private law was more congruent because it lacked this separation. The modern *ius mercatorum* developed during the Middle Ages between 500 and 1500 A.D. **Del Granado**, Juan Javier: "The Genius of Roman Law from a Law and Economics Perspective", 13 *San Diego Int'l L.J.* Vol. 301, 2011, p. 338.

² **Aubert**, Jean-Jacques: "Commerce", in *The Cambridge Companion to Roman Law*, (ed. **Johnston**, David), Cambridge University Press, 2015, p. 234.

³ The concept of the Roman economy covers the production, distribution and consumption of scarce goods and services in the Roman Empire during the long classical period. **Koops**, Egbert: "Price Setting and Other Attempts to Control The Economy", in *The Oxford Handbook of Roman Law and Society*, (ed. **Du Plessis**, Paul J./**Ando**, Clifford/**Tuori**, Kaius), Oxford University Press, 2016, p. 610.

agricultural and household goods and their distribution in small-scale markets⁴.

The control of the state was guided primarily by two considerations: opening the necessary sources of income to the tax authorities and serving the needs of the people of Rome. State expenses were funded by means of taxes and as well as by a number of domains and monopolies belonging to the state, such as mining⁵. Indeed, the Romans disliked monopolies and for instance; at the end of the fifth century, the Emperor Zeno provided that, no one was to be permitted to monopolise the sale of certain common commodities. The provision also prohibited any agreement in any unlawful assembly that any kind of merchandise that was the object of commerce, would not be sold for less than what was agreed upon by the parties in question. The measure provided that, should anyone practise monopoly, he would be deprived of all his property and sentenced to perpetual exile and that those who ventured to fix the prices of their merchandise or bind themselves by any illegal contracts of that kind would be punished by a fine. Any tribunal that did not enforce the laws as to monopolies was also to be punished by a fine⁶.

The public officials also acted against grain profiteering, particularly in later times, when criminal sanctions were invoked against the *dardanarii*⁷

⁴ **Wacke**, Andreas: "Freedom of Contract and Restraint of Trade Clauses in Roman and Modern Law", *Law and History Review*, Vol.11, No:1, Spring 1993, p. 2. The word "market" has multiple meanings. Used in a concrete sense, it refers either to the place at which goods and services are bought and sold or to the commercial activities taking place in such a location. Used abstractly, it may be used to denote the operation of the forces of supply and demand and to the way these forces affect the distribution of goods or services in smaller or larger geographical areas. The geographical areas in which these forces operate may also be called "markets". **De Ligt**, Luuk: "Roman Law, Markets and Market Prices", in *The Oxford Handbook of Roman Law and Society*, (ed. **Du Plessis**, Paul J./**Ando**, Clifford/**Tuori**, Kaius), Oxford University Press, 2016, p. 660.

⁵ **Wacke**, p. 2.

⁶ **Emmett**, Arthur R.: "Roman Law, "Private Property and the Public Domain: Lessons of Copyright Policy", in *Copyright Perspectives, Past, Present and Prospect*, (ed. **Fitzgerald**, Brian/**Gilchrist**, John), Springer, Switzerland 2015, p. 22.

⁷ The merchant cartels of the *dardanarii* were characterized by the brevity of their duration; in this respect, they are fundamentally distinct from modern industrial cartels and monopolies. Modern monopolistic enterprises are based on expensive technical plants and equipment, which a prospective competitor cannot set up at the drop of a hat. The merchant cartels of old, on the other hand, could, in practice, prevent a competitor's activities in the market place on a seasonal basis, but not permanently. **Wacke**, p. 3.

and other instances of private monopolies. According to some researches, it was not part of the task of professional bodies or guilds (*collegia*) to regulate competition or price levels⁸.

Starting in the early republican period, a series of *leges fenebres* tended to limit the rate of interest before banning interest altogether, although unsuccessfully. Other public laws bearing on commercial activities regulated the food supply (*leges annonariae/frumentariae*), [The supply of foodstuffs was undertaken by state officials within the framework of the *annona*⁹.] luxury consumption¹⁰ (*leges sumptuariae*), the occupation of agricultural land (*leges agrariae*) and taxation¹¹.

The market-economy principle of free competition remained by and undisturbed by state activities. The general view is that, taxation was not used as an economic control function¹².

There were some prescriptions relating to what had to be cultivated for safeguarding the food supply and as well as export limitations for agricultural products. Export limitations particularly aimed at restraining the

⁸ **Wacke**, p. 3. See for details in **Waltzing**, Jean Pierre: Etude historique sur les corporations professionnelles chez les romains, 4 vols. (1895-1900, repr. Hildesheim, 1970), Vol.1, pp. 181-190.

⁹ *Annona* is the Roman Goddess of the corn supply (the European term for grain, in this case wheat, not the new world maize). She is the personification of the produce grown in the year: Her name, *annona*, was the name of the wheat allotment given to the people of Rome by the government to stave off famine. Originally *annona* could be any food grown or made over the year, for example fruit or wine as well as grain, but in time it came to mean provisions in general, especially wheat. <http://www.thaliatook.com/OGOD/annona.php>, (access date: 06.12.2018).

¹⁰ The sumptuary laws of late Republic reissued several times but rarely enforced. These laws privileged the domestic economy over luxury items. Such rules were not intended to direct economy, even if they incidentally had an economic impact; their purpose was rather to encourage self-regulation by the Roman elite to keep the social peace. **Koops**, p. 610.

¹¹ **Aubert**, p. 235.

¹² In the republican and early imperial periods, trade was subject to all kinds of taxes, above all tolls and custom duties (*portoria*) at both municipal and imperial levels. It is difficult to estimate the impact of taxation on the volume of trade, but it is clear that the burden increased with time: from the reign of Constantine until AD 498, a special tax in gold and silver called *collatio lustralis* or *chrysarguron* was collected on behalf of the imperial treasury from merchants, who therefore had to be registered. By then, the time of *laissez-faire* and promotion of commercial activities on the part of public authorities was long gone. **Aubert**, p. 235.

production of wine, because they were more profitable, and advancing the production of wheat, because they were more important¹³.

The *plebiscitum Claudianum*¹⁴ of 219-218 BC, barred senators and their sons from owning, although not from operating, ships of large capacity (over 300 amphoras), so excluding them from lucrative public contracts, connected with the food supply and hampering the marketing of the produce of ever-growing agricultural estates. The risk of allowing senators to engage in naval commerce was actually greater than the risk posed by financially empowering the equestrian order. These considerations were nevertheless balanced against the financial incentive to participate in naval commerce. The result was the mixed senatorial response to the *plebiscitum Claudianum* championed by Flaminius: neither support nor vehement opposition, but tacit acceptance¹⁵.

State control over economic activities was not limited to shipping and became a general phenomenon in the fourth and fifth centuries. Unsurprisingly, it affected trades connected with the food industry (bakers, meat sellers, and so on), but it also extended to other commercial activities¹⁶.

¹³ Wacke, p. 2.

¹⁴ The *plebiscitum Claudianum* of 219-218 BC banned senators from involvement in commercial shipping, preventing them from participating in the increasingly profitable practice of fitting out ships to exchange goods in overseas trade. The obvious question is why senators would allow themselves to be prohibited from this lucrative form of business. Perhaps they had moral scruples. Looking back from his vantage point in the Augustan period, Livy writes that “every form of profit seeking was thought to be unsuitable for senators”. More significant to Livy, however, is the fact that only one senator, Gaius Flaminius, supported the measure, which passed as a plebiscite, a law formally enacted by the people, though in practice subject to considerable elite influence. Livy concludes that the law was an effort by the lower orders to weaken the power of the Senate, since it empowered the mercantile equestrian order, who were still permitted to amass wealth through shipping. Coffee, Neil: Gift and Gain-How Money Transformed Ancient Rome, Oxford University Press, 2017, p. 39.

¹⁵ Coffee, p. 39.

¹⁶ Aubert, p. 235. In the second century, the commerce of Gaul and with the agriculture and industry reached an unprecedented state of prosperity. To realize the brilliant development of commerce and industry in Gaul, it is sufficient to read the inscriptions in the twelfth and thirteenth volumes of the *Corpus Inscriptionum Latinarum* and to study the admirable collection of sculptures and bas-reliefs found in the country. The inscriptions of Lyons, for example, whether engraved on stone monuments or on various items of common use (*instrumenta domestica*) and particularly those which mention the different trade associations, reveal the great importance of the part played by the city in the economic life of Gaul and of the Roman Empire as a whole. Lyons was not only the great clearing house for the commerce in corn, wine, oil and lumber; she was also one of the largest centres in the Empire for the manufacture and distribution of most of the

Various emperors, including Tiberus, Nero and Commodus, are reported to have imposed maximum grain prices in the city of Rome during periods of severe food shortage and these measures were obviously motivated by the fact that keeping the citizen population of the capital city adequately supplied with basic foodstuffs was seen as a political priority¹⁷.

The economic policy of the Roman state, consisted of attempts to influence supply and demand, through government spending and monetary controls as well as selective taxation and production incentives, while accepting the resulting prices as a necessary outcome. In all, price setting was largely absent from the Roman economy: not because the mechanism was unheard of, but because it went against deeply ingrained belief in the primacy of party autonomy¹⁸.

On the other hand, everything in Rome had its price and this price was regularly formed by the operation of free market forces in a process of negotiation. So it means that, the agreement on the price in a given contract was left to the discretion of parties to the contract and they were also allowed to make a bargain (*invicem se circumscribere*)¹⁹

For instance:

D. 19.2.22.3 (Paulus libro 34 ad edictum)²⁰:

*“Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita **invicem se circumscribere**, ita in locationibus quoque et conductionibus iuris est.”*

“Just as in a transaction of purchase and sale it is **naturally conceded that the parties can either purchase or buy something more or less, and hence mutually restrain one another**, so the rule is the same in leasing and hiring.”

articles consumed by Gaul, Germany and Britain. **Morley**, Neville: Trade in Classical Antiquity, Cambridge University Press, 2007, p. 3.

¹⁷ **De Lig**, p. 667.

¹⁸ **Koops**, p. 618.

¹⁹ “*Invicem se circumscribere*” is very difficult to translate: to “overreach” or “outwit” each other would perhaps come closest to what is meant. It would be inappropriate, though, to take this term as implying and thus condoning deceit. **Zimmermann**, Reinhard: The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, p. 256.

²⁰ Paul. D.19.2.22.3 does not contain a carte blanche for foul play, for neither *actio empti* nor *actio venditi* could be granted in case of fraudulent machinations. There was no licence for wangling and knavery. **Zimmermann**, p. 256.

The jurist Paul warns that it is “naturally” allowed to buy what is worth more for less, and sell what is worth less for more, and generally for parties to a transaction to run rings around one another²¹.

Price undercutting by competitors remained permissible, even after Diocletian’s grandiose Maximum Price Edict in 301 A.D.²². Diocletian’s Edict introduced maximum price not only for grain and other food items but for a very wide range of goods and services. One of Diocletian’s aim was put an end to the never-ending price rises of the late third and early fourth centuries²³.

Measures to promote private competition in order to keep prices down, were unknown in antiquity. In Rome, during the Principate, freedom of trade was an accepted and widely practised principle. The question that concerns us is, whether this was also applicable to freedmen who plied the same trade

²¹ **Koops**, p. 612. See also in D.4.4.16.4 (*Ulpianus, On the Edict, Book XI*): “*Idem Pomponius ait in pretio emptiois et venditionis naturaliter licere contrahentibus se circumvenire.*”, “Pomponius also states with reference to the price in a case of purchase and sale, that the contracting parties are permitted to take advantage of one another in accordance with natural law”.

²² Zimmermann regards the Diocletianic rescripts as interpolated. **Zimmermann**, p. 261. Sirks, suggests that the original versions of Diocletian’s rescripts may have granted the possibility of in integrum restitutio in two cases in which classical requirements for making this remedy available were not met, but this theory can be made to work only by assuming that the substance of both texts was changed as a result of interpolations. **Sirks**, Adriaan Johan Boudewijn: “La laesio enormis en droit romain et byzantin”, *Tijdschrift voor Rechtsgeschiedenis*, Vol. 53, pp. 291-307.

²³ The authenticity of the text of Diocletian’s rescripts has been endlessly debated. It has been pointed out, for instance, that in the rescript of 285 AD the object of sale is first referred to as “a thing” (*res*) but subsequently as “a farm” (*fundus*). These and other linguistic oddities have been taken as proof that the original text must have been tampered with, either during the fourth or fifth centuries or by the Justinianic compilers. The current majority view is that none of these linguistic arguments is decisive. Another reason why many legal historians find it difficult to accept the two rescripts as genuine is that not a single Imperial constitution issued during the fourth or fifth century refers to a sale of a piece of land being rescinded on the grounds that the purchase price was less than half the market value. In assessing the validity of this argument we must, however, consider the likelihood that attempts to determine the “just price” or “true value” of purchased goods must have become increasingly problematic as a result of the galloping inflation of the fourth century. On balance, there are no good reasons to reject Diocletian’s rescript as inauthentic. Of course, that conclusion is perfectly compatible with the view that *laesio enormis* did not become a generally recognised remedy before the publication of the Justinianic Code. **De Ligt**, p. 668.

as their patrons. If there were general rules to limit or exclude competition, it was obvious that they should be included in such cases²⁴.

However, it is clear that, there is an evidence that in Classical Rome, the principle of free competition prevailed²⁵:

D.1.18.6.4 (*Ulpianus libro primo opinionum*)²⁶:

“Neque licita negotiatione aliquos prohiberi neque prohibita exerceri neque innocentibus poenas irrogari ad sollicitudinem suam praeses provinciae revocet.”

“The Governor of a province must make it his especial care that no one shall be prevented from transacting any lawful business, and that nothing prohibited shall be done, and that no punishment shall be inflicted upon the innocent”.

This text serves as a general directive that confirms the fundamental principle that freedom of trade should be protected by the provincial governor. The exposure clearly shows that the prohibition of illicit commercial activities constituted an exception. This prohibition could be based on two grounds: firstly, a defendant could be prevented, due to the imposition of a conviction, from pursuing his occupation. Secondly, in some rare cases, some activities such as gambling, witchcraft or astrology could be limited or even prohibited for reasons of public interest.

This text serves as a general directive confirming the basic principle that freedom of trade, should be protected by the provincial governor²⁷.

Inferior occupations, such as acting or free men recruited as gladiators (*auctorati*) were not formally banned but stigmatized them with the brand of infamy. But all of these were exceptions. The pursuit of occupations in the Roman Republic as well as in the Principate was regulated less actively, therefore everyone could enter into any occupation. The primary task of the provincial governor²⁸ was the protection of freedom of professional activity

²⁴ **Van den Bergh**, Rena: “Patrons, Freedman and Convenants in Restraint of Trade”, 72 THRHR, Vol.74, 2009, p. 79.

²⁵ **Schiller**, A. Arthur: “Restraint of Trade in Classical Roman Law”, (Restraint of Trade), in *Mnemosyna Pappulias*, Athen 1934, p. 235; **Camacho López**, María Elisa: “El contrato de agencia comercial. Análisis dentro del contexto del derecho romano”, *Revista de Derecho Privado*, Vol. 16, Jun. 2009, pp. 55-56.

²⁶ This text on gubernatorial responsibilities can be attributed, both as far as content and style are concerned, to late-Classical law. **Wacke**, p. 5.

²⁷ **Wacke**, p. 4.

²⁸ An often quoted passage from Ulpian’s treatise “*On the duties of the Provincial Governor*” refers to the existence of Imperial mandata urging provincial governors to

but it did not mean that there was a special office, like modern trade supervisory office, under the provincial governor. The text does not mention which measures were to be taken to ensure professional freedom. These were undoubtedly left to the discretionary coercive powers (*coercitio*) of the governor. The text constitutes a coercive public-law supplement to the private law penalty of invalidity, which is often ineffective in practice²⁹.

II. Restraints of trade in the context of *patronus* and *libertus* relationship

The limited number of Digest texts dealing with restraint of trade after the termination of a contract of employment apparently did not contribute to the development of modern law. The problem of restraint of trade of an employee manifests itself to a greater extent today than it did in Rome³⁰. Restraint of trade was obviously not a serious issue in Rome. Economic structures were fairly simple and there was not much pressure of competition.

The Digest contains but a limited number of texts, mainly in the context of the relationship between patron and freedman, dealing with the problems of restraint of trade³¹. Before slaves were set free, they would often acquire special knowledge and skills from working in the masters' businesses. If a slave was set free to administer the estate of his former master as *procurator*³², his livelihood was secured otherwise he had to establish his own occupation to survive after his manumission³³.

take action against speculators who threaten the urban food supply (D.47.11.6). **De Ligt**, p. 668.

²⁹ **Wacke**, p. 4.

³⁰ **Wacke**, p.7-8.

³¹ **Van den Bergh**, p. 79.

³² *Procurator* (in private law): "One who administers another's affairs under his authorization (mandatu)" (D. 3.3.1, pr). Wealthy people used to have a general manager (administrator) of their property, a procurator omnium bonorum, whose activity for his principal was practically unlimited (alienations were excluded), unless specific restrictions were imposed on him concerning certain kinds of transactions. He was designated as a general agent ad res administrandas datus (=appointed for the administration of the property). Normally such an agent was freedman (sometimes even a slave). **Berger**, Adolf: Encyclopedic Dictionary of Roman Law, Philadelphia 1953, p. 654.

³³ The most important form of release from slavery was manumission, a process in terms of which the master freed his slave who then became free (a *homo liber*) and a Roman citizen (*civis Romanus*). **Van den Bergh**, p. 75.

The economic activity freedom of *libertus* could clash with the duty of loyalty owed to his *patronus*. Whilst, previously, they were working for their masters who were benefiting from hard-working, experienced and successful slaves, there was now a possibility that they would apply their skills in competition³⁴ with the former master. This would naturally lead to a conflict of interests³⁵.

When the slave was set free, as a *libertus*, his duties of respect (that is, of *obsequium* and *reverentia*)³⁶ did not merely have an ethical basis, they also had legal consequences. According to Watson, the rights of a patron fell into three classes, namely the right of succession on the freedman's death, a right to *obsequium* (subservience) and a right to *operae* (a fixed number of days of work)³⁷. As the work performed by freedmen (*operae libertorum*)³⁸

³⁴ There are several legal relationships from which could have derived that obligation of non-competition by the freedman in Roman law, within which are; *obsequium*, *operae iuratae*, *operae stipulatae*, *stipulatio*, *contractus innominati* and *lex mancipii*. See for details in **Camacho López**, p. 64 ff.

³⁵ **Van den Bergh**, p. 79.

³⁶ The relationship between a freedman and his patron was based on fidelity and regulated in detail. The filial respect owed to the patron may be summed up in the terms *obsequium* (including *reverentia* and honor) and *officium*. During the Republic *obsequium* and *officium* had no judicial sanction: it merely constituted a custom every freedman was expected to follow. Although these terms were never defined, they may be regarded as negative in the sense that a number of things were forbidden in terms thereof. One may say that by virtue of *obsequium* the patron was immune from anything that might have detracted from his dignity as a patron. This included that the freedman was not permitted to bring any action involving discredit against his patron or his relatives or, without leave of a magistrate, any action at all. We have apparently no evidence for the penalty which was imposed for a breach of *obsequium*, but at one time the patron and his freedman could make an agreement regulating the penalty. **Van den Bergh**, p. 76; **Watson**, Alan: *The Law of Persons in the Later Roman Republic*, (Law of Persons), Clarendon Press, 1967, p.228. The positive rights, on the other hand, were embodied in *officium*. In terms of *officium* he was furthermore expected to take care of his patron if he needed anything and to render assistance when necessary. **Karadeniz**, Özcan: *Iustinianus Zamanına Kadar Roma'da İş İlişkileri*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, No. 396, Sevinç Matbaası, Ankara 1976, pp.198-199.

³⁷ **Watson**, Alan: *Roman Slave Law*, (Slave), Johns Hopkins University Press, Baltimore 1937, p.35. The obligations which the freedman owed his patron were contained, first, in the concept of *obsequium* and included respect and loyalty. Secondly, he was obliged to perform duties (*operae*) to a patron who had freed voluntarily and to which he had committed himself. And, thirdly, apart from any obligation to *operae* and *munera*, a *libertus* also had to support his patron in times of need according to his means. **Van den Bergh**, p. 76; **Camacho López**, p. 64.

constituted a major economic factor, it is no coincidence that most of the sources on restraints of trade concerned the patronage relationship³⁹.

The fact that *operae* can only be exacted when the freedman has been given sufficient time to earn money to support himself has a commercial slant; if this is not done the patron must support the freedman during the period of the services. Only *operae* which are in accord with the age, rank, health, requirements, and mode of life of the freedman (or of the patron) are to be performed; the rank of the freedman or the nature of the occasion might affect the business relations of the two parties, though this is not expressly mentioned. So also may commercial activities be concerned in the voluntary release of *operae* by the patron⁴⁰.

Variants from the normal *operae* may have commercial significance; for example, to attend the patron rather than offer him business or professional competition⁴¹:

D. 37.14.2 (*Ulpianus libro primo opinionum*):

“Liberti homines negotiatione licita prohiberi a patronis non debent.”

“Freedmen should not be forbidden by their patrons to transact lawful business.”⁴²,

³⁸ Such commercial factors as may be found in the *operae libertorum*. *Operae* are not due at all if freedom is acquired by fideicommissary manumission” or by purchase of freedom *suis nummis*, nor does an adopting father or husband acquire them; or in the great number of examples it will be noted that there is a definite separation from the person with whom the freedman may previously have had business relations. **Schiller**, A. Arthur: “The Business relations of Patron and Freedman in Classical Roman Law”, (Patron and Freedman) in *Legal Essays in Tribute to Orrin Kip McMurray*, University of California Press, Berkeley 1935, p. 629.

³⁹ In contrast, services performed by freeborn persons or labor contracts were often performed by laborers paid by the day (*mercennarii*). **Wacke**, p. 8-9. Several of the slaves who held places of some responsibility won their freedom as, for instance, Chrysippus, who attended Cicero’s son at Athens; Laurea and *Philotimus*, his own secretaries; Tiro, his reliable private secretary and agent and Dionysius, a *tutor*. Cicero had nine or ten of these liberti. A very large part of the financial business of Rome at this time was carried on by freedmen who had won the trust of their masters while slaves, and both Caesar and Pompey trusted their private business and secret correspondence to ex-slaves, thus inaugurating the baneful custom of using liberti in affairs of state, that had to be broken up after the reign of Claudius. **Frank**, Tenney.(editor): *An economic survey of ancient Rome*, The Johns Hopkins Press, Baltimore 1933-1940, p. 378.

⁴⁰ **Schiller**, *Patron and Freedman*, p. 629.

⁴¹ **Camacho López**, p. 57.

Limiting the principle to a particular status, that of a patron and freedman, an exceptionally important one in commercial matters is the passage of Ulpianus (D.37.14.2)⁴³ and according to this text freedmen may not be impeded by their patrons from pursuing lawful activities⁴⁴.

The same opinion is expressed by Papinianus in the text below:

D. 37.15.11 (Papinianus libro 13 responsorum):

“Liberta ingrata non est, quod arte sua contra patronae voluntatem utitur.”

“A freedwoman is not considered ungrateful because she works at her trade in opposition to the wishes of her patron.”

This text reports that a freedwoman is not classed as ungrateful if she exercised her art contrary to the wishes of her female patron (*patrona*)⁴⁵.

Although these two texts, make no specific mention of competition in the same kind of business, it is possible that this was indeed the case⁴⁶.

Two texts of Scaevola clearly deal with competitive activities:

D. 37.14.18 (Scaevola libro quatro responsorum):

“Quaero, an libertus prohiberi potest a patrono in eadem colonia, in qua ipse negotiatur, idem genus negotii exercere. Scaevola respondit non posse prohiberi.”

“I ask whether a freedman can be prevented by his patron from carrying on the same kind of business which his patron is transacting in the same colony. Scaevola answered that he could not be prevented from doing so.”

D. 38.1.45 (Scaevola libro secundo responsorum):

“Libertus negotiatoris vestiarii an eandem negotiationem in eadem civitate et eodem loco invito patrono exercere possit? Respondit nihil proponi, cur non possit, si nullam laesionem⁴⁷ ex hoc sentiet patronus.”

⁴² “Some authors express their suspicions about the authenticity of this passage, mainly by the use of the expression ‘liberti homines’, which is not used in other fragments. Santalucía thinks that, it is fruit of some interpolation done by the compilers. Again Rotondi points out his doubts about D. 37.14.2 due to the words ‘negotiatione licita’”. Camacho López, p. 57.

⁴³ This text is taken from the same book of Ulpianus from which Digest 1.18.6.4 was taken; it is clearly linked to the latter as far as both content and style are concerned. Wacke, p. 9.

⁴⁴ Schiller, Restraint of trade, p. 235.

⁴⁵ Watson, Slave, p. 40.

⁴⁶ Van den Bergh, p. 80.

“Can the freedman of a merchant who deals in clothing conduct the same business in the same town, and in the same place, if his patron is unwilling for him to do so? The answer was that there is no reason, in the case stated, why he cannot do so, if his patron sustains no injury thereby.”

According to Scaevola there is no rule to prevent him provided his patron will not suffer as result. Scaevola’s first text, however, mentions that, it was the same kind of trade in the same colony, while the second text states that, it is a clothing merchant who is involved, and he is conducting the same business in the same city and in the same area⁴⁸.

In the last sentence of D. 38.1.45 which states that, there is no rule preventing him "provided his patron will not suffer as a result". This seems to contradict the general rule and this clear contradiction suggests an interpolation of the final words of this text⁴⁹.

Generally speaking one may accept that a patron will necessarily suffer some financial prejudice, if his freedman were to practise the same trade in competition with him⁵⁰. The only activities that could possibly be prohibited, would be intentional interference in the patron’s business, for example; if he were to open a shop next door to the patron out of malice or were to lure away clients by unlawful means. This, however, would mean that the

⁴⁷ According to Waldstein, “*si nullam laesionem*” has nothing to do with the duty to perform *operae*. That was an independent agreement, which had been arranged previously. The question here is, merely whether the patron can forbid his freedman to practise the same trade or whether he can practise it against the will of his patron. The text only refers to “unfair competition” and “intentional harm of the patron”, that is where the freedman acted *contra bonos mores*. **Waldstein**, Wolfgang: *Operae libertorum: Untersuchungen zur Dienstpflicht freigelassener Sklaven*, Franz Steiner, Stuttgart 1986, p. 317. On the other hand, Wacke’s discussion of the “competition problem” sets out with the question whether the patron has the right to prevent the freedman from competition, and he thereupon adds that the sources answer this question predominantly negatively. **Wacke**, p. 11.

⁴⁸ **Camacho López**, p. 73. This could quite possibly be in the same street and right next to his patron.

⁴⁹ **Wacke**, p. 10; **Van den Bergh**, p. 80; **Camacho López**, pp. 59-60. We can only conjecture that Justinian permitted these passages to retain their original form, with the possible exception of D.38.1.45, because of the existence of the special relation of patron and freedman presented in the majority of them, a status which was of minor commercial significance in his day. **Schiller**, *Restraint of trade*, p. 236.

⁵⁰ Merely establishing a competitive business which might possibly cause his patron a loss of income was something the patron should have taken into consideration when he decided to set the slave free. The freedman had, after all, to provide for his own livelihood after manumission. **Van den Bergh**, p. 81; **Wacke**, p. 12.

freedman was acting *contra bonos mores*, in which case, he could indeed have been prevented from doing so⁵¹.

If a freedman were to neglect his duty to render services, the patron could use the *actio operarum* for compensation⁵². However, he could not, by means of the latter, prevent the free activities of the freedman. To obtain a prohibition against the exercise of an occupation or expulsion from the city, by means of a judicial order, the activity should consist of a truly reprehensible criminal conduct⁵³.

To sum up; The second text of Scaevola has three implications: first, freedmen can not neglect their duty to make specific services. Secondly, they can not engage in illegal activities when they compete with their clients, only when they are competing with others. Finally, they may not specifically conduct any intentionally prejudicial business to the detriment of their patrons, for example, entice away their clients.

The texts discussed above, seem to confirm that the patron did not have the power to prevent his freedman from conducting any activity in competition with him. A clause specifically directed against such competition would therefore be invalid⁵⁴.

⁵¹ **Van den Bergh**, p. 80.

⁵² In order to ensure freedmen's service, the *manus iniectio fruste*, which was initially given to the *patronus*, was replaced by *actio operarum* in the sources of the Classical Law Era. In spite of his commitment, if a freedman did not perform the requested works at the specified time, *patronus* could bring an *actio operarum* against his freedmen and this *actio* could only be brought after the day of operate. The *actio operarum* aimed not to force freedman to perform his duty to render services, but aimed to force freedman to pay a certain amount of money as a compensation. **Karadeniz**, pp. 207-208. The question of the measure of damages if the freedmen refuse to perform the *operae*, and the decision was that it was the amount of the *fructus ex illorum operis*, not the gain which would have accrued to the patron from prohibition to practise medicine. **Watson**, Law of Persons, p. 230.

⁵³ **Wacke**, p. 11.

⁵⁴ To deny a freedman to practise his skills would be a serious infringement upon his liberty and independence. Furthermore, to set a slave free on condition that he lived and plied his trade somewhere else would be unfair (*contra bonos mores*). It would furthermore encroach upon his personal life since a freedman was entitled to freely choose where to live from the time of Diocletian. **Van den Bergh**, p. 81. See, C. 6.3.12 (*Imperatores Diocletianus, Maximianus*): "*Qui manumittuntur, liberum ubi voluerint commorandi arbitrium habent nec a patronorum filiis, quibus solam reverentiam debent, ad serviendi necessitatem redigi possunt, nisi ingrati probentur, cum neque cum patrono habitare liberos iura compellunt.*". "Persons who have been manumitted are at perfect liberty to reside wherever they choose, nor can they again be reduced to slavery

However, the patron, could extend the service obligations (*operae*) to such an extent that insufficient time would remain for the freedman to establish his own successful business. This matter is discussed by Republican jurist Alfenus Varus in this Digest text⁵⁵:

D. 38.1.26 (Alfenus Varus libro septimo digestorum):

“pr. Medicus libertus, quod putaret, si liberti sui medicinam non facerent, multo plures imperantes sibi habiturum, postulabat, ut sequerentur se neque opus facerent: id ius est nec ne? Respondit ius esse, dummodo liberas operas ab eis exigeret, hoc est ut adquiescere eos meridiano tempore et valetudinis et honestatis suae rationem habere sineret.

1. Item rogavi, si has operas liberti dare nollent, quanti oporteret aestimari. Respondit, quantum ex illorum operis fructus, non quantum ex incommodo dando illis, si prohiberet eos medicinam facere, commodi patronus consecuturus esset.”

“Where a physician, who thought that, if his freedmen did not practice medicine⁵⁶ he would have many more patients, demanded that, they should follow him and not practice their profession, the question arose whether he had the right to do this or not. The answer was that, he did have that right, provided he required only honorable services of them; that is to say, that he would permit them to rest at noon, and enable them to preserve their honor and their health.

(1) I also ask, if the freedmen should refuse to render such services, how much the latter should be considered to be worth. The answer was that the amount ought to be determined by the value of their services when employed, and not by the advantage which the patron would secure by

by the children of their patrons, to whom they only owe respect, unless they are proved to be ungrateful; nor do the laws compel freedmen to live with their patrons.”

⁵⁵ At the end of this historical evolution the situation of the freedman ‘*prestant*’ *operae* (sworn or stipulated) with patron or third, is characterized by a number of constraints, some of which have not been altered by the innovations of Praetorian origin. First of all, the right to *operae* is an imprescriptible right of employers; it is not limited to the provision of positive services, but it even includes the possibility, for the patron, to prevent the exercise, by the *libertus*, of a trade that could compete with his. The *opera* can therefore be conquered in a negative way. This is what comes from a response from Alfenus Varus. **Fabre**, Georges: *Libertus, patrons et affranchis à Rome*, Roma, École Française de Rome, 1981, p. 325.

⁵⁶ The freedman obvious choice would have been the occupation he had learned under his former master and present patron. As int his example, the freedman of medical doctor could become a doctor himself. **Wacke**, p. 8.

causing the freedmen inconvenience through forbidding them to practice medicine.”

Here, *opera* that the patron asks of the freedman implies a positive performance - to follow him, to give him an honorable services- and a negative one is, not to practice the same art of the medicine, since to prevent any loss of clientele⁵⁷.

According to Alfenus, the patron may validly restrict the freedmen to work at their trade "provided that he required nonservile services from his freedmen, that is, so as to let them rest at noon and pay attention to their health and hygiene". It thus follows that the patron's power and the *obsequium* which was due to him enabled him to prevent the freedman from plying his trade, when he feared prejudicial competition. If the freedman was disobedient, it was considered an act of ingratitude⁵⁸. On the other hand, the effectiveness of doctor's restraint of his former assistant's competition depends entirely on the number of days of *operae* owed. It was to his interest to keep them away from practice as long as possible, so we may expect that he had exacted⁵⁹. At any rate, if the freedman followed the patron about for a long enough time, he might forget enough of his medical training to render his competition insignificant, or even be forced to take up another trade⁶⁰.

⁵⁷ **Lavaggi**, Giuseppe: "Nuovi studi sui liberti", in *Studi in Onore di Pietro de Francisci*, vol. II, Milán, Giuffrè, 1956, p. 80.

⁵⁸ **Van den Bergh**, pp. 81-82. The possible presence in classical Roman law of private restraint of trade presented as like this type: "by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service". **Schiller**, *Restraint of trade*, p. 234. On the other hand, Guggisberg and Baum have failed to note D.38.1.26 and yet deplore the absence of any material relative to restraint of competition clause (*konkurrenzklause*) in the Roman sources, see: **Guggisberg**, Paul: *Die Konkurrenzklause*, (*Abhandlungen zum schweizerischen Recht*), Bern 1907, p. 14 ff; **Baum**, Georg: *Das Vertragliche Wettbewerbsverbot*, Guttentagsche, Berlin 1914, p. 115.

⁵⁹ D.38.1.24 (*Iulianus libro 52 digestorum*): "... «Operas tuas pictorias centum hodie dare spondes?» ...", "Do you promise to give me today a hundred pictures which you have painted?". D.38.1.30.pr. (*Celsus, Digest, Book XII*): "...iuraverit dare se, quot operas patronus arbitratus sit...", "... to render all the services that his patron may desire...", that means as many services as his patron has judged fit. In the exercise of Celsus discretion the patron had to take into consideration what was fair and proper and not demand anything excessive. **Wacke**, p. 16.

⁶⁰ A doctor who thought he would have more clients if his freedmen did not practise medicine, exacted from them that they should escort him and not practise. We are not told the number of days on which the freedmen were to provide an escort but the prohibition on practising seems to be total. It can not mean that they were not to practise

In this Digest text there is a significant query: “*id ius est nec ne?*” and to be in doubt about the validity of such a clause. Alfenus recognized the predominant position of the patron but at the same time did not fail to appreciate the possible unfairness to the freedman. Their basic obligations were limited by the jurist, in so far as they had to perform only *liberae operae*⁶¹. In our text, “*liberae operae*” means that the patron could no longer demand servile work from his freedman, but only such tasks as were worthy of a free person. Alfenus’s emphasizing that the patron was not allowed to involve his freedman in completely menial or dirty, subservient jobs which had nothing to do with medicine and which were usually performed by slaves⁶².

Watson, however, regards it as curious that the agreement in restraint of trade was not held void, since this discussion is later than the edict of Rutilius⁶³. It may be that it was not contrary to the edict. He points out that, disobedience of the agreement not to practise was no longer regarded as a breach of *obsequium* in the time of Papinian (D.37.15.11), and that by the time of Scaevola, a patron could apparently no longer exact from his

medicine on the days when they to provide the escort, since the prohibition would then be pointless. Alfenus or his master Servius declared that this agreement was lawful, provided the patron exacted from his freedmen only services befitting free persons. Alfenus holds valid an agreement made *libertatis causa* restricting the rights of the freedmen to work their trade, but does not grant damages for the loss resulting from the breach of it. **Watson**, Law of Persons, p. 230.

⁶¹ In addition to the interrelation of patron and freedman dependent upon the status of the parties, it seems to have been the common practice for the slave to swear, before his manumission, that he would perform a specified number of days’ labor for his master after his manumission. This so-called *operae libertorum* ranged from a few days’ labor to services extending over a considerable period of time; in fact, one passage in the Digest states “as many *operae* as the patron shall decide. In the time of Justinian, the work that the freedman was to perform as *operae* was of two kinds, *officiales* and *fabriles*. The former were those within the *officium*, or duties for which there was a natural obligation on the part of the freedman to perform, such as accompanying the patron about the city or on his travels, taking care of his house, and performing various domestic duties. If, however, the freedman had become skilled in a trade, before or after manumission, he might offer such commercial activities as *operae*; these were termed *fabriles*. **Schiller**, Patron and freedman, pp. 627-628; **Karadeniz**, pp. 202-203.

⁶² **Wacke**, p. 14-15; **Camacho López**, p. 61.

⁶³ A Rutilius who is probably this one introduced a clause in his Edict, that he would not give to the patron more than an *actio operarum et societatis*. The purpose of this was to restrict the burden which a master could impose on his slave in return for the gift of liberty. **Watson**, Alan: “The Development of Praetor’s Edict”, (Praetor), The Journal of Roman Studies, Vol. 60, 1970, p. 108.

freedmen that they should not practise the same trade in the same colony⁶⁴, (D.37.14.18)⁶⁵.

Beside that, Alfenus's text draws a precise distinction for the purpose of calculating the damage payable, due to not to meet the demands of his patron and in this consideration, three possibilities can arise: First, the profit from the independent medical practice of the freedman, which was earned contrary to the agreement, but such acquisition of the profit is totally unacceptable and is not even mentioned. Second, the damages that the patron suffers due to the competitive activity of the freedman to whose practice patients from the patron's existing practice have moved by reason of, (for example, the charging of lesser fees). But this second manner of calculation is also rightly rejected by the jurist, as the patron cannot be guaranteed a fixed clientele for all time. The third possibility is the only applicable basis of calculation -namely the non-fulfilment of the freedman's duties, the extra takings that would have accrued to the patron (or the costs of hiring a possible substitute); in other words, the *fructus*, had there been proper performance of the freedman's duties⁶⁶.

As a conclusion; the restraint of trade on competition was, therefore, not enforceable in a significant sense and it was only enforceable indirectly, by way of the actionable duty to compensate for work not performed. The patron could not insist upon the negative side of the agreement, namely the abstention from competition. He could only rely on the bargain in a positive way, namely that the freedman work for him and with him in an efficient and proper way. The legal penalty attached only to the nonperformance of the obligation to render services and not to the duty to abstain from competition. This instance, accordingly contains no genuine prohibition of competition⁶⁷.

When the issue is approached from the perspective of *contra bonos mores*; structure of obligations and rights between patron and freedman was based on the moral concept of *fides* and the law strove to maintain a balance between the conflicting interests of the parties concerned. For this reason, if such a clause were regarded as being *contra bonos mores*, it would be

⁶⁴ Whether this should be translated as 'colony' or 'colonial town' or 'settlement' is not clear. **Watson**, Law of Persons, p. 231.

⁶⁵ A patron could not prohibit his freedman from operating the same kind of business as his own district in which they both lived. D.37.14.18; see also 37.14.2; D.38.1.45. In the Republic it seems that such a prohibition was valid, but no action was given to a patron for breach: D. 38.1.26. **Watson**, Slave, p. 40, fn.22.

⁶⁶ **Wacke**, p. 16.

⁶⁷ **Wacke**, p. 16.

invalid. It was only if a freedman were to play his trade *mala fide*, knowingly and intentionally harming his patron, that such a clause would be valid. This would explain why restraints placed on the freedman were not valid, why the *Digest* forbids the patron to prevent the freedman from playing his trade, and why the freedman is only forbidden to work in specific circumstances, namely when he acts with malice and works in close proximity to his patron so as to lure away his clients to his own benefit⁶⁸.

III. Restraints of trade in the context of *patronus* and *servus* relationship

In addition to freedman, slaves formed to other large group employees in classical ancient Rome⁶⁹. Therefore we might expect some safeguards against competition or even the divulgence of trade secrets⁷⁰ in the sale of slaves by one businessman to another. There is no clearly defined pact or stipulation providing that a slave so sold shall not engage in competitive practices against his former master, but there is one type of conditional sale that lends itself, at least hypothetically, to the point at hand⁷¹. *Pactum de servis exportandis*, seemingly, was a device of classical times and was regarded as imposed entirely in the interest of the vendor, who could therefore remit it:

D. 18.7.1 (*Ulpianus libro 32 ad edictum*)⁷²:

“*Si fuerit distractus servus, ne aliquo loci moretur, qui vendidit in ea condicione est, ut possit legem remittere, ipse Romae retinere. Quod et*

⁶⁸ Van den Bergh, p. 82.

⁶⁹ It seems unlikely that the balance between servile and free labour on the land was radically altered in the early Roman Empire, although some decline in the numbers and economic importance of slaves can be conceded. However, one may wonder whether too much has been made of the role of slaves in agriculture in the second and the first centuries BC, the hey-day of the slave system, when the total slave population in Italy reached two to three million (out of six to seven and a half million). Garnsey, Peter: Non-slave labour in The Roman World'in Cities, Peasants and Food in Classical Antiquity, Essays in Social and Economic History, Cambridge University Press, 1998, p. 136.

⁷⁰ For details see, Schiller, Arthur A.: “Trade Secrets and the Roman Law; the Actio Servi Corrupti”, (Trade), in American Experience in Roman Law, Göttingen 1971, pp. 1-10.; Türkoğlu Özdemir, Gökçe: “Roma Haksız Rekabet Hukukuna İlişkin Olarak Actio Servi Corrupti”, AÜHFD, 2005, Vol.54, Issue 4, pp. 213-233.

⁷¹ Schiller, Restraint of trade, p. 239.

⁷² Conjectured interpolations by Beseler, see. Beseler, Gerhard: “Romanistische Studien”, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, Vol. 50, Issue 1, Aug. 1930, p. 21.

Papinianus libro tertio respondit: propter domini enim, inquit, securitatem custoditur lex, ne periculum subeat.”

“Where a slave is sold under the condition that he is not to remain in a certain place, the party who sold him under this condition can remit that part of the contract, and allow him to remain at Rome. Papinianus says in the Third Book that this condition is to be observed on account of the safety of the master, to prevent his being exposed to danger.”

Such a condition, that a slave be exported, was usually protected by a penalty imposed on the buyer in case of breach⁷³.

Papinianus in his famous reversal of opinion as to existence of an *actio venditi* against a purchaser who had not complied with the condition concludes:

D. 18.7.6.1 (*Papinianus libro 27 quaestionum*):

“... Sed in contrarium me vocat Sabinus sententia, qui utiliter agi ideo arbitratus est, quoniam hoc minoris homo venisse videatur.”

“... The opinion of Sabinus, however, induces me to hold the contrary, for he thinks that an action can properly be brought, as the slave seems to have been sold for a lower price on account of the condition.”

A difficult passage of Papinianus defines the extent of the proscribed locale:

⁷³ If a penalty was agreed on by stipulation, this was clearly enforceable, but only from the promisor, even though there was a second buyer who allowed him to be in the forbidden place: it was the second sale, which was his act, that made this possible. He could of course impose a similar penalty on the buyer from him, and so protect himself. If the agreement for a penalty had been informal, there was a difficulty. The older lawyers could find no *interesse*. The mere desire to inflict a hardship on the slave was no *interesse*: in enforcing this there was no *rei persecutio*, but a *poena*. This could not figure in an *actio ex vendito*. This is Papinian's earlier views, but in an adjoining text he declares himself converted to the view of Sabinus, i.e. that the lower price at which he was sold was a sufficient *interesse*. The result is convenient but not free from logical difficulty. The reduction in the price is *causa* rather than *interesse*. The real *interesse* is the value to him of the man's absence. If a vendor had himself promised a penalty, this would, on any view, be a sufficient *interesse*, for any agreement for a penalty, with a buyer from him: it would indeed form the measure of its enforceability. One would have expected to find some necessary relation between the amount of the penalty in our case and the reduction in the price. **Buckland**, William Warwick: *The Roman Law of Slavery: The Condition of Slave in Private Law from Augustus to Justinian*, Cambridge University Press, 1970, pp. 69-70.

D. 18.7.5 (Papinianus libro decimo quaestionum):

“Cui pacto venditoris pomerio cuiuslibet civitatis interdictum est, urbe etiam interdictum esse videtur. Quod quidem alias cum principum mandatis praeciperetur, etiam naturalem habet intellectum, ne scilicet qui careret minoribus, fruatur maioribus.”

“Where a slave is forbidden by an agreement with the vendor to reside in the suburbs of a certain city, he is also held to be forbidden to reside in the city itself. And, indeed, although this has been prescribed by the Edicts of the Emperors, its meaning is obvious, for he who is deprived of a residence in the less important parts of a city, cannot enjoy one in the more important parts of the same.”

C. 4.55.5 (Imperator Alexander Severus)⁷⁴:

*“Qui exportandus a domino de civitate sua venit, nec in urbe roma morari debet: qui autem de provincia certa, nec in italia. Si itaque contra legem constitutam factum probare potes, utere iure, quod propterea tibi competit * ALEX. A. SEXTIANO SERAPIONI. * <A 225 PP. VII K. FEBR. FUSCO II ET DEXTRO CONSS.>”*

“A slave who has been sold by his master on condition of his removal from a city cannot reside in the City of Rome. Where, however, the condition applies to a certain province, he will be allowed to reside in Italy. Therefore, if you can prove that the condition agreed upon was violated, you can avail yourself of the right to which, for this reason, you are entitled.”

The condition is added for the protection of the vendor, since the lot of a slave is no worse outside than in Rome. The first impression regarding the *periculum venditoris* is that of physical violence, but this is not necessarily. Schiller assumed that, in fact, if a harsh master was concerned, he would perforce have to sell all his slaves by this conditional sale, and thus deprive himself of his means of livelihood. Might it not be that, after having trained a number of workers to be skilled in a particular trade, the master found that economically he was unable to utilize the services of all of them? If he sold the slaves outright, the purchaser would, without question, immediately set them to work in competition with the business of their former master. Schiller’s hypothesis of the purpose of the *pactum de servis exportandis* is offered with the realization that the conditional sale to forestall competition

⁷⁴ Conjectured interpolations by Beseler, see. **Beseler**, p. 25.

is but one of many possible aims, yet nevertheless the point is that the sources permit of this interpretation⁷⁵.

IV. Restraints of trade in the form of a *servitude*

We have next to consider other one of the other type of trade restraint: by the buyer of property not to use the same in competition with the business retained by the seller. This, as well as the remaining cases to be discussed, is represented in Classical Roman law by the very minimum of source material, if at all. Only one passage in the Digest concerns this type of restraint and modern conjectured interpolations might even remove it from consideration⁷⁶.

Our case from Roman law concerns a property near the sea (the *fundus Botrianus*), encumbered at transfer to the advantage of another property situated on the shore (the *fundus Geronianus*). The latter property was encumbered to the effect that no tunny fishing could be undertaken from the subservient property (which form of fishing was well known to be a particularly important part of the fishing industry of old):

D. 8.4.13 pr. (*Ulpianus libro sexto opinionum*)⁷⁷:

“Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur.”

“The vendor of the Geronian Estate set out in the contract for the Botrian Estate which he retained, that no tunny-fishery should take place near it. Although a servitude cannot be imposed on the sea by private contract, since by nature it is open to all, still, as the good faith of the contract demands that the conditions of the sale should be observed, the persons in possession or those who succeed to their rights are bound by the provisions of the stipulation or the sale.”

⁷⁵ Schiller, Restraint of trade, pp. 240-241.

⁷⁶ Schiller, Restraint of trade, p. 241.

⁷⁷ Schiller was inclined to believe there has been tampering with this text but on the other hand, he asserted that Ulpian held the restrictive covenant valid. See, Schiller, Restraint of trade, p. 243.

A private servitude could not operate in respect of the sea, which was a *res extra commercium*. No one could be prevented from fishing on the open sea⁷⁸. A prohibition of the public usage of the sea would constitute a personal *iniuria*, by means of *actio iniuriarum* (D. 43.8.2.9). On the other hand, the owners of the subservient property and their successors in title were, therefore, bound by their *bona fide* contractual obligations to honor the undertaking not to fish from the property. The fact that, the successors in title, were also bound by the *lex stipulationis vel venditionis*. We have to presuppose provincial property to which servitudes could be attached by mere private agreement⁷⁹.

Under this explanation we have a clear instance of a successful restraint of competition. The fact that, the covenant is inserted at the wish of the vendor does not affect the situation for the prohibition of fishing by the purchaser of the adjoining seaside plot is clearly for the benefit of the original owner of both plots. Nor does it matter, that factually we are concerned with seashore fishing, which may or not have been a commercial enterprise. The legal rule set forth was general enough to apply to other competitive undertakings⁸⁰.

Conclusion

1. The private economic activity of Ancient Rome can only be defined as the laissez-faire economy, which aims to produce only a limited amount of agricultural and household goods and their distribution in small-scale markets. The control of the state was guided primarily by two considerations: opening the necessary sources of income to the tax authorities and serving the needs of the people of Rome. The economic policy of the Roman state, consisted of attempts to influence supply and demand, through government spending and monetary controls as well as selective taxation and production incentives, while accepting the resulting prices as a necessary outcome. In all, price setting was largely absent from the Roman economy: not because the mechanism was unheard of, but because it

⁷⁸ D. 47.10.13.7 (*Ulpianus libro 57 ad edictum*): "... *quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi:...*", "...For the sea, as well as the shore and the air, is common to all persons, and it has very frequently been stated in rescripts that no one can be prevented from fishing, ...".

⁷⁹ Wacke, p. 18.

⁸⁰ Schiller, Restraint of trade, p. 242.

went against deeply ingrained belief in the primacy of party autonomy.

2. The Roman jurists recognized the conflict of interests that comes into play in the case of restraint of trade clauses and discussed the conflict in the light of relationship between patron and freedman: For the freedman formed part of the followers (*clientes*) of a patron, and was also bound by an independent duty of loyalty (the breach of which entailed penalties). The freedman often had to earn an independent living and moreover owed the patron *gratis* services. The patronage relationship by itself entailed no legal prohibition against competitive economic activities. In terms of commercial law, a restraint of trade was only possible, according to D. 38.1.26, where the service obligations of freedman was increased until no time remained from him to pursue his own vocation. As far as the law of damages is concerned, such a hidden restraint of trade clause entailed no penalty; only the failure to perform the duty to work for the patron was actionable.
3. Slaves formed to other large group employees in classical ancient Rome. Therefore we might expect some safeguards against competition or even the divulgence of trade secrets in the sale of slaves by one businessman to another. There is no clearly defined pact or stipulation providing that a slave so sold shall not engage in competitive practices against his former master, but there is one type of conditional sale (*Pactum de servis exportandis*) that lends itself, at least hypothetically, to the point at hand.
4. In the case of seller and the buyer of the property in D. 8.4.13 pr., the Roman law was more inclined toward a restraint of trade in the form of a servitude. Another factor in favor of such a restraint, in the sense of an obligation not to do something cast in a permanent servitudinal form which would be reflected in the calculation of the final contract price.

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