

*Status Controversy in Roman and Common Law*¹

The aim of the article is to analyse whether villain under the English common law was legally the same category as slave under the Roman law. Perhaps at first sight a remarkable notion, such conclusion could be theoretically justified by the evident reception of Roman law in a major medieval book of authority *De Legibus et Consuetudinibus Angliae* by Bracton. With regard to the personal status Bracton uses terms found in the Roman law codification of Justinian. To examine the question, the article from the methodological perspective compares the terminology, modes of acquiring and loosing the servile status and the legal capacity of slaves and villains. In its second part the article examines the judicial proceedings subject matter of which is the determination of disputed *status libertatis*. Since both the Roman and the common law system are systems built on remedies rather than substantive rights, principally the Roman *controversia de libertate* and the English *writ de native habendo* as the respective forms of action are examined.

Key words: slavery, slave, servitude, villain.

Słowa kluczowe: niewolnictwo, niewolnik, pańszczyzna, *villain*.

Introduction

Perhaps under the influence of non-legal social sciences the historical legal science has a clear tendency to distinguish between slaves as the antique category of the unfree and peasants (villains, serfs, etc.) as the respective feudal category. Undoubtedly one of the major influences in drawing such distinction is the Marxist theory of history which clearly distinguishes the class of slaves from the class of peasants. While Marx himself remained to a large extent silent on the details of transformation of slaves into peasants, subsequent authors have tried with differing results to explain such transition.²

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² For summary of transition see C. Katz, *Karl Marx on the Transition from Feudalism to Capitalism*, “Theory and Society” 1993, p. 363–389.

Disregarding how important such distinction may be in the economic or social history, the aim of this article is to assess the relevance of such distinction in the field of law based on the case study of reception of Roman law of slavery into the medieval English common law.

Basic legal distinction of persons based on their *status libertatis* known to the Roman law as well as to the common law of England is that made between free and unfree persons. Under the Roman law throughout all stages of its historical development, law knew (regardless of a possibly different social reality) only one category of unfree persons – slaves (*servi*).³ The common law of England originally distinguished between serfs (*servi*) and villains (*villani*) and the Domesday Book compiled on the orders of William the Conqueror in 1086 tells us of more than 25.000 serfs living in England at that time. This distinction was however soon afterwards lost and the common law writs (forms of action) as well as even the earliest English law books speak only of villains as the sole category of unfree persons.⁴

Around the year 1235 the medieval law book *De Legibus et Consuetudinibus Angliae* traditionally attributed to Henry de Bracton was compiled and is regarded by some to be the “flower and crown of English jurisprudence”.⁵ This book is perhaps the first and the only major authoritative book of common law significantly influenced by the Roman *ius commune* apart from the influence exerted on it by canon law and the works of Isidore of Seville.⁶⁷ To describe the unfree persons Bracton uses the terms *servi*, *mancipium*, *nativus* and *villanus* as synonyms while emperor Justinian’s codification of Roman law

³ Gai. 1.9; I. 1.3.

⁴ Occasionally villains are further subdivided into *villains regardant* and *villains in gross*. *Villains regardant a son manoir* (to a manor) were villains in relationship to a certain territorial manor while *villains in gross* were villains in relationship to a certain person. This distinction had however very little impact on the legal position of such persons and was pertinent only to the evidentiary stage of a potential judicial proceedings with regards to freedom of a villain. For a more detailed analysis see P. Vinogradoff, *Villainage in England: Essays in English Medieval History*, Oxford 1968, p. 54–55, and W. Holdsworth, *A History of English Law*, London 1922, p. 509–510.

⁵ T. Plucknett, *A Concise History of the Common Law*, London 1965, p. 258. Hereinafter we shall refer to the treatise as “Bracton”. Citations refer to the 1968–1977 edition of Samuel Thorne.

⁶ I will be using the term *ius commune* to refer to the body of law that was taught as law at the medieval universities and had the aspiration to be universal in its character. The body of *ius commune* can thus be divided into the Roman law discernable from the *Corpus iuris civilis* and the later canon law of the *Corpus iuris canonici*.

⁷ Güterbock in his analysis of Bracton has identified 1 explicit citation of Justinian’s Institutes, 10 from the Code and 12 from the Digest. However Bracton’s citations of Azo’s glosses contained in *Summa codicis* are extensive and references to them can be found on numerous places throughout Bracton’s treatise. K. Güterbock, *Bracton and his Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages*, Philadelphia 1866, p. 50. Bracton’s relation to the Roman law overall has been a matter of controversy. F. Maitland in his work *Select Passages from Bracton & Azo* [1895] expressed the view that Bracton was a “poor, an un instructed Romanist” since only general notions have been taken from Roman law but only little was used when dealing with the details of the various legal institutions. F. Maitland, *Select Passages from Bracton & Azo*, London 1894, p. xviii. This view has been disputed by more modern scholarship most notably by modern editors of Bracton’s work *De legibus et consuetudinibus Angliae* G.E. Woodbine [1922] and S. Thorne [1968–1977] who stated that that Roman law provided in essence the theoretical framework (*fundamental legal definitions and basic theories*) needed to analyse the English case law of his time and to fill in the gaps left open by the English common law. S. Thorne, *Bracton on the Laws and Customs of England*, vol. 1, Cambridge, MA 1968, p. 51. Some authors even dispute whether Bracton himself is the author of the treatise or if it’s a work of several clerks who revised the treatise on a number of occasions.

(*Corpus Iuris Civilis*) uses the terms *servus*, *puer*, *homo servus*, *mancipium* and *ancilla*.⁸ It is clear that there is a significant terminological overlap at least with regard to terms *servus* (pl. *servi*) and *mancipium*. This common terminology could perhaps be linguistically explained by the absence of an adequate word to describe a villain in Latin. However Bracton proceeds to tell us of the etymological origin of the term *mancipium*, which is the same as Justinian's.⁹ Furthermore, the distinction made between the persons who are *liberi* and *servi* as the only distinction relevant to the *status libertatis* of a person is found in the Institutes as well as in Bracton.¹⁰ It is therefore clear that Bracton was knowingly using Roman sources and tried to equate servitude with villainage as legal categories.¹¹

From the reading of Bracton it is apparent that Bracton attempted to introduce Roman legal concepts into the English law of his time. It may be open to question whether Bracton by such attempts did not misstate the English common law of his time in favour of bringing the Roman and common law into an apparent harmony. Although Sir Henry Maine was of a different view, the dominant view is that Bracton did give us a picture of the actual English law of his time. This view is supported inter alia by later books of authority such as *Summa de legibus Anglie que vocatur Bretone*¹² (Britton), *Fleta seu Commentarius juris Anglicani*¹³ (Fleta) and *Mireur a justices*¹⁴ (Mirror of Justices) draw-

J.L. Barton, *The Mystery of Bracton*, "The Journal of Legal History" 1993, vol. 14, iss. 3; P. Brand, *The Date and Authorship of Bracton: A Response*, "The Journal of Legal History" 2010, vol. 31, iss. 3.

⁸ M. Bartošek, *Encyklopedie římského práva*, Prague 1994, p. 251.

⁹ I. 1,3,3: *Qui etiam mancipia dici sunt, quod ab hostibus manu capiuntur*. Bracton f. 4: *Dici etiam poterunt mancipia eo quod ab hostibus manucapiuntur*.

¹⁰ To overcome the problem of distinguishing praedial and personal servitude Bracton introduced the distinction of *servi* as the personally unfree and *ascripticii* as unfree due to their holding of a villain tenure. Instead of creating separate categories such as *villains regardant* and *villains in gross*, Bracton utilizes Roman terminology to create a link between the Roman slave and colonus (*ascriptus glebae*) on one hand and the English *villain in gross* and *villain regardant* on the other.

¹¹ The changing attitude of the early English common law towards the *ius commune* can clearly be seen by comparing Bracton with the earliest English law book *Tractatus de legibus et consuetudinibus regni Angliae* ascribed to the Chief Justiciar of Henry II Ranulf the Glanvill. This treatise written at around 1180 puts into juxtaposition *leges Romanae* with the English *consuetudo regni*. Unlike Bracton written only two generations after, Glanvill clearly manifesting some knowledge of Roman law does not make any attempt to reconcile the English law of his time with the Roman law. Hereinafter we shall refer to the treatise as "Glanvill". Citations refer to the 1812 edition of John Beams. In this article all references will be made to the 5th book *Placitum de questione status*.

¹² It is the first English book of authority not written in Latin, but Law French. It was written around 1290 during the reign of Edward I (1272–1307) and traditionally its authorship has been attributed to John le Breton, Bishop of Hereford. Hereinafter we shall refer to the treatise as "Britton". Citations refer to the 1865 edition of Francis Nichols.

¹³ This book of authority was written like Britton during the reign of Edward I. It is cited by Sir Edward Coke in his *Institutes of the Lawes of England* (1628–1644) as an authoritative source of law. Hereinafter we shall refer to the treatise as "Fleta". Citations refer to the three-volume edition of Richardson and Sayles published by the Selden Society as annual volumes no. 72 (*Fleta. Prologue. Books I&II*, 1953), no. 89 (*Fleta. Books III&IV*, 1972) and no. 99 (*Fleta. Books V&VI*, 1983).

¹⁴ Alternatively *Speculum Justitiariorum*. Like Britton this treatise was written in Law French and is a compilation of political, legal and moral narrations collected and maybe written by Andrew Horn, who according to Sir William Blackstone was of the best-educated lawyers of his time. Hereinafter we shall refer to the treatise as "Mirror of Justices". Citations refer to the 1893 edition of William J. Whittaker.

ing from Bracton to such an extent that we can regard them as shorter and up-to-date versions of Bracton.

The issue has not been addressed in a comprehensive manner within the academic discourse. The legal status of English villains has been analysed most complexly at the end of the 19th century by the Russian-English historian Sir Paul Vinogradoff in his work *Villainage in England: Essays in English Medieval History* (1892) and partially by Sir William Holdsworth in Volume III of his *History of English Law* (1922–1966). Partially the topic was revisited by H.G. Richardson and G.O. Sayles (*Law and Legislation from Aethelberht to Magna Charta*, 1966), R.H. Hilton (*The Decline of Serfdom in Medieval England*, 1969; *Bond Men Made Free*, 1973), P.R. Hyams (*The Action of Nafity in the Early Common Law*, 1974; *The Proof of Villein Status in the Common Law*, 1974), J.H. Baker (*Personal Liberty under the Common Law of England*, 1995), J. Hatcher (*English Serfdom and Villeinage*, 1981) and D. MacCulloch (*Bondmen under the Tudors*, 1988). The relation of Bracton to Roman law has been examined in a technical manner by S. Thorne in his modern redaction of Bracton’s work (1968–1997) by identifying texts that have identical or similar wording to that of the *Corpus Iuris Civilis* and more specifically by K. Guterbock in his work *Bracton and his Relation to Roman law: A Contribution to the History of Roman law in the Middle Ages* (1866). While none of the former works analysed the influence of Roman legal concepts of slavery upon the English law of villain ship in any great detail, thus also none of the works examining influence of Roman law on Bracton focused specifically on the legal status of villain. This article therefore intends to fill a lacuna open in this area by analyzing the degree of reception of Roman law of slavery into the system of English common law.¹⁵

From the methodological perspective we will utilize the semiotic triangle that subdivides a linguistic term into three constitutive elements – sign, object and concept. If we find all three elements identical in both slavery and villainage, we must invariably conclude that both categories are identical from the legal viewpoint. For the purposes of this article the sign will denote the linguistic expression of a term (words or a group of words), the object will denote the factual antecedents, which the legal order attaches to the creation or cessation of a legal relationship and the concept will denote the normative consequences of a particular legal relationship.

¹⁵ It is beyond the scope of this article to analyse the historical development of slavery within the Roman law. The evolution of slavery is naturally of an interest to scholars focusing on the reconstruction of Roman law in its various stages of development. On the other hand Bracton in line with Azo and other glossators treated Justinian’s codification as a single act of legislature without any analysis of its historical development. Bracton and glossators did not consider Justinian’s text as a collection of sources from various historical periods but as a coherent and dependable text justifying the application of the dialectic methods to deal with its potentially conflicting parts. M. Bellomo has already noticed that revival of Roman law in the West during the era of glossators was not accompanied by any desire for or interest in historical knowledge and “it did not matter to the jurists whether Justinian has lived before or after Christ”. M. Bellomo, *The Common Legal Past of Europe: 1000–1800*, Washington, D.C. 1995, p. 64–65. Historical development of Roman law of slavery was already addressed in many notable works such as W.W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*, Cambridge 1908; A. Watson, *Roman Slave Law*, Baltimore 1987; L. Schumacher, *Niewolnictwo antyczne. Dzien powszedni i los niewolnych*, Poznan 2005; I. Biezunska-Małowist, M. Małowist, *Niewolnictwo*, Warszawa 1987 and O. Robleda, *Il diritto degli schiavi nella Roma antica*, Rome 1976.

We have already seen that a significant terminological overlap exists between the *ius commune* (specifically *Corpus Iuris Civilis*) and Bracton with regards to the terminological expression. In the next part we will compare the modes of acquiring and losing the status of *servi* (object) and the legal position of *servi* (concept). Since both the Roman legal system as well as the system of common law are systems built on remedies rather than substantive rights, in the second part of the article we will focus on the comparison of judicial procedures aimed at resolving controversies with regard to the unfree status of a person. We shall linguistically describe the legal category of unfree persons in both legal systems as slaves in order to mirror the Latin terminological equality although with regard to the English common law the usual English equivalent would be villain.

Servus – Object

The two principal modes of acquiring status of slavery are either by birth or by becoming a slave after birth. Both *Corpus Iuris Civilis* and Bracton are – with regards to this general distinction – almost in verbatim accordance.¹⁶ Under the Roman law, the status of mother from the time of conception until the birth of a child is the only legally relevant fact for determining the *status libertatis* of the child. If the mother was a slave throughout the whole period, the child would invariably be a slave in the absence of a conditional legal act providing for the manumission at the time of birth.¹⁷

For Bracton the acquirement of servitude was more complex and took into account not only the status of mother but also the place of birth, the existence of power of the lord at the time of birth over both or one of the parents and the marital or extramarital status of the parents. According to him a slave is born out of (1) the union of two slaves without regard to marital status or existence of power of their lord over them (*ex nativo et ex nativa alicuius copulatis vel solutis, sive sub potestate domini constituti sint, sive extra potestatem*), (2) the extramarital union of a slave woman and a free man (*ex nativa soluta generatur quamvis ex patre libero, quia sequitur condicionem matris quasi vulgo conceptu*) and (3) the marital or extramarital union of a slave woman and a free man if the child is born in a villain tenure (*de libero genitus, qui se copulaverit villanae in villenagio constitutae, sive copula maritalis intervenerit sive non*).¹⁸ A child was therefore born free out of the union of two free persons, out of a marital union of a slave woman and a free man if the child was born in a “free bed” (*in libero toro*, i.e. outside of a villain tenure) or from the extramarital union of a free woman and a slave man. Bracton agrees with Justinian that change of status of the mother could not be to the detriment of the child which meant that if the mother was free for any period of time from the moment of child’s conception to the moment of its birth free, the child was considered to be free.¹⁹

¹⁶ I. 1,3,4: *Servi aut nascuntur aut fiunt...*, Bracton f. 4b: *Servi autem nascuntur aut fiunt.*

¹⁷ I. 1,3,4.

¹⁸ Bracton f. 4b, f. 5.

¹⁹ I. 1,4; D. 1,5,5,2; Bracton f. 5.

While moving to the modes of acquiring slavery after a person is born free, Roman law distinguished between acquiring slavery under the *ius gentium* and the *ius civile*.²⁰ According to *ius gentium* a person became a slave as a result of war captivity (*captivitas*).²¹ Bracton is in full agreement with the Roman law. Nevertheless one of the later shorter redactions of Bracton Mirror of Justices limits this to cases of “Saracens” who were taken into captivity by Christians or who were bought and brought from beyond the Greek sea (*Sarrazins qe sont pris de Christiens ou achetez e amenez par de sa la meer de Greece*).²²

Bracton and Corpus Iuris Civilis are further in agreement with regard to acquiring the status of the slave due to ingratitude.²³ Whereas in Roman law a manumitted slave became a client of his former master (now patron), no such special relationship seems to be established under the common law while raising the question of the legal basis for punishing ingratitude. Some of the other modes of acquiring servitude under the *ius civile* such as sale abroad or literally beyond the Tiber (*venditio trans Tiberim*),²⁴ conjugal union of a male slave and a free female under certain circumstances by virtue of *Senatusconsultum Claudianum*²⁵ or as a penalty for certain criminal acts (*servitus poenae*)²⁶ have not been taken over by Bracton.

On the other hand Bracton tells us that a clergyman, nobleman or a knight who, before entering into these orders, were slaves will become slaves again after they cease to be part of the respective order and return to secular life (*postea ad secularem vitam redierit*). Although this mode of acquiring servitude is not found in *Corpus Iuris Civilis* with regard to slavery, entering into ranks of decurions, soldiers, monks, priests or bishops with the consent of the owner of property on which a colonus farms is one of the modes of losing the status of the semi-free colonus.²⁷ Bracton seems to have brought the matter into logical conclusion by declaring that leaving the holy or noble order will ipso iure resurrect the former legal status of a person including servitude. Finally according to Bracton judicial acknowledgment of servitude will impose slavery upon the declarant because other courts will be barred from reaching a different conclusion (*res iudicata*).

Slaves acquired freedom through manumissions. Under the *ius civile* a slave became free as a result of a collusive judicial proceeding (*vindicatio in libertatem*),²⁸ entry into the roll of citizens (*manumissio censu*),²⁹ declaration in testament (*manumissio testamento*)³⁰ and later upon fulfilment of a condition (*manumissio sub conditione*) or by informal legacy (*libertas fideicommissaria*).³¹ The free were those who only under the *ius honorarium* (*in libertate esse*) were freed through manumission among friends (*man-*

²⁰ D. 1,5,5,1.

²¹ I. 1,3,4.

²² Mirror of Justices 2,28.

²³ C. 6,7,2 pr.

²⁴ Tab. 3,7.

²⁵ Gai. 1,84; 1,86; 1,91; 1,160.

²⁶ D. 48,19,2 pr.; D. 28,3,6,7–8.

²⁷ M. Bartořek, *Dejiny řımskeho prava ve trech fazıch jeho vyvoje*, Prague 1995, p. 136.

²⁸ D. 40,2.

²⁹ D. 1,8.

³⁰ D. 40,4.

³¹ D. 40,5.

umissio inter amicos),³² by a letter (*manumissio per epistulam*) or at a feast (*manumissio in convivio*).³³ Strictly speaking these persons were under the *ius civile* still slaves, but the praetor offered them protection by denying their master *vindicatio in servitute*.³⁴ The establishment of the principate and the gradual decay of Roman republican institutions led to the gradual disappearance of the *manumissio censu* but due to the rise of Christianity a new *manumissio in ecclesia* was created.

Common law does not seem to differentiate between the various modes of manumission. Even at the time of Glanvill law seems to have made the transition from laying emphasis on form to the actual will by declaring that manumission will occur in every case when the will of the master to free a slave from all duties that he/she owns to him/her or his/her heirs is manifested.³⁵ Slave could also be bought by a third party in order to be manumitted. Without the will of the master or by a concludent act of the master a slave could become free if he/she resided in a royal borough for a year and a day without being claimed through an action by the master, by entering into a vassal relationship with his/her master, by certain acts in a court of law, by certain quasi-criminal acts of the master against the slave, by marriage of a male slave to his female master, by marriage of a female slave to any free man or by baptism if the slave was not a Christian.

Servus – Concept

Slaves under the Roman law had no legal personality of their own and where incapable of exercising any rights or doing duties in their own names. Their capacity to enter into legal relationships by their own acts was derived from that of their master, thus any right or duty arising from a certain legal relationship bound not them, but their master. Roman slaves were therefore incapable of owning or even possessing property and were incapable of suing in their own name not only their masters but also any third parties. Their status was absolute – even if they would be left without a master they would still be regarded by law as slaves. A wrong committed against the person of the slave would not entitle the slave to bring an action for such an injury. The only person entitled to bring an action for such an injury would be the slave's master provided that the injury was such as to amount to an insult to the master. Slaves were therefore strictly speaking things and not persons.³⁶

³² For example Gai. 1,4; 1,44.

³³ Gai. Ep. 1,1,2: *Latini sunt, qui aut per epistulam aut inter amicos aut convivii adhibitione manumittuntur.*

³⁴ Slaves manumitted in violation of Lex Aelia Sentia, Lex Iunia Norbana or in a form not recognized by *ius civile* acquired the status of Latini Iuniani. This meant that these persons did not acquire Roman citizenship and thus had no political rights of the citizens. Their legal capacity within the private law was also limited – although they had *ius commercii* they did not have the right to make a testament and had no *ius conubii*. The category was abolished by emperor Justinian.

³⁵ Glanvill 5,5.

³⁶ This is mainly true with regards to the archaic Roman law. In the pre-classical and classical Roman law slaves are still not subjects of any rights but are regarded at the same time as *personae* and *res*. Their master had power over them as over any other *res corporales* but they were also as the other *personae*

Bracton’s biggest point of departure from the Roman concept of servitude is the relative status of slavery.³⁷ In what precise manner this aberration occurred remains shrouded in mystery since Glanvill writing some 50 years earlier regarded slavery as an absolute state and barred a manumitted person from testifying before a court of law or from “waging law” by judicial combat.³⁸ According to Bracton a person was a slave only with regard to his/her master. In a judicial proceeding against his/her slave the master could raise the exception of villainage, which would bar the slave from suing him, but such exception was generally available only to the master. With regard to third parties the slave was regarded as a free person and therefore had the full capacity to sue or be sued.

Another differing aspect was the slave’s capacity to hold property in his/her own name. Under the Roman law a master could leave to his/her slave part of his/her property as *peculium* but the slave could not transfer ownership to another person without the consent of his/her master, who was still the legal owner of the *peculium*.³⁹ Under the English common law, a master became owner of the slave’s property only after he took possession of it. Even a declaration of the master manifesting his/her intent to take possession would not be sufficient, for as St. German in the 16th century treatise *Doctor and Student* says: “also yf the lord clayme all the goodes of the vyllayne and seasyth no parte of them: that seasure is voyd and the gyfte of the vylleyne is good not withstandynge that seasure”.⁴⁰ Until the master took actual possession of the slave’s property, the slave was legally capable of alienating the property to third persons.

Judicial proceedings pertaining to disputed status

Proceeding from the substantive analysis, we shall now focus our inquiry on the procedural aspects of proving the freedom or servitude of a person. As already mentioned, both the Roman law and the common law of England were legal orders based on a system of remedies as opposed to substantive rights. Both legal orders developed independently of each other a system of actions that delimited indirectly the substantive rights of a person.

In Roman law in the *legis actio* stage of civil proceedings a personal status of a person could be tried through *legis actio sacramento in rem* and in the formulary stage through *ex libertate in servitutem petere* or *ex servitute in libertatem petere* (collectively

alieni iuris an object of his *potestas*. Outside the sphere of private law slaves were considered to be persons. M. Kaser, *Das Romische Privatrecht. Erster Abschnitt. Das Altromische, Das Vorklassische und Klassische Recht*, Munich 1955, p. 246.

³⁷ Bracton f. 25: *Poterit enim quis esse servus unius et liber homo alterius, respective tamen, quamvis dicatur quod quilibet aut liber aut servus, nec pro parte liber, nec pro parte servus.*

³⁸ Glanvill 5,5.

³⁹ D. 6,1,41,1. W.W. Buckland notes that “mere possession of a peculium did not in itself increase the slave’s power of alienation: the voluntas of the dominus was still necessary”. W.W. Buckland, *The Roman law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*, Cambridge 1908, p. 201.

⁴⁰ *Doctor and Student* 114b. Reference is made to the 1974 edition of Plucknett and Barton (*St. German’s Doctor and Student*).

controversia de libertate).⁴¹ The principal writ of common law to the same effect was *writ (breve) de native habendo*, although personal status could be indirectly tried at various stages of development through other writs such as *writ de homine replegiando* for wrongfully seizing the body or property of the plaintiff, *writ of trespass de vi et armis* for wrongfully seizing the body or property of the plaintiff in the past and later through defamatory *trespass on case*. For the purposes of this article we shall focus exclusively on the principal *writ de native habendo*.

As can be seen from the superficial examination of the names of the Roman and common law forms of action, both actions were designed to be proprietary in nature through which the master as the owner of the slave claimed ownership (right of possession) of the slave. Under the *writ de native habendo* the master was the only person who could bring the action. In Roman law master could claim the alleged slave through *ex libertate in servitute petere*, but also the slave could through a special representative known as *adsertor libertatis* claim his freedom through *ex servitute in libertatem petere*.⁴² The defendant would logically be in the first case *adsertor libertatis* and in the second case the master. Unlike the Roman law, in proceedings initiated by the *writ de native habendo* besides another master claiming ownership (right of possession) of the slave the slave could directly become the defendant.

As far as the actual initiation of Roman *controversia de libertate* is concerned, there is a great degree of uncertainty about the form of this action in the formulary stage. The dominant but to no extent the only view is that the proceedings were prejudicial in character meaning that *condemnatio* was absent from the formula of the action.⁴³ The wording of *intentio* with regard to the *ex servitute in libertatem petere* is however so unclear that O. Lenel does not attempt to reconstruct the precise wording of the formula in his reconstruction of *Edictum Perpetuum*.⁴⁴ Given the very limited sources describing its application (the main being narrative sources of Livy and Dionysius on the trial of Virginia), it seems unlikely that any more light could be shed at this moment.

⁴¹ For a more detailed account of the Roman proceedings at various stages of its development see M.G. Nicolau, *Causa liberalis. Étude historique et comparative du procès de liberté dans les législations anciennes*, Paris 1933; and M. Mlkvý, *Procesná spôsobilosť strán v rímskom spore o slobodu [in:] Prvky a princípy rímskeho a kánonického procesného práva*, Bratislava 2016.

⁴² Slave could not petition the court directly since according to the Roman doctrine a human person cannot be simultaneously a party and the object of a judicial proceeding. Any Roman citizen however could undertake to represent the slave as his/her special representative under the name *adsertor libertatis* and could do so even against the actual will of the slave. L. Heyrovský, *Římský civilní proces*, Bratislava 1925, p. 65; A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, p. 386. As to the question who can act as *adsertor* see D. 40.12.1–6, but a more extensive approach to the question is offered by Cicero. Cic. *De domo sua* 78.

⁴³ However Lenel challenges this view on the grounds that Gaius does not mention this action in his list of prejudicial actions nor do the Digests of Justinian. Maschke further states that in certain circumstances as will be noted later it was necessary to show whether the alleged slave was in possession of his liberty or not before the commencement of the suit, which would undoubtedly be a prejudicial question. If the proceedings were themselves prejudicial, then a “pre-prejudicial” proceeding would have to be initiated. This notion does not appear to have any foundations in the Roman sources. O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu Dessen Wiederherstellung*, Leipzig 1883, p. 305–306; R. Maschke, *Der Freiheitsprozeß im klassischen Altertum insbesondere der Prozeß um Virginia*, Berlin 1888, s. 2.

⁴⁴ The *intentio* should ask the judge to answer the question *an Pamphilus liber sit (ex iure Quiritum)?*. O. Lenel, *op. cit.*, p. 305.

The proceedings under the *writ de native habendo* could have a wholly proprietary character when the dispute arose between two masters claiming ownership (right of possession)] in a slave.⁴⁵ This would have been dealt with in the sheriff’s court of the county in which the dispute arose. However if the slave declared himself/herself to be free, the case would be upon application removed from the court of sheriff to the royal court by the alleged slave using a special interlocutory writ *de libertate probanda* (alternatively *monstravit*) or by the master through *pone on writ de native habendo* (alternatively *pone de nativis*).

Probably the most important part for the definite outcome of any judicial proceeding is its evidentiary stage in which the primary allocation of the burden of proof can be crucial. Roman procedural law was built on the maxim that the burden of proof lies with the person claiming, not denying a fact (*ei incumbit probatio qui dicit, non qui negat*).⁴⁶ This would mean that in the case of *ex libertate in servitute petere* the burden would rest on the master and in *ex servitute in libertatem petere* conversely on the *adsertor*. A question certainly may arise as to the status of the slave who is the object of the proceedings since his/her factual state of freedom or servitude determines the allocation of burden of proof between the trial parties. Should disputes about his/her factual state arise, the praetor would have to prejudicially inquire whether the slave was *sine dolo malo* factually in possession of his/her liberty or not.

With regard to the English proceedings, Glanvill informs us that the party claiming freedom will invariably bear the burden of proving its freedom.⁴⁷ However later Bracton tells us that the burden will rest on the person claiming freedom if he/she was under the power (*sub potestas*) of the master before his/her flight from the villain tenure. The prejudicial question would therefore be whether the alleged slave was under power of his/her lord before his/her flight. Master had power over his/her slaves regardless of them possessing any land within his/her manor, but the slaves generally had to live on the manor of the master.⁴⁸ Later treatise Britton even tells us that a master retained his/her power over the slaves even outside of his/her manor provided that the slaves had the habit of returning to the manor (“villain’s nest”) not unlike the Roman law when dealing with the possession of animals.⁴⁹

Once the burden of proof has been allocated, the parties had then the opportunity to present evidence. In the Roman *controversia de libertate* the parties to the trial and the judge were free to decide what facts should be proven and by what means (e.g. testimonies, depositions under oath, witnesses, documents, expert testimonies, etc.). Like in the

⁴⁵ The wording of the writ as reported by Fitzherbert in his *Natura Brevium* (1534) is the following: *Rex vicecomiti S. salutatem. Praecipimus tibi quod juste et sine dilatione facias habere A.B. nativum et fugitivum suum cum omnibus catallis et tota sequela sua ubicumque inventus fuerit in balliva tua nisi sint in dominico nostro, qui fugit de terra sua post coronationem domini Henrici Regis filii Regis Johannis. Et prohibemus super forisfacturam nostram ne quis eum injuste detineat. Teste, etc.*

⁴⁶ D. 22,3,2.

⁴⁷ Glanvill 5,4.

⁴⁸ Bracton uses the term “levant and couchant” (*levantes et cubantes*). Bracton f. 6b.

⁴⁹ Proving this habit could be difficult. A proof would usually be the regular payment of chevage (*chevage*) to the master at certain times or alternatively doing a day’s work on the manor every year during the harvest. Britton 1,23,9.

modern procedural systems, it was left to the free discretion of the judicial body to reach decision based on the evaluation of evidence presented during the trial.

The English proceedings required a formal method of proof that could be satisfied only in two ways: (1) either the party carrying the burden of proof had to present an acknowledgement of record (villainage acknowledged in a previous judicial proceeding), or alternatively (2) had to produce suit. This meant that the plaintiff had to produce before the court at least two relatives of the alleged slave who would testify before the court that they were villains (slaves) of the suing master. If the plaintiff managed to establish one of these proofs, he/she would prevail regardless of any other potential piece of evidence.

It is a matter of historical and legal curiosity that precisely the formal nature of taking evidence in the proceedings under *writ de native habendo* has led to the factual abolition of villainage in England few centuries after Bracton. This was done through the permissiveness of courts in accepting a wide range of objections raised by the defendants. The post-Bractonian book of authority Fleta tells us that the defendants could object to the production of relatives from the defendant's maternal lineage if the defendant derived his freedom from the paternal line (*ex parte matris et non ex parte patris, ex cuius parte ipse clamat ipsum esse liberum*) or to any female witnesses since women should not be allowed to testify on the status of men (*mulieres ducat ad probationem status hominis admitti non debent*).⁵⁰

Defendant could also undertake affirmative defence alleging the freedom of his/her ancestors or by proving that he/she was a party to a lawsuit the subject matter of which was inconsistent with his/her servitude. Already hard evidentiary situation of the master-plaintiff was further worsened when courts, from the 14th century on, began to acknowledge that a bastard was always born free since a *filius nullius* cannot inherit anything from his father, not even personal status. Any speculations as to the status of the defendant's father were refused by the courts in favour of presumption of liberty. From the 15th through 16th centuries the English ecclesiastical courts which had jurisdiction over family matters started to issue certificates of bastardy upon request without any actual search. Proof of bastardy became in this period a legal fiction enabling the defendant to prevail in every proceeding under *writ de native habendo* over his master. For this reason villainage was never abolished by an act of parliament and technically remains an obsolete part of the English legal order to this day.

⁵⁰ Fleta 2,51.

Conclusion

The object of our inquiry as stated at the beginning of his article is whether the Roman category of slaves was legally identical with the English category of villains. From the methodological perspective we have stated that if the sign, object and concept of both categories are the same, then they indeed are one legal category found in two legal orders. From the legal viewpoint no distinction in terminology should be interpreted as being imported from the vocabulary of other system for which this distinction is significant or is a result of persistence of tradition.

When evaluating our results we have seen that with regard to the sign there is at least in Bracton's work a significant terminological unity with Justinian's codification. This unity is somewhat weakened when we consider objects of both legal terms. Although the grounds of acquiring the unfree status overlap to a significant extent, we see that perhaps war captivity, which was the dominant way of acquiring the status of slave in the social reality of ancient Rome, became only marginal for Bracton and for the later authors of authoritative books who limited it only to captured Muslims that did not convert to Christianity. In the English common law the dominant mode of acquiring unfree status was by birth, which is well manifested in giving ancestry such an important evidentiary role in proceedings under the *writ de native habendo*.

Christianity modified to a great extent the concept (normative consequences) of both categories. While Roman slaves had no legal capacity of their own, English villains had undoubtedly legal capacity albeit limited in relation to their master. Christian teaching advocating for the emancipation and amelioration of living conditions of slaves had a significant impact on law. Christian slaves had to have access to the sacrament of marriage and therefore law of a Christian state had to regard them in this aspect as subjects of law.⁵¹ From this point on, the common law gave slaves further rights which basically transformed their incapacity to act at all *erga omnes* into an incapacity to act against their master *inter partes*.

Comparison of procedural law shows that while the Roman law provided for equality of the trial parties by providing them with the same opportunity to influence the outcome of the judicial decision (mainly by proposing evidence), common law limited the master to presenting limited formal evidence while giving the defendant freedom to present any evidence pertaining to his/her status and even awarding him/her the privilege of alternative pleading. Evidentiary problems of a suing master are well documented in an actual case of 1304, when the master complained before the court that if a master had 100 slaves and all would desert him at the same time, he could not claim any single one of them since he would not be able to come forward with two relatives of any slave.⁵² Although this was a good argument, he could present before the court

⁵¹ This was to a certain extent true even under Justinian, who although still denying the slaves the capacity to marry gave their factual marriage legal significance after emancipation for the purposes of the law of succession.

⁵² Year-books 32–33 Ed. I. R.S., p. 512; E. Shanks, S. Milsom, *Novae Narrationes*, London 1963, p. cxlv.

only the defendant's father and as a result lost his case. The tendency from the very early stages of development was clearly in favour of liberty.

To answer the question posed at the beginning whether there was a reception of the Roman law of slavery into the common law we would need to clarify the term reception of *ius commune*. Reception of law in legal theory is defined as an intentional transplantation of substance of one legal order into another one.⁵³ With regards to the *ius commune* the so-called *reductive historiography* acknowledges the reception only within a hierarchy of sources in which the *ius commune* is a subsidiary source of law applicable only when royal, feudal or customary law is silent on a certain question.⁵⁴ The more extensive approach is to view reception not only within the hierarchy of sources but also by examining the degree in which the technical language, concepts but most fundamentally the methodological framework of the *modus arguendi* in resolving legal disputes was adopted.⁵⁵

As far as the reductive approach is concerned, it is clear that Bracton unlike Glanvill approached the Roman law within the *ius commune* as a source of law applicable in England. However if we examine the practice of courts, we find no direct references to the *ius commune* in the plea rolls of the courts, which closely followed the forms of action at common law (writs). We must conclude that even if Bracton treated *ius commune* as part of the English common law, it was not a source of law before the royal courts.⁵⁶ From the extensive viewpoint we may observe that the technical language as well as some of the legal concepts of slavery were undoubtedly borrowed from the Roman law not only by Bracton but also by subsequent treatises such as Fleta and Britton. Under the presumption that we understand reception within this meaning of the word, we are well entitled to speak of it in the context of the English common law.

Despite the reception we are nevertheless able to observe fundamental legal differences between slaves and villains, which probably stem from their different social origin and the different material conditions of the medieval English and Roman society. While the Roman slaves usually originated from war captives and their offspring (since as a matter of principle Roman citizen could not become a slave on Roman soil), English villains were created as elsewhere in Europe from amalgamation of quasi-slave serfs and originally free persons who due to their economic weakness lost some of their legal rights throughout the centuries. The terminological distinction between slave and villain seems, despite the arguable reception of Roman law into the English common law, warranted also in legal science.

⁵³ F. Weyr, *Recepce* [in:] *Slovník veřejného práva československého*, vol. III, Brno 1934, p. 715–718. Additional criteria can however be added such as the requirement of formal discontinuity and material continuity of a legal system or an outright quantitative threshold. Š. Luby, *Najzákladnejšie tézy Leninovho učenia o práve. Právnické štúdie*, p. 19; J. Beňa, *Kontinuita v práve* [in:] *Obzor*, iss. 64, no. 4, 1981, p. 350.

⁵⁴ Compare M. Bellomo, *The Common Legal Past of Europe: 1000–1800*, Washington, D.C. 1995, p. 150–151.

⁵⁵ *Ibidem*, p. 154–155.

⁵⁶ This is not to state that *ius commune* was not a source of law in England at all. Even at a much later time of Sir William Blackstone we find the *ius commune* (Roman and canon law) applied in the ecclesiastical courts, military courts, courts of admiralty and courts of universities at Oxford and Cambridge. W. Blackstone, *Commentaries on the Laws of England in Four Books*, vol. 1, Philadelphia 1894, p. 83. *Ius commune* was however not applied before the royal courts as a source of law.

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