CHAPTER 5

Commerce

This chapter deals with the main legal issues which arise in connexion with Roman commerce: contract in general; the main commercial contracts: sale, contracts of loan and for security; contracts for services, such as carriage of goods and building contracts. It then moves on to deal with how Roman businesses may have been organized: what sort of labour they used; and how they attempted to limit their liability. It concludes with the law of insolvency.

I CONTRACTS FORMAL AND INFORMAL

Contracts in Roman law can be divided into two main categories, formal and informal. First, there was the formal contract of *stipulatio*, which was made orally, not in writing. It was concluded by question and answer, which had to be in formal terms and had to correspond with one another. The promisee (or *stipulator*) would ask, for example, 'do you promise to pay 1,000 sesterces?', and the promisor must reply 'I promise to pay 1,000 sesterces.' The exact correspondence between question and answer created an obligation binding on the promisor; but, if the two did not correspond exactly, no obligation came into being. There is much to be said for this insistence on exact correspondence, since it leaves it absolutely clear which verbal exchanges create binding obligations and which do not. The high classical jurists tolerated no discrepancy between question and answer; later this came to be watered down, so that a request for 1,000 sesterces and a promise for 500 sesterces might be held good for the lesser amount, on the basis that the lesser was included within the greater.

So long as there was the necessary formal correspondence of question and answer, there was no restriction on the possible content of the promise – apart from the fact that an illegal or immoral promise would be unenforceable. *Stipulatio* could therefore be used to give legal force to

an agreement of any kind. It was a formal contract but an extremely flexible one. It was also a contract *stricti iuris*: its terms were interpreted strictly.

The second type of contract was precisely the opposite: entirely free of form. But each kind was applicable in only one specific situation. Contracts of this sort fall into various sub-categories, but for present purposes it is enough to say that some came into being when an object was delivered (contracts *re*: deposit, loan, pledge) and others came into being by agreement (consensual contracts: sale, hire, mandate, partnership). In neither case was there any need for any set form. But the enforceability of the contract depended on its meeting the precise legal definition for that particular contract. If it did not, there was no contract.

The difference between these two types of contract is fundamental. In the *stipulatio* a promise or series of promises was made, specifically adapted to the contractual situation at which the parties aimed. In consensual contracts, the law already set out the essentials which applied to a contract. So, for example, the consensual contract of sale (*emptio venditio*) included implied warranties on the part of the seller about his title to the goods and about their quality. In a sale by *stipulatio* such matters would need to be provided for expressly if they were to be terms of the contract.

On the other hand, in *mutuum*, the real contract of loan of money (or other measurable commodities), the contract was formed purely by the delivery of the money. But that was in some respects unsatisfactory: the contract of *mutuum* as such made no provision for the date for repayment of the loan; nor did it say anything about the payment of interest. If those were to be terms of the contract, they needed to be introduced by *stipulatio*.

These examples confirm the vital importance of *stipulatio*, both for concluding non-standard contracts and for adding non-standard terms to standard contracts.

In classical law it was therefore characteristic of the law of informal contracts that each contract had its own name; situations which fell outside the recognized categories were simply not contracts. Clearly, this leaves a wide range of cases. The most obvious is perhaps barter: one of the essentials of the contract of sale (as we shall see in the next section) was that the price should be in money. An exchange of goods for goods, barter, was therefore not a sale, and for most of classical law it was not a contract at all. But towards the end of the classical period there are signs of an extension of the law of contract to cover even these anoma-

lous situations, and there is the development of a category of so-called 'innominate' (literally, 'nameless') contracts. These covered arrangements for exchange of goods or services. If we ask why this development took place precisely in the late classical period, we are confronted with a choice familiar from chapter 2: on the one hand, it is arguable that this was a purely technical legal development, a change which the jurists regarded as desirable, having formed the view that the law of contracts had hitherto been too restricted in its scope; on the other hand, it might be thought that this was a reflection of some social change, and that social agreements which had hitherto worked perfectly well on an informal basis now came to be regarded as needing legal recognition and sanction. Which of these is more probable it is, as usual, impossible with any certainty to say.

II SALE

The emergence of the consensual contract of sale (*emptio venditio*) was a critical moment in the history of Roman commerce. Previously sale must have depended on an exchange of *stipulationes*, in which the seller promised to deliver the object of sale, and the buyer promised to pay the price. That had various drawbacks: formality; the fact that routine terms (for example, warranties of quality) had to be spelled out and formally promised in each individual contract; and the fact that the buyer and seller (or their slaves on their behalf) must meet face to face in order to make the contract. The development of the consensual contract of sale – at latest in the second century BC – overcame all of these disadvantages.

The contract of sale came into being only if there was agreement on the essentials: this meant on the object of sale and on the price. This does not sound very demanding. But it did have two important consequences. First, it meant that it was not possible to have a contract of sale with a price to be fixed in the future or (according to some jurists) by reference to a third party, since agreement on a price was interpreted as meaning agreement on a fixed price rather than agreement on how the price was to be arrived at.

Second, it meant that there could be no sale of generic goods, such as a litre of wine or a pound of corn. These cases were not regarded as satisfying the requirement that the object of the contract must be identified. A sale of generic goods was therefore regarded as coming into being only when the actual goods which were to be the subject of the sale had been

identifiably separated from the rest of the goods; or where the whole stock of goods rather than its individual parts was the object of the sale (Gaius, *D.* 18.1.35.5–7). The same problem would arise where, for example, a price per sheep was agreed, but it was not clarified exactly which sheep from the flock were the subject of the contract. This may seem more esoteric than practical. If so, the appearance is misleading. Suppose a second sheep-purchaser came to market and bought the sheep which the first purchaser thought he had bought, although they had not been identified. The first could not sue the seller for breach of contract, because until its object had been identified there was no contract.

These rules about certainty of price and object seem to go back to the days in which sale was a cash-sale, a transaction in which money and goods were exchanged on the spot. In developed Roman law, however, and even in the later republic, there was no need for the buyer and the seller to perform their parts of the contract at the same time, any more than this is necessary today. Classical Roman law never broke away from its refusal to recognize sale of generic goods. This was certainly not because trade in such goods did not take place: there are plenty of examples of it in the Digest as well as in wrecks at the bottom of the Mediterranean Sea (cf. Petronius, *Satyricon* 76). The conventional view is that the law could afford the luxury of this restrictive approach precisely because the *stipulatio* was still available as a means of entering into a contract for sale of generic goods. Curiously enough, however, there is no evidence that this approach was followed. Various substitutes for generic sale could be employed, such as loans repayable in kind, promises to pay penalties for non-delivery (Paul, *D.* 19.1.47), and so forth; but the lacuna in the law is perhaps smaller than has generally been appreciated: large quantities of goods could readily be sold, provided they were identified at least as a mass, and this would present no problems if they were housed in a warehouse or on board a ship, while agricultural produce might often be sold before it was harvested, making its identification straightforward (Ernst 1996: 276–99, 339–43).

In an ordinary contract of sale (*emptio venditio*) the whole point of the contract was that without need for express stipulation certain legal effects were automatically produced. It will be enough to mention three of these.

(1) The seller impliedly warranted his title to the goods, so that the buyer who was dispossessed by a person who turned out to be the true owner was automatically able to sue the seller for breach of contract. Initially the buyer had to demand a *stipulatio* for indemnity or for a

penalty (conventionally double) in the event that he was evicted from possession of the goods. (A special action was however available as of right if the goods had been made over by the formal conveyance of *mancipatio*.) In due course it became established that as a matter of good faith the seller was obliged to give this promise – so that he could be sued for breach of contract if he did not. The logical conclusion of this development was reached when the guarantee became implicit in the contract of sale itself. This appears to have happened by the early second century AD (Julian, *D.* 21.2.8).

This development illustrates the significance of the fact that sale was a 'good faith' contract. What this meant was that the parties' dealings with one another were assessed in any eventual litigation on the basis of what good faith demanded; and so, without any need for adding further express promises or undertakings, the law on sale kept pace with the customs of trade and commerce: it was open to a judge to find that the failure of a party to act in accordance with ordinary commercial standards was not consonant with good faith and therefore amounted to a breach of contract. The standard of good faith therefore gave the contract extraordinary vitality and flexibility.

(2) The seller impliedly warranted the quality of the goods. Initially the buyer took the risk of defects in the goods: *caveat emptor*. If he wanted a guarantee against particular defects, he would have to take it expressly by *stipulatio*. Only if the seller had fraudulently concealed the presence of defects in the goods would the buyer have a remedy, as this was of course a breach of good faith. In the course of the classical period, however, the aediles – magistrates who were responsible among other things for markets – introduced in their edict a liability for defects which was independent of the seller's knowledge or lack of good faith. The aediles' edict was concerned only with sales of slaves and cattle which took place in the market. (At Athens, the *agoranomoi* performed a similar role: Millett 1990: 172.)

Here we see something of the same pattern as with the warranty against eviction: to start with, the aediles set out a list of defects which the seller should expressly promise were not present; it later became possible to insist that the promise be given; and finally the warranty was implied in the contract. This is essentially the same regime as now governs sales of goods made in the course of business in Britain: the Sale of Goods Act 1979 sets out implied contractual terms on the quality and the fitness for purpose of goods sold. So far as Rome is concerned, the precise chronological steps by which the aediles' liability gradually came

to extend to all sales everywhere are uncertain, but the trend was firmly in the direction of a general implied warranty of quality. Where the goods were defective, the buyer was able to reject the goods and reclaim the price within six months or seek a rebate on the price to reflect the presence of the defect within twelve months.

Some of the surviving documents provide an interesting perspective on these warranties. For example, a papyrus of AD 151 attests the sale of a slave who is warranted to be healthy in accordance with the edict; payment of double the price is also promised for the event that the buyer is evicted from possession. Both of these warranties are given by *stipulatio*: particularly interesting is the fact that a reference to the aediles' edict and its list of diseases and defects is incorporated by reference in a *stipulatio*. It is difficult to be sure whether this approach is followed because by this date these warranties were not yet implied in the contract of sale, or whether the buyer was simply reluctant to rely on implied terms and good faith and preferred the certainty of a *stipulatio* (*FIRA* 3.133; cf. also *FIRA* 3.87–9 and 132).

(3) Once agreement had been reached on the essentials of the contract, the object sold and its price, the risk of accidental loss or destruction passed to the buyer. This happened only when the contract was, as the Romans put it, 'perfected', that is, any conditions to which it was subject had been satisfied, and the goods had been identified (where appropriate, by measuring them or weighing them out: Gaius, *D.* 18.1.35.5). It has been regarded as strange that the buyer became liable at such an early point in the transaction, since he would not become owner until the goods were actually conveyed to him, for example by delivery. The result is that, at a time at which he did not own the goods, he was at risk if they were lost or destroyed in certain circumstances. The explanation for this again seems to lie in the fact that sale was originally cash-sale, and conclusion of contract, conveyance and transfer of risk all took place at the same time. That would not account for the survival of the rule at a time when the contract was regularly concluded well before the conveyance of the goods was made. But the risk which passed to the buyer was only for events which were not preventable by the seller, and this restriction was interpreted strictly: the seller was still liable if the goods were stolen, unless the theft involved overwhelming force. So the sorts of risks which the buyer assumed on conclusion of the contract were for destruction by earthquake, flooding or fire (so long as the seller was not responsible for it). The risk rule, odd though it may seem, was therefore kept within strict limits.

The terms just discussed were (ultimately) implied in every contract of sale. But it was possible to introduce further terms ('pacts') into the contract. This could be done without need for additional *stipulatio*, because sale was a 'good faith' contract. One aspect of this was that, where the parties had entered into pacts in conjunction with the sale, the tenor of those pacts should be observed.

Some of these pacts were in the interest of the seller, and others in the interest of the buyer. So, for example, the parties could include in the contract a term allowing the seller to call off the sale if the price was not paid by a certain day or if he received a better offer within a certain period. There were difficulties of interpretation in both of these cases: was the sale concluded immediately but subject to cancellation in the future? Or did it not come into being at all until the price was paid or no better offer was received? The Digest discusses the legal consequences of this choice (Paul, *D.* 41.4.2.3–4; Ulpian, *D.* 18.2.2 and *D.* 18.3.1).

Clearly in the buyer's interest, on the other hand, were arrangements for sale on approval (*pactum displicentiae*) or for tasting of wine before purchase, which appears to have been absolutely standard practice. An interesting example of sale on approval is given by Ulpian; as appears from the end of the text, the buyer seems to have been an acrobat who specialized in jumping from mule to mule (*desultor*):

> This question is raised by Mela: if I have given you mules to try out, for you to buy them if you approve them, and for you to pay a daily rental for each one if you do not approve them, and within the trial period the mules have been stolen by thieves, what has to be paid: is it the price and the rental or only the rental? Mela says it makes a difference whether the sale has already been concluded or is to be concluded in the future: if it had already been concluded, the price could be claimed; if it was a future sale the rental could be. He said nothing about the appropriate actions. But I think, if the sale was concluded, the seller would have the action on sale (*actio ex vendito*), and, if not, the appropriate action ought to be given against the acrobat. (Ulpian, *D.* 19.5.20.1)

Here again we find the same concern whether the sale comes into being at once, but is liable to be set aside, or whether it is suspended until the buyer has given his approval. The reason it matters is that the risk of loss of the goods passes to the buyer when the contract is concluded: if the contract has been concluded, the loss falls on the buyer and the seller is entitled to payment of the price.

It seems likely that inclusion of any of these terms in a contract would have affected the price of the goods; and it is clear from the way some

jurists discuss them that they were regarded in a sense as being part of the price. Certainly, a buyer who is given generous terms for rejection of goods may have to pay a relatively high price; a seller who insists on stern provisions for calling off the sale may have to make do with a low one. All this gives a clear impression of the way in which the parties could negotiate the terms for their particular contract, using but modifying the basic background of the law of sale.

III LENDING AND BORROWING

1. Loans

Loans could be arranged in a number of different ways. One was of course *stipulatio*: the promisor simply promised to pay a certain sum at a certain date, and this could be calculated so as to include a charge for interest.

There was, however, no need for a *stipulatio*. Simply handing over money as a loan created an obligation on the part of the recipient to repay it. This was the contract known as *mutuum*. The contract came into being, as the Romans put it, *re*, by the very fact of delivery of the money. The obligation to repay was of precisely the same extent. Such a loan accordingly did not include any provision for interest. For this reason, it seems likely that *mutuum* was one of the range of contracts which were employed primarily between friends. Friendship evidently imposed such duties (Cic., *ad familiares* 14.1.5, 14.2.3). Indeed, a good deal of the borrowing in Rome seems to have taken place, just as it did in Athens (Millett 1983: 47; 1991: 218), between friends and relatives, and much of it would be purely for the domestic purposes of consumption or meeting problems of liquidity, rather than for investment. So a loan, although a contract, was not necessarily a commercial transaction: instead it fitted into an elaborate network of obligations owed by one friend to another. Some of these would be ultimately repaid only by a bequest (chapter 3 above; Garnsey and Saller 1987: 154–6).

Whenever the *mutuum* was employed in more commercial dealings, in which interest would have been demanded, it would have been necessary to enter into a separate contract for the interest. That could have been done by *stipulatio*; on the other hand, if a *stipulatio* had to be made for the interest anyway, it is not unlikely that it would have been extended to cover the principal too. In effect, therefore, the *mutuum*

would be superseded (in legal language, 'novated') by the contract of *stipulatio*.

Maximum interest rates were legally fixed from time to time. The history and the details are rather obscure, although it is tolerably clear that throughout the classical period the maximum rate was the so-called *centesimae usurae*, 1 per cent per month, and so 12 per cent per year (Zimmermann 1990: 166–70).

The documents of practice illustrate a variety of approaches to loans; although it is important to note that very similar examples are also found in the Digest (Paul, *D.* 12.1.40 and *D.* 45.1.126.2), so theory and practice here go hand in hand. Here is one of the Murecine tablets:

> [29 August AD 38] I, C. Novius Eunus, have written that I owe Hesychus Evenianus, the slave of C. Caesar Augustus Germanicus, 1130 sesterces which I received from him as a loan (*mutuum*) and shall repay either to him or to C. Sulpicius Faustus, as soon as he demands them. And Hesychus Evenianus, the slave of C. Caesar Augustus Germanicus, stipulated and I, C. Novius Eunus, promised that the 1130 sesterces above mentioned were duly paid in good coin. Transacted at Puteoli. (TP 17)

Here the loan is a *mutuum*, but it appears to have been reinforced by a *stipulatio*. This raised a legal question: did a *mutuum* come into being at all, or was the whole transaction just a *stipulatio*? Or did the *stipulatio* novate an existing *mutuum*? Or did both subsist concurrently? The later classical jurists appear to have favoured the view that it was just a *stipulatio* (Pomponius, *D.* 46.2.7; Ulpian, *D.* 46.2.6.1). In the case of this document, however, there is some reason to believe that both transactions were regarded as subsisting, so that the creditor would have a choice which type of action to pursue (Wolf and Crook 1989: 22).

There is an interesting development in the following year, in which another document (TP 18) attests a loan transaction between the same parties, this time for 1,250 sesterces, again reinforced by a *stipulatio*, but this time also by an oath to repay the principal sum on or before 1 November. Failure to repay not only brings with it the sanction of perjury but also a penalty of twenty sesterces per day for late payment. From this one can safely conclude that this particular lender was tiring of this particular borrower. The general conclusion, however, must be that parties had a broad freedom to fix the terms of their own contracts. A puzzle about this and other similar documents which has yet satisfactorily to be explained is that, viewed as a rate of interest, the penalty is considerably in excess of any legal rate.

2. Bankers

An interesting feature of the tablet just cited (TP 17) is that it mentions C. Sulpicius Faustus as an alternative payee to whom repayment of the loan could be made. He was the banker in whose archive this tablet was found, together with a large number of other documents of loan and security and other matters (some of which are discussed below). These tablets confirm that, although Rome had no banking system as such, and much credit and lending appears to have taken place on the basis of personal rather than commercial relationships, there were none the less bankers in the sense of people who accepted deposits, on which they might pay interest, who acted as paying agents, and who lent out money against interest. The leading study of Roman banking concludes that bankers tended to operate at a local level (Andreau 1987: 652); this finds some support in the case of the Sulpicii, who appear to have been a banking 'house' at Puteoli: three generations of them are attested, all apparently freedmen.

So far as loans made by bankers are concerned, only a little need be added here to what has been said already. Comparison of the two documents just mentioned indicates that, as would be expected, bankers varied the stringency of the terms of their loans, presumably taking account of the attractiveness of retaining the particular customer.

It is interesting that the document cited above (TP 17) requires repayment of the loan on demand. This is not an unworkable provision (modern overdrafts are also repayable on demand), but it can only have worked if desirable customers at least were given notice when repayment of their loan would be demanded. It is very striking that none of the documents in this archive, or the similar documents from Herculaneum, contains any date for repayment of the loan. Nor do they make any provision for payment of interest. Since altruism and banking do not go hand in hand, some explanation is needed. Because the documents specify no definite term for the loan, it is impossible to conclude that the capital sum already included an advance reckoning of the amount of interest due. There is also no evidence of separate documents which might have contained agreements on interest. A strong possibility is therefore that payment of interest was provided for informally, in a pact. That would not allow the creditor to sue for it, but his position may have been sufficiently protected by the fact that the loan was repayable on demand; if the debtor was not paying the interest, one can be fairly sure that repayment would soon be demanded. It may also be that this

method allowed the creditor to avoid the restrictions on interest rates which would otherwise have applied (Paul, *D.* 2.14.4.3; Gröschler 1997: 149–94, 371–2 on TP Sulp 60–2 and TH 70–4).

So far as bankers' borrowing money or taking deposits is concerned, clearly a loan (*mutuum*) could be made to a banker as to any other individual. A more interesting possibility, however, was to make not a loan but a deposit (*depositum*). Under the ordinary contract of deposit, the depositee was not entitled to use the object deposited and to do so was a breach of contract. This form of deposit would therefore be of interest to bankers only for safe deposits or where the money was not going to be touched at all. In general, however, bankers will have wished to make use of the money and return not the precise coins deposited but the equivalent value. This could be done either by *mutuum* or by so-called 'irregular deposit', a type of deposit in which the depositee was able to use the object deposited.

The details of this arrangement are extremely controversial. What is at least clear is that it was imported from Hellenistic practice and eventually acclimatized in Rome. At least in late classical law it appears to have been accepted – although still not without dispute – that, where the depositee (the banker) used the money, he came under an obligation to pay interest: the jurists could deduce this consequence from the fact that deposit was a good faith contract (Scaevola, *D.* 16.3.28: Papinian, *D.* 16.3.24). The Digest contains evidence of deposits where the money was not to be touched and those where it was, as well as deposits where interest was to be paid and those where it was not (Ulpian, *D.* 42.5.24.2 and *D.* 16.3.7.2). The difference between these types emerged most clearly if the bank failed: those whose money had not been touched and who could identify it as theirs could simply claim their property back; those whose money had been used but who had not received interest had a preferential claim in the insolvency; whereas those who had received interest ranked together with ordinary creditors of the banker (Andreau 1987: 529–44; Bürge 1987: 552–8; Zimmermann 1990: 215–19; Kaser 1971: 536).

This evidence seems to suggest that there was a range of possibilities open to a Roman who had cash to spare, and which option he chose would depend on what risk he was prepared to accept (cf. perhaps Plin., *ep.* 10.54–5). Or, viewed from the other perspective, it seems likely (just as is the case today) that bankers with less good credit ratings would have to offer better interest rates in order to encourage customers to deposit with them.

3. Investment and securities

All the evidence points to land constituting the main and most important element in wealth in Roman times. The ancient sources depict it as being a safe investment, but suggest that anything else was more fragile and might be fraught with great risk (Plin., *ep.* 3.19.8; Kehoe 1997: 76, 135). None the less, the economy was not purely agricultural. When Pliny found a surplus of municipal funds his first reaction was to attempt to buy land with it; when there was none to be had, he attempted to arrange to lend out the money (Plin., *ep.* 10.54–5). Those with free wealth did invest in businesses: Caesar, for example, had shares in a tax-farming enterprise; and Cato in a shipping business (Cic., *in Vatinium* 29; Plutarch, *Cato maior* 21.6–7). It is likely too that some of their investments will have been in the shape of personal debts. This raises the issue of credit and forms of security. Modern businesses depend on ready access to credit and are vitally affected by the means of borrowing available to them and the types of security with which they are able to secure their indebtedness. It is not self-evident that similar considerations apply to pre-industrial societies such as that of ancient Rome. None the less, capital-intensive businesses such as shipping must have called for borrowing, and sometimes that borrowing will have had to be secured.

Two main categories of security have to be considered: personal security, in which another person guarantees that the debtor will pay; and real security, in which property is pledged to the creditor to guarantee payment. Nowadays, although personal security is by no means extinct (loans to private companies are regularly secured by personal guarantees granted by their directors), real security is the commoner form, most typically in the form of a mortgage secured against land. A critical difference between Rome and the modern world is that the Romans had a marked preference for personal rather than real security. It is quite possible that there is a question of status involved here: a wealthy Roman's word was his bond, and security as potent as any pledge. The same may not of course have been true at the lower levels of the social scale.

4. Personal security

There were three main types of personal security, *sponsio*, *fidepromissio* and *fideiussio*, which differ in a number of more or less technical respects. The details are avoided here, and what follows is very much a broad-brush picture. All three types of security were founded on a *stipulatio*, in which

the promisor or surety undertook an obligation towards the creditor, just as the principal debtor had done. The obligation might be for the same amount as the debtor's liability or it might be for less, but it could not be for more. How easy it was to find someone to undertake this obligation would of course vary from case to case, but there is little doubt that undertaking personal security was part of the code of (mainly upper-class) social duty which was based on friendship and good faith. As Fritz Schulz said, 'Roman friends made mutual claims on each other which would in many cases cause a modern "friend" to break off the friendship without delay' (Schulz 1936: 233; Konstan 1997: 80).

The two obligations, of the principal and the surety, were interrelated: each was regarded as being an obligation for the same thing (*eadem res*). The most important practical consequence of this was that, because it was not possible to sue for the same thing twice, when the creditor sued either the principal debtor or the surety, the other was automatically released from liability. This meant that it was important to choose correctly whom to sue; although it appears to have been regarded as improper to sue the surety without first calling on the principal to repay (Cic., *Att.* 16.15.2; Gaius, *D.* 47.10.19). But the basic conception of Roman suretyship which this reveals was that the whole of the debt should be recovered from one person. In order to maximize the chances of being able to do this, the creditor had an interest in maximizing the number of sureties, in the hope that at least one would be solvent at the time the debt fell due.

Another form of personal suretyship is also attested, which proceeds upon a different basis: here the surety undertook only to indemnify the creditor against the amount he was unable to recover from the principal debtor. Obviously, in this instance the creditor had to proceed first against the principal. But since in this case the obligation undertaken by the surety was not the same as that of the principal debtor, the action against the principal debtor would not extinguish it (Celsus, *D.* 12.1.42 pr.).

Once the surety paid the creditor, he in effect acquired the creditor's own claim against the debtor. It is not possible to go into the details here; in essence, however, the surety was treated as having been given a mandate by the principal debtor to become his surety. Once he had performed the mandate, in accordance with general principles he was entitled to reimbursement (Gaius, *Inst.* 3.127).

Personal security was evidently of the greatest importance. That is clear not just from the steady refinement of the rules, tending to

increase its practical utility, but also from the extraordinary volume of legislation which dealt with it. For the details we are indebted to one of Gaius's historical excursuses, in which he lists no fewer than five republican statutes which altered the rules on personal security (*Inst.* 3.121–7). Their dates are not entirely clear. A *lex Publilia* gave the surety an action against the principal debtor if he was not reimbursed within six months; a *lex Apuleia* (after 241 BC?) ruled that one of several sureties who had paid off the creditor in full could recover part of his payment from the other sureties; a *lex Furia* (before 81 BC) limited the liability of each of several sureties to a proportionate share of the whole debt, and also released them after two years; a *lex Cicereia* required a debtor to declare the amount of the debt and the number of sureties and, if he failed to do so, released the sureties; and a *lex Cornelia* (81 BC) limited the amount for which one could in any given year stand surety for any given individual to 20,000 sesterces. The obvious conclusion from all this legislative activity is that there was great concern to relieve the position of the surety.

Legislation continued under the empire. A ruling of Hadrian reaffirmed that if a surety could prove that there were other solvent sureties, the creditor had to restrict his claim against him to his proportionate share.

5. Real security

Real security in Roman law can be divided into three types.

(1) The first, *fiducia*, was a form of security in which the debtor transferred ownership of some property to the creditor. The creditor undertook to reconvey the property to the debtor when the debt was repaid. The creditor was full owner of the thing for the time being, but his ownership was qualified by the terms of his undertaking (or *fiducia*): on repayment he must reconvey the property; meantime he had to look after it, he could not (yet) sell it, and he had to offset profits made through the thing against the debt owed. A fairly complete example of such a transaction is preserved in a tablet from Spain dating from the first or second century AD (*FIRA* 3.92).

But this undertaking was a purely personal one in favour of the debtor, and the debtor's rights against the creditor were therefore only *in personam*: that is, they were good only to enforce this personal agreement. If the creditor breached the *fiducia* and conveyed the property to a third party, the debtor had no right to recover it, since he was not the

owner. This seems to be true even if the third party knew of the existence of the *fiducia*.

It will be obvious that this form of security placed the creditor in a very strong position – as owner of the security – and the debtor in a correspondingly weak one. Whether any given transaction made use of *fiducia* will therefore have depended to some extent on the bargaining strengths of the respective parties. But there would be other relevant considerations too. Since *fiducia* made the creditor owner, there was no need for him to retain possession of the secured property; he would anyway be able to recover it from a person in possession of it by using the owner's action for recovery of property (*vindicatio*). This is important, since it meant that the creditor could let the debtor continue to use the property, either informally or under a rental agreement, and would not thereby jeopardize his security. And the advantage to the debtor was that he could pledge even property which he needed in order to generate income to repay the debt. (As we shall see, this was not true of another form of real security, *pignus*.)

The advantages and disadvantages of *fiducia* are therefore more finely balanced than at first appears. Although *fiducia* was abolished by Justinian, and therefore does not appear in the Digest, a good deal of documentary evidence survives indicating that it was used throughout the classical period.

(2) *Pignus* was a form of security in which the debtor remained owner of the property he was pledging, and what he transferred to the creditor was possession. From the point of view of the debtor this was an improvement in one respect, since if the creditor parted with the property, the debtor, being owner, was able to recover it. But it suffered from the drawback that, since the creditor was in possession, the debtor would be deprived of the use of his property. That was a critical restriction on what he could pledge, since any property he depended on to cultivate his land or to operate his business could not be used as security. It follows that he was in effect limited to pledging property which was surplus to his requirements. Even the creditor could not use the pledged property unless this was agreed; if he drew income or fruits from it, these had to be set off against the interest payable on the loan, failing which the capital.

To overcome this inconvenience, the law seems to have developed so as to allow pledges to be made, for example, of a tenant's basic agricultural equipment, without his having to give up possession (Labeo, *D.* 20.6.14). This seems, however, to have required express agreement; by

contrast, in an urban tenancy the tenant's belongings were impliedly pledged against payment of the rent (Neratius, *D.* 20.2.4). Further examples of pledges without possession are discussed below in connexion with hypothec.

On default by the debtor, the creditor had two remedies. First, an interdict to recover possession of the pledged goods from the debtor or anyone else who had them; this was known as the *interdictum Salvianum* (Gaius, *Inst.* 4.147). Clearly this would be needed only if the pledge creditor lost the possession which he was initially given. Second, the creditor had an action to recover the property if it had been disposed of to a third party. The dates at which these remedies were developed are unclear, but it may be that they go back to the first century BC (Kaser 1971: 472–3).

(3) Under a third, evidently later, form of security, hypothec, the creditor obtained neither ownership nor possession but had only the right to take possession when the debt fell due, if it was not then paid. The same remedies were available to the creditor under this form of security; the difference was of course that the creditor would need to use one of them to obtain possession in the first place.

Hypothec offered the clear advantage to the debtor that he could realize the equity value of things – including land, with which there is some reason to associate this form of security – while he continued to use them to earn his living and to repay his indebtedness. Indeed, since the debtor did not have to surrender any specific property, it was possible to interpret a hypothec as creating a security right over goods the debtor would acquire in the future. This could clearly be of the greatest value for businesses, which turned over their stock on a regular basis. Here is an example:

> A debtor pledged a stall (*taberna*) to his creditor. It was asked whether this was a nullity or whether he was to be regarded as having pledged, under the term *taberna*, the goods which were in it. And if, over the course of time, he had sold those goods and had bought others and brought them into the *taberna*, and he had then died, would the creditor be able with his action (*actio hypothecaria*) to claim all the goods found there, even if the types of goods had changed and different ones brought in? He replied: the goods which were in the debtor's *taberna* at the time of his death are regarded as being subject to the pledge. (Scaevola, *D.* 20.1.34 pr.)

The fact that the debtor did not need to surrender ownership or possession of the security had one other major consequence: he was able to offer the same property as security more than once. The principle is the same as in a modern mortgage of land: a borrower who has already bor-

rowed against the value of his land is able to take out further loans, provided there remains equity in the land against which creditors are prepared to lend. Plainly this introduces a complication which the other forms of real security do not involve: it becomes necessary to be able to find out how much equity is left in the property offered for security, and to regulate the priority of the various secured creditors. The second point seems to have caused some analytical difficulty for a while; the earliest cases suggest that the validity of the second security was treated as being conditional on the discharge of the first, so that there was an insistence that only one pledge could be valid at a time (Africanus, *D.* 20.4.9.3). But this view was gradually overcome, and a second pledge which was valid independently of the first was recognized by the mid-to-late second century AD (Marcellus, *D.* 20.4.12.7; Paul, *D.* 44.2.30.1; Ulpian, *D.* 20.1.10). Once this stage was reached, it became established that an earlier creditor took priority over a later (*prior tempore potior iure*: *C.* 8.17.3 (AD 213)), and that a later creditor, by paying off an earlier one, could succeed to his place in the security ranking.

Much more problematic was the first point: knowledge of the existence or extent of prior charges. That is regulated nowadays at least for charges on land or company charges by a register of charges: the existence of such a register makes it possible to say that a creditor knew (or ought to have known) of the existence of prior charges against the secured property. But the creation of such registers for movable property is plainly difficult, now as in Rome. The closest to this sort of solution that we seem to find in Rome is a constitution of the emperor Leo in AD 472, which provided that pledges which were publicly documented should take priority over those that were not, even if they had been established earlier (*C.* 8.17.11). During the classical period, however, there does not seem to have been any adequate means of addressing this problem. Attempts to compel full disclosure seem to have been half-hearted. For example, it was made a crime for a debtor to mislead a creditor as to the extent of existing borrowing against a property which he was offering as security (*C.* 9.34.1 (AD 231); *C.* 9.34.4 (AD 244)). The offence fell under the generic heading of fraud, *stellionatus*, literally 'behaving like a gecko'. Geckos have not so far been confirmed as tending to act in this way. But, just as the debtor leaves the creditor empty-handed, so the gecko escapes by shedding its tail in its predator's hands or jaws, leaving him cheated of his main prize (Stein 1990: 82–3).

In classical law it is difficult to see how a creditor could have had much confidence that any property which was still in a debtor's possession was

not subject to a prior charge. Nor would this be a problem only for hypothec, since any prior charge would also be good against a subsequently created *fiducia* or *pignus*. Matters can only have been made worse by the tendency in later classical law to subject property to implied or tacit hypothecs for worthy causes (such as the hypothec of a child over property bought by his tutor in his own name but with the child's money; or the hypothec of the fisc for taxes and certain other claims; see Kaser 1971: 466). For all these reasons, it is not clear that classical law ever came to an adequate solution of this problem. The result is that a potentially powerful instrument remained blunt, and the law of real security less useful and versatile than it might have been.

Some documents of practice are interesting on the subject of the various types of security. One recounts, much along the lines of the tablet (TP 17) cited earlier, the making of a loan by Evenius Primianus through his slave Hesychus to C. Novius Eunus, repayable on demand. It continues:

> And for these 10000 sesterces I have given him a pledge [*pignus* or *arrabo*] of approximately 7000 modii of Alexandrine wheat and 4000 modii of chickpeas, spelt, monocopi and lentils in 200 sacks. All this I have stored in my possession in the Bassian public stores of Puteoli. I declare that I bear the risk. (TP 15, 28 June AD 37)

From this it is clear that C. Novius Eunus pledged his goods without giving up their possession: this was therefore a case of hypothec. It is worth noting in passing that the value of the pledge greatly exceeded that of the loan: at a conservative valuation of 3 sesterces per modius, the wheat alone was worth 21,000 sesterces (Duncan-Jones 1982: 145–6; on *arrabo*, Millett 1990: 175–6).

Four days later C. Novius Eunus borrowed a further 3,000 sesterces and evidently did give up possession in favour of the creditor: this we can tell not just from the absence in the second document of any reference to his retaining possession but (much more emphatically) from the fact that on the same day the creditor entered into an agreement to rent the part of the public store which held the pledged goods (TP 7 and 16, both 2 July AD 37; Wolf and Crook 1989: 17–20). It is interesting to note that no additional security was taken for the second loan: there was still sufficient equity remaining in the initial security to cover the second advance to the borrower. We seem here to have a picture of increasing desperation on the part of C. Novius Eunus, or of increasing harshness on the part of his creditor: not only is the value of the security demanded

very high in relation to the sum advanced, but security with possession is almost immediately taken.

It is time to sum up on securities. The extraordinary concern with regulating the details of personal security suggests that it was regarded as particularly important. Probably those with landed wealth but temporary problems of liquidity would have found little difficulty in arranging for personal guarantors and so managed to secure loans without much personal inconvenience. But it does not seem likely that this would be true very far down the scale of status or wealth. At that point real security is likely to have played a much more vital role.

In the area of real security, on the one hand, there is a good deal of flexibility in the development of different forms of security, so that what the creditor received might be ownership or possession or simply the right to take possession. But, on the other hand, there remained problems: an ordinary *pignus* cannot have been useful for the debtor who needed to retain possession of income-generating property, although concessions were admittedly made to overcome this difficulty. Hypothec, although much more versatile, was much weakened by uncertainty about the extent of prior charges, and in later classical law by a multiplicity of implied hypothecs.

Owing to these inadequacies in the law of real security, small, undercapitalized landowners may have had difficulty in raising cash against the value of their land except by entering into *fiducia*. But security of that sort involved transferring title to the creditor. Probably it was not uncommon for the debtor to continue to farm the land as the tenant of his creditor. Some tenants would find it difficult to redeem the *fiducia*. It is at least possible that in this way the law of real security contributed to the decline of the class of small owner-farmers and the rise of great tenanted estates (Schulz 1951: 403–5; cf. de Neeve 1984: 156).

6. Sea loans and insurance

A special kind of loan was the sea loan (*fenus nauticum* or *pecunia traiecticia*; Millett 1983; de Sainte Croix 1974), which appears to have originated in Hellenistic practice. Here the borrower negotiated a loan from the creditor in order to finance a voyage and the purchase of goods. The characteristic feature of these loans was that if the ship foundered there was no obligation to repay the loan. On the other hand, if the ship returned safely, the loan had to be repaid at a substantial rate of interest. In effect, the sum payable in interest covered not just conventional interest but an

insurance premium; for that reason these loans were not subject to the normal rules on maximum interest rates. It seems that dealing of this sort fell outside the ordinary scope of banking practice, although bankers might act as paying agents for the creditors (Andreau 1987: 603–4). Similarly, in Greek practice it seems that there were professional moneylenders who specialized in such loans (Millett 1983: 51; 1991: 188–96).

A well-known example is cited in the Digest. The main terms were these: Stichus, on behalf of his owner, lent money to Callimachus in Beirut; Callimachus was to buy goods with the money and ship them to Brindisi; there he was to sell the goods, buy new goods and ship them back to Beirut; on both legs of the voyage the goods were at his risk; he was also liable to maintain any slave of the lender's who travelled on the voyage with him. The loan was made for a period of 200 days, during which the journey there and back must be completed; the return journey was to begin on or before the ides of September (13 September); if it did not do so, the whole of the loan and interest would fall due as if the voyage had been completed (Scaevola, *D.* 45.1.122.1). These terms were set out in a *stipulatio*.

Winter sailing was extremely hazardous, and the borrower had to be encouraged to complete the voyage well before the weather deteriorated. That is the reason why, in effect, the risk of the venture was placed entirely on the borrower, Callimachus, if he did not embark on the return journey before 13 September. In the event the goods were loaded in time, but the return journey was not commenced until after 13 September. The ship sank. Callimachus was liable.

IV CONTRACTS OF SERVICE

From a vast range of possibilities, there is space only to glance at two types of contract, contracts for carriage of goods or persons, and building contracts.

1. Contracts for carriage

Carriage of goods would generally be governed by the contract of hire (*locatio conductio*). But there was more than one way in which the parties could construct their contractual relationship, and which way they chose will no doubt have depended not just on the particular result they aimed at but also on their relative bargaining positions. For example, they

might enter into a contract purely for hire of the ship itself. A contract in this form would not go into the question of delivery of goods at any particular destination; so the rent would be due regardless whether the goods were delivered (Scaevola, *D.* 19.2.61.1).

On the other hand, a proper construction of the contract might indicate that its object was the transporting of particular goods or persons from one place to another. An example of this sort is found in a papyrus of AD 236, in which the master of a ship agrees to transport 250 *artabae* of pulses to Oxyrhynchus for a rental of 100 silver drachmae, 40 payable at once and 60 on delivery. The contract allows time for loading and four days for unloading at Oxyrhynchus, but if the ship is still occupied after that there is an additional charge of 16 drachmae per day (*FIRA* 3.155). In this sort of case, if the delivery did not arrive at the contracted destination, it is likely that no payment would be due (Ulpian, *D.* 19.2.15.6). But the result might be different, depending on the terms of the contract: so, for example, the jurists Labeo and Paul disagree on whether the master of a ship who has contracted to transport cattle is entitled to payment for one which died *en route*. Labeo says no; Paul says it depends on whether payment was agreed for each cow embarked or disembarked (*D.* 14.2.10 pr.). Ulpian raises the question whether a fare is due for a baby born in the course of the voyage. He thinks not, essentially on the basis that a baby does not take up much space and will not be making full use of the facilities on board (*D.* 19.2.19.7). The reasoning does not have much of a legal flavour to it (might one not have said that the contract was to pay a fare for each person who embarked?), although the result accords with common sense.

The carriage of goods by sea was risky; from time to time it was necessary to jettison cargo in order to save a foundering ship. This might work harshly if the ship was saved but the loss of the cargo simply lay where it fell, on the owner of the particular jettisoned cargo. The Romans therefore, like other Mediterranean nations, adopted the rule of the *lex Rhodia* to distribute losses equally among all the cargo owners. This result was reached by making use of the ordinary contractual actions: so those whose goods had been lost would sue the master of the ship for breach of contract (*actio locati*), while those whose goods had been preserved would be liable to be sued by him for a contribution or (more simply) their goods would not be released until they had contributed (Paul, *D.* 14.2.2 pr.). The application of the rule of the *lex Rhodia* gave rise to a number of intriguing problems: was damage to the ship to be treated on an equal footing with damage to cargo? No – this loss falls

on the master of the ship. Were those whose cargo – for example, pearls – in effect added no weight also liable to contribute? Yes. If so, in what proportion? According to the value of their goods. Should account be taken of passengers? No – no valuation can be made of free persons (Paul, *D.* 14.2.2.1–2).

2. *Building contracts*

Building contracts are interesting because they present some of the problems of other contracts writ large: they may involve substantial sums of money; they are relatively long-term; they are complex; and the buildings are meant to last (as indeed some of the Roman ones actually did). These features raise peculiarities about design, terms for payment, risk, and warranties for defects. All of these problems are familiar enough in modern practice.

The Roman sources indicate that building contracts were entered into both by means of *stipulatio* and also by means of the contract of hire (*locatio conductio*): in this case the employer (*locator*) let out the job of construction to the contractor (*conductor*). Although no detailed examples of the *stipulatio* form of a building contract appear to survive, it would be possible (as we have seen in other contexts) for a detailed document to be confirmed by *stipulatio* (Proculus, *D.* 45.1.113 pr.; Papinian, *D.* 45.1.124). The contract would normally at least provide for a completion date, failing which a reasonable time would be understood (Labeo, *D.* 19.2.58.1), and for the specifications to which the building was to be built. A clear surviving documentary example of a building specification is the public works contract to build a wall at Puteoli: there great detail is given about what materials and measurements are to be used (*FIRA* 3.153 of 105 BC; cf. Cato, *de agricultura* 14–15; Labeo, *D.* 19.2.60.3; Martin 1989).

Roman building contracts fell into two categories still commonly in use today: lump sum and measured work. In the first case, the builder is entitled to a lump sum for completing the project, although part of this is typically paid in advance. In the second case, the builder is entitled to payment for the work he has actually done, as measured (Florentinus, *D.* 19.2.36). In the case of measured work, the risk would pass to the employer as he approved each stage (cf. Iavolenus, *D.* 19.2.51.1). The risk of 'acts of God' such as earthquakes would in any event be on the employer, unless otherwise agreed (Florentinus, *D.* 19.2.36; Iavolenus, *D.* 19.2.59).

The critical moment in the contract was when the building was com-

pleted and had to be approved by the employer. At least in later law, the standard of approval seems not to have been purely subjective but to have been that of a 'reasonable man' (*bonus vir*: Paul, *D.* 19.2.24 pr.). Approval of the building meant that final payment was due, as well as that the risk now lay wholly on the employer. In particular, it meant that if defects later emerged in the building they were the responsibility of the employer: in modern terms, there was no defects liability period after final approval had been given, unless approval had only been given because the contractor had fraudulently concealed defects in the work (Paul, *D.* 19.2.24 pr.). It would, of course, be possible to contract for a more extensive defects liability.

V THE ORGANIZATION OF BUSINESSES

This section sets out the basic legal rules on agency and liability and then ventures to suggest how, optimally, the Romans might have chosen to organize their business activities to take advantage of the background of these legal rules. Since much of the evidence is drawn from the legal sources, the argument is to some extent inferential and has to be read subject to the methodological caveats mentioned in chapter 2. But since commercial law has to be seen against a background of risk, it seems reasonable to suppose that people would try to reduce their exposure to risk where possible, consistent with taking advantage of opportunities to make profits. There is another reason why they should have taken particular care to do so: procedure in the event of bankruptcy was very harsh. That is discussed in section VI of this chapter.

1. Representation and agency

Although the Roman jurists developed a number of informal contracts such as sale, any contract which was in any way unusual or untypical would have to be entered into by *stipulatio*. That in turn required the presence of the contracting parties face to face. Communications being slow, there was a real restriction on how many contracts any individual could enter into in how many geographically dispersed locations; this strictly limited number was the necessary consequence of the fact that there was a strictly limited number of places in which a person could be at the same time. Accordingly, it became necessary to develop rules for representation, to allow the acts of one person to bind another. This was a breach with the strict principle of Roman law that obligations were

personally binding only, and a contract gave rights only to the parties to it and to nobody else.

That rule did not apply, however, where one of the contracting parties was a slave or a child in the paternal power of his father. But that case raised its own difficulties: initially, the paterfamilias could scarcely make use of members of his own family for business purposes, since nobody could usefully be sued for what they did: the paterfamilias was not liable under their contracts (Gaius, *D.* 50.17.133); while slaves had no standing to appear as litigants in court and no proprietary capacity; and dependent children, although they could be sued, had no proprietary capacity and would therefore be unable to satisfy any judgment. So long as this remained the case, clearly nobody would knowingly deal with a slave or dependent child.

All this changed with the development of legal remedies based on the *peculium*. The *peculium* was a fund of property granted by a paterfamilias to a person in his power, whether slave or free. It might be made up of any property: land, movables, businesses, other slaves. It remained the property of the paterfamilias and could be revoked by him, but in practice the person in power had charge of it and could deal with it as if it were his own. There will be more to say about it in connexion with limitation of liability; for the present it is enough to note that the *peculium* allowed slaves and children to make themselves useful, since creditors were now accorded a right of action against the paterfamilias, albeit one restricted to the value of the *peculium*.

One consequence of the fact that a paterfamilias had power over his slaves and children was that any property and any rights acquired by them immediately vested in him. They served merely as channels by which contractual entitlements flowed to and vested in the paterfamilias. This was a feature of the most crucial importance where the paterfamilias wished to enter into contracts at a distance. By sending a slave or a child there, he could himself acquire contractual rights in dealings entered into many miles from Rome. The importance of this can hardly be exaggerated. For a business of any great scale, it is improbable that a paterfamilias would have, or would have adopted, sufficient children to run it. Accordingly, slaves would play the major part.

In passing, it is important to clarify the scope of one piece of legislation which might otherwise be thought to have restricted the role which sons could play in commerce. The *senatus consultum Macedonianum*, passed under the emperor Vespasian, prohibited loans to sons in paternal power, regardless of their age. According to Ulpian, the reason was that

one borrower, Macedo, had found it necessary, in order to repay his creditors, to come into his money sooner rather than later and had therefore murdered his paterfamilias (*D.* 14.6.1 pr.). To discourage others from following this course, the *senatus consultum* prohibited lenders – even after the death of the paterfamilias – from recovering money lent to sons. A permanent defence against any claim for repayment was given, and this was expressly conceived as being for the purpose of penalizing the moneylender (Marcian, *D.* 12.6.40 pr.; Ulpian, *D.* 14.6.9.4). The market in such loans must therefore immediately have disappeared. Interpreted literally, this legislation would have brought all dealings with sons to a halt. But it was accepted that it did not apply where the paterfamilias had appointed his son to carry on trade or authorized him to do so from his *peculium* (both of these possibilities are discussed in the next section). It also applied only to loans and not to other transactions unless they were loans in disguise; and only if the creditor knew or ought to have known that he was lending to a son in power (Ulpian, *D.* 14.6.3 pr. and 3; Pomponius, *D.* 14.6.19).

2. *Liability and limitation*

The peculium

The praetor's innovation consisted in allowing creditors of slaves or dependent children to bring an *actio de peculio* against their paterfamilias. This was an ordinary action based on the contractual obligation entered into by the slave or child, but it had the special feature that it was limited to the maximum of the amount in the *peculium*. Accordingly, the creditor could have recourse against the paterfamilias not to the full extent of the debtor's obligation but only up to a maximum of the amount in the *peculium*. The result was that, when faced with creditors' claims, the paterfamilias was not subject to bankruptcy proceedings in the normal manner but was at risk only to the extent of the property which he had permitted the slave or dependent child to hold *in peculio*.

This action was available only for acts done by a person under the power of a paterfamilias and was based mainly, but not purely, on relations of status. It did not depend on any authority or task being delegated by the paterfamilias to the child or slave; nor did it depend on the paterfamilias knowing that the business was being carried on. Instead, it depended on the revocable grant of a fund of property to a person who stood in a certain relationship of status to the paterfamilias: commerce and status were therefore intertwined.

There are two important qualifications.

(1) Actions based on the *peculium* were relevant only to the dealings of the child or slave with property or under contracts. Where a dependent member of the paterfamilias's family committed a civil wrong (a delict), such as theft, assault, or damage to property, the paterfamilias was automatically liable to pay the damages, although he could limit his liability by surrendering the wrongdoing child or slave to the person who had been wronged ('noxal surrender'). But the *peculium* had nothing to do with cases of this sort.

(2) The *actio de peculio* was appropriate only where the paterfamilias did not know of the business being carried on. By contrast, where he did know of the business, the praetor gave creditors the benefit of another procedure, the *actio tributoria*, which was slightly less advantageous to the paterfamilias. In each case, however, the main point is the same: in the action the value of the property in the *peculium* or within the particular business acted as a ceiling on the paterfamilias's liability.

Actio institoria *and* actio exercitoria

The praetor introduced two further actions which were important in business dealings: they allowed creditors to sue the owner or principal of a business rather than the 'agent' with whom they had actually dealt. (The terms 'principal' and 'agent' are used loosely.) The first, the 'action on shipping' (*actio exercitoria*), was specific to shipping and allowed a claim against a ship owner (*exercitor*) for the acts of the ship's captain. The second, the 'action on agency' (*actio institoria*), was generally available and allowed a claim against a person who had placed an 'agent' or *institor* in charge of a business, for acts done by the agent in the course of the business. Two general points are worth noting. First, since these actions allowed customers to sue the owner of the business, whom they might never have seen before, they involved a breach of the fundamental principle that an obligation was strictly personal and bound only the person who had undertaken it. Second, the actual agent, the *institor* or captain, might be of any status: free, or in the power of a paterfamilias, or a slave. In each case the owner of the business had unlimited liability for the acts done by the agent in the course of the business. Where the agent was a slave – who could not be personally liable in contract – these actions were the customer's only remedy. On the other hand, if the agent was a free person, he or she would be personally bound by the contract and could be sued upon it, so these actions simply offered an additional remedy, an alternative defendant from whom the creditor could attempt

to recover. Since the employer would on the whole be better able to satisfy a claim than the employee, this must none the less have been the customer's remedy of first resort (*D.* 14.1 and 3; Pugliese 1957; di Porto 1984; Aubert 1994).

The circumstances in which liability under these two actions could arise were restricted by the terms of appointment (or *praepositio*) of the *institor* or captain: to use modern (though Latin-derived) terms, by the authority given by the principal to the agent. It was therefore open to the principal, by suitably restrictive drafting of the terms of appointment, to limit the circumstances in which liability came home to him at all.

Ulpian, in his discussion of the *actio institoria*, states that 'not every transaction with an *institor* binds the person who appointed him, but it does so only if the contract was made on account of the business of which he was put in charge' (*D.* 14.3.5.11). There are other statements to the same effect. The principal could also reduce the scope of, or avoid, a liability that would otherwise arise, by giving express notice to parties contracting with his agent; there is a certain amount of discussion about what language such notices must be in, and how large and visible they must be. But it is a matter of contracting out of a liability which would otherwise exist. Plainly, the effectiveness of this limit on the principal's liability turns on how strictly the terms of the appointment are interpreted. The Roman approach was a rather narrow one (*D.* 14.1.7; *D.* 14.3.13 pr.). Accordingly, a certain degree of protection was afforded by suitably tight drafting of the terms of the agent's or captain's appointment. But if, for example, the agent or captain ran up huge losses within the terms of his appointment, the principal was without any protection. Where there was a significant degree of risk, it still made sense to rely on slaves or dependent children rather than independent labour: only that could offer a set financial limit on liability.

Ignorance – a good thing

If a slave or dependent child was running a business, whether the owner or paterfamilias was liable without limit under one of these actions or only up to the amount of the *peculium* depended on the paterfamilias's relationship with the business. The Digest texts make it plain that the paterfamilias was liable up to the amount in the *peculium* even if he had no idea what his slave or child was doing. On the other hand, a principal was liable to the *actio exercitoria* or *institoria* only if he had actually placed the agent in charge of the business, or the captain in charge of the ship, and thereby shown his intention that it should be operated. In

short, the paterfamilias could enjoy a financial limit on liability only where he did not appoint the slave or child to do anything, but remained at arm's length from the business. So the apparent advantage of limited liability offered by slaves and dependent children is only that: apparent. In fact, in order to gain that advantage the paterfamilias had to stay at arm's length from the business and not appoint anyone to do anything. The law therefore encouraged a *laissez-faire* attitude on the part of the paterfamilias.

It may be that the explanation of this apparent conundrum lies in the *servus vicarius*. The *peculium* of a slave (a *servus ordinarius*) often included other slaves (known as *servi vicarii*); their *peculia* might equally contain slaves; and so *ad infinitum*. It is here that limitation of liability is able to play its true and effective role. The facts of one text from the Digest will serve as an example. Ulpian deals with the case where the shipowner (to use the term loosely) is not an independent person but is in the power of another person: he is a slave or dependent child. He therefore does not own the ship but simply has it in his *peculium*. He appoints a captain to run the ship. This involves one more layer than the basic case: not just shipowner and captain, but shipowner's paterfamilias, shipowner and captain. The main consequence is that anybody wishing to bring the *actio exercitoria* based on what the captain does will have to bring it not against the shipowner but against his paterfamilias. Ulpian draws a distinction: if the shipowner is carrying on that business by the will (*voluntas*) of his paterfamilias, then the action can be brought against the paterfamilias without limitation. On the other hand, if the business is not being carried on by the will of the paterfamilias but by the will of the dependent shipowner, the paterfamilias is liable only up to the value in the shipowner's *peculium* (*D.* 14.1.1.19).

Here we see the true significance of the rules described earlier. There is unlimited liability for acts done by the captain or manager within his terms of appointment, but this is true only at the level of the person who appointed him. The liability to which the ultimate owner of the ship or business is exposed is limited by the value of the *peculium* of the slave or dependant responsible for appointing the captain or business manager. That might be a dependant several degrees removed from the ultimate owner himself.

The legal sources therefore suggest that, depending on the level of risk involved in any particular enterprise, it would – ideally – be appropriate to have the enterprise managed not just by slaves or other dependent labour but by slaves who stood at some remove from the paterfamilias

by reason of belonging to the *peculium* of one of his other slaves, and so offered the advantage that the paterfamilias had not himself appointed them to do anything, and might indeed have no knowledge of precisely what they were doing. When we consider how business was organized, at least by the wealthy, we should therefore be aware of the advantages which *servi vicarii* had to offer. The law presents significant advantages to businesses organized in the shape of a pyramid, with the paterfamilias at the apex and below him layers of managers and workers. This hierarchy also makes realistic the possibility that the owner of the slaves might have little idea what each was doing; and that itself justifies the central role played in the jurists' discussions by considerations about intention and will in determining the extent of the paterfamilias's liability.

Of course, the fact that this approach maximizes the advantages of one trader means that it also minimizes those of his trading partners. It follows that whether in fact a trader will be able to deal with his trading partners on such advantageous terms – or whether, for example, they will insist on his undertaking personal or unlimited liability in a transaction – will turn on their respective bargaining strengths. Accordingly, in reality the points mentioned so far would not be the only factors at work.

3. *Independent labour*

Slave labour was not the only labour available at Rome (Garnsey 1980). Independent employees acted as individuals and acquired rights solely for themselves. If they entered into a contract with somebody, there was no question of those contractual rights automatically vesting in their employer. This is quite different from the conception of agency with which we are now familiar, for example, in Scots and English law, where the acts of the agent can actually create contractual relations between the employer and the third party with whom the agent deals. In these systems the employer or 'principal' does not have, for example, to have the agent assign his contractual rights to him. But in Roman law the employer did not enjoy this advantage. It is true that there would be no great difficulty in setting up another contract by which the independent employee agreed to transfer to his employer any rights he might acquire. Yet this would introduce an additional step into the situation which might cause problems: the only person who would be entitled to sue the third party would be the employee, who contracted with him; and if the employee became insolvent, it would be of little use to the employer to

have a right of action against him. All these anxieties could be removed, however, by the simple expedient of making use of dependent labour: children and slaves. Probably until the early third century, there were advantages in using dependent labour for purposes of agency. Put simply, since the dependent agent was as a matter of law identified with the paterfamilias himself, to use such labour was in effect to cut out the middle-man.

None the less, the legal sources alone provide plenty of evidence of the employment of independent people, especially freedmen, sometimes doing the same jobs as they had done when they were previously slaves. Equally, there are faint signs of developments in the law making it easier to employ free people. From the second century AD, there was a slow but sure recognition that it was possible for one person to acquire rights through a free person, a procurator. This is said to have been more or less accepted in the case of acquiring possession at about the end of the first century AD (Neratius, *D.* 41.3.41). Certainly by the third century any doubts seem to have been overcome.

More generally, in the writings of the jurist Papinian at the end of the second century or beginning of the third, there are clear indications that actions might be available, on account of dealings carried out by a procurator, both for and against his employer. This does not mean that independent agents had not been used before. But it is probably right to detect in this development that a need had been perceived and was being gradually addressed by the law, to make remedies available between the parties genuinely interested in a transaction, and not to make the efficacy of remedies dependent on contingencies such as the solvency of the procurator. It may also be right to see in this development signs of what is sometimes called the 'juridification' of relationships: the incorporation within a legal framework of relations which had previously been based purely on *amicitia* or *officium*. However that may be, what is clear is that in a system which had wholeheartedly favoured the employment of dependent labour, the balance was being redressed to make the employment of independent labour more straightforward.

4. Partnership

One of the consensual contracts developed by Roman law was that of partnership (*societas*). It is quite clear that the background to this was far from commercial: the earliest precursor of partnership was an arrangement under which co-heirs of an inheritance continued to own and

administer it in common. This seems to have left its mark on the law of *societas*, as it eventually developed, since one form of partnership was a partnership 'of all property' (*omnium bonorum*) which seems most unsuitable for commercial purposes.

None the less, it was possible to enter into a partnership for one line of business only or for a single transaction, and this would bring the advantages of combining the skills and expertise, and not least the capital, of the partners. Apart from ordinary commercial ventures, a typical instance of partnership in the late republic was that of tax collectors (*publicani*); to some extent this was governed by special rules (Buckland 1963: 513).

The partners were free to make whatever terms they would for sharing profits and losses, except that it was not permitted to have a partner who shared only in the losses and not in the profits. In the absence of other provision, shares in profits and losses were equal. A Dacian document of AD 167 sets out terms for a partnership in – so far as its fragmentary state reveals – some detail. Oddly enough, it then goes on to confirm them by means of a *stipulatio*. Since the document contains only a *stipulatio* by one of the partners undertaking obligations to the other, it seems most likely that another, reciprocal version of the document would also have been produced. The alternative is that the document simply betrays a misunderstanding of the law (*FIRA* 3.157).

To modern eyes the most striking feature of the Roman partnership is that the only people on whom it normally had any effect were the partners. To the outside world its existence was of no significance: so if one partner entered into a contract to sell goods, he alone was bound by the contract. The partnership agreement mattered only to him and his partner, since under it he might be obliged to communicate to his partner some of the benefits he derived from the contract. The only exception to this rule would be if the other party to the contract (in this example the buyer) could show that the partner with whom he had dealt had been acting as the agent (*institor*) of the other: in that case, as explained already, he could sue the 'principal' partner, even though he had had no dealings directly with him. For these reasons, although the possibility of entering into a partnership brought advantages in terms of sharing costs and resources, it brought no particular benefit as a means of structuring a business.

5. *Some conclusions on business organization*

The development of the law of agency through procurators certainly made it easier to make use of independent labour within the organization of a business. Equally, the adoption of a strict approach to interpreting the terms on which an *institor* or captain had been appointed made it possible with appropriate drafting to make use of them for specific highly specialized purposes, without giving too much of a hostage to fortune. But there was still no substitute for making use of a slave or dependant at critical junctures of the business, particularly in high-risk activities, because only they could offer the advantage of a limitation to the value of their *peculium*.

The legal advantages of a *laissez-faire* approach to business fit rather well with what is known about social attitudes to trade. There is plenty of evidence in the Digest and elsewhere of a healthy disdain for involvement in trade. There were also restrictions on the extent to which senators could engage in trade (Talbert 1984: 45–6). These are of course issues quite different from benefiting, or drawing the profits, from trade: the aristocracy may not itself have traded, but it certainly took the profits from trade (Plutarch, *Cato maior* 21.6–7; Whittaker 1993: 58). That picture – of keeping a safe distance from trade – is complemented by the conclusions drawn here from the legal sources: not simply (as is well known) that it was possible to trade by means of intermediaries, but also that there were positive advantages to be had by reducing one's level of involvement and knowledge of the business and to confining oneself to enjoying profits vicariously. We can draw some comfort from the fact that social attitudes and legal rules point towards the same kind of organization of business, along *laissez-faire* lines. This suggests that the law is not operating here in its own remote world of isolated rules but is firmly anchored in the realities of Roman life and the demands at least of its well-heeled citizens.

VI INSOLVENCY

The law of insolvency has a significant bearing on commercial enterprise, since, when contemplating taking risks, all but the boldest will reflect for a moment on the consequences of financial disaster. In Rome they were rather serious. There were two ways in which a creditor could enforce a debt owed to him: execution against the person of the debtor and execution against his property. The details of personal execution are

uncertain. It seems unlikely that a deeply obscure provision of the Twelve Tables (3.6) – 'let them cut up their shares' (*partes secanto*) actually referred, as used to be believed (perhaps by those who had recently read *The Merchant of Venice*), to the creditors carving up the debtor's body rather than his assets. But what personal execution did mean was that the debtor, although not enslaved, was in the power of the creditor and could be imprisoned. It may be that this continued until he had worked off his debt, although this is not certain.

In classical times, the normal procedure seems to have been execution against the debtor's property. Even this was extremely drastic. A creditor who was not satisfied could seek an order from the praetor for seizure of the debtor's whole property. Fortified with this order, the creditor could then take possession and administer the property on behalf of all the creditors of the debtor; the granting of the order was publicized, presumably to allow other creditors to join the proceedings. This stage was typically followed by a public auction of the debtor's whole property, in which the property was knocked down to the bidder who offered the creditors the highest dividend on their claims. The procedure was called *bonorum venditio* (Gaius, *Inst.* 3.78–9).

From the creditors' point of view, it seems clear that this sort of system could hardly have been guaranteed to produce the best return: it might well have been possible to sell specific items of property for more, individually. But the notion that seems to lie beneath this system is that, with the exception of privileged creditors such as the fisc or certain municipalities (Plin., *ep.* 10.108–9), all creditors must be treated in the same way. For that reason the praetor introduced a series of remedies which made it possible to undo a transaction under which one creditor had knowingly benefited at the expense of the others within the year preceding insolvency (Kaser 1971: 251–2).

From the debtor's point of view, the remarkable – and very harsh – feature of this system was that the sale was not only of items of the debtor's property sufficient to meet the debt (as would, for example, typically be the case nowadays), and it made no difference that one or two items in his estate might satisfy it: the whole had to be sold up. Behind this system is a notion of bankruptcy quite different from our own: the modern conception in Britain is that the debtor's estate should be taken out of his control and administered by a trustee, in order to realize the assets and satisfy the creditors as far as possible. In contrast, in the Roman approach lurks the idea that the debtor must be punished. Two further points support this view. First, the fact that the proceedings made

the debtor *infamis*, not quite the same as 'infamous', but a state which (crucially) involved social stigma, as well as some civil disabilities, such as being unable to be a judge, to appoint an agent to conduct litigation, or as a rule to conduct litigation on behalf of anyone other than oneself (Kaser 1996: 194, 208, 212, 383–403).

Second, Augustus (or possibly Caesar) introduced a procedure, *bonorum cessio*, which mitigated the harshness of this regime to some extent. The significance of the introduction of this measure at a time when there was serious indebtedness at the highest levels in society cannot be doubted (de Neeve 1984: 154–7). The details of the procedure are not well known, but its availability may have been restricted to those who were not at fault for their insolvency. Under this procedure the debtor voluntarily surrendered his property to the creditors; the consequence was that he did not become *infamis* and was also not liable to execution against his person; but the whole of his property was still affected (*D.* 42.3; Kaser 1996: 405–7; Pakter 1994).

A procedure under which only items of property sufficient to meet the debt were sold up became routinely available under the *cognitio* system of procedure, which gained ground throughout the principate but appears to have superseded the formulary procedure only in the third century. Prior to that, however, though at an uncertain date, a *senatus consultum* had apparently permitted *clarae personae*, members of the senatorial class, to enjoy such a privilege. They therefore could avoid the worst rigours of insolvency; and under this procedure they did not become *infames* either. But that was not the normal rule for the classical system of procedure (Kaser 1996: 404–5).

With failure bringing this unattractive prospect into view, it seems likely that a Roman would have taken great care to structure business dealings so as to avoid the risk of personal insolvency and the sale of his entire personal property. Whether these rules inhibited commerce as a whole is a question which it is really impossible to answer.

VII CONCLUSIONS

The orthodoxy is that the Roman economy was undeveloped; and evidence for the extent and importance of trade and commerce is inadequate (Garnsey and Saller 1987: 43, 47). It is true that in Roman times trade and business were relatively insignificant compared with land. But they were not neglected by the law. Although it is conceivable that the jurists might have created a mass of commercial law in the absence of

any significant commercial practice in which to employ it, it does seem doubtful whether they would have developed structures and rules of much sophistication if their economy went little beyond exchange for purposes of subsistence.

Yet the sorts of structures and rules considered in this chapter are of considerable sophistication. Although some relics of the past remained, such as the impossibility of sales of generic goods and some inconveniences in the law of real security, mostly these can be understood and could be overcome: for example, because *stipulatio* would be used for a generic sale and personal security would regularly be used in preference to real security.

The documents of practice also indicate that complex commercial transactions did not take place purely in the imagination of the jurists. Many of the documents demonstrate remarkable fidelity to the law described in the legal sources. It is, however, also true that the documents throw up puzzles which the legal sources do not. To conclude with just one: it is common to think of 'good faith' contracts as having the advantage of simplicity. But what practice seems to confirm beyond question is the continuing vitality and importance of the formal contract of *stipulatio*. Time and again what we find in practice is a detailed contract (such as the sales, building contracts and partnerships mentioned above) confirmed by a *stipulatio*. This means that the parties gave up the apparent benefits of the good faith contract – ease of formation, implied terms, a less rigid procedural regime (see the next chapter) – in favour of a contract which required to be entered into formally, the parties (or their representatives) face to face, and which would be interpreted strictly. The message is not unambiguous. It is not possible to decipher it with any conviction here. But it does at least seem possible that to the Romans the archetype of contract remained the formal promise, and the strictness with which it was interpreted offered the welcome benefit of certainty.