1-1-1962

Consensual 'Societas' between Romans and the Introduction of 'Formulae'

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(*Oxford*).

A very common view still held seems to be that until the second half of the second century B.C. and the passing of the *lex Aebutia*, *formulae* were not available in actions between *cives* (1). This has been very forcefully attacked, especially by Kunkel (2) and Kaser (3), and the purpose of the present note is merely to add another argument to theirs.

The general view of the development of *societas* is as follows. The original type of partnership was *ercto non cito* which occurred when a *pater* died and his *sui heredes* did not divide the estate. It was, therefore, a partnership of all the property of the partners. Next, the praetor established a *legis actio* by which other people who wished to set up a similar partnership could do so. Then with the growth of Roman trade and the introduction of the peregrine praetor (4) *peregrini* could, from the second half of the third century B.C., form a consensual contrat of partnership and *cives* could contract such with *peregrini*, but not with other *cives* alone. And finally, the *lex Aebutia* of about 140 or 120 B.C. extended the formulary system to

(1) E.g. Girard, *Manuel élémentaire de droit romain*, 8th edit. (Paris 1929), p. 1055 ff. ; De Zulueta, *The Institutes of Gaius*, 2 (Oxford 1953), p. 252 f. ; Arangio-Ruiz, *Storia del diritto romano*, 7th edit. (Naples 1957), p. 151 f.

(2) 'Fides als schöpferisches Element im römischen Schuldrecht', *Festschrift Koschaker*, 2, p. 1 ff.

(3) Above all in *Das altrömische Ius* (Göttingen 1949), p. 290 ff.

(4) But for the correct view of the jurisdiction of the *praetor peregrinus* see Daube 'The peregrine praetor', 1951, J.R.S., p. 66 ff. *Contra*, Serrao (who seemingly mistranslates Daube), *La 'Iurisdictio' del pretore peregrino* (Milan 1954), especially p. 10 ff.

actions between *cives* and so *cives* could, *inter se*, form a consensual *bonae fidei* partsnership.

But such a development of *societas* is impossible.

Partnership of all one's assets is only suitable among farmers and between very close relatives and friends. It is conceivable, but only just, that brothers would enter into such a contract although they were traders. But in almost all cases where the parties were merchants, something other, such as a partnership of one type of business or even of one transaction, would be wanted. Accordingly, the type of partnership protected on the common view by the peregrine praetor must have been a *societas unius negotii* (5) and perhaps occasionally *societas unius rei.* It cannot have been, except possibly on very rare occasions, a *societas omnium bonorum.*

But if the consensual contract of partnership *inter cives* developed a century after consensual partnership involving at least one peregrine, we would inevitably find the main influence on the former to be the existence of the latter. First, because the main reason for extending the formulary system was to extend the benefits hitherto enjoyed by peregrines and by citizens dealing with peregrines, and the most obvious way to do so is to take over appropriate *formulae* en masse. Secondly, it is easier and much more convenient to model a *formula* on an existing *formula* rather than on an existing *legis actio,* and especially to model a *formula* involving a consensual *bonae fidei* agreement on another such *formula.* Thirdly, *ercto non cito* in its two forms would give very considerable protection to those citizens who wanted a *societas omnium bonorum* ; protection in the second half of the second century B.C. would be primarily needed for those who wanted a mercantile contract and the merchant class was extremely powerful at that period.

However, it is abundantly clear that the *formula* of the *praetor urbanus* for *societas* was modelled on *ercto non cito* and not on a *formula* of the *praetor peregrinus.* Only one *formula* was given by the urban praetor and that was for *societas omnium*

(5) Cf. ARANGIO-RUIZ, *La Società in diritto romano* (Naples 1950), p. 29.

bonorum. This is generally accepted (6) and is rightly deduced from the facts that in the case of *beneficium competentiae* Sabinus argued from *societas omnium bonorum* to *societas unius rei* (7) and that *societas omnium bonorum* is always dealt with first in the commentaries (8). But, pace Arangio-Ruiz (9), it cannot be argued that, in the *formula*, *omnium bonorum* are 'Blankettworte', *i.e.* words inserted instead of leaving a blank space. It is, to begin with, not the type of situation where one finds 'Blankettworte' — they occur where one is given *Aulus Agerius* and *Numerius Negidius* for the names of the parties, where a specific object is mentioned to represent any object which may be claimed, and where a certain sum is mentioned by way of damages where in practice the sum would be a variable. Again, one does not, in the very nature of things, have to argue from the 'Blankettworte' to the specific cases, as is done in *societas*, since the function of 'Blankettworte' is simply to show that the action is generally available. Lastly, if there were more than one type of partnership, but still a limited number, the *formula* need only have said *Quod As As cum No No societatem coiit*. 'Blankettworte' here would be, at the very least, quite superfluous. Likewise, it is not a pattern *formula* on the lines of those found in *iniuria*, where an extreme case is given as an example to show the furthest limits of the action (10) — again for the last reason given above and because in fact *omnium bonorum* in the *formula* merely caused the jurists difficulty in deciding whether specific rules also applied to other cases.

Therefore, the date of the introduction of the *formula* for consensual partnership between citizens must be pushed back to a time when a partnership of all one's property was, if not

(6) Cf. LENEL, *Edictum Perpetuum*, 3rd edit. (Leipzig 1927), p. 297 ff. ; ARANGIO-RUIZ, *loc. cit.*

(7) D. 17.2.63 pr. ; cf. D. 42.1.16.

(8) D. 17.2.1.1 ; h.t. 3 pr. ; h.t. 5 pr. ; G. 3.148 ; cf. LENEL, *op. cit.*, p. 297 n. 8.

(9) *Op. cit.*, p. 29 n. 4.

(10) See DAUBE, '*Ne quid infamandi causa fiat*. The Roman law of defamation', *3 Atti del congresso internazionale di diritto romano e di storia del diritto*, p. 413 ff.

the only type practised, at least overwhelmingly the most common, and to a time before the *formula* of the peregrine praetor would be influential. So, such a consensual partnership must have been recognised in Rome long before the passing of the *lex Aebutia* and before the time when the formulary system is thought to have been introduced. It is impossible to say with any accuracy when consensual partnership between Romans was recognised, but it was probably sometime in the third century B.C. A form of partnership less than *societas omnium bonorum* was recognised at least as early as Quintus Mucius ([11]).

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The sole positive reason for placing the introduction of the formulary system between Romans as late as the second half of the second century B.C. is Gaius' Institutes 4.30.

> Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate veterum qui tunc iura condiderunt eo res per ducta est, ut vel qui minimum errasset litem perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones, effectumque est ut per concepta verba, id est per formulas, litigaremus.

From this passage it is argued that *formulae* were unknown in cases between Romans until they were introduced by the *lex Aebutia* and extended by the two *leges Iuliae* ([12]). But that is not what the text says. It does not say that the *lex Aebutia* and the *leges Iuliae* introduced *formulae* but that they abolished the *legis actiones* and brought it about that we sue by adapted pleadings, that is by *formulae*. That last phrase is ambiguous and need only mean that they made actions under the *formulae* very common. One might compare it with phrases like 'The

(11) D. 17.2.11.

(12) The disputes as to the relative scope of these *leges* need not concern us here. See BUCKLAND, *A Textbook of Roman Law*, 2nd ed. (Cambridge 1932), p. 628. For a rather different account of the *lex Aebutia*, see KASER, 'Die *lex Aebutia*', *Studi Albertario*, I (Milan 1953), p. 25 ff. It is hoped to go into this question more fully later.

Labour Government brought it about that young men go to 'niversity' or 'Thomas Cook & Son brought it about that British people visit the Continent'. Neither phrase means to imply that these two activities were unknown before the establishment of a Labour Government and Messrs Cooks. So the phrase is extremely dangerous ground on which to erect a theory which has so many objections on other scores (13). Its true meaning is, I suggest, that the formulary system which was already in existence for certain cases was extended by these statutes to cases where a *legis actio* had been optional or alone possible. The situation may have been that in some cases where the XII Tables, for instance, established a *legis actio* no relevant *formula* had hitherto been framed ; or if there were both a *legis actio* and a *formula* the type of action used may have been in the choice of one or other of the parties and an unscrupulous defendant with no real defence might insist on the *legis actio* in the hope that the plaintiff might make a mistake in the words, or a dishonest plaintiff decide on the more rigid *legis actio* to exclude a particular *exceptio* (14). That Gaius was thinking of something of this sort appears from the reason he gives for the passing of the *lex Aebutia*, namely, that *legis actiones* were unpopular because a party who made the slightest mistake lost his case. On the general view, a much more serious objection to the pre-Aebutian system would be that since one had to sue one the words of a statute, many actions which would seem very reasonable (15) would necessarily be excluded because they did not come within the scope of a statute. This surely would have been a greater reason for the unpopularity of the *legis actio*

(13) E.g. see, for the prior existence of consensual and *bonae fidei emptio venditio*, CATO, *De Agri Cultura* 146, 147, 148 ; D. 19.1.38.1 ; for a real action in *pignus*, CATO, *op. cit.*, 146 (the transaction in at least this text is outside the scope of the *interdictum Salvianum*). For an example of the difficulties caused by refusing to accept the existence of *formulae* before the *lex Aebutia*, see ARANGIO-RUIZ, *Il Mandato in diritto romano* (Naples 1949), p. 7 n. 1.

(14) Gaius 4.108 tells us there were no *exceptiones* in *legis actiones*.

(15) And they would be known because they were available in cases involving *peregrini*.

system and could scarcely have been ignored by Gaius. And if the *lex Aebutia* had introduced the formulary system in cases between citizens it would have been much more important for its effect in broadening the law than for cutting away procedural handicaps, but yet that side of it is not mentioned by Gaius. Nor is that aspect of it considered by Aulus Gellius who is our only other source for the *lex*.

> Noctes Atticae 16.x.8. « Sed enim cum 'proletarii' et 'adsidui' et 'sanates' et 'vades' et 'subvades' et 'viginti quinque asses' et 'taliones' furtorumque quaestio 'cum lance et licio' evanuerint omnisque illa Duodecim Tabularum antiquitas, nisi in legis actionibus centumviralium causarum lege Aebutia lata consopita sit, studium scientiamque ego praestare debeo iuris et legum vocumque earum quibus utimur ».

Here, too, the *lex Aebutia* is mentioned only for the part it played in the downfall of the *legis actiones*. Moreover, if the *lex* had suddenly introduced *formulae* for the first time, in even a limited way, it would have been a statute of great importance and one would have expected to find many other references to it ([16]).

(16) Although I still hold to my opinion that *mandatum* first arose in cases between *cives* and that the *actio mandati* cannot be much earlier than 126 B.C., I now feel that some of my arguments are doubtful and that the emphasis on the *lex Aebutia* was misplaced : *Contract of Mandate in Roman Law* (Oxord 1961), pp. 1-23.