Comptes rendus


The early nineteenth century saw a drive for what we now call corporate companies with limited responsibility. The Roman law of the ancien régime had only provided the societas and in spite of efforts to expand its possibilities, jurisprudence had kept the old boundaries: personal liability of all partners for debts of the common enterprise, non-transferability of shares, dissolution of the partnership at the death or the insolvency of a partner. Only some companies existed, but these were authorised by public decree and not suitable for private enterprise. Yet the developing economy needed capital and for that a suitable vehicle to attract it in large quantities, and at the same time a vehicle which allowed for continuation of business independently of the associates. They needed, in short, the modern incorporated company with limited liability. Lacking legislation, what the jurists tried to do was to examine once more the ancient sources and see whether companies of the kind their time needed were already present, in nuce or more developed, in the Roman empire. If so, they could introduce it through application of the Roman law and through jurisprudence. And indeed, perhaps not surprisingly, they found what they needed. But was this in accordance with the sources or was it just their way of interpreting? This is, in a nutshell, the theme of Fleckner’s voluminous study, which we can only notice in this journal.

The author has set out four elements a company should comply with according to nineteenth century and modern criteria: structure (separation of management and ownership), protection of the individual fortunes, protection of the common assets, transferability of participation. Further, he distinguishes three forms of organisation of capital-concentration in Roman Antiquity: societas, societas publicanorum and peculium. To these criteria he subjects these three forms and a fourth, corporations (but very restricted, see below).

Fleckner’s study gives first a fine and, considering the length of many footnotes (several times footnotes flow unabashedly over the next page), a complete review of the nineteenth century German literature on the limited company.

As regards Antiquity, his survey is also very extensive, but here one must keep in mind the restrictions implied by his point of departure. We shall enter into these, but only for the purpose of indicating the limitations of his study: the reader should bear well in mind here that what Fleckner covered is already very much, and that he deals with this in an exhaustive and profound way. He looked for entrepreneurial forms of capital-concentration, not all forms of concentration of capital. He took peculium as criterion and restricted himself to common ownership of slaves as form of common enterprise. Thus other possibilities are not mentioned and if one would take the main title as guide, it might perhaps be misleading; however, the subtitle prevents this. Perhaps he might better have left out the corporations, since it is not evident for those he mentions – the funerary and professional colleges – that they pursued business at all, or business which required
an accumulation of capital. Theoretically the monthly contributions to the funerary fund were indeed capital accumulation, but it was not entrepreneurial nor economically significant, and the same goes for the professional associations. But since he did not, he should also have mentioned here the colleges of traders who made a living in supplying the market of Rome with food stuffs (collegia negotiatorum, collegia naviculariorum, see D. 50.6,6 §§ 6, 8 and 9). They were licensed by the authorities, true, but so were the societates publicanorum, and they were meant to accumulate and invest capital, to make a profit, and they, like the societates publicanorum, had a separate management. There we see, most likely in the 2nd century, transferability of participation (Fleckner, to avoid the misleading word of ‘share’, uses the less restricted word ‘participation’), and certainly in the 3rd and later centuries.

Likewise there was another form of concentration of capital, meant to pass over to heirs or other persons, viz. the town councils in the 3rd. century and afterwards; but without entrepreneurial purpose, as with the collegia naviculariorum to a great extend too. Yet these forms demonstrate that in Antiquity people had an open eye for the desirability to bring and keep capital together for certain purposes and that they thought out suitable vehicles for this. In this context Fleckner deals with Rostowzew’s idea that there was a market of and traders in company shares in Rome, most recently stubbornly propagated by Hansman / Kraakman / Squire and Malmedier. In an exemplary way, characteristic for his entire book, Fleckner first gives a survey of the literature and the status quaestionis (p. 450–462). After that he finishes in an irrefutable way with this wholly unsubstantiated idea (p. 462–498). It is sad that energy has to be spend to this idea and that some nevertheless believe it since it is so ‘attractive’, but e tanto malo tandem bonum: an exhaustive and lucid discussion of the question.

Further, Fleckner’s restriction to the peculium of slaves in co-ownership leaves several matters out: first the possibility that slaves themselves could enter a societas, second the possibility of restricting the owner’s liability by the actions quod iussu or de in rem verso, and third the use of Junian Latins and freedmen in commercial enterprise. Particularly Junian Latinity provided the opportunity to invest an amount of capital into an enterprise, with limitation of liability to this amount, with possibility of transfer of the participation in any case by testament, and with full return of the investment and any profit if the enterprise was successful; and this all without being directly involved, which kept investors like senators out of the limelight of ‘vulgar’ business. The same, but to a lesser extent, goes for freedmen who were Roman, since the manumitter had a right to a share of his inheritance unless there were three or more children. In view of these disadvantages of ‘normal’ freedmen it is not too far-going to assume that Junian Latinity was especially created to make investments with a full return possible.


2 Since Fleckner appeared G. Dufour, Les societates publicanorum de la République romaine: des ancêtres des sociétés par actions?, RIDA, 57 (2010), p. 145–195, who, without reference to Fleckner, concludes that the societates publicanorum did not resemble the modern company by shares, but rather the société en commandite.