

Was there a *consortium* in Pliny's Letter VIII 18?

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a. — The Roman *consortium* is a difficult subject in Roman law. The reason is not simply that the sources say so little about this aspect of law but that the Romanists have written so much about it⁽¹⁾. Although the Gaius-fragment of Antinoe answered a number of questions about the *consortium* it also left some questions unanswered; for instance, it failed to explain whether the Roman *consortium* was more than simply a shared estate. Some Romanist scholars try to solve this problem by making historical comparisons of laws; Wieacker⁽²⁾, for example, has drawn a parallel between the Roman *consortium erecto non cito* and the Germanic "Hausgemeinschaft", and on this basis has concluded that in the former more was in fact shared than merely the estate; this particular point has been challenged by Albanese⁽³⁾.

I would not have broached such a difficult subject, had it not been for the fact that some Romanists, and Kunkel in particular,

(1) For sources and literature see M. KASER, *Das römische Privatrecht*¹, Munich 1971², 99 note 30.

(2) F. WIEACKER, *Societas, Hausgemeinschaft und Erwerbsgesellschaft*, Weimar 1936; IDEM, *Hausgemeinschaft und Erbeneinsetzung*, Festschrift H. Siber I, Leipzig 1941, 1-58; see also G. MACCORMACK, *Hausgemeinschaft and Consortium*, cf. RW 76 (1977) 1 ff.

(3) B. ALBANESE, *La successione ereditaria in diritto romano antico*, Ann. Ser. Giur. Univ. Palermo 20 (1949) 127-487; for commentary see M. KASER, *Iura* 1 (1950) 455.

argue, on the basis of a letter by Pliny, that in a *consortium* it was not only the estate that was shared but so was the *patria potestas*, and they maintain that this *consortium* still occurred at the beginning of the second century. Kunkel's view is disputed by Bretone, who believes that the *consortium* mentioned in this letter of Pliny is possibly a *consortium* in the sociological sense. From a juridical point of view, he thinks, we are probably dealing here with a *societas omnium bonorum*.

The letter in question is no. VIII 18. I first became interested in this letter in connection with my investigation of the Roman law of succession, as revealed in Pliny's letters. I do not intend to deal in detail here with references in the letter to the law of succession. But I do want to make my contribution to the discussion of the history of the Roman *consortium* by commenting on certain sections of this letter. I shall begin by saying something about the general content of the letter. Then I shall go on to explain what views people have formed of the Roman "*consortium*" on the basis of this letter; finally, I hope to be able to indicate why these views are not correct.

b. — VIII 18 C. *Plinius Rufino Suo S.*

- 1 *Falsum est nimirum quod creditur vulgo, testamenta hominum speculum esse morum, cum Domitius Tullus longe*
- 2 *melior adparuerit morte quam uita. Nam cum se captandum praeuisset, reliquit filiam heredem, quae illi cum fratre communis, quia genitam fratre adoptauerat. Prosecutus est nepotes plurimis iucundissimisque legatis, prosecutus etiam proneptem. In summa omnia pietate plenissima ac tanto*
- 3 *magis inexpectata sunt. Ergo uarii tota ciuitate sermones: alii fictum ingratum immemorem loquuntur, seque ipsos dum insectantur illum turpissimis confessionibus produnt, ut qui de patre uuo proauo quasi de orbo querantur; alii contra hoc ipsum laudibus ferunt, quod sit frustratus improbas spes hominum, quos sic decipi pro moribus temporum est. Addunt etiam non fuisse ei liberum alio testamento*
- 4 *mori: neque enim reliquisse opes filiae sed reddidisse, quibus auctus per filiam fuerat. Nam Curtilius Mancianus perosus*

generum suum Domitium Lucanum (frater is Tulli) sub ea
 condicione filiam eius neptem suam instituerat heredem, si
 esset manu patris emissa. Emiserat pater, adoptauerat pa-
 truius, atque ita circumscripto testamento consors frater in
 5 fratris potestatem emancipatam filiam adoptionis fraude
 reuocauerat et quidem cum opibus amplissimis. Fuit alioqui
 fratribus illis quasi fato datum ut diuites fierent, inuitissi-
 mis a quibus facti sunt. Quin etiam Domitius Afer, qui
 illos in nomen adsumpsit, reliquit testamentum ante decem
 et octo annos nuncupatum, adeoque postea improbatum sibi,
 6 ut patris eorum bona proscribenda curauerit. Mira illius
 asperitas, mira felicitas horum: illius asperitas, qui numero
 ciuium occidit, quem socium etiam in liberis habuit; felicitas
 horum, quibus successit in locum patris, qui patrem abstule-
 7 rat. Sed haec quoque hereditas Afri, ut reliqua cum fratre
 quaesita, transmittenda erant filiae fratris, a quo Tullus ex
 asse heres institutus praetatusque filiae fuerat, ut concilia-
 retur. Quo laudabilius testamentum est, quod pietas fides
 pudor scripsit, in quo denique omnibus adfinitatibus pro
 8 cuiusque officio gratia relata est, relata et uxori. Accepit
 amoenissimas uillas, accepit magnam pecuniam uxor optima
 et patientissima ac tanto melius de uiro merita, quanto
 magis est reprehensa quod nupsit. Nam mulier natalibus
 clara, moribus proba, aetate decliuis, diu uidua, mater olim,
 parum decore secuta matrimonium uidebatur diuitis senis
 9 sanusque durisset. Quippe omnibus membris extortus et
 fractus, tantas opes solis oculis obibat, ac ne in lectulo
 quidem nisi ab aliis mouebatur; quin etiam (foedum mise-
 randumque dictu) dentes lauandos fricandosque praebat.
 Auditum frequenter ex ipso, cum quereretur de contumeliis
 debilitatis suae, digitos se seruorum suorum cotidie lingere.
 10 Viuebat tamen et uiuere uolebat, sustentante maxime uxore,
 quae culpam incohati matrimonii in gloriam perseuerantia
 uerterat.
 11 Habes omnes fabulas urbis; nam sunt omnes fabulae Tullus.
 Expectatur auctio: fuit enim tam copiosus; ut amplissimos
 hortos eodem quo emerat die instruxerit plurimis et anti-

12 *quissimis status; tantum illi pulcherrimorum operum in horreis quae neglegebat. Inuicem tu, si quid istic epistula dignum, ne grauari. Nam cum aures hominum nouitate laetantur, tum ad rationem uitae exemplis erudimur. Vale.*

Gaius Plinius greets his dear friend Rufinus.

- 1 People are certainly mistaken if they believe that a testament is a reflection of a man's character since Domitius Tullus appeared to be a much better person after his death
- 2 than during his lifetime. For although he let himself be courted by legacy-hunters he appointed as his heir his daughter, whom he shared with his brother because he had adopted his brother's child. He showered a great many very attractive legacies upon his grandchildren and even left something to his great-grandchild. In short, his bequests were imbued with affection and all the more unexpected.
- 3 So now various rumours are spreading round the city. Some people say he was a hypocrite, an ungrateful, inconsiderate person; but these people who say scandalous things about him are revealing their motives, for they are inveighing against a father, a grandfather and a great-grandfather as if he were a person without offspring. Other people, however, praise him because he frustrated the perverse hopes of certain people; deceit of this kind is in keeping with the spirit of our times. They also say he was not free to make any other kind of will; he did not bequeath anything to the girl, he simply returned the amount by which the girl had increased his estate. For Curtilius Mancina, who had taken a dislike to his son-in-law, Domitius Lucanus (who is the brother of Tullus), had appointed his daughter, his own granddaughter, to be his heir on condition that she was released from her father's authority. Her father had released her from his authority, her uncle had adopted her, and in this way the testament had been evaded: by the fraudulent device of adoption the brother and partner had brought the emancipated daughter back under the paternal authority of a brother, thereby acquiring a very considerable estate.
- 5 These brothers seemed to be destined, as it were, to acquire

wealth against the will of those who made them rich. Even Domitius Afer, who had taken them into his family, left a will which he had drawn up 18 years previously and which he later disapproved of to such an extent that he had their father's estate confiscated.

- 6 What remarkable severity on the part of the one and what remarkable good fortune on the part of the others! The severity of the person who drove him from the circle of citizens, with whom he shared children, and the prosperity of those persons to whom he became a father, having taken
- 7 their father from them. But this estate of Afer, together with the other estate which he and his brother had collected, had to be transferred to the daughter of the brother through whom Tullus had been declared the sole heir in preference to the daughter to make him favourably disposed towards her. This testament is all the more praiseworthy in that it was dictated by devotion, fidelity and sensitivity, and all
- 8 relatives, including his wife, received a share in return for their devotion to him. This excellent and very patient wife, who was criticised all the more for her marriage, the more she devoted herself to her husband, received the most splendid country-houses and a large sum of money. For it seems that this woman, who was of noble birth and unimpeachable integrity, advanced in years and had already been a widow and mother for a long time, did not act in a befitting manner by marrying a rich old man whose body was so wasted by
- 9 sickness that even a woman who had wed him as a healthy young man would have found him repugnant. All his limbs were so dislocated and deformed that he could only perceive his wealth with his eyes and could only move in his bed with the help of others. And, however distressing and pitiful it is to relate he had to get someone to clean and brush his teeth. He was heard to say regularly, when complaining about his humiliating and weak condition, that he licked
- 10 the fingers of his slaves daily. Yet he lived and had the will to live and received tremendous support from his wife who, through her constant devotion, changed the disgrace of her marriage into glory.

- 11 Now you know about all the rumours that are circulating in the city, for all the rumours are about Tullus. We are eager to know what will happen at the public auction. He was so rich that he could put statues and sculpture on display in extensive parks on the very day he bought these parks. He had so many work of art in store that he could
- 12 not say exactly how many he owned. Now, if you know something which is worth writing a letter about, do not hesitate to write it down. For men's ears do not simply like to hear something new; by reading such letters men acquire wisdom and knowledge of life.

Greetings.

Letter VIII 18 cannot be dated exactly; but we do know for certain that the eighth book of Pliny's Letters was written between 107 and 108⁽⁴⁾. At that time Pliny was about 45 years old and had already had a brilliant career in Rome as a lawyer and magistrate, and he would soon be setting out on a special mission to Bithynia on behalf of the Emperor Trajan⁽⁵⁾.

VIII 18 recounts a remarkable family history. Since a considerable number of people are involved who are related to each other in rather a complicated way, I shall, for the sake of clarity, say a few words about them⁽⁶⁾. The main personages are two brothers: Cn. Domitius Lucanus and Cn. Domitius Tullus. Their father was Sextus Curvius Tullus. The brothers were adopted by the famous orator and infamous delator Cn. Domitius Afer, who later was to accuse their father and have his estate confiscated. One brother, Domitius Lucanus, married the daughter of T. Curtilius Mancina; they had a daughter, Domitia Lucilla. Curtilius Mancina wanted to leave his inheritance to Domitia Lucilla but was anxious to prevent it from falling into the hands of his son-in-law, Domitius Lucanus, whom he hated; therefore he made a will in which he instituted Domitia Lucilla

(4) A.N. SHERWIN-WHITE, *The Letters of Pliny*, Oxford 1968, 38.

(5) A.N. SHERWIN-WHITE, *The Letters of Pliny*, Oxford 1968, 80 ff.

(6) A.N. SHERWIN-WHITE, *The Letters of Pliny*, Oxford 1968, 486; see also note 9.

as his heir, and to the *heredis institutio* he added a *condicio emancipationis* (7). However, because of a fraudulent device on the part of the brothers the *condicio emancipationis* was not carried out in the way Mancía had intended. The girl was in fact emancipated by Lucanus but was thereupon adopted by his brother, Tullus. Now when Pliny wrote this letter, the father, S. Curvius Tullus, the adoptive father, Cn. Domitius Afer, and the father-in-law, T. Curtilius Mancía, had already been dead for some time. Domitius Lucanus, who in his will had instituted Tullus as his sole heir, is also dead. And now Domitius Tullus, who had reached a ripe old age and had been tended and cared for till the last moment by a devoted wife, is dead as well.

Domitius Tullus had become very rich by acquiring the inheritance of Domitius Afer and Curtilius Mancía, and of Lucanus. He had allowed himself to be courted by legacy-hunters (8) and few people thought that he would leave his inheritance to his closest relatives. Everyone in Rome is very curious about his will. To everyone's surprise, however, Tullus appointed his adopted daughter Domitia Lucilla as his heir and left a whole series of legacies to her children and even to her grandchild, so the legacy-hunters got nothing. We are less interested in this series of four testaments and of other matters associated with these than we are in the fraudulent device which was used to evade the *condicio emancipationis* which Curtilius Mancía had put in his will, since it is in this connection that Kunkel has formulated his theory about the *consortium*.

c. — The first Romanist to write about the Pliny letter in question with particular reference to the *consortium* was, as we said, Kunkel in his article "Ein unbeachtetes Zeugnis über das römische consortium" (9). Kunkel argues that on the basis of several references in the literature on rhetoric, a number of

(7) See S. SOLAZZI, *Sulla "condicio emancipationis"*, AG 86 (1921), 168 ff with texts and literature.

(8) See my article *Captatio and crimen*, RIDA (1979) 387-397, with texts and literature.

(9) W. KUNKEL, *Ein unbeachtetes Zeugnis über das römische consortium*, MéL. A.B. Schwarz, Ann. Fac. Droit Istanbul 4 (1954) 56-78.

inscriptions and above all, Pliny's letter, it would appear that in classical times the concept and the social function of the *consortium* was still very much alive. Kunkel begins his analysis of VIII 18 by pointing out that from this letter and from some of Martial's epigrams it appears that the brothers Lucanus and Tullus shared the estate equally, in complete partnership and their lives were closely linked as well. Kunkel is particularly interested in par. 4; he quotes

Nam Curtilius Mancina perosus generum suum Domitium Lucanum (frater is Tulli) sub ea condicione filiam eius neptem suam instituerat heredem, si esset manu patris emissa. Emiserat pater, adoptaverat patruus, atque ita circumscripto testamento consors frater in patris potestatem emancipatam filiam adoptionis fraude revocaverat, et quidem cum opibus maximis. I translate: "For Curtilius Mancina, who had taken a dislike to his son-in-law, Domitius Lucanus (who is the brother of Tullus), had appointed his daughter, his own granddaughter, to be his heir on condition that she was released from her father's authority. Her father had released her from his authority, her uncle had adopted her, and in this way the testament had been evaded: by the fraudulent device of adoption the brother and partner had brought the emancipated daughter back under the paternal authority of the *father*, thereby acquiring a very large estate".

About the second sentence Kunkel writes: "Mithilfe dieser Adoption, sagt Plinius, wurde das Testament umgangen: als *consors* des Lucanus brachte Tullus durch die Adoption dessen emanzipierte Tochter in die Gewalt ihres Vaters zurück, und zwar mitsamt ihrer reichen Erbschaft".

He goes on: "Wenn man diese Schilderung des Plinius wörtlich nehmen dürfte, ergäbe sich daraus ein Ausmass der Rechtsgemeinschaft unter den *fratres consortes*, wie es nicht einmal der Gaiustext von Antinoe für die alte *societas erecto non cito* bezeugt: die Adoption der Erbin durch Tullus bewirkt nicht nur, dass die Erbschaft, sondern auch dass die Adoptierte selbst in die *potestas* des Lucanus fällt. *Potestas* kann dabei nicht anderes heissen als die Mitherrschaft des *consors*. Demnach müsste nicht nur das Vermögen den Konsorten gemeinsam zustehen, sondern

auch die *patria potestas*: Adoptiert einen von ihnen, so werden beide Väter!"

According to Kunkel, if we interpret the words of Pliny literally we have here a description of a partnership in which there is joint control not only of the estate but also of the *patria potestas*. Kunkel thinks that joint *patria potestas* of this kind might have been possible under the terms of the old *consortium ercto non cito*. This is also the view expressed by, for instance, Wieacker and Kaser, namely that in pre-classical times the *consortium* was more than simply a shared estate. The fact that Gaius says nothing about this in the Antinoe-fragment is not an insurmountable problem for Kunkel; he is of the opinion that Gaius did not treat the *societas ercto non cito* exhaustively, since he was dealing with this matter in connection with the law of obligations and would probably deal with aspects of the law of things rather than with aspects of the law of persons such as *patria potestas*. It is also conceivable that Gaius was no longer familiar with all the implications of the old *consortium*. One real difficulty for Kunkel is the fact that Pliny is not referring to conditions at the time of the Twelve Tables or during the Republic but he is referring to a *consortium* in his own day. In Pliny's day one could conceive of a *consortium* in which there was joint patronage or guardianship. No trace can be found in the sources of joint *patria potestas*. One gets the impression, Kunkel thinks, that any such notion was quite out of the question, at least as far as classical law was concerned.

Although Kunkel maintains that Pliny was well acquainted with the law in view of his career as an orator, and could express himself very clearly, as was evident from a number of his letters on legal subjects, he adopts a cautious approach here; he wonders whether Pliny's words should not be interpreted more in a social sense than in a juridical sense. In a joint household where authority over estate, slaves and freedmen is shared, in practice there should also be joint responsibility for the children. It is easier to understand how Mancina's inheritance could have been owned jointly; if this had not occurred automatically Tullus would have had to make the inheritance common property by

means of, for instance, *in iure cessio*, in the same way as was done in the case of *societas omnium bonorum*; Pliny does not say this in as many words, but that is not such a big problem. Although Kunkel might have been satisfied with such an explanation he is tormented by doubt. In the first place he wonders whether the *consortium* in its original sense of a community of goods and life-partnership between brothers can be equated with the *societas omnium bonorum* of the Digest. Kunkel concludes that it cannot, and supposes that in classical times there must have been a *consortium fratrum* which was fundamentally different from the *societas omnium bonorum*. The basis of this was not the agreement between the parties but the sense of community that arose as a result of the undivided inheritance. According to Kunkel, partnerships of this kind still exist today in Italian country districts. With regard to the right of the *fratres consortes* to dispose of the estate, Kunkel thought that this aspect was also to be found in the *societas omnium bonorum* in that it did not contain an *actio pro socio* relating to the *consortium*. This explains why there is no question of *consortium fratrum* in the title of D. 17. 2. *Pro socio*.

Kunkel's views received a certain amount of support. Kaser, for instance, writes in his handbook⁽¹⁰⁾: "Mit der Aufspaltung in mehrere Familien, die mit dem Wegfall des Pater Familias eintritt, ist es vereinbar dass diese Familien in den genossenschaftlich gebauten Rechtsverband des Consortiums vereinigt bleiben. In dieser Verband sind offenbar nicht nur die Vermögensrechte sondern auch die Personengewalten vergemeinschaftet".

Kaser bases his argument on Kunkel's article and mentions particularly Pliny's letter VIII 18. According to Kaser, the *consortium* is not simply an "Erbengemeinschaft" but it is a "familienrechtliches Verhältnis". Sherwin-White⁽¹¹⁾ in his commentary on Pliny's letters follows Kunkel closely on this point.

(10) M. KASER, *Das römische Privatrecht I*, Munich 1971², 59 ff.

(11) A.N. SHERWIN-WHITE, *The Letters of Pliny*, Oxford 1968, 470 - in error, SHERWIN-WHITE uses the term "*Manus*" instead of *patria potestas*.

Gaudemet⁽¹²⁾ in his book on "Les communautés familiales" also supports Kunkel's view about the *consortium* in classical times, although he does this somewhat cautiously. His reasoning too is based partly on Pliny's letter VIII 18 and especially on the words "*consors frater*" in par. 4.

d. — Bretonne, however, in his article "Consortium e Communio"⁽¹³⁾ is not in agreement with the views of Kunkel quoted above. He introduces his argument by remarking that although the *consortium* disappeared as a separate juridical notion in the last century of the Republic, this does not necessarily mean that it did not live on in the social conscience, kept alive by the spirit of *concordia* and *pietas* which of necessity would prevail in a partnership between brothers. Such a notion, which is not important juridically speaking, cannot be overlooked by history or by literary imagination. Bretonne refers here to Pliny's letter VIII 18. He reproduces the text but he prints in italics the words "*quae illi cum fratre communis, quia genitam fratre adoptaverat*" in par. 2, the words "*circumscripito testamento consors frater in fratris potestatem emancipatam filiam adoptionis fraude revocaverat, et quidem cum opibus amplissimis*" in par. 4, and in par. 6 the words "*quem socium etiam in liberis*". With regard to the crucial sentence in par. 4 Bretonne does point out that there is a text where the words "*in patris potestatem*" are used instead of "*in fratris potestatem*", but he does not consider the difference in wording to be of any importance.

Bretonne is of the opinion that one is certainly not justified in concluding from this letter of Pliny that adoption by one of the *fratres consortes* caused the *patria potestas* to fall to both of them, and one cannot thereby conclude that the classical *consortium* included not only a joint estate but also joint *patria potestas*. In his view this letter is significant solely for the socio-

(12) J. GAUDEMET, *Les communautés familiales*, Paris 1963, 63 ff. 82 ff.; (still in doubt) J. GAUDEMET, *Étude sur le régime juridique de l'indivision en droit romain*, Paris 1934, 12 note 2. Concerning the fortune of Lucanus and Tullus, GAUDEMET refers to Pliny, Letter IV 2, 5 - mistakenly, it would seem, for this letter is about a rich man called Regulus.

(13) M. BRETONNE, *Consortium e communio*, *Labeo* 6 (1960) 211 ff.

logical interpretation of the *consortium*, not for the juridical interpretation. Bretone maintains that Pliny is writing here about a daughter who is "*communis*" to the "*fratres consortes, quia genitam fratre adoptaverat* (n.b. *alter frater*)". Pliny seeks to equate the real father with the adoptive father and he uses a phrase which he used earlier in the letter. That is to say, whenever he writes about Afer, who had adopted Lucanus and Tullus, he describes him as a "*socius in liberis*" of the natural father. If you think carefully about the strange case which Pliny describes and these peculiar family relationships, it is impossible to deduce from the sentence in par. 4 that the *consortium* includes joint *patria potestas*.

According to Bretone, Pliny is not writing specifically about law here, but in a very witty and shrewd way he is cloaking a literary motif in juridical terminology. Bretone thinks that what Pliny is really trying to say is that when one brother adopts his brother's daughter he has in a sense returned her to her own father.

Finally Bretone wonders how one is to explain in legal terms that the one *consors* who had not adopted the child acquired a share in the estate which the adoptive *consors* had acquired via his adopted daughter. He thinks that this must be a case of a so-called *consortium voluntarium*, which is really a form of *societas omnium bonorum*. Everything which the partners acquire has to be brought by special (legal) act into this "*societas*".

Bretone's opinion has also won support. Kaser, however, in his article "Neuere Literatur zur 'societas'" (14) followed Kunkel in as much as the latter maintained, on the basis of Pliny's letter VIII 18, that the *consortium* did occur in classical times; but on the subject of possible joint *patria potestas* Kaser sides with Bretone. Kaser adds an objection to those already made by Bretone. He declares that rights acquired after the conclusion of a *consortium* do not automatically become part of the partnership. On the subject of the acquisition of a share in the inheri-

(14) M. KASER, *Neue Literatur zur "societas"*, SDHI 16 (1975) 287 note 34.

tance of Mancian, which was certain to become common property, Kunkel himself assumes that an *in iure cessio hereditatis* was necessary because the joint heirs (as *socii omnium bonorum* etc.) were in duty bound to share between them any future increase in the estate. The daughter could only have come under the *patria potestas* of the adoptive parent as a result of adoption, and, in any case, as Pliny pointed out, she thereby entered into a far-reaching socially dependent relationship with the other brother⁽¹⁵⁾.

e. — Why is Kunkel's interpretation untenable? From the epigraphical material which Kunkel introduces, one could conclude that Lucanus and Tullus had common business interests. The precise juridical character of their partnership is not clear. The Epigrams of Martial, from which Kunkel quotes, calls these brothers supreme exponents of fraternal affection. However, one is not justified in concluding from these sources that there was a *consortium*. Pliny's letter will be decisive here. I fully support the view that Pliny expressed himself clearly and correctly on juridical matters. In my view this letter provides no justification for departing from this view. Kaser's interpretation of Pliny's words in par. 4 however raises insurmountable juridical problems. Kaser rightly points out that it is difficult to accept that *patria potestas* is automatically shared whereas Kunkel himself maintains that rights acquired at a later date (n.b. after the start of the "*societas*") have to be brought into the partnership by means of *in iure cessio*. In my opinion there are many more problems to solve.

Firstly, Pliny states in par. 7 that Lucanus made a will. I wonder how this fact can be reconciled with the existence of the *consortium*. A *consors* was not allowed to dispose of a share in the community. Kunkel maintains that Lucanus made his will at the moment when the *consortium* came into being. I therefore

(15) M. KASER, *Neue Literatur zur "societas"*, SDHI 16 (1975) 287 nt. 34: "Die Tochter aber kann durch die Adoption nur in die Vatersgewalt des Adoptierenden gelangt sein und kam damit allerdings, was Plinius wohl auch gemeint hat, in eine weit reichende soziale Abhängigkeit auch vom anderen Bruder".

wonder when this could have happened; for was a *consortium* not a continuous undivided inheritance which came into being on the death of the testator? Gaudemet believes that a *frater consors* can make a will, although this is not in keeping with the original character of the *consortium*. However, he does not see why a *frater consors* should not enjoy this right which the Romans used so often. In my opinion one of the essential elements of a *consortium* is then missing, namely the notion of a joint indivisible estate, so it is doubtful if there is still a real *consortium*.

A second objection relates to the *condicio emancipationis*. If the *consortium* between Lucanus and Tullus included joint *patria potestas*, then Lucilla was in the *potestas* of both Lucanus and Tullus even before the death of Mancina. If Mancina had known this — and he may well have done — and if he had wished his granddaughter to be *sui iuris*, then he would have named both fathers in the *condicio emancipationis*. Also since Mancina considered only Lucanus in the *condicio emancipationis*, then one might doubt whether, according to Kunkel's theory the *condicio emancipationis* was really fulfilled by the fraudulent adoption.

I cannot accept Breton's view either, however plausible it may appear. The way in which Pliny uses the words "*socius*" and "*communis*", i.e. in a non-juridical sense, could in fact indicate that, legally speaking, there was no question of joint *patria potestas*, even in par. 4. One can certainly say that Pliny is not using these terms here in a strictly juridical sense. This might indicate that the words "*consors frater*" do not necessarily relate to a "*consortium*" in a strictly juridical sense either.

To me, however, one of the basic problems is the inconsistent way in which Breton continues to interpret Pliny's words in par. 4. Breton considers that when Pliny writes about shared *patria potestas* he is expressing himself in juridical terms but not in connection with a juridical matter. When Pliny writes about an inheritance becoming common property, then, according to Breton, his words must again be interpreted in the juridical sense. When Breton maintains that there is no *consortium*

because, juridically speaking, there is no joint *patria potestas* he is really undermining his argument that there is a *societas omnium bonorum*, since the estate too could have been "common" only in the social but not in the juridical sense.

f. — In view of the above objections to the interpretations given by Kunkel and Bretone we shall have to look closely at what Pliny really says. Of vital importance are the words in the second sentence of par. 4. In my view one has to see the sentence as a whole and not explain it simply on the basis of one term. This term need not be used in a juridical sense. I therefore feel that Gaudemet has not sufficient grounds for asserting that there was a *consortium* in Pliny's letter VIII 18, since he bases his argument solely on the words "*consors frater*" and refrains from discussing the rest of the text. I do not think that the Romans used the terms "*consors*" and "*consortium*" solely in a strictly juridical sense, which is linked with the *consortium erecto non cito*. In the well known definition of marriage by Modestinus the word "*consortium*" is used in the broad, non-juridical sense of partnership, community. In my view "*consors*" can also mean "partner" in the broadest sense of the word, even if it is not used in connection with a *consortium erecto non cito* ⁽¹⁶⁾ (cf. Bretone's interpretation of the terms "*socius*" and "*communis*").

In our detailed study of Pliny's words we must firstly check whether the way in which Kunkel reproduces Pliny's words is in accordance with modern textual criticism. Kunkel reproduces Pliny's words thus: *Emiserat pater, adoptaverat patruus, atque ita circumscripto testamento consors frater in patris potestatem emancipatam filiam adoptionis fraude revocaverat, et quidem cum opibus maximis.*

If one compares the texts of Guillemin ⁽¹⁷⁾, Schuster ⁽¹⁸⁾, Stout ⁽¹⁹⁾ and Mynors ⁽²⁰⁾ one sees that in two places Kunkel's

(16) Concerning "*consors frater*" in connection with "*societas*" see also F. LANFRANCHI, *Il diritto nei retori romani*, Milan 1938, 310 ff.; see too the article by KUNKEL mentioned under 9.

(17) A.M. GUILLEMIN, *Pline le Jeune, Lettres*, III, Paris 1967, 78.

(18) M. SCHUSTER - R. HANSLIK, *Plinius Minor*, Leipzig 1958³, 261.

(19) S.E. STOUT, *Plinius epistulae*, Bloomington 1962, 254.

text deviates from the rest without any explanation. Firstly, Kunkel's text contains the words "*in patris potestatem*" whereas all modern editions used the phrase "*in fratris potestatem*", the editors thus rejecting the version with "*in patris potestatem*" as being the less correct one. Secondly, at the end of this sentence in Kunkel's version are the words "*cum opibus maximis*", whereas all modern editions give "*cum opibus amplissimis*"; Stout omits "*cum opibus amplissimis*" completely. I do not intend to elaborate upon the reasons for these textual differences. I refer the reader to the texts themselves, particularly to Mynors' text. The point is that Kunkel may have used a deviant text (21).

Next we must find out how Pliny's words should be translated, particularly in the light of the above-mentioned textual differences. In translating, it is not always easy to ascertain to which of the two brothers Pliny is referring. One first encounters this problem when looking for the subject of the verb "*revocaverat*". Of those who have translated Pliny's letters in their entirety, anon. (22) and Guillemin (23) think that the subject is Lucanus; Radice (24) and Lambert (25) are not clear on this point, whereas Kasten (26) thinks that Pliny means Tullus. The Romanists Kunkel, Kaser, Bretonne think that Tullus is the subject; so do I. By the fraudulent device of adoption Domitia Lucilla comes back under the *patria potestas* and it is Tullus who is the adopter (27).

(20) R.A.B. MYNORS, *C. Plini Caecili Secundi Epistularum libri decem*, Oxford 1968, 248.

(21) KUNKEL may have been using a different text such as R.C. KUKULA, *Plinius Minor, Opera*, Lipsiae 1908. This text contains the words "*patris*" instead of "*fratris*" but not "*maximis*" instead of "*amplissimis*".

(22) (ANON.), *Lettres de Pline le Jeune*, Paris 1932, 232 (edit. Flammation).

(23) A.M. GUILLEMIN, *Pline le Jeune, Lettres III*, Paris 1967, 78.

(24) B. RADICE, *Pliny, Letters and Panegyricus*, London-Cambridge (Mass.) 1969, II 55.

(25) A. LAMBERT, *C. Plinius Caecilius Secundus, sämtliche Briefe*, Zürich 1969, 319.

(26) H. KASTEN, *Plinius der Jüngere, Briefe*, Munich 1968, 475.

(27) Concerning *adoptio* see M. KASER, *Das römische Privatrecht I*, Munich 1971², 348; concerning *adoptio* in the Pliny letter in question see

The fundamental question is: under whose *potestas* does the girl come? All of the above-mentioned translators, with the exception of Lambert, think that Domitia Lucilla comes under the authority of Lucanus. This is very surprising, because all of them use the text containing the word "*fratris*". According to Kunkel as well, the girl came back under the *patria potestas* of Lucanus; this is the only possible interpretation of his text. Kaser, who also puts "*in patris potestatem*", thinks however that the girl could only come under the *potestas* of the person who adopted her, namely Tullus. Although Bretone notices the variants "*fratris*" and "*patris*" he thinks that Pliny means that the girl comes under the *potestas* of Lucanus. According to Bretone, the textual variant makes no difference. In the light of modern textual criticism I also read "*fratris*" here and this can refer either to Lucanus or to Tullus. I think that Pliny means Tullus. This is apparent, I think, from what Pliny writes in par. 3: *addunt etiam non fuisse ei liberum alio testamento mori: neque enim reliquisse opes filiae sed reddidisse, quibus auctus per filiam fuerat*. Now, one could argue, I suppose, that the prefix "*re*" in "*revocaverat*" is intended to emphasise that the girl comes back under the authority of her father; in my opinion, however, Pliny wants to stress that the girl does come back under the paternal authority, but under that of her father's brother, Tullus.

g. — What consequences does this translation of Pliny's words in par. 4 have for the juridical interpretation? In my opinion it is not possible to conclude from these words that a *consortium fratrum* existed between Lucanus and Tullus, by virtue of which they shared *patria potestas* over Lucilla. The text does not say that the *patria potestas* passed to both Lucanus and Tullus; according to Kunkel's (mis)reading of the text the girl simply came under the *potestas* of her father; modern texts say simply that she came under the authority of one brother, and that brother can be none other than Tullus.

the article by W. KUNKEL, *Ein unbeachtetes Zeugnis über das römische consortium*, Mélanges A.B. Schwarz, Ann. Fac. Droit Istanbul 4 (1954) 63 note 15.

Can one then conclude on the basis of the text that there was a *societas omnium bonorum*? The words "*et quidem cum opibus amplissimis*" are not regarded by everyone as being genuine. Furthermore, the same objection holds here as held above in relation to the assumed *patria potestas*. The text does not say that the inheritance which Lucanus and Tullus received was a joint one; it states simply that the inheritance goes to the person who acquires the *patria potestas*: and this can only be Tullus.

If there was no *consortium fratrum* and no *societas omnium bonorum* between Lucanus and Tullus, what picture do we get of their relationship? Undoubtedly there was very close collaboration between Lucanus and Tullus; this is apparent not only from Pliny's letter but it is evident also from the epigraphic and literary sources quoted by Kunkel. One could explain their relationship in terms of "*pietas*", as Kunkel suggests, but this word is rather a strange one to use in connection with these two brothers. As far as the *patria potestas* is concerned, Lucilla was originally under the *potestas* of Lucanus and later under that of Tullus. No definite conclusions about the legal nature of the brothers' partnership can be drawn from either Pliny or from the other sources.

In conclusion, I believe that Kunkel's contention that there is a case of *consortium fratrum* in Pliny's letter VIII 18 with joint *patria potestas* is incorrect. The erroneous interpretation stems from inaccurate reproduction of the text and an inaccurate translation, from which an incorrect conclusion is drawn. Bretone's assertion that in the letter in question there is a *societas omnium bonorum* in the juridical sense and a *consortium fratrum* in the social sense is also incorrect, for he bases his conclusion on the same textual interpretation and the same translation as Kunkel. Consequently the views of Kunkel and Bretone that the *consortium erecto non cito* was more than a joint estate and that it still persisted in Rome well into the second century are no longer tenable. There is no support in the other sources mentioned by Kunkel for those views either.