The *lex Junia* and the Effects of Informal Manumission and Iteration

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1: Junian Latinity. 2: What were the effects of informal manumission and iteration? 3. The views of Vangerow, Cantarelli, Steinwenter and Buckland about the character of informal manumission. 4: The informally freed before the lex Junia. 5: The possible construction of the lex Junia and the status conferred by it. 6: *In libertate esse* or *morari*. 7: Informal manumission as a source of Junian Latinity. 8: The lex Aelia Sentia as a source of Junian Latinity. 9: Other sources of Junian Latinity. 10: The patronage over Junian Latins. 11: Iteration and other modes of acquiring the *ius Quiritium*. 12, 13: The *tutela* as patronal right. 14: The claim on the *bona Latinorum* (the *debitum*) before iteration. 15: The claim on the *bona Latinorum* (the *debitum*) after iteration. 16: *Obsequium* and *operae*. 17: *Munera* and the *origo*. 18: The *nomina* of Junian Latins. 19: The status of the children and freedmen of Junian Latins. 20: Conclusion: all quiritary ownership ended by the informal manumission. Further arguments for this. 21: Was iteration always possible? 22: Gai. 2.195 and the problem it poses. 23: A suggested solution for Gai. 2.195. 24: The decision of Antoninus Pius in Gai. 2.195 in itself. 25: Plin. *ep.* 10.104. 26: The interpretations of Hardy, Steinwenter and Sherwin-White. Hardy's interpretation refined. 27: Summary.

1. — Junian Latins were Roman freedmen whose estates always and wholly devolved to their manumitters. This category

of Latins — generally called *Latini* or (*personae*) *Latinae condicionis* in our sources [1] — was created by the lex Junia of most probably 17 B.C. The lex laid down that a manumission, not in accordance with the requirements of the civil law (and because of this not conferring formal freedom and Roman citizenship to the slave), now gave a special kind of coloniary Latinity [2] and thus a freedom and civil status, recognized in the civil law and endowed with *commercium* [3]. Of course some requirements were still to be fulfilled, or else it could not be called a manumission (see below). However, the lex also provided that when a Junian Latin died, the lex itself were supposed never to have existed with regard to his estate. Consequently it was considered as if it were *peculium*, which enabled the manumitter to obtain *bonorum possessio* of it with preference over the children of the deceased Junian Latin. These children were and remained Latins (see nr. 19).

(1) In Gaius' Institutions generally *Latini*; in for instance Sue. *Cl.* 19 and *Vesp.* 3.1 (*personae*) *Latinae condicionis.*

(2) Coloniary Latins were the citizens of Latin colonies, founded by the Romans. These colonies were peopled by Romans who emigrated to them. They lost their Roman citizenship by this, but gained that of the new domicile. In the field of the private law they were presumably nearly equal to the Romans. It is not certain whether they had the *ius connubii.* See A. Steinwenter, v. *Ius Latii*: RE 10 (1910) cc. 1260-1278. (Periodicals are referred to with the sigla as published in P. Rosumek, *Index des Périodiques*, Suppl. à *L'Année Philologique*, tome LI, Paris 1982).

(3) According to UE 19.4 *mancipatio* could occur between Romans and Junian Latins, because of the *commercium. Commercium* is the capacity to perform the formalities of the Roman civil law. It is doubted whether it implied for a peregrine or a Latin as much as for a Roman citizen. See on this M. Kaser, *Vom Begriff des "Commercium"*: *Studi Arangio-Ruiz* II, Napoli s.d., particularly pp. 140-142, where he assumes that in any case the ownership acquired by *mancipatio* will have given to peregrines an ownership resembling essentially quiritary ownership, and probably *usucapio* too. It seems to me that even in this careful approach the *commercium* would bar pretences of quiritary ownership of other people at the same time. That would make that ownership as good as any quiritary ownership.

However, the lex Junia contained some restrictions with regard to the exercise of the *commercium*: see p. 223.

2. — In a previous article I described in short some of the peculiarities of Junian Latinity, while particularly entering upon the possible motive for the enactment of the lex Junia (4). In this article I want to go into the effects of the lex Junia with special regard to the patronal relations a Junian Latin had, both after the manumission, as after the iteration of this manumission. Normally a Roman citizen freedman got his manumitter for patron. The latter was entitled to reverence (*obsequium*), services or corvées, if agreed upon (*operae*), tutelage if the manumitted person was a woman or an *impubes* (*tutela*), and under circumstances to a part of the estate (the *pars* or *portio debita*; for convenience's sake called by me the *debitum*). With Junian Latins the situation was complicated, because the freed slave did not become a Roman citizen, but could become so if the manumission was repeated (*iteratio*). What was the situation then in between? Why had the lex Junia to provide that the manumitter could claim the estate? And on what basis? Who was regarded as patron for the other claims? And what if there would be, after iteration, a duplicity of patrons, which would happen if the manumitting person had the slave *in bonis*, but was not (yet) the quiritary owner? Then only the former quiritary owner could iterate,

(4) A.J.B. SIRKS, *Informal Manumission and the lex Junia*: RIDA 3d. s., 28 (1981) pp. 247-276 (pp. 250 and 273 on the date), with on p. 259 n. 9 a survey of recent literature to which should be added: L. RODRIGUEZ ALVAREZ, *Las leyes limitadoras de las manumisiones en epoca augustea*, Oviedo 1978, part. pp. 127-152. On pp. 127-141 RODRIGUEZ gives a fine exposé of the whole controversy around the date of the lex Junia. His opinion is that it was enacted in 17 B.C.

On slavery and dependence in Antiquity see now the survey of literature, drawn up by J. GAUDEMET, *Esclavage et dépendance dans l'Antiquité*: TRG 1982, pp. 119-156.

Recently A. GUARINO, *Spartaco*, Napoli 1979, p. 114 has put forward that the Junian Latins were mainly "schiavi delle campagne". It is not the place here to enter into this, as it suffices to observe that GUARINO's approach does not exclude the possibility that Junian Latins were active in commerce and finance, as shown by Sue. *Cl.* 18,19. GUARINO's approach has a place in G. GILIBERTI, *Servus quasi colonus. Forme non tradizionale di organizzazione del lavoro nella società romana*, Napoli 1981, p. 2 note 3. p. 20 note 25.

but he would become patron too by this. But why was it only the former quiritary owner who could iterate? Did a *nudum ius Quiritium* remain, or some remnant of it, after the manumission by the person who had the slave *in bonis*, and was this the basis for that capacity? And if so, could that *ius Quiritium* be transmitted? Some writers, as VANGEROW, CANTARELLI and STEINWENTER, assume this to have been so; others doubt it. It is with these questions that I will deal here. It will already have appeared by the use of the word "former" that in my opinion all quiritary ownership ended by the manumission, regardless of the form used.

3. — I will set out in short the view of VANGEROW, as published by him in 1833. He sees a manumission *vindicta*, *censu* or *testamento* as the transfer of the *ius Quiritium* to the slave. In the case of a manumission by someone who has only *in bonis*, a formal manumission confers, after the lex Junia, Junian Latinity, but the *ius Quiritium* that was with the quiritary owner as a *nudum ius Quiritium*, remains with this person as such. The distinction between *in bonis habere* and the *nudum ius Quiritium* occurs too in Gai. 1.54. But Gaius applies it to a slave, not yet manumitted, while VANGEROW assumes that the distinction is valid as well for a slave, already manumitted. If a Quiritary owner manumits informally, he retains the *ius Quiritium* in the same way as *ius nudum*. When someone who has a slave *in bonis* has manumitted this slave formally, and the person in whom the *ius nudum Quiritium* is vested, iterates, the remnant of this *ius* is transferred to the slave, who then has acquired both the quiritary and bonitary ownership of himself, and thus has become completely free and a Roman citizen. VANGEROW's view leads one to conclude that a *dominus* under twenty years of age, who manumits a slave formally without the *causae probatio*, prescribed by the lex Aelia Sentia, loses his quiritary rights and therefore will never be able to iterate the slave; while on the other hand the lex Aelia Sentia bars the grant of citizenship to the slave. He would then become a *morans in libertate* and by virtue of the lex Junia a Latin (VANGEROW presumes the lex Junia to be of

a later date than the lex Aelia Sentia). The same would happen if a *dominus* over twenty would manumit *vindicta* a slave under thirty without *causae probatio* (5). It is this view that has been adopted by CANTARELLI in 1882-1883 (6), and STEINWENTER in 1925 (7). This approach had already been attacked by BUCKLAND in 1908. He categorically denies that the manumission consists of the grant of ownership to the slave. By performing the requirements of manumission the owner destroys the possibility that the slave can ever again be possessed by him. This is, however, only a negative act, and cannot be seen as transferring ownership. Then the manumission has a second effect: it grants the person citizenship at the same time. According to BUCKLAND, manumission was not the transfer of *dominium*, it was the creation of a *civis*, and not merely a release from ownership, but from the capacity of being

(5) C.A. VON VANGEROW, *Ueber die Latini Iuniani*, Marburg 1833, pp. 16-17, 23, 66: "Die Civität also entspricht dem quiritarischen, die Latinität dem bonitarischen Eigenthume, und alle Manumission stellt sich heraus als eine *Veräusserung des Sklaven an diesen selbst*, so dass er nun sein eigner Herr wird (...)." On pp. 75 ff. VANGEROW compares the different forms of manumission with different forms of transfer of property. P. 83: " (...) dem Satze nämlich, dass der Sklave, welcher, weil er nicht feierlich freigelassen wurde, oder weil er nur im bonitarischen Eigenthum seines Freilassers stand, Latiner wurde, *fortwährend in dem quiritarischen Eigenthume dessen blieb, der ihn auch vorher in diesem Eigenthume hatte*". This *nudum ius Quiritium* he calls "mehr ein formelles als materielles Recht", and he compares it with the *duplex dominium*. On p. 84 he maintains that an *in bonis habens* could not destroy the quiritary ownership of someone else by manumission. Further pp. 147-172 on iteration; part. p. 148, where he says that by the iteration the quiritary ownership is transferred to the former slave, who already had the bonitary ownership of himself.

(6) L. CANTARELLI, *I Latini Juniani*: AG 29 (1882), pp. 3-31, 30 (1883) pp. 41-117. Part. pp. 61-62 and 92-93.

(7) A. STEINWENTER, v. *Latini Iuniani*: RE 12 (1925) cc. 910-924. STEINWENTER does not say so explicitly, but in c. 919 he accepts the consequences of VANGEROW's view and thus, implicitly, the view itself. M.A. DE DOMINICIS, v. *Latini*: NNDI 9 (1968) cc. 462-467, does not express himself on this point, though mentioning, a.o., STEINWENTER and not BUCKLAND (see note 8).

owned (8). In the course of this article, which will develop along another line than that of BUCKLAND, we will see that his vision on the character of manumission is right or at least much better adapted than VANGEROW'S, CANTARELLI'S and STEINWENTER'S to the analysis of the phenomenon in issue.

4. — But first of all we have to clear the field of our research and to ascertain in which cases we can speak of informal freedom in the sense of the lex Junia. Maybe other statuses than Junian Latinity are too of interest for us for these problems. Again it is not certain that in all cases Junian Latinity is of interest for us in this respect also (see for this last point nr. 9).

In the time before the lex Junia there was not yet that Latinity (I leave aside the point whether a thing like Aelian Latinity existed. To me it seems rather improbable (9)). There were slaves, informally freed slaves, Roman citizen freedmen and coloniary Latins. The first and the third category do not pose any problem. In Roman law the first were non-persons, and the third category were Romans who, being freed, had their patrons who were identical with their manumitters or agnatic descendants of them. The coloniary Latins were persons of another *civitas* and not Romans, nor could they have a Roman as patron or be patron to a freed Roman, though they had the *ius commercii* and maybe *connubii* (see note 2). However, the second category is of interest. These persons were slaves who were freed by their masters while the requirements of the civil law were not complied with. The imperfectly or informally freed (the definitory correctness of the adjective remains a problem (10)), were protected or kept in freedom by

(8) W. BUCKLAND, *The Roman Law of Slavery*, Cambridge 1908 (repr. 1970), Appendix IV (pp. 714-718). Remarkably enough STEINWENTER does not mention this handbook among his literature of reference, neither does he seem to be aware of BUCKLAND'S criticism.

(9) See RODRIGUEZ (note 4) for the date of the lex Junia. Lately A. WILINSKI, *Zur Frage von Latinern ex lege Aelia Sentia*: ZRG 80 (1963) pp. 378-392 has gone into this point, like M.A. DE DOMINICIS, *La "Latinitas Iuniana" e la legge Elia Senzia*: TRG 33 (1965) pp. 558-574.

(10) BUCKLAND (note 8) uses the term informal throughout. He explains

the praetor, for example against a possible *reivindicatio* or *actio Publiciana*. In this way the praetor did not recognize the claim for possession of the possessor or owner anymore. We might say that their possession or the capacity to possess them had ended by their act of manumission (see nr. 21), although it had been imperfect to the civil law (see below). Thus the honorary law set aside, but did not annul, the civil law. The praetor will not have protected all cases. Presumably he did protect when he could judge a slave to be in a state of freedom as the result of a wish of the *dominus* to this effect (FDos. 5 and 8). In such cases one could presume an informal manumission, next to those in which an informal manumission had undeniably taken place. The freed slaves remained slaves to the civil law, and when they died their estate devolved to their manumitters as *peculium*, because these had remained their owners (Gai. 3.56, FDos. 5).

We do not know about their children, but we have to assume that these were slaves and claimable too (Gai. 3.56). In the literature sometimes these informally freed are referred to as *in libertate morantes* or as *in libertate tuitione praetoris*

it on pp. 444-445: next to the three recognized modes of manumission there were "less formal ways". He then points to the *in libertate morantes*, who were *in tuitione praetoris*, saying: "They were evidently not *derelicti*: the informal declaration that they were to be free was very far from an abandonment of all rights". The minimum requirement was that the master wanted and declared the slave to be free, of which some sign should exist. On p. 446 he acknowledges the objection of WLASSAK to the term informal, as each informal mode had its own form; but he is of the opinion that the term informal is nevertheless justified as it refers rather to the substantial guarantee of witnesses.

My objection is that in the case of an *in bonis habens* the formal mode was used, but that the lack of quiritary ownership barred Roman citizenship. In such a case we might better speak of an imperfect manumission, if it were not for the fact that after the lex Junia such a manumission would be perfect to this law. But as the term informal is, anyway, better than the term praetorian (because with a manumission *vindicta* the praetor's assistance was needed too), I will keep to its use as established by BUCKLAND, holding its restrictions in mind. GUARINO (note 4) p. 111 rightly speaks of "l'affrancato *iure honorario*" instead of a praetorian manumitted.

morantes ([11]). But such terms are confusing, particularly the first one, as *in libertate morari* or *esse* does not necessarily refer to being informally freed. A group of *in libertate morantes* was formed by those slaves, who behaved as if they were free, because they claimed to have a right to be so, for example if they were born free, but had sold themselves when being still under twenty-five. And then it is suggested that there were also slaves, just left to themselves without any manumission, in a state of factual freedom. With this questions I will deal in nr. 6. First I will go further into the lex Junia, because this lex changed the outcome of *voluntate domini in libertate esse*. Consequently we have to bear this lex in mind when analysing references to the state of *in libertate esse* or *morari*.

5. — As said the lex Junia remedied the position of informally freed slaves by giving them a status, derived from coloniary Latinity. In my previous article on the lex Junia I suggested a possible juridical construction of this lex, which I will repeat and augment here, as it will prove useful again in entering upon the problems posed.

Of the text of the lex Junia we possess, apart from the indirect references in Gaius, Ulpian and the Fragmentum Dositheanum, a literal citation in *Quintiliani declamationes* 340 and 342. These *declamationes* are, in the opinion of RITTER and LEO, school notes, probably made by pupils of the famous rhetor Quintilian. LEO thinks it very probable that the teacher indeed was Quintilian himself. RITTER even thinks of an edition of Quintilian's *liber artis rhetoricae*, prepared by his pupils ([12]).

(11) So for example VANGEROW (note 5) p. 12 and further passim; CANTARELLI (note 6) p. 43; STEINWENTER (note 7) p. 911; WEISS (note 58) c. 1374; BUCKLAND (note 8) p. 445 on the contrary refers to them as *in tuitione praetoris morantes*, which in any case is better. Further for the term: nr. 5.

(12) *M. Fabii Quintiliani Declamationes quae supersunt CXLV*, rec. C. RITTER, Lipsiae MDCCCLXXXIV (= 1884). C. RITTER, *Die quintilianischen Declamationen*, Freib.i.B./Tübingen 1881 (repr. Hildesheim 1967), pp. 246-252, 256. F. LEO, *Quintilians kleine Declamationen: Nachrichten d. Göttinger Gesellsch. d. Wiss., Phil.-hist. Klasse*, 1912, pp. 109-121 (=:

But whatever the truth may be, both authors at least agree that these rhetoric exercises can have been written down at the end of the first century, or at the beginning of the second century A.D.

Declamatio 340 and 342 are about the subject "*Qui voluntate domini in libertate fuerit, liber sit*". The student had to work this theme out in speeches, both with regard to the *ius*, as well as with regard to the *aequitas*. Several times it is said that these motto's are the words of the law in question ([13]). As the exercises are about slaves, not freed formally, and as there is no mention of the age of slave or master, the law concerned can only be the lex Junia. This was already suggested by VANGEROW. According to him we can use this source even if it were not a work of Quintilian, because it is classic anyway and confirmed by FDos. 7 ([14]). WLASSAK, on the contrary, was not at all convinced of the trustworthiness of it. If other "*leges*" to which in rhetoric exercises was referred were merely inventions, why not this one too? Besides, FDos. 7 says *lex ... iubet quos dominus liberos esse voluit*. If the *voluntas domini* had been an integral part, why was it not quoted here? Thirdly, he cannot believe that a Roman law would connect such consequences to just a factual state. WLASSAK concludes that there

Ausgewählte kleine Schriften II, Roma 1960, pp. 249-262). A philological study of these *declamationes*, without consequences for this inquiry: S. WAHLÉN, *Studia critica in Declamationes minores quae sub nomine Quintiliani feruntur*, Upsaliae MCMXXX (= 1930). A survey on the question of the authorship: LANFRANCHI (note 16) pp. 18-23.

(13) *Decl.* 340, ed. RITTER (note 12) p. 342, 14-18: *non enim difficile fuit ei, qui hanc legem componebat, id scribere*: "*qui voluntate domini fu<er>it*"; *nunc hoc scribendo*: "*qui in libertate fuerit*" ...; p. 343, 4-10: *etenim legum lator putavit etiam eos, qui a dominis fuga abessent, esse in libertate*: *quod colligo scripto eius*: "*qui voluntate domini in libertate fuerit*". *Apparet, aliquos et non voluntate domini in libertate esse. Quod si verum est, potest etiam in libertate esse etiam qui liber non est.*; p. 344, 11-12: ... *ut propius ad verba legis accedam*... — *Decl.* 342, ed. RITTER *ibid.* p. 350, 1-3: *et ideo adiectum est in lege*, "*qui voluntate domini in libertate fuerit*".

(14) VANGEROW (note 5) p. 64 note 2. An allusion was made by DE DOMINICIS (note 9) p. 569.

cannot have been a "stillschweigende" (silent) manumission, except in some special cases, while the beginnings of a later, wider interpretation were slightly discernible. For the rest, all manumissions, including the praetorian ones, required a particular expression of the wish to manumit. This is the basis of WLASSAK's contention that there was no such thing as a formless (or informal) manumission: all manumissions had their own form (15). To his contention about the *declamationes* we can answer that FDos. 7 apparently is meant as a paraphrase, not a quotation of the lex, and that the *voluntas* is amply mentioned in it. Then WLASSAK's third argument is rather overdone. *Decl.* 340 declares: *invito domino potest aliquis esse in libertate, invito autem non potest esse liber. Aliud est in libertate esse, aliud liberum esse.* The factual state is narrowly defined. We will see that in some texts WLASSAK, as a consequence of his rejection of the text of *decl.* 340 and 342, is forced to give rather far sought solutions (see nr. 6).

Concerning WLASSAK's first argument, the appraisal of the value of legal references in rhetorical works is much more favourable nowadays. LANFRANCHI has evaluated those references and found many of them correct or trustworthy (16). BONNER has, independently of him, researched the law in the Controversies of Seneca Rhetor. His conclusions are that very few of the fifty laws in this work are clearly fictions. The majority is, if not demonstrably Roman as they stand, far closer to Roman law than has been generally supposed. He confirms LANFRANCHI'S results (17).

LANFRANCHI doubts WLASSAK'S contention that the lex Junia, thus conceived, was against for example an *odium libertatis* as shown by the lex Aelia Sentia. We do not know whether such an *odium* was the reason for that lex. He concedes that the

(15) M. WLASSAK, *Die prätorische Freilassungen*: ZRG 26 (1905) pp. 374-376, 381. See for BUCKLAND'S criticism note 10; for WLASSAK'S contention and the subsequent discussion RODRIGUEZ (note 4) pp. 121-125.

(16) F. LANFRANCHI, *Il diritto nei retori romani*, Roma 1938, pp. 38-41.

(17) S.F. BONNER, *Declamations in the Late Republic and Early Empire*, Berkeley-Los Angeles 1948, pp. 131-132.

way the lex Junia was interpreted is one coloured very much by a rhetoric *favor libertatis*. According to him the lex originally ran in this way: *Qui voluntate domini aliquid pro libero fecerit, liber sit.* The *voluntas* then would have been the interpretative work of rhetors (18). However, we cannot accept this. It would mean that all references to the contents of the lex Junia on the point of the *voluntas domini* (see note 20) (which never refer to an *aliquid pro libero facere,* n.b.!), would be rhetorical inventions or later interpolations. That goes too far for at least juridical sources as Gaius or the Ulpiani Epitome. On the other hand, we can observe that LANFRANCHI rejects, implicitly, WLASSAK's reconstruction of the lex that ran: *Quos dominus ... liberos esse voluit* (19). So we can conclude that there are no good arguments to accept WLASSAK's hypothesis, and that it neither did find support. In consequence there is no or not enough reason to distrust the quotations of *decl.* 340 and 342.

Of course we have to be careful in appreciating the value of the knowledge of the law as exposed in these exercises. But it is not very probable that a mistake in the quotation of the law was made, even by a pupil in rhetoric, particularly as this quotation would have been most probably a dictation by the teacher. (It is of course different with the interpretation of the law). Therefore I assume the motto to be a citation from the original text of the lex Junia, and I will quote it accordingly so. To this I will add in small italics the known direct references to dispositions of the lex, likely to have been borrowed from the lex, adapted to the singular form of the citation. Though textually the result of course never can pretend to be more than a guess, it may be useful by giving a quick insight in the construction and clauses of the lex.

QUI VOLUNTATE DOMINI IN LIBERTATE FUERIT, LIBER SIT (20) *atque si esset civis Romanus ingenuus* (21) *qui*

(18) LANFRANCHI (note 16) pp. 137-140, 186.
(19) WLASSAK (note 15) p. 377.
(20) *Qui ... sit*: Quint. *decl.* 340 (ed. RITTER p. 342, 8-9, p. 343, 6-7),

ex urbe Roma in Latinam coloniam deductus Latinus coloniarius esse coeperit (22). *Libertas talis esse debet, ut praetor tueatur* (23).

(*Nec potest*) *testamentum facere* (24) *vel ex testamento alieno capere* (25) *vel tutor testamento dari* (26).

Is, cuius ante manumissionem ex iure Quiritium Latina vel Latinus inpubes fuerit, (*eius*) *tutor* (*sit*) (27).

Bona eius ad manumissorem pertineant ac si lex lata non esset (28).

The *voluntas domini* was an essential part of the lex. For instance, in UE 1.12 it is said that a slave under thirty years of age, manumitted *testamento* without the required *causae probatio*, would have remained a slave, were it not for the lex Aelia Sentia that ordered to consider the slave, in such a case, "*atque si domini voluntate in libertate esset*". By this the lex Junia applied, and so the author declares: "*ideoque Latinus fit*". I will return to the *voluntas* below.

Of course the lex could not stop at declaring anyone being in freedom to be free. It stated that it had to be a freedom that the praetor would have protected as before the lex Junia (FDos. 8; see also Gai. 3.56). So a runaway slave was in free-

decl. 342 (ed. RITTER p. 349, 9-10, p. 350, 2-3). Sustained by Pomp. *12 ad Q. Mucium* D. 40.12.28 (see note 47); Paul. *51 ed.* D. 40.12.24.3; FDos. 6 and 7; Gai. 1.22, 3.56; UE 1.12.

(21) *ingenuus*: Gai. 3.56. Sustained by Salvian. Mass. *ad eccl.* 3.7.34 (see note 30). Contra: FDos. 6, which has *liberti*. This may have been a correction, to explain the later situation.

(22) *atque ... coeperit*: Gai. 3.56. Sustained by Gai. 1.22; FDos. 6.

(23) *libertas ... tueatur*: FDos. 8 (where *proconsul* may be an addition). Sustained by Quint. *decl.* 340; Gai. 3.56.

(24) (*nec*) ... *facere*: Gai. 1.23. Sustained by UE 20.14. Further GE 1.1.4.

(25) *vel ... capere*: Gai. 1.23. Sustained by Gai. 2.110, 275; UE 22.3. Further UE 20.8 (a contrario), 17.1, 25.7.

(26) *vel ... dari*: Gai. 1.23. Sustained by UE 11.16.

(27) *Is ...* (*sit*): UE 11.19. Sustained by Gai. 1.167.

(28) *Bona ... esset*: Gai. 3.56. Sustained by Gai. 2.155, Inst. I. 3.7.4.

dom, but not *voluntate domini*. He would not be protected by the praetor, and thus not be free by virtue of the lex (see about this Quint. *decl.* 340 (note 13)). But even with this restriction it could not declare anyone free and a Roman citizen. By that the requirements of the civil law for manumission, and in consequence the formal manumission itself, would have been abolished. Apparently the Romans did not want to take this step, because they inserted a fiction. That fiction said the persons thus declared free were considered to be similar to Roman *ingenui* citizens, who had been brought over to Latin colonies. Roman citizens who officially were settled in Latin colonies (a *deductio in coloniam ex lege*) lost their Roman citizenship, but gained that of the Latin colony and became coloniary Latins. This made them nearly equal to the Romans, as they had the *ius commercii*.

But some provisions of the lex Junia modified this *ius commercii* of the informally freed and their status, thus attained. By the *ius commercii* the Junian Latins would have had access to nearly all the Roman legal institutes. Now, although they kept the *testamenti factio*, the lex forbade them to make a testament, to accept from a testament having been instituted as heir or legatee, and to be instituted as a testamentary tutor. So they remained capable of being a *familiae emptor*, a *testis* or a *libripens* (UE 20.8). *Fideicommissa* they could take (Gai. 2.275; UE 25.7). Further they could not be instituted as Atilian tutors (Schol. Sin. 17 (45)).

If there were no testament, their estates would have gone, most probably, to their children. Agnates a Junian Latin did not have, otherwise his *patronus* would have been able to inherit *manumissionis iure* (Gai. 3.56). But a provision in the lex Junia constituted that the estate of a Junian Latin would go to his manumitter as if the lex had not been passed. Such a presumption would make a Junian Latin, in retrospect, an informally freed slave under the protection of the praetor; everything such a slave had acquired, his *dominus* would have acquired *iure peculii* (Gai. 3.56; FDos. 5). So the provision indeed made the manumitters able to get *bonorum possessio* of

the whole estate, over the children, *iure quodammodo peculii*, as Gaius says (3.56) ([29]).

Maybe the last clause was worded stronger, or interpreted in a stronger way. The way Salvian and Justinian describe its effects are arguments in favour of that: *ut vivant scilicet quasi ingenui, et moriantur ut servi,* says Salvian ([30]). But for us it is enough if we part from Gaius' words and merely suppose that this fiction did only apply to the *bona Latinorum.*

We saw that the lex Junia must have referred explicitly to the *voluntas domini.* If we regard Gaius, Ulpian and the Fragmentum Dositheanum, this *voluntas* is interpreted as an informal manumission, i.e. as a manumission *inter amicos* (Gai. 1.41; UE 1.10; FDos. 4, 6, 7, 15) ([31]). Only in FDos. 15 a manumission *per epistolam* is mentioned. The word *domini* does not necessarily have had to refer to a *dominus ex iure Quiritium* (Gai. 1.35, 167; UE 1.16; FDos. 15; Pomp. *12 ad Q.Mucium* D. 40.12.28 (see nr. 11 and note 57)).

(29) P. Voci, *Diritto ereditario romano,* vol. II, Milano 1963, pp. 33-35 on the *bona Latinorum.* See also p. 254.

(30) Salv. Mass. *ad eccl.* 3.7.34: *Ita ergo et tu religiosos filios tuos quasi Latinos iubes esse libertos, ut vivant scilicet quasi ingenui et moriantur ut servi, et iuri fratrum suorum quasi per vinculum Latinae libertatis adstricti, etiamsi videntur arbitrii sui esse, dum vivunt, quasi sub illorum tamen positi potestate moriantur.* etc.

Salvian fulminates against the practice of rich Romans, who had sons (and daughters) who joined the church, to bequeath to these children only usufructs in order to save the family capital. Such children of course would be inclined to leave their property to the church, not to their family. It is not impossible that Salvian exaggerates. But his reference to *ingenui,* which squares with the manumission if one does not know the exact contents of the lex Junia (cfr note 21), may very well be a sign that he knew what he was talking about. See for Justinian note 73.

(31) See for the manumission *inter amicos*: B. Albanese, *Ancora sulla "manumissio inter amicos": Scritti G. Ambrosini,* Milano 1970, pp. 19-30, with further lit. See for a survey on the discussion between Albanese, who has a rather strict view on this manumission, and Biscardi, who tends to a wider interpretation, Rodriguez (note 4) pp. 121-125. Cfr too Martial. *epig.* 9.87, where Martial has to sign *tabellae* (Rodriguez (note 4) p. 113).

On the other hand Quint. *decl.* 340 and 342 show a more liberal interpretation of these words. If a slave does something accordingly to his master's will as if he were a free person, then he is regarded as being in freedom by the will of his master and thus, in accordance with the lex Junia, as free. It does not matter whether this was the intention of his master or not (*decl.* 340: *sic quisquis aliquid pro libero fecit*; *decl.* 342: *qui volentibus dominis fecerint aliqua tamquam liberi*). The author of the exercises even declares that the lex was not meant to see to *manumissi*: *Si de his loqueretur lex, quos dominus manumisisset et liberos esse voluisset, supervacuum erat* (*decl.* 342). This, however, regards obviously the formal manumissions which alone, before the lex Junia, made free. The author makes a difference here between *in libertate esse* and *liber esse*. Was this a crucial difference? LANFRANCHI does not exclude the possibility that it corresponded to respectively an informal and formal manumission, while *in libertate esse* corresponded too with the state of *in tuitione praetoris esse* anterior to the lex Junia (32). Yet in FDos. 7 the paraphrase runs *liberos esse*. It has to be said, however, that after the lex Junia any *voluntate domini in libertate esse* amounted to a *liber esse*, which might have blurred the distinction. Nevertheless *liber* as term must have retained at least something of its special quality of indicating the *status libertatis* with full citizenship, as for example in a testamentary manumission. The use of another word must have led here to inefficacity of the disposition (unless it was interpreted as an informal manumission which, however, is not certain: see nr. 6). Of the (assumed) *voluntas* the author gives some examples: a slave boy who has to wear the *toga praetexta*, in order that the master evades the tax on him; a slave girl who is sent with a *dos* to the leader of pirates, as if she was the sister of a boy captured by these, and who had to marry now the leader in order to set the boy free.

However, we have to be careful. At the time the lex Junia was enacted the *voluntas* must have been interpreted rather

(32) LANFRANCHI (note 16) p. 184.

strictly. UE 1.12 proves this. The lex Aelia Sentia had to declare a manumission *testamento*, void because of the lack of a *causae probatio*, as effective to that extent that the slave in question had to be considered *atque si domini voluntate in libertate esset*. Yet it had been undeniably the testator's will to set him free. Also in the case of a defective manumission *vindicta* the wish did not amount to anything. Further Gaius' advice to a *dominus* under twenty how to create a Junian Latin (prove the cause and then manumit *inter amicos*), shows that here too a mere *voluntas* was not enough, or at least not easily presumed. Only with later jurists we find cases that might point to a more liberal application. We do not know whether some cases, mentioned by Justinian in CJ 7.6.1, originated from rhetorical instruction books.

For that is what we have to keep in mind. In the rhetoric, rather bizarre cases were sometimes posed, to attract the student's attention. In making his *declamatio* he had to follow first the *ius*, and then the *aequitas*; but not so strictly. Even Quintilian, who stressed the need for rhetoric to be as faithful to reality as possible, conceded in some way these exigencies of education. But he wanted to keep the references to the *ius* still as correct as possible, presumably because he had fulfilled some juridical functions himself (33). So it might have been that the lex Junia was envisaged for cases of informal manumission, particularly *inter amicos*, but was interpreted gradually in a wider sense in rhetoric, while the jurists kept to the strict sense. At the beginning of the third century a wider application in the law might have taken place then, though the examples we know are at least based on some manumission (34). Some examples of Justinian, on the contrary, might have been taken from rhetoric textbooks, if there is no parallel to them in the classical law (35).

(33) Leo (note 12) pp. 118-119 (= 259-260).

(34) E.g. Paul. (Scaev. *4 resp.*) D. 40.9.26, and CJ 7.8.5, cfr FDos. 16 (Buckland (note 8) p. 574).

(35) E.g. CJ 7.6.1.9, because of Quint. *decl.* 342.

WLASSAK too adheres to such a restricted interpretation in the application of the lex Junia, but the basis for his argument is different. He believes the lex was adopted for school purposes by the rhetors. The references of the *declamationes* to the formless manumissions were rhetoric inventions, as normally all manumissions, the praetorian ones too, had their own form (36). As said before, his emphasis on the need for a form must be considered to be too strong. The lex Junia only required a *voluntas domini*, that, of course, had to be distinguishable, and a factual freedom. The same goes for LANFRANCHI's suggestion (see note 18). But their words keep their value in so far as that they warn rightly for the possible existence of rhetoric interpretations (for example, maybe the case of the slave boy in *decl.* 340 who wore the *toga praetexta*).

The next point to consider is the nature of Junian Latinity. It is customary to speak of Junian Latinity or Latinity. Still, according to MOMMSEN, we should not do so. Someone was citizen of a Latin town and therefore also a *civis Latinus*, to whom the law of that particular Latin town applied, like to Romans the law of Rome. Latin law was equal to Roman law. A personal Latin law therefore did not exist. MOMMSEN regarded the Junian Latins as being devoid of a home town, thus — in his reasoning — without an applicable Latin law, and thus without a law. Consequently he considered their status more a "qualificirter Sclavenstand" than "eine Gattung des latinischen Rechts" (37). But he had to acknowledge anyway, like STEINWENTER (38), that these Latins existed as free persons. In another article STEINWENTER denies strongly that a Junian Latin could have a home town (39). He bases this on UE 20.14, but unfortunately applies the argumentation, given there for the incapacity of *dediticii* to make a testament, to the Junian

(36) WLASSAK (note 15) p. 383.

(37) Th. MOMMSEN, *Römisches Staatsrecht*, Leipzig 1887, III pp. 626-627.

(38) STEINWENTER (note 2) c. 1271.

(39) STEINWENTER (note 7) c. 918.

Latins. UE 20.14 simply says that the latter were prohibited by the lex Junia to make a testament.

Yet it is not at all sure that MOMMSEN's observation has such a terrible impact as he seems to suggest. He distinguishes between the *Latini prisci* and the *Latini coloniarii*. The city laws of the first gave their citizens a complete equalization to the Romans, as far as we know of. Latins of these towns would become Romans by domiciling in Rome. Of the other Latins an equalization only existed in the private law (40). MOMMSEN sums up consequences of the equalization, of which I repeat some. The Roman legislation could be extended over Latin territory. There was *commercium*, which meant that when Latins and Romans had dealings, the Roman law could and would apply. A Latin could acquire *iure Quiritium* land, while such land would remain subject to Roman taxes and *munera*. At least there existed in Rome unity of legal procedure between Latins and Romans (41) (STEINWENTER denies Latins the *in iure cessio*, quiritary ownership and the *legis actio* (42)).

What now if a coloniary Latin resided in another town than his home town, for example Rome? He would not become a Roman. Would not this mean that in his dealings with Romans and other Latins the Roman law applied, and with peregrines the *ius gentium*? Apparently it did. The Romans themselves do not seem to have had any problem with this at all. They just made some special provisions in the lex Junia that denied the Junian Latins some of the institutions they otherwise would have had access to by virtue of the *ius commercii*. Evidently they presumed the Junian Latins would live according to the Roman law. Maybe they had as far as the status of the Junian Latins was concerned some standard coloniary statutes in mind, that granted the *ius commercii*. I will not elaborate on this but I think that the attitude of the Romans themselves does

(40) MOMMSEN (note 37) pp. 623, 635-639.

(41) MOMMSEN (note 37) pp. 627, 629, 630-631, 632.

(42) STEINWENTER (note 2) cc. 1276-1277; cfr M. WLASSAK, *Der Ausschluß der Latiner von der römischen Legisactio*: ZRG 28 (1907) pp. 114-129.

not show the problem MOMMSEN sees, and it would be enough if it is shown that the position of MOMMSEN and STEINWENTER is really questionable, and that the consequences do not appear to be in line with their suggestion.

Besides, it is not at all improbable that Junian Latins had a home town. In FV 221 it is said that an iterated Junian Latin should take up the guardianship over the children of his manumitter, not of his iterant, like he has to take up the *munera* of the home town (*origo*) of his manumitter and not of his iterant. For the latter a rescript of Marcus Aurelius is cited, but it is not impossible that this rescript was about an uniterated Junian Latin (see nr. 17). MOMMSEN's statement is left hanging in the air by this text, which is not to be found in his Römisches Staatsrecht.

Seen the state of the case, as long as no counter-arguments have been put forward, it is better to assume that Junian Latins in their dealings could use and most probably did use Roman law, or the *ius gentium*, depending on the kind of transaction, on the status of their partners and on their domicile.

6. — After the lex Junia those manumitted slaves who would have come into the group of informally freed slaves became Junian Latins. What exactly defined their status and position has been discussed before (see also nr. 19). What remains are some texts, in which is spoken of *in libertate morari* or *esse* (43).

(43) H. HEUMANN - E. SECKEL, *Handlexikon zu den Quellen des römischen Rechts*, Jena 1907, p. 352: *in libertate morari*: Ulp. *45 ed.* D. 38.2.16.2; Scaev. *23 dig.* D. 40.4.29; Ulp. *5 fideicomm.* D. 40.5.30.17; Ulp. *55 ed.* D. 40.12.12.1.ff.; Paul. *51 ed.* D. 40.12.24.3; Paul. *54 ed.* D. 41.2.3.10; D. 41.2.28.pr., which should be Jul. *44 dig.* D. 41.2.38.pr. To these should be added: CJ 7.4.4 (Alex. Sev.); CJ 7.45.2 (Carac.); CJ 8.25.1 (Sev.-Carac.).

VIR, *in libertate esse*: Iul. *43 dig.* D. 22.3.20; Pomp. *12 Q.Muc.* D. 40.12.28; Pap. (test.) *6 resp.* D. 40.4.49; Ulp. *54 ed.* D. 40.12.7.5; Ulp. *55 ed.* D. 40.12.10.pr.; Ulp. *55 ed.* D. 40.12.12.pr., 3, 4; UE 1.12; Paul. *3 ad l. Ael. Sentiam* D. 40.9.16.3. See for UE 1.12 pp. 222, 226, 238, 242 and 243.

The ThLL, VII-2, c. 1311, l. 27 ff: (*in libertate esse, morari*) QUINT. *decl.* 340 p. 342,3 voluntate domini [*saepius ibidem*], p. 343,2 in -e est ...,

It is not always possible to say that they refer to an undisputed state of slavery or freedom, the latter being Roman citizenship or Junian Latinity. I will leave aside the question whether *voluntate domini in libertate esse* (or *morari*) amounted in the times before the lex Junia to the state of being under the praetor's protection (*in tuitione praetoris*). It seems to me reasonable to assume a continuity here, seen Gai. 3.56 and FDos. 5 and 8.

Concerning those texts, several of them refer to the *causa liberalis*, i.e. the procedure for the acknowledgement of freedom. If a slave behaved *sine dolo malo* as if he was free, the burden of the proof that he was not free came to lie on the other party, viz. the *dominus*. If he behaved *dolo malo* as if he was free, he had to prove himself that he ought to be free. The texts describe his state as *in libertate morari* with or without *dolus malus* (D. 40.12.7.5; D. 40.12.10.pr.; D. 40.12.12.pr.-4; D. 41.2. 3.10). A similar case is found in CJ 7.45.2. Here someone is free, but is revindicated in servitude.

In other texts we have to deduce from the circumstances what is meant, and we have to be alert for a *voluntas domini* to *in libertate morari* or *esse*, as in that case the lex Junia would apply. Sometimes such a *voluntas domini* can only be deduced. That, however, would be enough. Sometimes the *voluntas* amounts to a distinct (in)formal manumission. In CJ 8.25.1 a slave is correctly manumitted, with consent of the creditor to whom he was given in security. He has lived in freedom since, i.e. he has not been recalled in slavery by his manumitter. As the consent of the creditor was seen as a renunciation of the pledge, the lex Aelia Sentia that would have made such a manumission void in case the debitor was insolvent (Gai. 1.37, FDos. 16), must have been considered not applying. Then in D. 40.4.29 the expression refers to slaves who were manumitted *testamento*, thus formally. The testament has to be regarded as null, but the liberty, granted by it, has to be

quisquis caret forma servitutis. *al. cfr* PLIN. *epist.* 4,10,4 moretur ... in -e [SCAEV. *dig.* 40.4.29 MEN. *dig.* 40.12.29.pr. ULP. *dig.* 40.12.12.1 *al.*].

maintained if the manumitted had remained in their state of acknowledged freedom for five years. In D. 40.4.49 a citation from a soldier's testament runs: "*Samiam in libertate esse iussi*". Normally this would not have led to liberty, as the phrase then should have run *liberam esse iubeo* (cfr Gai. 2.267). WLASSAK thinks the main fault to have been the use of *iussi* instead of *iubeo*. The other fault was that the phrase was not clear enough to assume a distinct *voluntas* (44). As it concerned the testament of a soldier, in which case the civil law rules were not so strictly applied, the manumission was considered valid. We do not know whether the testator thought of giving Junian Latinity (which seems to have be done sometimes by testament, see CJ 7.6.1.6).

If a *causa liberalis* had started, the party that claimed to be *dominus* could start other personal actions too against the other party. These proceedings, however, had to be postponed then until the *causa* was decided. The fact that a second proceeding was begun did not prejudice both parties. The person claimed to be a slave was treated as if free during the time the *causa* lasted, because of the ordination of the *causa*. Therefore he was not considered to be *voluntate domini in libertate* as a result of the second proceedings, which otherwise would have entailed Junian Latinity (D. 40.12.24.3) (45). WLASSAK, however, rejects the possibility of the presence of Junian Latinity in such a case. He suggests the phrase in question (*aut ... morari*) has to be disconnected from the preceding phrase (*nec ... fieri*) and says it does not see to the outcome of the *causa*. He concedes that by this the text becomes a problem. To solve this he presumes that the phrase concerned the *cautio*. When a

(44) WLASSAK (note 15), p. 398 note 3.

(45) Paul. *51 ed.* D. 40.12.24.3: *Sed si quas actiones inferat dominus, quaeritur, an compellendus sit suscipere iudicium. et plerique existimant, si in personam agat, suscipere ipsum ad litis contestationem, sed sustinendum iudicium, donec de libertate iudicetur: nec videri praeiudicium libertati fieri aut voluntate domini in libertate eum morari: nam ordinato liberali iudicio interim pro libero habetur, et sicut ipse agere, ita cum ipso quoque agi potest. ceterum ex eventu aut utile iudicium erit aut nullum, si contra libertatem pronuntiatum fuerit.*

slave was in factual freedom with the wish of the master (I will return below to this factual freedom of WLASSAK) during the *causa*, and he ran away before the end of it, the master would have to blame only himself. Therefore he could not demand a *cautio* from the *adsertor libertatis* (46). WLASSAK himself says this interpretation does not hold for this case. The *cautio* would already have been settled before the second proceedings started, so the second proceedings could not influence the *causa* anymore in this respect.

In D. 40.12.28 it is said that a slave is not considered to be *in libertate voluntate domini* if the *dominus* did not know he was his slave. The *dominus* does not only have to want the slave to be in freedom, he also has to want to lose his possession (see too D. 41.2.38.pr., below). In this case he did not know the slave was in his possession, so he could not lose the possession. This interpretation of the lex Junia must have been meant against too wide interpretations, that may have originated in for example rhetoric education. WLASSAK has to reject again Junian Latinity, as there is no suggestion of some manumission here. Referring to texts that do not look to me as pertinent, he concludes that a wish to free was absent here. Again he discerns a factual freedom, of interest for the question of the *cautio* (47).

Normally invalid codicils did not oblige the *fideicommissarius*. But if a heir nevertheless ratified an invalid codicil and, in this case, wanted the slaves to whom the invalid codicil had granted freedom to *morari in libertate*, these slaves had obtained a *iusta libertas*. Thus rescribed Septimius Severus and Caracalla, according to D. 40.5.30.17. With a *iusta libertas* Roman citizenship must have been meant, but the slaves must have become, originally, Junian Latins. The decision of the

(46) WLASSAK (note 15) pp. 391-397.

(47) Pomp. *12 ad Q.Mucium* D. 40.12.28: *Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse: et est hoc verum: is enim demum voluntate domini in libertate est, qui possessionem libertatis ex voluntate domini consequitur.* On this, WLASSAK (note 15) pp. 397-401. See note 57 too.

emperors must have been that as the testator had wished the slaves to be freed formally and as the heir, though not obliged, had confirmed this wish sua sponte, he should manumit as wanted, not as he himself wished. But in another text, D. 40.9. 16.3, it is not completely clear whether *in libertate fuisset* only saw to an informal freedom, or that the manumission had had full effect.

In D. 22.3.20 the term refers to the situation that a free person was robbed of his freedom. According to WLASSAK this text sees to the ordination of the *causa liberalis* (48). D. 38.2.16.2 is about a freedman who has been recalled in slavery by his patron, on unjust grounds as it later appears to the patron, who then lets him *morari in libertate*. By this the patron retains his *ius patronatus*, which can only mean that the freedman was considered to be free again, otherwise there would have been no question of the *ius patronatus* and of inheriting. So we cannot say the freedman was a slave, and some manumission has to be assumed, e.g. an informal one, or at least a *voluntas domini*, enough to have the same effect. An argument for this may be purveyed too by CJ 7.6.1.8. Justinian refers to the view that when a slave had lost the *causa liberalis*, he would become a Junian Latin if someone paid his price to the *dominus*. If that was possible in a case where the decision of the *causa* was justified, then in D. 38.2.16 where the ground was found later to be unjust, it could very well have been possible too; if the opinion referred to existed already in the second century A.D. In Iul. *44 dig.* D. 41.2.38.pr. only an informal manumission can have been meant. Here the owner sends a letter to his slave, writing him to *in libertate morari*. It means he will lose possession of his slave the moment the latter reads the letter. Thus the slavery is finished for once and for all, and so this has to be considered an informal manumission *per epistolam* (cfr FDos. 15, where Julian is said to have taken a similar stand with regard to a manumission *per epistolam* by a woman. She needs her tutor's *auctoritas* not so much at the moment on which she writes the letter, but at

(48) WLASSAK (note 15) p. 395 note 1 (= p. 396).

that moment on which the slave learns of her wish). Another text, CJ 7.4.4 of 222 (?) A.D., is about a woman slave to whom fideicommissary freedom was due, but who *voluntate domini in libertate morata est*. The question now was, which status her children had who were born since. According to the text these were slaves if the mother had not asked for her freedom. Had she, however, done so, then she would have become a Roman citizen and her children Roman *ingenui*. As this text poses considerable difficulties, it has to be left out of the inquiry (49).

(49) CJ 7.4.4: *Si voluntate domini in libertate morata est, cui fideicommissaria libertas debita fuerit, secundum senatus consultum et constitutiones ad id pertinentes civis Romana facta ingenuos peperit. sed si numquam ab ea libertas petita est, sibimet imputare debet, cum interea ex ea progeniti servi sint.* (Alex. Severus, probably in 222 A.D.).

If the woman would have asked for her freedom as soon as it could be given, the *dominus* would have been *in mora* if he did not give it. All children born since then would have been *ingenui* Romans, as constitutions declare (Marcian. *4 reg.* D. 40.5.53.pr.). The children born before were slaves, but should be handed over to the mother after her manumission, in order that they would be manumitted by her and become her freed persons, not her manumitters' (Mod. *9 reg.* D. 40.5.13; Ulp. *5 f.c.* D. 40.5.26.3-4; Marcian. *4 reg.* D. 40.5.53.1). The woman herself, however, would not become free until after a formal manumission by the *dominus* or, by virtue of the SC Rubrianum, by the praetor.

But if she had remained in freedom *voluntate domini*, she would have become a Junian Latin and have born Latin *ingenui*. Then the Justinian compilators would have interpolated *servi* instead of *Latini*. Rightly, as in 531 the lex Junia had been abolished (CJ 7.6.1). A. MONTEL, *La condizione giuridica dei figli di schiava*: *Studi Bonfante* III, Milano 1930, p. 648 considers the possibility of an interpolation, but not in this sense. What makes *servi* the more suspect is that those children, born between the moment the master could give the freedom due, and the moment the mother asked for it, are declared by some constitutions to be *ingenui* too (Marcian. *4 reg.* D. 40.5.53.pr.). But we do not know whether these constitutions were edicted before or after this decision of Alexander. On the other hand, *Romana facta* is only correct if we suppose an implied request for freedom by the woman. Yet *Si ... est* does not suggest this, and then the phrase should be *Latina facta*, while *secundum ... civis* should be supposed interpolated, like *servi* for *Latini*. Or do we have to assume that if she had not asked for her liberty, no *voluntas* could be assumed, which in consequence would make the children born *servi* indeed?

We have seen that in some texts WLASSAK interpreted *voluntate domini in libertate esse* or *morari* as pertaining to a state of factual freedom not entailing Junian Latinity or Roman citizenship. This he assumes also in Plin. *ep.* 4.10.

In Plin. *ep.* 4.10 Pliny addresses himself to a Sabinus. Both were heirs of a Sabina and in this capacity they had inherited a slave, Modestus, whom the testatrix had meant to set free and to whom she had wanted to bequeath too. However, she had not complied with the conditions for manumission, and therefore Modestus could not be considered free. By this the legacy remained with the heirs too. Pliny now wrote to Sabinus that Modestus "*moretur ergo in libertate sinentibus nobis, fruatur legato, quasi omnia diligentissime caverit*".

WLASSAK says that a grant of Junian Latinity would not have helped Modestus as Junian Latins could not accept legacies (see nr. 5). Nothing in the letter indicates a praetorian manumission, and therefore *sinentibus nobis* should not be regarded as pointing to a manumission or the plan to manumit. "Daher ist der Ausdruck *fruatur legato* von Plinius wohl mit Bedacht gewählt: der Sklave sollte wie prekäre Freiheit, so nur den tatsächlichen Genuss des Vermächtnisses haben." Moreover, WLASSAK thinks the fault of the legacy lying in the word *iussi* (in: *Modestum quem liberum esse iussi*). He compares this with D. 40.4.9. Yet it is also possible that *iussi* was a reference to an anterior manumission in the testament that, however, was not written or failed to actualize (50). The latter is the opinion of TELLEGEN. On the purport of *moretur ergo in libertate* this author comes to a similar conclusion as WLASSAK (whom he does not mention), viz. that the slave was in fact left in peace. This happened in a number of cases. Slaves in such a state were probably protected by the praetor since the times of Marcus Aurelius. For these latter contentions TELLEGEN refers to the texts cited by HEUMANN/SECKEL which, however, do not reveal such a situation (51).

(50) WLASSAK (note 15) p. 398 note 2.

(51) J.W. TELLEGEN, *The Roman Law of Succession in the Letters of Pliny the Younger* I, Zutphen 1982, pp. 71 ff, where he says that *quod*

But WLASSAK's opinion is questionable here. It is in the line

ipsa scripsisse se credidit should be regarded as a reference to a (non existent) anterior phrase. TELLEGEN refers for his argumentation also to the newly found part of Dasumius' testament. (See for this W. ECK, *Zum neuen Fragment des sogenannten Testamentum Dasumii*: ZPE 30 (1978) pp. 277-295). His opinion on *moretur in libertate* TELLEGEN states on p. 76, and again on p. 79, now as one of his two conclusions with regard to the letter in question. He gives on p. 76, note 23, without commentary, the reference to HEUMANN-SECKEL (see note 43), and further mentions PULCIANO. PULCIANO says on the page cited that the condition of the slave in question now was one of factual freedom, like of those informally freed as from before the lex Junia (with reference to BUCKLAND). Thus PULCIANO must have meant an informal manumission or freedom here, and therefore that the slave would or had become a Junian Latin (as the lex Junia had been passed a long time before).

TELLEGEN is right when saying that *morari in libertate* does not necessarily refer to a praetorian manumission (p. 76), but the point is that we have to be alert for a *voluntas domini*. In D. 38.2.16.2, D. 40.5.30.17 and D. 41.2.38.pr. such a *voluntas* has to have been present. That would have produced Junian Latinity instead of slavery in factual freedom. D. 40.12.12.1.ff, D. 40.12.24.3 and D. 41.2.3.10 are about the *causa liberalis*. In D. 40.12.12.1 a free person, brought up a slave and ignorant of his real status, starts to live secretly in freedom. In D. 40.12.12.2 a slave presumes himself to be free because of e.g. a manumission *vindicta*. The manumission appears to have been void. He is considered to be in freedom *sine dolo malo*. D. 40.12.12.3 repeats this rule in a general way. D .41.2.3.10 says that when a slave starts to live like free, the owner loses possession. It is not said that he was left in fact in peace, and the same goes for the other texts. In D. 40.12.24.3 being in freedom is connected with a *voluntas domini*, and thus Junian Latinity could have been the only possible result, not slavery in factual freedom. In D. 40.4.29 slaves are freed *testamento*; later the testament is discovered to have been invalid. As it is said that *semel datam libertatem infirmari* would be against the *favor libertatis*, we have to suppose that the freedom remained valid until annulled by a *causa liberalis* and that the freed slaves were in freedom *sine dolo malo* (D. 40.12.12.2,3). The prohibition to rescind the given freedom after five years of effective freedom must have contained an order to denegate a *vindicatio in servitutem*. If TELLEGEN had this text in mind when suggesting the probability of praetorian protection, it has to be said that here the slaves originally were not left in fact in peace, but manumitted *testamento*, which affects the purport of the enclosed rule too. Seen that all, there is no reason to presume the existence of a state in law between straight slavery and Junian Latinity; Plin. *ep.* 4.10 is no reason for this either (see below).

of his assumption that always some form of manumission was needed, that he cannot accept Junian Latinity here. Yet even if we would accept this, a « praetorian » manumission or a reference to it is not impossible here.

Pliny writes to Sabinus in terms that remind strongly of those of Julian, as tradited in D. 41.2.38.pr. (*Qui absenti servo scribit, ut in libertate moretur...*). There the letter was addressed to the slave, here to the coproprietor, and so it cannot have given Modestus informal freedom straight away. But even if Pliny had done so, it would not have had any effect yet, as there was still a coproprietor. On the other hand, if Pliny would have let Sabinus know his wishes on the subject, which he did here, could not Sabinus, if willing too, have told Modestus of both Pliny's and his *voluntas*, and then give him, next to Pliny's letter, a letter of freedom of him, Sabinus, too? Would not Modestus have been regarded then free and a Junian Latin ([52])?

If we regard the letter, these arguments nothing but gain weight in the light of the literal text of the lex Junia as quoted in *decl.* 340 and 342, and a more positive interpretation of Pliny's words, as suggested by GUILLEMIN, RADICE and SPRUIT ([53]), and by the ThLL (see note 43), is certainly possible and even cogent. Could not *sinentibus nobis* be seen as the wish for a common *voluntas,* and in any case as the expression of Pliny's?

(52) If Pliny would manumit formally, the effect would be that his co-ownership would accrue to Sabinus (see E. WEISS, v. *manumissio*: RE 14 (1930) c. 1377; M. KASER, *Das römische Privatrecht* I, München 1971, p. 294 n. 15). But also we do not know whether the slave was with him; and for a *manumissio vindicta* his presence was essential. As Sabinus has informed him about the testament, the slave rather will have been with him. Then the letter to Sabinus could be considered as a *manumissio per epistolam* under the condition that Sabinus would manumit too. If this manumission by Pliny would already take effect, his portion would not go to Sabinus (a majority opinion among the jurists: UE 1.18; further PS 4.12.1).

(53) J.E. SPRUIT, *C. Plinius Caecilius Secundus en het erfrecht van zijn tijd*, Deventer s.a. (1973), p. 18; A.-M. GUILLEMIN, *Pline le Jeune, Lettres*, tome II, Paris 1927. For RADICE *ad hoc locum*, see note 119.

How else could Pliny write the will would thus be executed *quasi omnia diligentissime caverit*? A state of mere factual freedom and by this of a remaining and unmitigated civil law slavery would really fall short of what the testatrix had wanted (*liberum esse iussi*) and of what Pliny writes. WLASSAK's argument that a Junian Latin could not accept legacies, does not hold here anyway. It is clear that Pliny, as heir, could have donated the usufruct to Modestus, who as a Junian Latin could accept. Another additional argument might be UE 1.12, where a manumission *testamento*, void because of the lack of a *causae probatio*, is declared, by virtue of the lex Aelia Sentia, as leading to *voluntate domini in libertate esse* and thus, by virtue of the lex Junia, to Junian Latinity. Pliny might have had this rule in his mind too. A last argument is that Junian Latinity, with its special rule about the estate, would correspond with *fruatur legato*. Modestus' position would have resembled indeed that of an usufructuary (54).

Therefore the letter does not exclude a reference to an informal manumission, or to Junian Latinity, based on a *voluntate domini in libertate morari*. Contrary to what has been asserted, by WLASSAK and TELLEGEN, Pliny's letter cannot be said to prove or suggest the presence of a state of factual freedom not entailing Junian Latinity, or of slaves, being in such a state merely on moral grounds.

The point here is that one has to take account, with regard to the possibility of informal freedom or Junian Latinity, whether the *in libertate morari* or *esse* is with or without a *voluntas domini*, as this makes the difference between slavery and freedom. A strict interpretation of *voluntas*, in the sense that an informal manumission was required, might then have happened in case there had not yet been a factual freedom. Literally the lex Junia demanded some permanence of freedom,

(54) Salvian. Mass. *ad eccl.* 3.7 describes the conditions under which fathers left property to their religious sons and daughters in such a way, that it concerned most probably usufructs. Those conditions he equals with Junian Latinity. See also on the liberty of freedmen and Junian Latins to dispose of their goods SIRKS (note 4) p. 266.

but in Gaius' Institutes we see informal manumission at once producing the desired effect.

It appears that *in libertate morari* or *esse* refers to a state of being free, whether one is legally free or not. The circumstances decide, sometimes in retrospect, whether that freedom is a legally recognized one or not. Thus as term *in libertate morari* or *esse* is unfit to be used as a description of informal freedom. This is confirmed by Quint. *decl.* 340 and 342, where it is said that not all cases of *in libertate morari* or *esse* entail liberty by virtue of the lex Junia. This only happens when a *voluntas domini* is considered to be present (see note 13).

After the abolition of the lex Junia in 531 A.D. *in libertate esse* or *morari* did not entail any more Junian Latinity. Informal manumission now gave Roman citizenship in some cases, while in the rest of the cases it did not have any effect anymore. From that moment on it would be possible to speak of *voluntate domini in libertate esse* as being in a factual state of freedom, while slavery remained. There would be no praetorian protection too in that time. The question about a *voluntas domini* would have kept its interest in the case of a *causa liberalis* (see D. 40.12.24.3 and D. 40.12.28), but it was the outcome of the *causa* now that decided whether there was freedom or slavery.

7. — When was Junian Latinity produced? Originally by an informal manumission, i.e. a manumission not in compliance with the requirements of the civil law, but complying anyway with those of the lex Junia. Some manumission or similar act at least had to take place, so that a wish of the master to grant freedom was recognizable. We can distinguish two situations.

The first is that a quiritary owner, who has the slave to be manumitted *in bonis* too, does not manumit *vindicta*, *censu* or *testamento*, but *inter amicos*, i.e. in the presence of some witnesses (five?) ([55]). Later on the manumission with a written

(55) In CJ 7.6.1.2 *inter amicos* is defined as in the presence of five witnesses. See also note 31.

document of it as piece of evidence (*per epistolam*) and the manumission in the church (*in ecclesia*) or by the invitation to dine at the master's table as one of his equals, i.e. as a free person, (*convivio*), were added to the said mode of manumission ([56]). I will deal, however, only with the way of *inter amicos*, as Gaius only speaks of this.

In the second situation a person who had only *in bonis* — I will call him the *in bonis habens* for short — manumitted correctly *vindicta*, *censu* or *testamento*. But as he was not the quiritary owner this produced no civil law result (before the lex Junia). Such a situation could occur, for example, when someone had bought a slave without a *mancipatio* having been performed. Not until after a year would he become quiritary owner by *usucapio* (UE 1.16).

In both situations it was necessary to have *in bonis* the slave to be manumitted. Someone who was merely quiritary owner could not effectively manumit (Gai. 1.54, FDos. 9).

If a master did not know that he owned a slave, it was not possible that, evidently on basis of the lex Junia, this slave could claim to be free by some act of his master that could be interpreted as the manifestation of a *voluntas* ([57]).

8. — The lex Aelia Sentia of 4 A.D., which I assume to have been passed after the lex Junia (see note 4), did complicate manumission, but did not alter it fundamentally.

(56) See KASER (note 52) pp. 295-296; M. KASER, *Das römische Privatrecht* II, München 1975, pp. 136-137.

(57) Pomp. *12 ad Q.Mucium* D. 40.12.28: *Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse: et est hoc verum; is enim demum voluntate domini in libertate est, qui possessionem libertatis ex voluntate domini consequitur.* This text must have been part of Pomponius' commentary on the *causa liberalis* or on the lex Junia, as *in libertate esse* is connected with the *voluntas domini*. For the *causa liberalis* the *voluntas* could be important: were it present, then the lex Junia applied, and the *causa* would be decided. After the abolition of the lex Junia it would decide whether a *dolus malus* was considered to be present or not.

It prescribed for *domini* not yet twenty years of age as sole mode of manumission the manumission *vindicta*, after a *causae probatio* before a *consilium* (Gai. 1.38). In the *probatio* it had to be shown that the reason for the manumission lied in the close (emotional) relationship between manumitter in spe and the slave, for example that he was a natural brother of the *dominus* (Gai. 1.19, 1.38). We have to assume that without *causae probatio* a manumission *vindicta* by such a *dominus* was void, like the manumission in fraud of creditors to which Gaius in 1.37 refers, and like the manumission *testamento*, which is confirmed by Gai. 1.40. This is the opinion of WEISS too ([58]). Such manumissions did not produce Junian Latinity, particularly as Gaius says in 1.41 that such a *dominus*, in order to make a slave a Junian Latin, has to prove the cause anyway and then has to manumit him *inter amicos*. In this case any formal mode would give Roman citizenship.

As it is rather improbable that for an *in bonis habens* under twenty years less was required, we have to assume that here too only after a *causae probatio* a manumission *vindicta* was valid, producing Junian Latinity.

The case is far more complicated with slaves under thirty years of age. According to Gai. 1.17, three conditions were to be fulfilled in order to make a slave a Roman citizen. He should be thirty years old, his master should be quiritary owner, and the manumission should be a formal one. As soon as one of these requirements lacked, the slave became a Junian Latin (*sin vero aliquid eorum deerit, Latinus erit*). Certain minimum requirements still had to be complied with. The master had to be an *in bonis habens*, if not quiritary owner; the manumission had to be one *inter amicos* (according to Gaius), if not, e.g., *vindicta*. Moreover, these two minima should not occur together. But what about the age?

Gai. 1.18 says the lex Aelia Sentia established that slaves under thirty years of age only became Roman citizens, if after a *causae probatio* a manumission *vindicta* was performed.

(58) E. WEISS, v. *manumissio*: RE 14 (1930) cc. 1376-1377.

This is confirmed by UE 1.12. The latter text suggests that without *causae probatio* the slave remained a slave, and thus that the manumission had been void (59). The lex Aelia Sentia also established that in case of a manumission *testamento* of a slave under thirty years of age, the slave was to be regarded as being *voluntate domini in libertate*, which made him a Junian Latin. It is more probable that this was meant as a remedy for the chosen mode of manumission, than for a lack of a preceding *causae probatio*, particularly as in UE 1.12 nothing is said about such a lack here. Therefore the lex Aelia Sentia only required a *causae probatio* in case Roman citizenship was wanted for a slave (the requirements for the manumitter of course left aside). Concerning the conferment of Junian Latinity on slaves under thirty years of age, we have to assume that it did not contain impediments. So here a mere manumission *inter amicos* by a *dominus* of twenty years old or older must have sufficed, both for slaves under thirty years of age as slaves of thirty years and older. This is confirmed by FDos. 14.

With regard to manumissions by *in bonis habentes* the situation is not clear. FDos. 14 only sees to manumissions by quiritary owners. The point is, whether the absence of a *causae probatio* made a manumission *vindicta* still confer Junian Latinity on the slave, like before the lex Aelia Sentia, and whether the same happened in case of a manumission *testamento*.

(59) The text reads: *ideo sine consilio manumissum caesaris servum manere putat*. The evident corruptness of this phrase has elicited several emendations. So: *lex Aelia Sentia* (HERTZ), *Cassius* (PUCHTA) (mentioned in KRUEGER's edition in the Collectio II); *Cae(lius) Sa(binus) <manumisso>ris* (KNIEP, ad Gai comm. I, p. 112, as mentioned by V. ARANGIO-RUIZ, *Sul "liber singularis Regularum"*: BIDR 30 (1921) p. 210 note 5, who, however, remarks that the name in this form occurs in Gaius, but not in Ulpian where the jurist is referred to as Caelius). STEINWENTER (note 7) c. 917 supposes it to be a glossem. In spite of the remark of ARANGIO-RUIZ, it seems the best to assume that there was written *Cae(lius) Sab(inu)s* or *Cae(lius) Sabi(nu)s*, which then would have been read as *Caesaris*.

According to STEINWENTER and WEISS, a manumission *vindicta* without *causae probatio* led to Junian Latinity. STEINWENTER seems to think only of quiritary owners manumitting; he assumes a similar outcome in case of a manumission *testamento* (60). WEISS interpretes the provision of the lex Aelia Sentia in UE 1.12 as pertaining to all modes of manumission, for which the assistance of a magistrate was needed (61). Yet this cannot be read in the text (see note 59 too).

Thus if we presume that here Gaius allowed two defects, viz. that the slave to be manumitted was not yet thirty years old and the manumitter not a quiritary owner, then a manumission *vindicta* produced Junian Latinity. For a manumission *testamento* this is more difficult to assume, because here UE 1.12 suggests a nullity. Would such a manumission have been valid, if done by an *in bonis habens*? On the other hand, if we would apply Gai. 1.17, the outcome to be expected would have been Junian Latinity (which might explain the difference of opinion, suggested in UE 1.12 (see note 59)). Then, however, the express provision of the lex Aelia Sentia would have been superfluous.

The conclusion is that, in respect of manumitters less than twenty years old, the lex Aelia Sentia always required a *causae probatio*. Otherwise neither Roman citizenship nor Junian Latinity was conferred. In respect of slaves less than thirty years old it did establish a new rule concerning the acquisition of Roman citizenship, viz. that they could only become Roman by a *causae probatio* and a subsequent manumission *vindicta*, by their quiritary owner. Such slaves, if manumitted now merely *vindicta*, *testamento* or *inter amicos* by their quiritary owners, became Junian Latins (see resp. Gai. 1.17, UE 1.12 and FDos. 14; in the last case because the lex Aelia Sentia did not provide anything for informal manumissions of those slaves). It is doubtful whether a manumission *vindicta* or *testamento* of such slaves by *in bonis habentes* conferred Junian

(60) STEINWENTER (note 7) cc. 917-918.
(61) WEISS (note 58) cc. 1369-1370.

Latinity; it seems better to assume it did not, though there might have been a difference of opinion among the Roman jurists on this point. If such a manumission had been preceded by a *causae probatio*, we might assume in line of Gai. 1.17 that, at least in the case of a manumission *vindicta*, the slave became a Junian Latin (62).

9. — After this act other sources of Junian Latinity came into being. In two cases we can speak of a presumed informal manumission, and then we can treat them as the two above mentioned instances. In the other cases the situation is that the existing status of (Junian) Latinity is given to someone, to give him or her a status other than Roman citizenship or slavery, independently of manumission (63). As I want to compare the effects of manumission and iteration, those cases are not suitable for this inquiry.

10. — Normally a Roman citizen freed man or woman got at the moment of manumission as patron his or her manumitter or the manumitter's agnatic descendants up till the fourth grade. The claim for the patronage was called the *ius patronatus*. In the case of a woman manumitter the tutor of the latter acted for her. The relation between patron and freed person had several consequences. As a consequence of the *ius patronatus* a patron could demand respect (*obsequium*), services or corvées (*operae*) if agreed upon, and eventually a part or the whole of the estate of the freed person (the *pars debita* or

(62) KASER (note 52) p. 297 note 40 presumes the age of thirty years to have been included in the term *maiores triginta annorum*.

(63) BUCKLAND (note 8) pp. 548-551. The two mentioned are: the exposure by a master of an ill slave (CJ 7.6.1.3, D. 40.8.2, Sue. *Cl.* 25) and the marrying of a slave girl to a freeman, while giving her a *dos* (CJ 7.6.1.9). Some other cases might be considered similar, but they are rather obscure. Further the *lex mun. Salpensana* c. 28 relates the manumission *vindicta* of a slave by a citizen of Salpensa, a maybe Latin *municipium*. The slave would become a Latin *optumo iure*. This might have been said to distinguish it from Junian Latinity.

portio debita) (64). For the sake of convenience I will call the latter the *debitum*, as it could consist sometimes of the whole estate. It made up an important part of the *ius patronatus*, as it could mean a considerable material gain for a patron. If the freed person was an *impubes* or a woman, the patron would be regarded as the legitimate tutor too.

Now if a quiritary owner had manumitted *inter amicos*, he would become the patron of the Junian Latin. This is in any case what Gaius says. If he performed the iteration, i.e. repeated the manumission, now for example *vindicta*, the Junian Latin would become a Roman citizen and his *libertus*. Thus he was patron again, or, according to the civil law as it existed before the lex Junia, had only now become the patron.

In the case of an *in bonis habens* manumitting for example *vindicta*, a complicated situation would show up. The manumitter would become patron and would get in the future possession of the estate of the Junian Latin. But he was not regarded as the legitimate tutor, if this was necessary. The lex Junia appointed as such the former quiritary owner. If the latter iterated, the Junian Latin would become a Roman citizen and his *libertus*; but the manumitter retained the claim for the *debitum* (Gai. 1.35) (65), though this claim will have lessened to the amount a patron was entitled to when it concerned the

(64) For a general survey of the *ius patronatus* and its consequences in the law of succession: P. Voci, *Diritto ereditario romano*, vol. I, Milano 1967, pp. 331-378.

(65) Gai. 1.35: *<Praeterea possunt> maiores triginta annorum manumissi et Latini facti <iteratione> ius Quiritium consequi. Quo ... triginta annorum manumittant* — (here 1 ½ line illegible) — *manumissus vindicta aut censu aut testamento fit civis Romanus <et eius> libertus fit, qui eum iteravit. Ergo si servus i<n> bonis tuis, ex iure Quiritium meus erit, Latinus quidem a te solo fieri potest, iterari autem a me, non etiam a te potest et eo modo meus libertus fit. Sed et ceteris modis ius Quiritium consecutus meus libertus fit. Bonorum autem quae, cum is morietur, reliquerit tibi possessio datur, quocumque modo ius Quiritium fuerit consecutus. Quodsi cuius et in bonis et ex iure Quiritium sit, manumissus ab eodem scilicet et Latinus fieri potest et ius Quiritium consequi.*

estate of a Roman citizen freed man or woman. This we can infer from a constitution of Trajan (see note 94). To distinguish both patrons I will call therefore from now on the *in bonis habens* who manumitted the *patronus* and the second patron, if present, just patron. By the way, we see that here it was no problem that the quiritary owner did not have the person to be iterated *in bonis*, as was required with manumission, though iteration is supposed to be the repetition of the manumission. Had a Junian Latin to be present at an iteration *vindicta*? We do not know. It would seem better to distinguish manumission and iteration as acts.

The same complicated situation would turn up too if a Junian Latin acquired Roman citizenship in another way than iteration, for example by imperial grant (*beneficio principis*). Here too the manumitter remained *patronus* (Gai. 1.35; see further nr. 11).

It will be evident by the space Gaius dedicates to the Junian Latins that the construction of the lex Junia had created some problems. Among these were problems that did not show when a quiritary owner who had *in bonis* manumitted informally, but which became manifest when a mere *in bonis habens* manumitted for example *vindicta*. Because of this I will examine the latter situation now by focusing on iteration and its effects. These will be compared every time with those produced by the manumission. As effects I will regard not only the questions of the tutelage, the *debitum*, the *obsequium* and the *operae*, but also of the *munera* and the *origo*, of the name and of the status of the children and the freedom of Junian Latins.

11. — Literally *iteratio* means repetition (66). By it is meant the act by which the manumission that made a Junian Latin (and before the lex Junia of course an informally freed, protected by the praetor), is repeated. It had to be done, and

(66) *Oxford Latin Dictionary*, ed. by P.G.W. GLARE, Oxford 1982: 1: repetition, reiteration; 2: (agr.) a second or additional ploughing (...); the material obtained from a second pressing; 3: (leg.) a second manumission.

could only be done, by the former quiritary owner and had to be *vindicta*, *censu* or *testamento* (Gai. 1.35, FDos. 14). Those times, known to us, that Gaius refers to it, he does not say that the person who had had the manumitted slave in quiritary ownership at the time of the manumission, still was the quiritary owner (Gai. 1.35, see note 65; Gai. 1.167, see note 67; in the same sense UE 3.1,4 and 11.19). Though this does not need to disprove at once the theories of VANGEROW, CANTARELLI and STEINWENTER, it is already an indication that the quiritary ownership might have ended by the manumission. On the other hand, it has to be admitted that Gaius speaks several times of the acquisition of the *ius Quiritium* by Junian Latins (e.g. Gai. 1.32c-35, 66) like Pliny (see nr. 21). But he does not do so all the time. Elsewhere he speaks of the acquisition of the *civitas Romana* (Gai. 1.31, 67-68, 71, 74), and it is evident that he has in mind the acquisition of full citizenship, not of property.

As I said, it is not exactly possible to speak of a repetition, as this time the demand to have the person to be manumitted *in bonis*, could not be fulfilled. But for an iteration *vindicta* at least the presence and cooperation of the Junian Latin will have been necessary.

There were ways open to Junian Latins, other than iteration, by which they could obtain Roman citizenship. The lex Aelia Sentia of 4 A.D. established the *anniculi probatio* (Gai. 1.29-32; UE 3.1,3; see nr. 19). Further a Junian Latin could acquire it by serving for six (later three) years in the *vigiles* of Rome, by virtue of the lex Visellia of 24 A.D. (Gai. 1.32b; UE 3.1,5). The *vigiles* were a corps of nightwatches and a fire brigade. He could also build a ship with a capacity of at least 10.000 *modii*, which ship had to transport grain to Rome for at least six years. This Claudius edicted, in or after 51 A.D. (Gai. 1.32c; UE 3.1,6; Sue. *Cl.* 18-19). Later, in or after 64 A.D., Nero constituted that a Junian Latin would get citizenship if he had a personal fortune of at least 200.000 sesterces, and build a *domus* in Rome that cost at least a 100.000 sesterces (Gai. 1.33; UE 3.1). Then Trajan established that if a Junian Latin set up

a milling business at Rome, in which not less than a 100 *modii* of grain a day were milled, for at least three years, he could obtain Roman citizenship (Gai. 1.34; UE 3.1). A Junian Latin could become a citizen also by imperial grant (*beneficio principis*), apparently just by request, though we see with Pliny that influential patrons were used (Gai. 3.72-73; UE 3.1,2).

In these cases it could happen too that the manumitter was not identical with the former quiritary owner. What happened then? Whose freedman would a Junian Latin in such a case become? Gaius is very clear on this point. In 1.35 (see note 65) he states that all these modes had the same effect as iteration, i.e. that a Junian Latin became the *libertus* of the former quiritary owner (and not, e.g., of the emperor), and that likewise the manumitter as *patronus* retained the claim for *bonorum possessio* (but not of the whole estate anymore, see note 94). So when I enter into the effects of iteration after this, we may assume that the conclusions made, apply too for the cases in which Roman citizenship was acquired not by iteration. The only exception is the case of acquisition *beneficio principis invito aut ignorante patrono* (Gai. 3.72-73, see p. 269).

It is evident that in the Roman Empire the Roman citizenship was in itself a desirable status. That already was a good reason for a Junian Latin to pursue an iteration, or to try to obtain the citizenship in another way. Sometimes the manumitter or the patron acted out of a feeling of generosity (cfr, for example, Plin. *ep.* 10.104, below). It could also happen that a Junian Latin was instituted as heir or legatee. In such a case he could try to become as yet a Roman citizen within the time, available for the *cretio* (UE 17.1, 22.3). Seen the demands for the other modes, iteration will have been the obvious way then.

12. — As said the tutelage was explicitly reserved by the lex Junia for the former quiritary owner (67). Normally the tutelage

(67) Gai. 1.167: *Se<d> Latinarum et Latinorum inpuberum <tute>la non omni modo ad manumissores li<b>er<o>squ<e> eorum pertinet, sed ad eos quorum ante manumissionem ex iure Quiritium <fuerunt; unde si ancilla ex iure Quiritium> tua sit, in bonis mea, a me quidem*

would go to the manumitter, as a result of the interpretation of the Twelve Tables Law. That law ordered that the estates of freed men and women, who had died without a testament, should go to their manumitters. The jurists of olden times (the *veteres*) had connected this provision with another provision of the law, viz. that when a person needed a tutor, the nearest agnate should be the tutor then, by the reasoning that this agnate would be the heir too in the case of that person dying without a testament and *heredes sui*. Evidently the thought behind this all has to have been that the nearest agnate as first claimant to such an estate should be tutor too of the owner of that possible future estate. Presumably they thought that it was because of his interest in it. The *veteres* then concluded that the same had to apply to the manumitters, who like the nearest agnate had such a claim on the estate. Consequently they had to be accepted as legitimate tutors (Gai. 1.165) ([68]).

Transponed to the case in question, one would suppose the former *habens in bonis* to be the tutor, which would mean that the lex Junia contained an evident deviation of the rule. But we have to be careful, as the similarity with the category of Roman citizen freedmen is deceptive. While there a parallel with the position of the nearest agnate (or agnates) in the law of succession was possible, here the claim of the *patronus* was *iure quodammodo peculii*, and thus not as a nearest agnate. That was the ground of his claim, by which he got possession. If we take Gaius' words, that a Junian Latin became the *libertus* of the former quiritary owner after iteration, for

solo non etiam a te manumissa Latina fieri potest, et bona eius ad me pertinent; se<d> eius <tu>tela ti<b>i conpetit, nam ita lege Iunia cavetur. Itaque si ab eo, cuius et in bonis et ex iure Qu<iritium> ancilla fuerit, facta sit Latina, ad eundem et bona et tutela pertine<n>t.

UE 11.19 in the same way: *Lex Junia tutore<m> fieri iubet Latinae vel Latin<i> inpuberis cum, cuius etiam ante manumissionem ex iure Quiritium fuit.*

(68) For the guardianship: E. SACHERS, v. *tutela*: RE 7a (1948) cc. 1497-1599.

exactly what they are, we have to assume that the iterant became the civil law patron and by this the nearest agnate of the freedman. Consequently he should be tutor too, after the iteration. So what the lex Junia established would have been the application beforehand of the logical outcome of the iteration, if done. But why had the lex Junia to declare this? Could it not have been possible to let the manumitter be tutor till the iteration indeed had taken place? The answer lies in the point that it was not a logical thing that the manumitter would be tutor, as there was only a superficial similarity between this kind of patronal relationship and that between Romans and Roman citizen freedmen. It is exactly the fact, that here the freedmen were of Roman status, there of Latin status, that must have been the reason for the provision of the lex Junia.

13. — In my previous article I suggested a legal construction of the lex Junia, which I repeated above in nr. 5. If we accept this construction as working hypothesis, further observations can be made. First, a *deductio in Latinam coloniam,* done by order of the *pater familias,* destroyed the *patria potestas* because of the change in *status civitatis* (Gai. 1.131). I think we can assume the same for a case of *deductio* by virtue of a law. Then, a *capitis deminutio minima* destroyed the agnatic connection (Gai. 1.163). If we apply these rules here, it would mean that the fictions of the lex Junia entailed the rupture of the *potestas* and the agnatic connection (in as far as assumed by the *veteres*) between the freed slave and the manumitter. The manumitted kept the name of his manumitter, because the Latin name system was the same as the Roman system. According to Roman law there was no possibility for the manumitter to claim (a part of) the estate, unless he was instituted by the manumitted. Romans could be instituted as heir by Latins and vice versa, as we may deduce from the lex Junia too (see nr. 14). It was by the last fiction of the lex Junia, that the Junian Latin's estate was treated as if the lex had not been enacted, i.e. that it was treated as if it were *peculium,* that the claim of the manumitter was established. But as this did not establish a supposed agnatic connection, the fiction could not

have been of any avail to solve the problem of the tutelage. Thus it must have been necessary to make a special provision for this in the lex Junia. That the Romans chose the former quiritary owner for tutor, may have been due to the wish to prevent complications in the case of iteration, or to the thought that iteration would automatically establish a patronal relation between the iterated Junian Latin and the iterant and make the latter tutor anyway, in case one was needed. It was only natural to take this as the point of departure. It is also possible that both considerations concurred. Another possibility would have been that a tutor was appointed, as would be necessary in case the former quiritary owner died. For this, Romans as well as Latins were eligible (69). However, the Romans did not choose this solution, which can be explained as a wish to settle the case beforehand, and to adapt Junian Latinity as much as possible to the existing patronal system, thus preventing future troubles as far as possible.

14. — With regard to the *debitum* the situation is far more complicated. We have to clear this first, in so far as this is possible given the lacunae in Gaius' Institutions on this point (70).

There is no doubt that someone who had manumitted a slave in a way that made this slave a Junian Latin, could successfully claim his estate after the latter had died. Of course it could not happen *iure peculii*, as the Junian Latins were not slaves anymore. But the usual rules on the *debitum* did not apply either, as they were not Roman citizens. In so far as the estate of a Latin freedman could not devolve on the grounds of the manumission to the *patronus*, there was a problem inherent to the chosen set-up of the lex Junia. It solved it by decreeing that the estate would devolve to the manumitter as if the lex had not been enacted (Gai. 3.56: (...) *quia scilicet*

(69) See SACHERS (note 68) c. 1527. That coloniary Latins could be (testamentary) tutors of Romans can also be deduced from the express provision of the lex Junia, that prohibited it.

(70) For the short survey of VOCI, see note 29.

neque ut servi decederent, ut possent iure peculii res eorum ad patronos pertinere, neque liberti Latini hominis bona possent manumissionis iure ad patronos pertinere, necessarium existimavit, (...) *ut bona eorum proinde ad manumissores pertinerent, ac si lex lata non esset. itaque iure quodammodo peculii bona Latinorum ad manumissores ea lege pertinent*).

The lex Junia expressly forbade Junian Latins to make a testament and to inherit by a testament, though they could be instituted as heirs (Gai. 1.23, 24). In the last case they could try to become Romans within the time, granted for the *cretio* (UE 17.1, 22.3). This is an argument, by the way, to presume like MOMMSEN that a coloniary Latin normally could institute Romans as heirs, and could be instituted by these as such and accept inheritances (71). When a Junian Latin died, his estate could only intestately devolve to other persons, for example his children, if we assume that a Latin law was applicable and had rules for that. Such an assumption is not unreasonable, as Latins and Romans had much in common. If there were no intestate heirs, his estate would be without heir and thus *vacans*. But because of the provision of the lex Junia the manumitter had a claim on the complete estate and could exclude everyone else if he wanted so. What was the reason for this provision? That the estate would not be *peculium* is apparent. It can be argued why the *patronus* could not inherit *manumissionis iure*. As said in nr. 13 the agnatic connection would have been destroyed by the fiction of the *deductio*, and this may have been meant by Gaius. Another possibility, not to be ruled out though we know so little about Latin law, is that in a Latin law a patron did not have a claim for a *debitum*. In view of the supposed similarity between Roman and Latin law this is not so unreal. We have to remember that the *debitum*

(71) Gai. 2.110 says that though peregrines and Junian Latins could not acquire as heir or legatee (the latter because of the lex Junia), they could in case of the testament of a soldier. Why was the express prohibition of the lex Junia necessary, if not for the reason that coloniary Latins could indeed be instituted as heir or legatee? Cfr also MOMMSEN (note 37) p. 632.

did not exist originally, and that it was introduced between 118 and 74 B.C. by the praetor, i.e. *iure honorario* (72). That makes it possible that the law of coloniary Latin towns did not know the *debitum*. But again we do not know whether a Latin law applied. As the *patronus* belonged to another city it is not probable, *potestas* and thus patronage being destroyed by a *capitis deminutio minima*. Anyway, those two reasons explain sufficiently why the lex Junia had to make a provision for a claim for which the Romans felt a strong need, vide the introduction of it in Roman law. The lex Junia solved it by the said fiction. We do not know whether it declared the lex Junia completely void on the Junian Latin's death, or that this was only restricted to his possessions. Gaius' words suggest the latter, and indeed nothing more was needed. But Salvian and Justinian suggest that retrospectively the Junian Latin was regarded as a slave (73). For what the Junian Latin had done during his lifetime this would not have mattered, and the status of his children will have remained unimpaired by a fiction of such an extent. Also the fiction did not really undo the situation, created by the application of the lex Junia, even if restricted to the estate. Were it to have been so, then the *patronus* could have claimed *iure peculii*, as the Junian Latin indeed would have to have been considered a slave or at least his estate as a (kind of) *peculium*. As Gaius speaks of *iure quodammodo peculii*, it is better to assume that the fiction did not have such far reaching consequences and for example did not give the *patronus* a *reivindicatio* for the estate (74). The

(72) Ulp. *42 ed.* D. 38.2.1 describes the introduction of an *actio pro socio* by the praetor Rutilius in 118 B.C. This action was substituted by the *pars debita* of the *patronus*, before the praeture of Verres in 74 B.C. See A. WATSON, *The Law of Persons in the Later Roman Republic*, Oxford 1967, pp. 228-229, 231-234.

(73) For Salvian see note 30. Justinian in CJ 7.6.1.1b says: *Quis enim patiatur talem esse libertatem, ex qua in ipso tempore mortis in eandem personam simul et libertas et servitium concurrunt et, qui quasi liber moratus est, eripitur non tantum in mortem sed etiam in servitutem?* Likewise in I. 3.7.4.

(74) ALIBRANDI'S reconstruction of Frag. Berol. de iud. 1.1 suggests a *(rei)vindicatio*: *<Plane si ea lex lata non esset, quidquid nobis iure*

praetor had, in granting *bonorum possessio*, the choice between the *patronus* and let us say the children of the deceased. In that case the patronal claim, based on the last fiction that made the possessions of the deceased considered as if possessed by a slave *in tuitione praetoris*, must have been strong enough for the praetor (or another competent magistrate) to grant the *patronus bonorum possessio*, with the n.b. *complete* exclusion of the children or other descendants of the freedman. This preference for the former in *bonis habens* was also maintained in case a Junian Latin had obtained Roman citizenship in any other way than iteration (Gai. 1.35; see note 65).

I argued in a previous article why the Romans wanted the *debitum* to consist of the whole estate of Junian Latins (and not, though being free to do so, of the portion, usual with Roman freedmen). I assumed that the Romans used informal manumissions in at least some cases in order to put out capital and at the same time secure its complete return, with the profits made ([75]). The choice made here is an argument for this too.

Could the estate of a Junian Latin devolve upon other persons than the *patronus*? Gaius says that at the death of the *patronus* the claim on the *bona Latini* went to his heir, whether *extraneus* or not (Gai. 3.58). This was the outcome of the said last fiction, that made the estate treated as a kind of *peculium*. (A result of this was that, in the case of a *venditio bonorum* of the estate of the *patronus*, a *heres necessarius* of the *patronus* having obtained *bonorum possessio* of the estate of a Junian Latin of the late *patronus* posterior to that *venditio*, was regarded as having been enriched by the estate *ex hereditaria causa*. Therefore it was sold too by the creditors of the insolvent deceased *patronus*. This would not happen with the other acquisitions he would make after the latter's death (Gai.

Qui>riti<um per servos ad>qui<ritur, per Latinos Iuni>anos <quaesitum aeque e>x iu<re Quiritium n>ostrum <esse intell>egeretur <; idque post mortu>os Latinos <id vindic>are recte <ex iure> Quiritium pe<tere possumus>. With all respect due for such a reconstruction, I do not think it well-founded enough to change my opinion.

(75) SIRKS (note 4) pp. 261, 267-269, 272.

2.155)) ([75a]). But a SC Largianum of 42 A.D. provided that in case a *patronus* had appointed an extraneous heir while there were *liberi non nominatim exheredati*, the *proximus* or *proximi* of these *liberi* could exercise a claim for the *debitum* in precedence over the heir (Gai. 3.63, 64) ([76]). With *liberi* were meant the sons and daughters of the *patronus*, and the children of his sons. The question arose whether children of daughters were included, and likewise the children of a *patrona*. Cassius thought it possible, most other jurists did not. Gaius gives an argument why the words of the SC would exclude Cassius' interpretation (Gai. 3.71).

Now the rule of the SC Largianum only applied if an extraneous heir had been instituted. This is explicitly said in Gai. 3.69, and it made its application rather complicated. Gaius furnishes some examples.

In one case, the children of the testator are instituted for unequal portions. What about the *debitum*? There is a lacuna in the text, but all reconstructions quite rightly assume Gaius says that as there was no extraneous heir, the SC did not hold force, and an estate of a Junian Latin should be divided in proportion to everyone's heritage (Gai. 3.69). Otherwise it should have been divided in equal parts.

In another case, children, as well as an extraneous heir, are

([75a]) In Gaius 2.155 the phrase runs: ... *velut si Latinus adquisierit, locupletior factus sit* (i.e., the heir). MUIRHEAD (note 76) cites GOUDSMIT who suggests the emendation *Latinum*, referring to Gai. 2.195. MUIRHEAD himself refers too to Plin. *ep.* 10.104. However, why did not Gaius write *ius Latini* then, which would have been correct (see ROMANO, note 107)? Though the phrase is rather concise, it is not impossible, and the reconstruction put forward by MOMMSEN is in line with it.

([76]) In 3.63 Gaius first speaks of one manumitter, then of the *liberi* and heirs of manumitters. In translations this is, sometimes, rendered differently. For example, F. DE ZULUETA, *The Institutes of Gaius*, Part I, Oxford 1969, and J. MUIRHEAD, *The Institutes of Gaius and Rules of Ulpian*, Edinburgh 1880, change the singular into a plural; while J.E. SPRUIT, *De Instituten van Gaius*, Zutphen 1982, changes the plural into a singular form. Maybe we should indeed suppose Gaius being here colloquial.

instituted as heirs. The heritage of the *extraneus* differs in size from the portions of the children. According to Caelius Sabinus the SC applied instead of the lex Junia, and in consequence the whole estate of a Junian Latin, freedman of the testator, should be equally divided among the children. Javolenus, on the contrary, said the SC applied together with the lex Junia. Thus the part of the estate that, had the SC not existed, would have gone to the *extraneus*, now should be equally distributed among the children, while of the remainder every heir, including the *extraneus*, should receive a portion according to his or her heritage (Gai. 3.70). For example, if the extraneous heir was instituted for a third, a third of the estate would first be divided among the children. Then the remaining two thirds would be divided in accordance with the heritages, which would make the *extraneus* receive one third of two thirds, i.e. two ninths. In Caelius Sabinus' view the *extraneus* would receive nothing at all.

Such was the system of the *debitum* with regard to Junian Latins. There were more peculiarities but these are of no importance here (see note 4). Contrary to the system of the *debitum* with Roman citizen freedmen (see nr. 15), the *patronus* of a Junian Latin was able to leave his right to a certain extent to anyone he wanted, viz. as long as he permitted his choice of heir be determined by this consideration. After the enactment of the SC Largianum this faculty was not restricted. He just had to take care now to disinherit *nominatim* all his children and grandchildren whom he did not want to benefit under the SC and to institute the heir or heirs he wanted. If he wished to, he could compensate the disinherited with legacies and *fideicommissa* in order to avoid a possible *querela inofficiosi testamenti*, like he might have felt compelled to do so even without the existence of the SC.

It does not appear from Gaius' exposition in 3.58 - 3.71 that a *patronus* could transfer his right by way of a bequest. Even more, this possibility may be regarded as excluded by the said exposition. Would it have existed, it surely should have been mentioned in 3.58 - 3.62, where Gaius compares the two systems

of *debita*. Because in those paragraphs such a mention does not occur, we may assume, notwithstanding the lacunae in the text, that the possibility did not exist.

15. — Did the *patronus* retain his claim on the estate of his freed slave, after the former quiritary owner had iterated? Gaius says that the iterated person became by this the *libertus* of the person who had iterated, i.e. the former quiritary owner, like he would become the *libertus* of this person if he acquired Roman citizenship by any other way open to him (Gai. 1.35, see note 65). According to the Twelve Tables the iterant then would have a claim for the *debitum* too (Gai. 1.165). Yet Gaius says that nevertheless the *patronus* kept his position and therefore his claim (Gai. 1.35, 167, resp. in note 65 and 67). Maybe the lex Junia provided for this. It is also possible that the concerning rules were interpreted in this way. The *debitum* was a product of the honorary law, and thus it would have been possible for the magistrate to grant *bonorum possessio* to the person he considered as having a better claim, if both persons could claim equally justifiedly. And as the *patronus* had had the former Junian Latin once *in bonis*, it might indeed be said that he had a claim, at least as good as that of the iterant. If one supposed for a moment that the deceased person was still a slave, he would have been protected against a claim of the former quiritary owner if he got possession. The same would go for the possession of the *peculium*. The lex Junia strengthened his position.

However, the proportion of the claim on the estate changed into the amount to which a patron of a Roman citizen freed man or woman was entitled to (77), and its transmissibility was affected also. With a Junian Latin he could leave it to his heir, the restrictions of the SC Largianum taken into account. Now the *debitum* turned into a right, to be exercised only by certain descendants. In case of a male patron it had originally

(77) For this, in extenso, P. Voci, *Diritto ereditario romano*, vol. I, Milano 1967, pp. 331-347. Further for a graphic survey of the portion: Sirks (note 4) p. 275.

been confined to the agnatic male and female descendants up till the third grade, but the praetor had excluded the female descendants. Only after the passing of the lex Papia of 18 A.D. could a freeborn daughter of a patron, on whom the *ius trium liberorum* had been bestowed, claim too, though not as much as a son. In case of a *patrona* the transmissibility was far more restricted. Originally none of her descendants could claim, probably because the claim for the *debitum* was confined to the agnates, and she had only cognatic descendants. Later, possibly after the lex Papia, a son of hers who had at least one child, could exercise her claim for the *debitum* (Gai. 3.53). Unlike the children of a *patronus*, her children did not have to be born out of wedlock, in order to be able to exercise the claim (Paul. *43 ed.* D. 38.2.18).

At this point the *adsignatio* has to be mentioned. This was introduced by a SC between 41 and 47 A.D. A patron with two or more children in his *potestas* could, even by the mere expression of his will, assign the *debitum* to any of his agnatic descendants. Its introduction proves that a patron could not dispose of his claim for the *debitum* by for example a legacy or in any other way. *Adsignatio* remained the only way (78). We do not know whether the *adsignatio* was applied to the *debitum* towards Junian Latins. If we knew that it was introduced before the SC Largianum we could presume it did not; but now we do not know. If it did not, then a patron had more liberty to assign the claim than a *patronus*, with the restriction that this liberty did not extend beyond his agnatic descendants and that he had to have two children in his *potestas*. If it did, then iteration did not make any difference in this respect.

Then the amount claimable by a male patron could decrease in case of a male Junian Latin (see note 77). With a female Junian Latin it could, however, remain the same. To achieve this her patron, who was her tutor, would have to deny her his *auctoritas*, which she needed to make a testament. And as

(78) See KASER (note 52) p. 299 note 23. Septimius Severus declared void a distribution of the *ius patronatus* by a *iudicium familiae creiscundae* (Paul. *1 decr.* D. 10.2.41).

a Roman woman had no *heredes sui*, her *patronus* would inherit all. There could be a possible conflict here between a former *in bonis habens*, who had manumitted her and of course had all interest in her estate, and the former quiritary owner who was her legitimate tutor. This could occur of course only after the iteration, because as a Junian Latin the woman could not make a testament. Apart from that, a Roman freed woman could free herself from her tutelage by obtaining the *ius quattuor liberorum* (Gai. 3.44; see note 77).

The *debitum* of a female patron could decrease too, and even more than that of a male patron. Furthermore the *debitum* of a patron freed woman was for a lesser claim than that of a freeborn female patron, but here the acquisition of the *ius quattuor liberorum* would, however, enlarge this claim (Gai. 3.49-52; see note 77).

16. — We do not know how the claims for *obsequium* and *operae* were settled in this case. Normally *obsequium* was due only to the manumitter personally and his children, and could not be transferred. It was the reverence due, which involved a.o. rules about the actions a freedman could bring against his patron ([79]). There does not seem to be much objection to assume that an iterated Junian Latin would have to reckon with *obsequium* towards two patrons, seen the personal character of it. Maybe we have to assume the same for the reciprocal duty of patron and freedman to support each other, if necessary (the *alimenta*) ([80]).

With *operae* the situation will have been different. *Operae* did not exist originally, but it became practice to let a freed slave swear or promise to do services (corvées) for the manu-

(79) Voci (note 77) pp. 373-375, who does not treat or name the question at issue. The difference between *ius patronatus*, *obsequium* etc. already follows from the way the relevant titles in the Digest are arranged: D. 37.14: *De iure patronatus*; D. 37.15: *De obsequiis parentibus et patronis praestandis*; D. 38.1: *De operis libertorum*; D. 38.2: *De bonis libertorum*.

(80) Voci (note 77) p. 375.

mitter and, eventually, for the latter's children. Those *operae* which were marked by the special relationship between manumitter and freedman (the *operae officiales*), were due to the patron only and, in the case they were promised too to his children or if these were the direct heirs of the patron, to his children also. Other *operae*, which could be performed for anyone (the *operae fabriles*), could be promised to other persons than the patron, and had to be performed for them if the patron ordered so. *Adsignatio* of the *ius patronatus* and thus of the claim for the *debitum* did not deprive the other *liberi* of their right on *operae* ([81]). If the *operae* were thus so closely connected with the person of the manumitter, it seems justified to assume that those *operae* a Junian Latin might have had to promise to his manumitter were not obliged to an extraneous heir of the latter, but only to his children. This is the more probable in view of the strengthening of the position of the *liberi non nominatim exheredati* by the SC Largianum. But if a manumitter had had his Junian Latin promise *operae* (and though we do no know whether this happened, there is no reason not to assume the possibility of it), could not the iterant do the same again? Or do so, if the manumitter had refrained from it? I cannot think of a reason why this should have been impossible. Then an iterated Junian Latin might have had to comply with two patrons in this respect.

17. — An argument for this may be drawn from the way the question was solved, of which town an iterated Junian Latin had to fulfil the *munera*. Since an edict of Hadrian the home town (*origo*) of the manumitter was regarded as the *origo* of the freed person with respect to the *munera* (CJ 10.40.7). As this text may be interpolated, we do not know whether it concerned the formally manumitted or also the informally manumitted. For the latter, the way a rescript of Marcus Aurelius is referred to in FV 221 might be an indication. But

(81) Voci (note 77) pp. 343-373, however, without treating or naming the problem at issue; Kaser (note 52) pp. 299-301, with further lit. For the inefficacy of the *adsignatio* in this respect: Paul. *2 man.* D. 38.1.51.

the rule would create a problem anyway in case a Junian Latin was iterated. For the case of the *munera*, Marcus Aurelius decided that the freedman had to comply with those of the home town of his manumitter, not of his iterant. Ulpian applied this decision to the question, whose children an iterated Junian Latin had to take guardianship of (FV 221) ([82]). It appears from this that if a Junian Latin had to fulfil *munera*, these would have been before his iteration *munera* of the home town of his manumitter and that that was to be the case anyway after iteration; but also that after the iteration the home town of the iterant, if another person than his manumitter, could rightly claim him too for the *munera*. This means that such a right would have been derived from the iteration, not from a remaining proprietal right. However, the proof would have been a case in which a Junian Latin was claimed for *munera* by the home town of his former quiritary owner. Unfortunately we do not know of such a case, and neither do we know whether Junian Latins had to fulfil *munera*. But as they could be appointed tutor, it is rather probable that they could be obliged to do the latter. As coloniary Latins they would have been *municeps* anyway, and in Roman towns too. FV 193, that says that in the same way as Roman citizens Junian Latins should be excused with regard to the *tutela* (v., for example, FV 191, 247), indicates they were regarded equal to Roman citizens indeed, in this respect ([83]). We do not know whether the lex Junia limited this. The mere rendering of the rescript does not exclude the possibility of their being obliged to all *munera* (see note 128 too).

18. — We know a Junian Latin got the *praenomen* and the *nomen gentilicium* of his manumitter; further he got a *cognomen* (an example is given by Plin. *ep.* 10.104). That this

(82) FV 221: Item. *Si alius eum Latinum fecerit, alius iteraverit, an utriusque liberorum tutelam suscipiat, videndum, quasi utriusque meritum habeat; nisi forte exemplo munerum, <quibus> divus Marcus rescripsit apud orig<i>nem eius, qui Latinum fecit, debere eum fungi, sol<i>us eius liberorum tutelam suscept<u>rum dicemus.*

(83) MOMMSEN (note 37) p. 233; further nr. 5.

was possible, was due to the fact that the Latin name system was the same as the Roman (84). So, theoretically, we can never be sure whether for example a L. Scribonius Ianuarius, a *navicularius* at the beginning of the second century (85), was a Junian Latin or a Roman citizen freedman (that he was a freedman is indicated by his *cognomen*). This is valid for all such cases, unless we find a *tribus* mentioned (86) or can infer it from something else, as the mention of a testament by him (not in this case; his brother and son-in-law erected the grave-stone, and thus he could have been a Junian Latin). But what happened after iteration or after for example conferment of citizenship by imperial grant? Gaius says that by all these modes the Junian Latin became the *libertus* of the former quiritary owner (Gai. 1.35, see note 65). If the former quiritary owner had been the manumitter too, the freedman would keep his name. But what if the manumitter had been an *in bonis habens*? I have not found a clue to this. Maybe we have to presume the freedman kept his name.

19. — Another point is the status of the children and freedmen of Junian Latins. Regarding the former, the status depended on that of the mother, *iure gentium*, as the Junian Latins were considered not to have the *ius connubii* (Gai. 1.80-81; UE 5.9; UE 5.4 can be interpreted in this way). If she was a Junian Latin, would her children become Junian Latins too? Vangerow says they were freeborn Latins, having the same

(84) Mommsen (note 37) p. 213; E. Meyer, *Einführung in die Lateinische Epigrafik*, Darmstadt 1973, p. 89.

(85) CIL 6.9682 (tabula marmorea, Roma): *L(ucio) Scribonio Ianuario, / negotianti vinario, / item navicul(ario) cur(atori) / corporis Maris Hadriatici; / L(ucius) Scribonius Festivus, // frater, et / M(arcus) Manlius Callicarpus, / socer, fecerunt.* The two brothers must have been freedmen of a member of the gens Scribonia, of the branch Libo, which achieved prominence in the first century A.D. Lucius was a common *praenomen* in this branch. For the *cognomen*: note 129.

(86) Originally Latins were, when residing in Rome, temporarily inscribed in a *tribus*, if an election were to take place. Since the days of Augustus this all was obsolete. So Latins could not dispose anymore of a *tribus*, unlike the Romans who still could mention theirs.

status as coloniary Latins, but without the rights that emanated from being citizen of a town. He has, with the latter, probably the rights of the *Latini prisci* and the *ius connubii* in mind. This might mean that he does not regard them Junian Latins. If, however, we have to take this restriction the way he uses it with regard to freedmen of Junian Latins (see note 89), it can only mean that he looked upon the children as Junian Latins (87). CANTARELLI does not specify his definition, when he calls the children *latini*, and STEINWENTER confines himself to saying that they followed the status of their mother (88). Gai. 1.67, where it is said that a child was *Latinus aut peregrinus, id est eius condicionis cuius et mater fuerit*, might seem to be an argument to assume the Latinity acquired to be Junian Latinity. If we presumed this to be the case, it would make a very difficult situation. The lex Junia had been made for cases of manumission, and Junian Latinity was created for manumitted slaves. It seems to me very doubtful whether we can say that the lex Junia applied to persons not manumitted, like the children of female Junian Latins who would be born free and not in slavery (a great advantage in those times). It is rather possible that Gaius intended to draw only a distinction between Latins and peregrines and to prevent confusion. In my reconstruction of the lex Junia the logical conclusion would have to be that the children and freedmen of Junian Latins were coloniary Latins, who did not suffer the handicaps the lex imposed on the informally manumitted.

If a Junian Latin had contracted marriage with a Latin or Roman woman in a special way, viz. with certain sollemnities and in order to procreate children, he could obtain Roman citizenship from the praetor if he showed this magistrate a son or daughter, born out of this marriage, when one year old. He,

(87) VANGEROW (note 5) p. 128: "... so wurden nun auch die Kinder, wenigstens vorerst, freigeborene Latinen, und ihr Rechtszustand war ganz der eines Latinus coloniarius, nur dass natürlich auch hier die besonderen, auf Gemeindeverhältnisse begründeten Rechten hinwegfielen". For the latter: *ibid.* pp. 107-108, 109.

(88) CANTARELLI (note 6) p. 72; STEINWENTER (note 7) c. 919, l. 29 ff.

his child and his wife if she was a *Latina*, would then become Romans on this basis (the *anniculi probatio*: Gai. 1.29-32a, UE 3.1,3). By force of a SC, an iteration that conferred Roman citizenship on a Junian Latin, would do the same with his children (UE 3.4). We do not know whether this was the case too with the other modes of acquisition.

What about their freedmen? VANGEROW says a Junian Latin (who could have quiritary property and could free formally, i.e. *vindicta*), could make his freedmen only Junian Latins, not coloniary Latins. For the latter citizenship in a Latin colony was required. STEINWENTER implies that Junian Latins could have freedmen, but he does not elaborate on this. BUCKLAND seems to suggest, arguing that a manumitter could not give his freedmen a better status than he had himself, that a Junian Latin could only confer Junian Latinity, and this only *vindicta* (because of the *ius commercii*). BUCKLAND refrains from any conclusion because of the lack of information ([89]). Like with the children of a female Junian Latin, it does not seem to me plausible that the lex had such far reaching consequences.

As a matter of fact, the status of the Junian Latins would have been basically that of coloniary Latins. So they would transmit this to their children and manumitted slaves. The restrictions of the lex Junia were only meant to safeguard the interests of their patrons and not, for as far as we know, of themselves as patrons. Therefore there is no reason why they should apply to the children and freedmen of Junian Latins too. Besides, if they did it would have led to problematic consequences we should have found mentioned in Gaius' Institutes. But we do not ([90]). Lastly, the words of the lex Junia cannot be

(89) VANGEROW (note 5) p. 11 (on p. 126 VANGEROW contends a Junian Latin would have *tutela* over his freedmen *ex lege Iunia*, if only he had had them in quiritary ownership); CANTARELLI (note 6) p. 71 is not clear on this point; STEINWENTER (note 7) c. 919, l. 42: "... über seine eigenen Latinischen Freigelassenen ..." (without explaining how these freedmen came into being); BUCKLAND (note 8) p. 534.

(90) For example: did Junian Latins have *potestas* over their children? (Probably not: see UE 7.4). If not, then the children would be able to

interpreted as applying to children and freedmen of Junian Latins. A child was not *in libertate*, it was freeborn and thus at once a *liber*. The same with a slave, formally manumitted. It might be different, however, if a Junian Latin manumitted informally himself. But did the lex Junia apply to informal manumissions by Romans only, or also to those by (Junian) Latins? We do not know but it seems safer to assume, for the time being, that it did not.

20. — I will sum up the conclusions of the foregoing, with regard to the position of the former quiritary owner in the case of a manumission by a mere *in bonis habens*, followed by an iteration by him. He, the former quiritary owner, did not get the claim for the *debitum*, though the freedman now became his *libertus*. He did not get the *tutela*, as the lex Junia had already conferred this to him immediately after the manumission. We do not know his position concerning the *obsequium* and *operae*. With the *munera* there was confusion, but only after the iteration, about the *origo* the freedman belonged to now, and it was decided in favour of the manumitter. The same happened with the *tutela* over the children of the manumitter, a duty a freedman might be called to. Finally the Junian Latin got the name of the manumitter, and probably kept this after iteration. In all these cases we can conclude that the former quiritary owner had no rights before iteration, except for the *tutela* which, however, was granted to him expressly by the lex Junia. Evidently only by iteration the position of patron was bestowed on him. This can be seen particularly in case of the *debitum*. Twice Gaius feels compelled to say, after the mention of the iteration, that although the freedman now becomes the *libertus* of the former quiritary owner (who iterated), the claim for the *debitum* nevertheless remains with the manumitter (Gai. 1.35, 1.167). Thus it was because he had performed the iteration that

own things for themselves. If such a child died, who would inherit then? Only the gap on fol. 144 (Gai. 3.68, 21 lines) allows for the presumption of it having been mentioned in a lacuna. Still it should have been mentioned too in Gai. 3.58-62.

a former quiritary owner could, theoretically, claim, and not because he was the former quiritary owner. The iteration must have been the source of that presumed patronal right, and indeed with some reason. Because after iteration the iterant was, according to the civil law, the patron and *agnatus proximus* of the freed person, and therefore according to the Twelve Tables the *bonorum possessio* (and later the *pars debita patrono*), and the *tutela*, should come to him.

Yet it was only the former quiritary owner who could iterate. What did qualify him? A remainder of the proprietal rights? VANGEROW stated that the iteration consisted of the conveyance of the *nudum ius Quiritium* to the manumitted slave, who already had bonitary ownership of himself. STEINWENTER expressed himself more cautiously: "Da die praetorische Freilassung sowie die Manumission durch den bonitarischen Eigentümer das *dominium ex iure Quiritium* über den Latinus weiterbestehen liess, so vermochte der quiritische Eigentümer durch eine (...) Freilassung (*iteratio*) den L(atinus) I(unianus) zum *libertus civis Romanus* zu machen" (91). He wisely leaves the question aside. BUCKLAND had already contested the notion of a transfer of quiritary ownership. His argument is founded on two points: one, that a manumission is not transfer of ownership whatsoever, but is just the renouncement of the capacity to own or possess, and by this ends the capacity of the slave to be possessed; two, that a manumission is at the same time the conferment of citizenship to the manumitted. "Manumission is not transfer of *dominium*; it is creation of a *civis*, and release not merely from ownership, but from the capacity of being owned" (92). It seems to me that Iul. *44 dig.* D. 41.2.38.pr. is a good additional argument for his propositions. And with a Junian Latin a *civis* was created in a certain way too, though not a Roman citizen. As a Latin was in private law the equal of Romans by the *ius commercii*, he occupied a better position than the peregrines without the *ius commercii*. We may assume that their manumission ended the possibility

(91) STEINWENTER (note 7) c. 921.

(92) BUCKLAND (note 8) App. IV, the phrase cited on p. 715.

that they were owned or possessed. As the *in bonis habens* lost possession and the capacity to possess, so the quiritary owner must have also. As there was no existing quiritary ownership or a *nudum ius Quiritium* left, the conclusion must be that this was not the basis for the iteration. That means that only the fact that he was the former quiritary owner, could have been the ground for his capacity to do so. Can this indeed be said?

Dominium is one aspect of the power wielded over a slave; *potestas* is the other. It was vested in the *in bonis habens*, whether he was quiritary owner too or not. Someone who was merely quiritary owner did not have *potestas* (Gai. 1.54). After a correct manumission the *potestas* was continued in a modified form. Unfortunately VANGEROW stresses only the aspect of *dominium*, which distorts his view on the question (see for this BUCKLAND, note 92). Presumably we have to put more emphasis on the end of the *potestas* as such (*manus*) and its continuation in another form (patronage), than on the end of commercial ownership: a free person *in mancipio* could be manumitted too (93). Normally the modified *potestas* would be with the person who lost quiritary ownership and the *in bonis habere* by a correct manumission. This would establish the patronal relationship including the modified *potestas*, the freedman now becoming his *libertus* (and the same for a woman slave). In case of an informal manumission it was the former quiritary owner who had the capacity to iterate and who would get then that modified *potestas* over the freed person or anyway a good claim to it, and this even if he did not have the slave *in bonis* at the time of the manumission or iteration. Then that capacity to iterate and to claim the patronage must have been a derivation of the civil law rules on the acquisition of liberty and citizenship by manumission, and not of a remaining quiritary right. BUCKLAND's distinction between liberty of ownership and citizenship proves to be useful here. Then a manumission would have conferred only liberty, before the lex Junia of a praetorian

(93) WEISS (note 58) cc. 1366, 1372-1373; KASER (note 52) pp. 70, 115-119, 293-295, 302.

kind as the praetor protected thus freed slaves, whose manumission was not recognized in the civil law. The lex Junia formalized that liberty into Junian Latinity, which also gave a certain civil status too, but not yet full Roman citizenship. By the latter alone a proper patronal relation would be established. For that status it must have been necessary, as it appears, that a quiritary owner fulfilled the requirements, prescribed by the civil law for a proper manumission (leaving aside the cases in which citizenship was conferred by law, SC or imperial grant). It is not known in civil law that a defective manumission produced Roman citizenship.

This would explain why only the former quiritary owner could iterate. The civil law did not know of any other owner, nor of any other way of manumitting with conferment of citizenship than *vindicta*, *censu* or *testamento*. Only in these cases the effect of the public law would be the creation of a citizen freed man or woman, with at the same time a fixed patronal relationship. The lex Junia did not infringe on this. And as a Roman citizen freedman became the freedman of the person who had manumitted him formally and made him a citizen, so a Junian Latin became the Roman citizen freedman of his former quiritary owner at the moment of iteration. This was not only the result in the case of an iteration: if a Junian Latin attained Roman citizenship in other ways, he would still become the *libertus* of his former quiritary owner (Gai. 1.35). That shows that the moment of acquisition of Roman citizenship was constitutive in the public law.

Though iteration established a patronage between the former quiritary owner and the former Junian Latin, which could lead to the argument mentioned, that the interpretation of the Twelve Tables should apply, the situation did not much alter. The *patronus* kept the claim for the *debitum*, though it decreased, and maybe for the *obsequium* and *operae* too. The *tutela* had already been assigned to the former quiritary owner. So if a Junian Latin had not been *in bonis* of his quiritary owner, he would have two patrons now, or at least two persons, one of them patron, and the other occupying the position of a

patron. This might create a problem in the case of an iterated woman Junian Latin with property, that she wanted to bequeath to someone. She had to make a testament for this, for which she needed the *auctoritas* of her tutor, here the former quiritary owner. By giving his consent, he would rob the *patronus* of a part of the future estate anyway. This will have made an *in bonis habens* cautious to make female slaves Junian Latins, if he had commercial intents with them. In the case of a Junian Latin having been *in bonis* of his quiritary owner, he would only have one patron and none of the problems of the duplicity could occur. The iteration of a female Junian Latin would present no problem either, and if the patron consented to a testament, he had to blame himself (Gai. 3.43). That such conflicts of interests occurred, and that finances were the bone of it, is proven by Gai. 3.72. Here a constitution of Trajan is mentioned, that saved the *patronus*' claim to the estate, as established by the lex Junia, in case a Junian Latin obtained Roman citizenship by imperial benefit without his *patronus*' knowing or consent. The freedman would become a Roman citizen and could make a testament, but he had to institute his *patronus* as first heir. Later a SC under Hadrian provided that if in such a case the freedman obtained (again) Roman citizenship (the *ius Quiritium*) by way of the lex Aelia Sentia or of a SC, that restriction would be annulled (94).

(94) Gai. 3.72-73: 72. *Aliquando tamen civis Romanus li<b>ertus tamquam Latinus moritur, velut si Latinus salvo iure patroni ab imperatore ius Quiritium consecutus fuerit: nam ut divus Tr<a>ianus constituit, si Latinus invito vel ignorante patrono ius Quiritium ab imperatore consecutus sit, quibus casibus, dum vivit iste libertus, ceteris civibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liberi eius hered<es> esse possunt; et in hoc tantum habet testamenti factionem, <u>t patronum heredem instituat eique, si heres esse noluerit, alium substituere possit.* 73. *Et quia hac constitutione videbatur effectum, ut ne umquam isti homines tamquam cives Romani morerentur, quamvis eo iure postea <u>si essent, quo vel ex lege <Aelia> Sentia vel ex senatus consulto cives Romani essent, divus Hadrianus, iniquitate rei motus, auctor fuit senatus consulti <f>aciundi, ut qui ignorante vel recusante patrono ab imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex lege Aelia*

21. — Could the successor of a former quiritary owner iterate? In VANGEROW's view this would present no problem. The *nudum ius Quiritium* was transferable, and therefore the capacity to iterate and give this *nudum ius* to the Junian Latin. In his trail CANTARELLI, while STEINWENTER does not draw this conclusion (explicitly) (95). I assumed all ownership ended by the manumission, so there would have been nothing left to bequeath or leave. A successor could neither call himself therefore quiritary owner, nor former quiritary owner. This is in the line of BUCKLAND's opinion too. The fact that a former quiritary owner could iterate will have been the result of his having had at one time before the informal manumission the manumitted slave *in bonis*, and having been at at least the moment of manumission still the quiritary owner of that slave. A letter of Pliny, examined in nrs 26 and 27, gives another argument for this conclusion.

Another point to which I would like to pay attention before going over to Gai. 2.195, is whether iteration always was possible. STEINWENTER has denied this for the case in which a quiritary owner had freed a slave of not yet thirty years old *vindicta* or *testamento*, but without the *causae probatio* required by the lex Aelia Sentia. Quiritary ownership ended, according to him, by the chosen mode of manumission. We saw in nr. 8 that it was very unlikely that Junian Latinity was produced with a manumission *vindicta*. So iteration was indeed

Sentia vel ex senatus consulto, si Latini ma<nsi>ssent, civitatem Romanam consequerentur, proinde ipsi haberentur, ac si lege Aelia Sentia vel senatus consulto ad civitatem Romanam pervenissent.

We know from Gai. 1.35 (see note 65) that the manumitters retained in this case their claim on the *bonorum possessio*. But it did not comprise anymore the whole estate (otherwise Trajan's constitution would be superfluous), thus the *pars debita* only. Secondly, we may conclude now that the *patroni* were interested in getting the whole estate, otherwise Trajan would not have enacted this.

(95) VANGEROW (note 5) pp. 147-158. VANGEROW argues against the older opinions of HOLLWEG and ZIMMERN, who supposed the iteration to have been a strict personal right of the manumitter only. As these authors formulated their views before the discovery of the Veronese manuscript, I have left their writings aside.

possible then, even if one adheres to STEINWENTER's view that the quiritary ownership still persisted. Of course it is here, in fact, the manumission of someone who is still a slave, and not of a Junian Latin. In the case of a manumission *testamento*, Junian Latinity was conferred by the lex Aelia Sentia. Here iteration was of course not possible anymore, but not because quiritary ownership had ended, though it might seem so, but because the life of the former quiritary owner had ended, which ended both that quality, as any quiritary ownership, if still existing, vested in him.

We have to distinguish between two kinds of impossibility with regard to iteration. An objective impossibility, viz. when the manumission had not had any effect, like the example given; and a subjective impossibility, viz. when the manumission had had an effect (cfr the case given above), but the former quiritary owner was no longer present to iterate, for example had died.

22. — However, there is a text in Gaius' Institutions from which it would appear that a patron, maybe the former quiritary owner, could bequeath a quiritary right. In Gai. 2.195 the question is dealt with whether in the case of a legacy *per vindicationem* the legatee has to accept (after the adition by the heir, if necessary), in order to obtain quiritary ownership of the legacy *in suspenso* (the Proculian, or rather the Julian view), or that he became the owner as soon as there was an heir, being regarded as having never been the owner in case he rejected the legacy afterwards (the Sabinian view). The latter opinion prevailed originally (96). But Gaius says that it would appear from a constitution of Antoninus Pius that this emperor favoured another interpretation (97):

(96) See about this KASER (note 52) p. 753; M. WLASSAK, *Vindikation und Vindikationslegat*: ZRG 31 (1910) pp. 266 note 4, 378 notes 11 and 14 and 379. H. ANKUM, *Julian. D. 30.84.5 und das Ziel der 'actio empti' nach Eviktion*: *Studi Guarino*, to be published in 1983; G.L. FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, pp. 46 and 47 ff.

(97) Gai. 2.195, first part: *In eo solo dissentiunt prudentes, quod*

> *Sed hodie ex divi Pii Antonini constitutione hoc magis iure uti <v>idemur quod Proculo placuit; nam cum legatus fuisset Latinus per vindicationem coloniae, "deliberent", inquit, "decuriones, an ad se velint pertinere, proinde ac si uni legatus esset".* (Gai. 2.195, fin.).
>
> At the present day, however, as the result of a constitution of the late emperor Antoninus Pius, the view taken by Proculus appears to be preferred. For in a case where a Latin (Junian Latin freedman) had been legated by vindication to a colony he said: "The decurions are to consider whether they wish the Latin to be theirs, just as if he had been legated to an individual." (translation by F. De Zulueta).

A Latin was bequeathed to a colony by way of a legacy *per vindicationem*. It is apparently a colony of Romans as there are decurions mentioned (see p. 281 for the point whether it could have been a colony of Latins). Antoninus Pius said that the decurions should deliberate whether they would accept. Their decision would be regarded as the decision of one person.

Doubts have been raised about the Gaian authenticity of this passage, but as these doubts cannot be substantiated enough, we may assume its genuineness (98), and continue our inquiry.

First of all it has to be ascertained that the text is impossible if taken literally. A Latin could not be the object of a legacy *per vindicationem* or of any other bequest. A legacy *per vindicationem* could but concern personal and real property, and usufructs and servitudes of or on personal and real property, that were in the quiritary ownership of the testator, both at

Sabinus quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatari<i>, etiamsi ignoret sibi legatum esse: et posteaquam scierit et ce<ss>erit legat<o>, proinde esse atque si legatum non esset; Nerva vero et Proculus ceterique illius sc<h>olae auctores non aliter putant rem legatari<i> fieri, quam si voluerit eam ad se pertinere.

(98) For an exposition and refutation: *Gai Institutionum Commentarii IV*, mit phil. Kommentar herausgegeben von M. David und H.L.W. Nelson, Kommentar 3 (3. Lief.), Leiden 1968, pp. 393-395.

the time he made up his testament, and at the time he died (with some exceptions to this rule, that are not of relevance here) ([99]). Because free men never could be quiritary property, Gaius cannot have meant the Latins that were not Junian Latins. Further the possibility of a mere *servus Latinus* has to be excluded as Gaius then would have spoken of a *servus* ([100]).

With Junian Latins, the situation is rather complicated. In view of the last clause of the lex Junia, could one really say a Junian Latin was free for ever? Was he not considered a slave again, after his death, or at least a slave who had been under the praetor's protection during his lifetime, but was nevertheless a slave to the civil law? Or should we take the clause as pertaining only to the estate, and not to the person of the Junian Latin? But whatever one sees as the answer to these questions, it does not provide a clue here to the situation of a Junian Latin during his lifetime. Was there something with regard to a Junian Latin, that could be held in quiritary ownership during his lifetime, and that could be transferred?

Some authors do not think it impossible. VANGEROW rejects the idea that the goods of a Junian Latin still living were legated. He maintains that the Latin himself was bequeathed, but seems to think of the patronal rights when he says this ([101]). KNIEP thinks the legacy concerned a remnant of the rights of the quiritary owner. These could be: a) a claim to the goods of the living Junian Latin (this KNIEP rejects: during a Junian Latin's life his goods could not be his patron's); b) claims to *operae* — this KNIEP does not think improbable here (but see p. 278); c) the right to the guardianship (regarded by KNIEP as

(99) See KASER (note 52) p. 743.

(100) As it concerns a legacy *per vindicationem*, he should have been a slave of which the testator had had quiritary ownership. Then for the Roman law the slave would have been a slave and the status of the owner irrelevant.

(101) VANGEROW (note 5) pp. 84-85. He distinguishes this sharply from the faculty of the *patronus* to dispose of the possessions of his Junian Latins while still alive. This he deduces from Plin. *ep.* 10.104 (VANGEROW p. 135), for which see below. Cfr too note 107.

improbable); d) the right to iterate (rejected by KNIEP, because in Plin. *ep.* 10.104 Pliny, a heir or legatee, has to ask Trajan to grant his Latins the *ius Quiritium*) ([102]). STEINWENTER says the remaining quiritary ownership showed itself in the fact that a Junian Latin could be legated *per vindicationem* (citing Gai. 2.195, Plin. *ep.* 10.104) and that the *tutela* devolved to the quiritary owner (citing Gai. 1.167, UE 11.19). For the rest, "das Patronat in seinen nutzbaren Rechten" devolved to the manumitter, even if he had had only *in bonis* ([103]). It is difficult to see what STEINWENTER understood by the legacy.

Other authors deny theoretically the possibility, but leave room for a de facto validity of such a legacy; or they refrain from further comment. BIONDI says it could not have been a legacy *per vindicationem* because quiritary ownership did not exist. He cites ARANGIO-RUIZ who presumed a limited effect of the legacy, like that of a *mancipatio* by a *non dominus*. BIONDI himself has no comment ([104]). GROSSO suggests it might be explained by the many fictions of the lex Junia, that such a legacy had any value. He does not elaborate this thesis ([105]). KASER does not express himself on the point ([106]). ROMANO names several hypotheses about the passage; but he seems to doubt a bequest of quiritary ownership, with the argument that Pliny in *ep.* 10.104 speaks of the "*ius Latinorum suorum*" which

(102) F. KNIEP, *Gai Institutionum Commentarii IV*, Jena 1913, vol. II pp. 344-346.

(103) STEINWENTER (note 7) c. 919. With regard to STEINWENTER'S opinion, one can ask what advantage was left for the colony. Besides, the *tutela* devolved to the former quiritary owner by an express stipulation of the lex Junia, and thus could not have been the logical consequence of any remainder of the quiritary ownership. Further it is not at all sure that Plin. *ep.* 10.104 concerned a legacy *per vindicationem* (see pp. 284-285).

(104) B. BIONDI, *Successione testamentaria e donazioni*, Milano 1955, p. 348. V. ARANGIO-RUIZ, *Parerga*: *Atti R. Acc. di Napoli* 61 (1942) p. 272 sqq.

(105) G. GROSSO, *I legati nel diritto romano*, Torino 1962 (sec. ed.) p. 77 note 1.

(106) KASER (note 52) pp. 743, 749. He names this legacy, without comment, on p. 750 note 67.

was left to him, not of "*Latinos suos*" (107). My opinion is that the answer has to be strictly in the negative, as considerable objections can be made. These will be put forward in due course.

Theoretically Gai. 2.195 can relate to three possible situations: a) the former quiritary owner of a Junian Latin, who was not his manumitter, had bequeathed his (former) quiritary right; b) the former quiritary owner, who was his manumitter too (and thus was the *patronus*), had left a (former) quiritary ownership; c) the former *in bonis habens* and *patronus*, who had not been quiritary owner, had bequeathed a quiritary right, this being his *ius patronatus* or the claim for the *debitum* (viz. for the whole future estate).

Was there a quiritary ownership or a remainder of quiritary ownership, that could be bequeathed *per vindicationem*? And if there existed something like that, what did it imply? As we have seen, we have to assume that all proprietal rights, including the quiritary, ended at the moment of manumission. Thus there was nothing to legate. The possibilities a) and b) are ruled out. We will see this too when we imagine what the results of such a transfer would have been. The colony would have been entitled to the guardianship, in case the need for this occurred, and maybe to *operae* and *obsequium*. It is not very probable that a colony would bother about such a legacy.

Literally there is no solution to the text. But maybe it was an expression, which meant that the claim for the future estate

(107) S. ROMANO, *Sull'acquisto del legato "per vindicationem"*, Padova 1933, pp. 4-5, names several hypotheses about this passage. He seems to doubt a bequest of quiritary ownership, saying that in Plin. *ep.* 10.104, Pliny speaks of the "*ius Latinorum suorum*", not of "*Latinos suos*". He cites some suggested possibilities: whether a legacy to a colony was possible (unlikely to have been the case, see note 109); whether the decurions had a right to represent the colony in matters of private law; or that there was a large passive inheritance which had rendered necessary a complex evaluation, because of the interests of the colony. These not so probable suggestions show the problems produced by this text. DAVID and NELSON also refer to the fact we do not know exactly what the original case was about (see (note 98) p. 393).

of the Junian Latin had been bequeathed? That would be possibility c). For this we have to consider whether the claim for the *debitum* could be called the quiritary property of the *patronus* and therefore be the object of a legacy *per vindicationem*.

In itself the question cannot be posed. The Romans did not perceive someone having a right as him or her being the owner of that right. The question should be whether a claim could be transferred and if so, whether the transmission could be effected by a legacy *per vindicationem*.

With regard to the *ius patronatus* on a citizen freedman it was impossible. The succession to the patron had been established in the law. This is proven by the introduction of the *adsignatio* by a SC between 41 and 47 A.D. (see nr. 15). We do not know whether *adsignatio* was possible with regard to the *ius patronatus* on Junian Latins. But even if it were possible, then there would be no *adsignatio* here, as a colony could not be reckoned as one of the *liberi*. Furthermore it is very improbable that an *adsignatio* would be done by a legacy *per vindicationem*, the subject of Gai. 2.195.

Still it cannot be denied that between Junian Latins and citizen freedmen a great difference existed. After their death the possessions of Junian Latins were considered as being a kind of *peculium*, and Junian Latins were said to die as slaves. Could this have resulted in a faculty of the *patronus*, to transfer or dispose of his *ius patronatus* or his claim for the estate?

It has been put forward as a possible solution of Gai. 2.195 that as the *patronus* would acquire the estate of a Junian Latin *iure quodammodo peculii* later on, he might have come to be regarded already in the lifetime of the Junian Latin as the quiritary owner of those goods. This view might have enabled him to bequeath these goods *per vindicationem* and thus the patronal claim ([108]). With all due respect, this seems to me impossible. It presumes the testator was the former quiritary

(108) David and Nelson (note 98) p. 393.

owner who had had *in bonis* (I think it would go too far to suppose in the case of a mere former *in bonis habens* a future *usucapio*). But in my opinion the lex Junia, that firmly established the *ius commercii* of the Junian Latins (see note 3), would bar any possibility for a *patronus* to dispose of his freedman's goods as if they were his quiritary property. Besides, if he wanted to bequeath the proceeds of his patronal claim, he would do better by imposing on the future claimant a *fideicommissum* or legacy *per damnationem* to turn over any proceeds, as soon as they could be reclaimed.

Why did the estate of a Junian Latin devolve to his manumitter? As the result of the last clause in the lex Junia, viz. that with regard to the estate the lex was supposed not to have existed when a Junian Latin had died (*ac si lex lata non esset*), the manumitter could claim as if he were still the *dominus* of the informally manumitted, *bonorum possessio* of the whole and get it with the exclusion of all other claimants. The argumentation must have been that if in retrospect the lex Junia were regarded as not having existed, a Junian Latin retrospectively would have only been an informally freed who would have been protected during his lifetime by the praetor, but whose possessions would nevertheless go to his *dominus iure peculii* (Gai. 3.56). As the Romans were mainly or only interested in the estate, it would not have been necessary to extend such a fiction more than needed, viz. to assume that a Junian Latin would have been a slave (and anyway, still was a slave protected by the praetor). That might have jeopardized the status of his children, his freedmen, and his contracts etcetera too. It was enough to restrict the fiction to the estate. Such a restriction might explain why Gaius speaks of *iure quodammodo peculii*: the manumitter did not become *dominus* again of the Junian Latin (preferring Gaius to Salvian and Justinian). Anyway, it will have been a sufficient justification to grant the manumitter *bonorum possessio* for the whole.

If the *patronus* had died, his heir (or *liber*) could claim *bonorum possessio*. In case of a *liber* the SC Largianum was the ground for the claim. But what was the basis for a heir?

A heir inherited all slaves and *peculia* the *de cuius* had been entitled to, and all future claims and debts coming forth from the legal position of the *de cuius*. Now it is possible to argue that the claim to the estate of a Junian Latin was such a claim, viz. to the *peculium* of a slave that had belonged to the *de cuius*, and this is confirmed by Gai. 2.155. Such a claim could only be with the former *in bonis habens* and his heirs. The right of the *liberi non nominatim exheredati* merely rested upon the force of the SC Largianum; because they were exheredated they had lost it.

Kniep has suggested the legacy in Gai. 2.195 concerned *operae* (see note 102). It will have become clear in the foregoing that such a disposition cannot have been possible: it was no object of quiritary ownership.

I will sum up the conclusions we have made. In Gai. 2.195 there cannot have been a question of a legacy of a *nudum ius Quiritium* or a remainder or whatever of a quiritary right of the testator, because all quiritary ownership had ended by the manumission. Neither could it have been a legacy of the quiritary ownership of the *ius patronatus* or of the claim for the estate, because the *ius* was not owned in this way, nor allowed the reality of the *ius commercii* given by the lex Junia for the thought that the *patronus* did in any way already own the future estate. And we can argue a contrario too. If such a legacy *per vindicationem* had been possible, the heir or *patronus* could have claimed the estate with a *rcivindicatio*. But Gaius says that nowhere. With the knowledge of Roman law we have at this moment, a literal or less literal reading of Gai. 2.195 has to be considered impossible.

23. — Does this mean that the text poses an unsolvable problem? Maybe not. Let us suppose the testator wanted to give one of his slaves freedom and the use of his *peculium*, and also the colony (where he might have lived) this *peculium*. If he would have freed the slave informally, he would have had to make the colony heir; let us assume he did not want to do this

(though it was possible ([109])). He might have imposed on the heir a *fideicommissum* or legacy *per damnationem* for the estate, in favour of the colony. Yet there is a legacy *per vindicationem* here, which was to this extent better, that the colony did have a right now, independent of the heir after the inheritance had been accepted. The solution to this must be that the testator bequeathed the slave, together with the *peculium*, *per vindicationem* to the colony, under the condition to manumit the slave *inter amicos* or otherwise informally, together with the *peculium*. This was possible and the slave would become the freedman of the colony, which would get the claim for the estate as patron (Gai. 2.263, 266).

Literally we cannot read this in the text, just like we cannot read the other interpretations. However, in the quotation from the constitution there is, actually, no mention of any Junian Latin. We read this in Gaius' accompanying text. *Legare Latinum* would then have been a concise way of speaking (I do not think a clerical error of a copier probable ([110])). The result of this interpretation would be the same, anyway, as is the case with all other interpretations, viz. that the colony would get the estate of the Junian Latin when he died. But what is more, this interpretation might well link to what ought to have been the case Antoninus Pius decided.

24. — Gaius cites the decision to show that when he wrote his Institutes (according to NELSON between 161 and 178 ([111])), the prevailing opinion seemed to be that one had to accept expressly a legacy *per vindicationem*, in order to acquire it in quiritary ownership. This as distinct from before, when without doubt the Sabinian view prevailed. But the words cited do not suggest this as the original problem. Antoninus Pius said: "The decurions are to consider whether they wish (him) to be theirs,

(109) See Iul. 78 *dig.* D. 28.6.30 with a colony as substitute heir.

(110) A possibility might be the copier jumping one line, like presumably in 1.167 (see note 67). However, I do not see a similar possibility of restoring the text to a (more) acceptable meaning.

(111) H.L.W. NELSON, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden 1981, p. 73.

just as if he had been legated to an individual." (*Deliberent decuriones, an ad se velint pertinere, proinde ac si uni legatus esset*). This means the problem was: how a colony had to accept or reject, not whether it should accept or reject, or whether such a legacy was possible. This MITTEIS already remarked ([112]). Otherwise Gaius should have cited words more relevant.

We may assume a colony could be instituted as legatee. It is implicitly stated here, and it would follow from the fact that a colony could be instituted as heir (see note 109). Thus the problem must have been the acceptance, if necessary.

A colony was a group of citizens (let us presume here of Romans) which constantly changed in composition. So, if one thought it necessary that an acceptance should be made, it would be impossible for all who had belonged to the colony at the moment the testament was made, or the testator died, or the heir accepted, to accept in person. The solution is the one given by the emperor: the decurions should take a decision, which will then be regarded as the decision of one person. In this way the decision of the majority of the decurions becomes the decision of all, and it will be as if only one person has accepted in person the legacy. So the problem of the *corpus incertum* that cannot accept is avoided. *Corpus incertum* as term has a certain similarity with *persona incerta*. This is a heir who, apparently, is not identifiable enough, for example a *postumus alienus*. The choice of the testator has to be certain (UE 22.4). In case of a *corpus* the problem was not the uncertainty of the choice of the testator, but the point of acceptation: *nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est et neque cernere universi neque pro herede gerere possunt, ut heredes fiant* (UE 22.5) ([113]).

However, it has to be said that a colony as a separate part of the *populus Romanus* could be instituted as heir and legatee, at least until the second half of the second century (see note 109

(112) See L. MITTEIS, *Römisches Privatrecht*, Leipzig 1908, p. 377 note 4.

(113) See KASER (note 52) p. 685; MITTEIS (note 112) pp. 378-379.

and Gai. 2.195). This implies that the argument of UE 22.5 cannot have applied originally. Is it not possible that later on, particularly after the *constitutio Antoniniana* of presumably 212 A.D., when the differences between colonies and *municipia* became more diffuse, the question how a colony had to accept was used to argue why a *municipium* could not be instituted? But even then being a colony must have been an advantage, as Gai. 2.195 shows that a colony could accept an inheritance by way of a decision of the decurions while UE 22.5 categorically denies *municipia* any possibility of accepting. Is it possible that in Gai. 2.195 a colony of Latins is meant? If so, then they must have had the *ius commercii* without restrictions, otherwise a legacy *per vindicationem* would have been impossible. It is not impossible, as according to UE 24.28 a SC under Hadrian established that *civitatibus omnibus, quae sub imperio populi Romani sunt, legari potest.* But that SC, if of relevance here, might have left open too the question of how to accept or reject.

From Gaius' *sed hodie ... hoc magis iure uti videmur* we may gather that it was uncertain before whether the Proculian (or more rightly: the Julian) or the Sabinian view prevailed. With a pure legacy *per vindicationem* the Sabinian view caused no problems. The colony just had to treat the legacy as one of its properties, as soon as the heir had accepted (if necessary), or could leave it and so reject it (Gai. 2.195). However, in the case of a legacy *per vindicationem* the necessity to accept or reject could expressly occur, if a *fideicommissum* had been imposed on the legatee, for example the *fideicommissum* to manumit a legated slave. The bequeathed slave had a right to know what would happen. If the colony did not want to reject, it had to let its acceptance be known. The heir could demand security (*cautio*) for the execution of the *fideicommissum*, and the slave should know when the colony might be regarded as being *in mora*. In this case he could go to the praetor and obtain his freedom from him, as if the testator or the colony had freed him ([114]). If the colony wanted to reject, it had to let

(114) KASER (note 52) p. 295; BUCKLAND (note 8) pp. 527-529, for the

it know again as soon as possible. As long as it did not express its will, it was uncertain whether the *fideicommissum* would be carried out or had to be enforced by the praetor, and it was uncertain too whether the slave belonged to the heir after all. In the latter case it may have been possible too that other stipulations of the testament had to be complied with, e.g. that the heir should free the slave. Reason enough, it seems to me, to necessitate the colony to declare its intention.

One might object that Gaius should not have deduced from a constitution like this that the Proculian (rather the Julian) view prevailed now. If Antoninus Pius had wanted to express himself more clearly on this point, there should have been a clearer wording. Yet Gaius does not make such a strong statement: *magis iure uti videmur* is a careful expression. On the other hand it is not so strange that he cited the constitution for the controversy. If Antoninus Pius would have held strictly to the Sabinian point of view, all that would have been necessary for him to say would have been that either the colony should manumit the legated slave, or the decurions should decide to reject, which decision then would be regarded as the unanimous decision of the inhabitants of the colony. As this apparently was not the case, his words indeed might suggest he did consider the legacy as not yet accepted, and in need of acceptance. Besides, one could argue that reflections about rejection indicate an uncertainty with regard to acceptance, particularly if the rejection does not make the legacy a *res derelicta*, but retrospectively property of the heir.

25. — But Gai. 2.195 is not the only text that suggests the *ius patronatus* on Junian Latins could be transferred. A letter by Pliny the Younger to the emperor Trajan, written in about 112 A.D. (*ep.* 10.104), gives reason for this.

legatarius fiduciarius, and pp. 611-613 for the SCa Rubrianum (of 103 A.D.), Dasumianum, and Iuncianum (of 127 A.D.). The first two provided for the case a *fiduciarius*, who was *in mora* or who failed to appear for the praetor (in order to manumit), was respectively liable and not liable.

Valerius, domine, Paulinus excepto Paulino ius Latinorum suorum mihi reliquit. ex quibus rogo tribus interim ius Quiritium des; vereor enim, ne sit immodicum pro omnibus pariter invocare indulgentiam tuam, qua debeo tanto modestius uti, quanto pleniorem experior. sunt autem pro quibus peto: C. Valerius Astraeus, C. Valerius Dionysius, C. Valerius Aper.

Sir, Valerius Paulinus has left me the right of patronage over his (Junian) Latins, with the exception of Paulinus. I ask you to grant at this moment to three of them the Roman citizenship. As it is, I fear it would be too unreasonable to ask you the same favour for all of them, as I should use your indulgence with more modesty, the more you grant it to me. The persons for whom I make the request are G. Valerius Astraeus, G. Valerius Dionysius, and G. Valerius Aper.

The letter is about the Junian Latins of G. Valerius Paulinus, who was an ex-consul and had died in 112 A.D. The other Paulinus is supposed to have been his son ([115]). The answer of Trajan was to grant indeed the citizenship ([116]).

However, the difficulty in this text is far less than those of Gai. 2.195, as it leaves open the possibility that Pliny was a heir. HARDY translates *excepto ... reliquit* with: "to the

(115) For Valerius Paulinus: R. HANSLIK, v. *Valerius Paulinus*, nr. 290: RE 8a (1955) c. 175. No son is known of him, nor other descendants.

(116) Plin. *ep.* 10.105: *Traianus Plinio suo. Cum honestissime iis qui apud fidem tuam a Valerio Paulino depositi sunt consultum velis mature per me, iis interim quibus nunc petisti dedisse me ius Quiritium referri in commentarios meos iussi, idem facturus in ceteris pro quibus petieris.* HARDY (note 117) p. 221 thinks *apud fidem tuam depositi sunt* refers to a purpose on the part of Valerius Paulinus that Pliny should procure the *ius Quiritium* for these freedmen. A similar opinion with TRISOGLIO (see note 119 and p. 290). SHERWIN-WHITE, however, is of the opinion that the cited words do not indicate a *fideicommissum*, as HARDY according to him seemed to think. Trajan could not gather that from Pliny's letter. The reference *in fidem* is simply to the patronal relationship (SHERWIN-WHITE (note 118) p. 715).

exclusion of his son Paulinus, has made me by his will patron of his Latin freedmen", as according to him "*excepto* is used in an unusual sense, and must mean 'excluded from the will'." He rejects the emendation "*excepto* (*Paulino*) *uno*" as suggested by ALDUS, as Paulinus could not have been one of the freedmen (117). Likewise assuming the textual tradition to be right, SHERWIN-WHITE suggests that Pliny must have been one of the heirs, because patronal rights could not be bequeathed, and because there is written *mihi reliquit*. As *excepto Paulino* indicates the exclusion of the other heir, Pliny must have had those rights *per praeceptionem*. Only in this way a testator could favour one heir over the other. SHERWIN-WHITE, who supposes too that Paulinus was a son of the testator, therefore does not agree with HARDY who thought the son completely disinherited (118). Other commentators or translators presume an exclusion of Paulinus too (119). VANGEROW, as later CANTARELLI, simply assumes a capacity to dispose of the possessions of Junian Latins still living, by means of a legacy *per vindicationem* (120). STEINWENTER thought a legacy *per vindicationem* of

(117) E.G. HARDY, *Pliny's Correspondence with Trajan*, London 1889, p. 220. See note 129 too.

(118) A.N. SHERWIN-WHITE, *The Letters of Pliny*, Oxford 1966, p. 714.

(119) TRISOGLIO suggests that the exclusion of the son of the patronage may have been done in order to facilitate the acquisition by them of Roman citizenship. Pliny, as a good acquaintance of the princeps, was in a better position than the unknown son (*Opere di Plinio Cecilio Secondo*, a cura di Francesco TRISOGLIO, Torino 1973, ad 10.104: "L'esclusione del figlio dall'eredità è limitata ai liberti di diritto romano"). I wonder whether the exclusion really was necessary or favourable, to attain that goal. Pliny could have asked it as a favour anyway. Besides, the testator had been consul and thus was not unknown; presumably his son neither. L. AMIRANTE, *In tema di acquisto del legato "per vindicationem"*: IVRA 3 (1952) p. 252 does not elaborate on this point. For the translations: *Plinius der Jüngere, Briefe*, ed. H. KASTEN, München 1976, p. 649; *Pline le Jeune, Tome IV, Lettres Livre X*, texte établi et traduit par M. DURRY, Paris 1959, p. 77; *Pliny, Letters*, with an English transl. by W. MELMOTH, vol. 2, Cambridge Mass./London 1958, p. 415; *Pliny, Letters*, with an English transl. by B. RADICE, vol. 2, Cambridge Mass./London 1969, p. 297; TRISOGLIO (v. *supra*).

(120) VANGEROW (note 5) p. 135; CANTARELLI (note 6) p. 76.

the *ius patronatus* being the case here (see note 103). About this we can be brief. There was nothing quiritary in that *ius* that made it possible to bequeath it *per vindicationem*, and moreover it was tied to the person of the heir or to the *liberi* ex SCo Largiano. The Latins themselves can be excluded of the bequest too, for the reason given by ROMANO that the *ius* was left, not the Latins (see note 107).

26. — In order to analyse the letter it will be convenient to take stock of all the possible juridical qualifications of both Paulinus and Pliny, and then examine the possible combinations. For the moment I assume Pliny was heir, and Paulinus was not one of the Latins (see note 129).

Paulinus may have been 1) *liber* and heir, 2) an extraneous heir, 3) a *liber non nominatim* disinherited, and 4) a *liber nominatim* disinherited. In the first instance Pliny, even if heir, would be excluded by virtue of the SC Largianum. In the second case he as heir and Paulinus as co-heir would have to divide the claimable estates, and Paulinus would not be excluded. In the third instance, if Paulinus had a right to the Latins — which is suggested by *excepto* — he will have derived it from the SC Largianum. But not being a heir, he could not have been under any obligation to transfer it or its proceeds to Pliny, nor could the testator have robbed him of this right. So here too Pliny cannot have had a right at the cost of Paulinus. But in the fourth case Pliny indeed would get all, if sole heir. If there was another heir, it would depend on his or her qualifications whether there would be another *liber* and heir (the first case, with Paulinus substituted), or an extraneous heir (the second case, again with a substitution). As there is no suggestion at all in the letter of a third person, I will leave this possibility aside, having it mentioned for the sake of completeness. So in situation four Pliny would get the *ius patronatus* entirely, and Paulinus would be excluded. That will have been the basis of HARDY's explanation.

But could it have been possible that in one of the other cases Pliny had a bequest too, or if such a bequest alone was possible,

that he had a mere bequest? The first is the suggestion of SHERWIN-WHITE, who presumes a prelegacy to Pliny as heir, Paulinus remaining heir too. This is impossible. A *praeceptio* could only concern things that had been quiritary property of the testator or in his *bona*; but we saw before that the patronal claims could not be considered as such. By virtue of the SC Neronianum such a *praeceptio*, if not converted anyway, could effectively be claimed as a legacy *per damnationem* ([121]). I do not think it probable that an ex-consul like Valerius Paulinus would have made a disposition which could only be claimed with the help of that SC. This goes too for the case that Pliny might have been a mere legatee *per praeceptionem*. This legacy is in itself impossible. Both Sabinians and Proculians agreed that a legacy *per praeceptionem* was but possible with a heir. To the Sabinians such a legacy was invalid if made to an extraneous, while the Proculians thought it claimable as a *per vindicationem* ([122]). Furthermore a legacy *per vindicationem* (STEINWENTER's solution) cannot have been the case because of the lack of quiritary property. Thus there remain three qualifications for Pliny: extraneous heir, extraneous heir with a legacy *per damnationem* or a *fideicommissum* in his favour, and mere legatee *per damnationem* or *fideicommissarius*. In the two latter cases it has to be examined, however, what could be bequeathed if not the actual *ius patronatus*. We can think of an obligation imposed on the heir to turn over all proceeds coming forth from the *patronatus*, to Pliny, as soon as they were claimable.

(121) Gai. 2.221-223; KASER (note 52) p. 746. See for a detailed examination and exposition, with indication of potential glosses: J.-F. LEUBA, *Origine et nature du legs per praeceptionem*, Lausanne 1962, pp. 52-53, 89-93. If the SC Neronianum only applied when someone had made a legacy *per vindicationem* while not owning the legated object, then of course there would be no remedy and the legacy would be void as we saw that one did not own the patronal rights (see p. 278). I will leave aside here the question whether the SC Neronianum converted deficient legacies into valid ones, or just made them claimable by suitable actions as has been suggested by NUYENS.

(122) LEUBA (note 121) pp. 57 ff., 76; FALCHI (note 96) pp. 135-136.

Whether this is possible depends on our interpretation of the phrases *excepto Paulino*, *reliquit* and *ius*, and of the relation between the two Paulinuses. *Excepto Paulino* does not necessarily indicate an disinheritance ([123]). It just can mean that Paulinus had been left out with regard to the patronal rights only, and this should have been done then in other ways. If *ius* means *ius patronatus* (what is obvious to assume), so that Pliny was now *patronus*, then indeed Paulinus should have been disinherited and Pliny appointed only heir. Otherwise the *ius patronatus* could not be transferred. But if *ius* means here: any right to claim the estates, for example indirectly, then Paulinus as heir might have been left out by a legacy or *fideicommissum*, being under the obligation to turn over whatever he could claim. In any case *ius Latinorum suorum* does not mean: the ownership of his Latins, as this was impossible (see nr. 22). With regard to *reliquit* an argumentation similar to that for *excepto* can be given. It could mean that Pliny had been instituted as heir, though maybe *reliquit mihi hereditatem* or *reliquit me heredem* might rather have been expected. But generally it means that someone left something, be it as legacy or *fideicommissum* ([124]).

To solve this we have to analyse why Pliny expresses himself in the way he does, viz. apparently with a pleonasm: that Paulinus had been excluded, and that he had got the *ius*. Pliny asked the emperor for grants of citizenship. Trajan had established that in case a Junian Latin got the Roman citizenship in this way, while his *patronus* did not know or did not want it, the Junian Latin would become Roman citizen indeed and enjoy all his rights by this, but that he would die as a Junian Latin. That made his estate go to his manumitter as before.

(123) HEUMANN-SECKEL (note 43) p. 185: *excipere*: ... 7) von einer Regel, einer Bestimmung eine Ausnahme machen, festsetzen. *Oxford Latin Dictionary* (note 66) p. 635: 3) to except, set aside, exclude b) (in abl. abs.) with the exception of.

(124) HEUMANN-SECKEL (note 43) pp. 503-504, say that *relinquere* in the sense of "zurücklassen" could mean "nach dem Tode zurücklassen, hinterlassen", and in a more strict sense "jemandem etwas durch letzten Willen hinterlassen, vermachen".

And though the new Roman citizen could make a testament, he was obliged to institute as first and sole heir his manumitter. By this constitution Trajan safeguarded the interests of the *patroni* in the return of the whole estate (see note 94). We do not know when Trajan constituted this. He reigned from 98 to 117, and Pliny's letter probably dates from 112. So it might well already have been so. But even if the constitution had not yet been passed, it is not singular to presume the same motive here, particularly as constitutions and laws do not come out of the blue. If not for the constitution, then out of consideration for Trajan's position Pliny may have said what he said; and maybe the emperor already cared to know in such cases. In *ep.* 10.5 Pliny refers to the wish of the *patrona*, when he asks for the citizenship for her slaves, like HARDY observes (see note 117).

What Pliny does say in the letter is, that the person one would expect to be the *patronus* now after Valerius Paulinus' death (viz. the mentioned Paulinus, maybe a son), is not the *patronus* and consequently does not have to know or approve; that the person who has to know and to approve, i.e. the *patronus*, is no one else than him; and that it is the *ius patronatus* that forms the basis of this. This would be in accordance with the prescription of Trajan's constitution and by that provide the Junian Latins with an unimpaired Roman citizenship. In any case it would prevent Trajan hurting somebody else's interests.

Well, only if Paulinus was the testator's son one could expect him to be heir and thus *patronus*, particularly in view of the preference granted to *liberi non nominatim exheredati* by the SC Largianum. Then *excepto* meant to say that Paulinus was excluded and could not be hurt by the grant. But if a son was not the *patronus*, who else was? This is indicated by Pliny's *reliquit*. As he mentions only himself, there cannot have been another claimant for the *ius* and the future estates. So it is not a pleonasm that Pliny uses *excepto* and *reliquit*.

But we can draw more conclusions. Apparently Paulinus was not the *patronus* one would expect. As Pliny says that the

ius was left to him, we have to rule out the possibility of bequests to Pliny. Otherwise the *ius* would have been still with Paulinus and he would still be the *patronus* whose interests would be hurted by the grants, and it would not have been necessary for Pliny to say that he was the interested party now. Though *excepto* is quite an understatement for a disinheritance, we have to assume, like HARDY, it to be meaning that here. Consequently Pliny must have been only heir. But what HARDY does not say is that the disinheritance must have been on good grounds, or that Paulinus must have been recompensated with large legacies, or that he had acquiesced for some reason. Otherwise he could have filed a *querela inofficiosi testamenti* and have rescinded the testament ([125]). Maybe for this reason did SHERWIN-WHITE opt, contrary to HARDY, for an institution of both Paulinus and Pliny as heir, with a *praeceptio* for the latter.

We may conclude that the most probable situation, underlying the letter, was that the son of Valerius Paulinus had been disinherited while Pliny was instituted as sole heir. A *querela inofficiosi testamenti* had apparently not taken place, which can point to acquiescence on the part of Paulinus, or to a real bad behaviour on his side, or to sufficient recompensations for him. By being heir Pliny had become the *patronus* and indeed had got the *ius patronatus*.

A last point is why Pliny asks for the grants. I do not mean why he wanted to make these Junian Latins Roman citizens. The motive for this might have been that he wanted to show the same benevolence to the freedmen of his friend Paulinus, as the latter had shown towards his and Pliny's slaves. Pliny mentions his kindness in one of his letters (*ep.* 5.19). At the same time he delivered them from a status to which the taint of slavery still clinged ([126]). But the question is, why did Pliny

(125) KASER (note 52) p. 712 about the *querela*. I mentioned this restriction in SIRKS (note 4) p. 253 note 15.

(126) In Tac. *ann.* 13.27: *velut vinclo servitutis attineri* (if Tacitus has not the *deditícii* (too) in mind). Further the characterizations by Salvian (note 30) and Justinian (note 73). And not without truth: what

not iterate himself? To this the answer can be simple: as said before all quiritary ownership had ended by the manumission, and at the death of the former quiritary owner this quality, necessary for the iteration, ended also. So there was nothing that could go over to a heir. TRISOGLIO has suggested that the testator had instituted Pliny as heir, as he wanted the Latins to become Roman citizens, hoping that a plea by Pliny for this would find (more) success than one by his son who was not so known (see note 119). This is very unlikely. Paulinus had been consul and thus must have been well known to the emperor, maybe even on speaking if not good terms. In any case there is no indication that there was enmity between these men. Would Trajan have refused the son, what he probably would not have refused the father? But even then he could still have asked Pliny to intervene for his Junian Latins, without disinheriting his son. We have to grant TRISOGLIO that in this case we have to suppose that his son would not object to Pliny's request. But even then the Latins would become Roman citizens. A definite argument against his opinion is, however, the question why Valerius Paulinus did not iterate himself, viz. *testamento*. It has to be conceded that we do not know whether he himself had manumitted them, and whether he was the former quiritary owner. Yet, seen their names, it is very probably that he had manumitted them.

By the grant the Junian Latins became Roman citizen freedmen. They would have become the *liberti* of their former quiritary owner (see nr. 11). Maybe this was Valerius Paulinus the testator. Pliny's claim to their estate decreased by this to the amount the patron of Roman citizen freedmen was entitled to.

27. — In the foregoing we saw, with regard to the effects of informal manumission and iteration, that some conclusions were possible. These conclusions were the results of a some-

was someone in the eyes of Romans, when he could not make a testament, and whose estate would fall to his manumitter *iure quodammodo peculii*?

times rather dogmatical approach to the problems, inherent to the subject. It is not said that the Romans themselves have always reasoned in that way to such an extent: we know they were very capable of dealing with dogmatics in a rather undogmatical way, if necessary. But, on the other hand, in the case of Junian Latinity dogmatics must have played a not inconsiderable part (vide, e.g., Gai. 3.55-56), which justifies in any case some dogmatical approach. Moreover, in view of the lack of sources, such an approach to a subject like this is about the only one to produce results, sufficiently palpable.

I resume briefly the observations made in this article. An informal manumission ended all ownership, whether quiritary or *in bonis* (bonitary). It gave, after the lex Junia, to those thus freed (for whom we should not use the term *in libertate morantes*), the status of Junian Latinity. This was modelled on the status of citizens of Latin colonies. As the lex Junia contained provisions with regard to the *ius commercii* of the Junian Latins, this must have been one of the juridical consequences of that modified status of coloniary Latinity, even though the Junian Latins were not citizens of a Latin colony. Moreover, it is not impossible that they had an *origo*. The manumission did not establish a full civil law patronage. For that a formal manumission was needed. This, the iteration, therefore had to be done by the former quiritary owner by a formal mode of manumission, and was done as if the Junian Latin was still *in bonis* (though he was of course not any more). In some respects the first patronage was continued anyway: with regard to the *munera*, the *origo*, the tutelage over the children of the patron, probably the name, and the patronal claim to the estate, the manumitter had precedence over the iterant.

In two texts it seems as if a Junian Latin or the patronage over him, or the claim to his estate, could be object of a bequest. In Gai. 2.195 the text itself is, literally, unsolvable with the knowledge we have at the present day of Roman law. A suggestion might perhaps be that here was meant a legacy *per vindicationem* of a slave with *peculium*, under the condition to free this slave with *peculium* informally. In Plin. *ep.* 10.104 the

situation must have been that the son of the testator was disinherited *nominatim*, if a son, and Pliny instituted as sole heir; while the disinheritance must have been well-founded, or the disinherited have acquiesced, or have received enough compensations, as otherwise a *querela inofficiosi testamenti* might have been possible ([127]) ([128]) ([129]).

(127) I wish to express my thanks to Prof. H. ANKUM for a discussion over an earlier draft.

(128) It was not impossible that someone was *municeps* of two towns. He would make any freedman of him *municeps* of these two towns too (Ulp. 2 *ed.* D. 50.1.27.pr.). So the thought, that a Junian Latin by iteration would become *municeps* in both the town of his manumitter, as in that of his iterant (if another person), is not impossible in itself.

(129) MEYER (note 84) p. 90 says that since ca. 100 B.C. the *cognomen* of freed persons usually was the name, these persons had had before their manumission. It was forbidden for freedmen to use the old Roman *cognomina*. So they had to use mainly Greek or other names (MOMMSEN (note 37) pp. 425-426). For these two reasons it is very unlikely that the excluded Paulinus in Plin. *ep.* 10.104 was a freedman, whether a Roman citizen or a Junian Latin, of the ex-consul C. Valerius Paulinus.