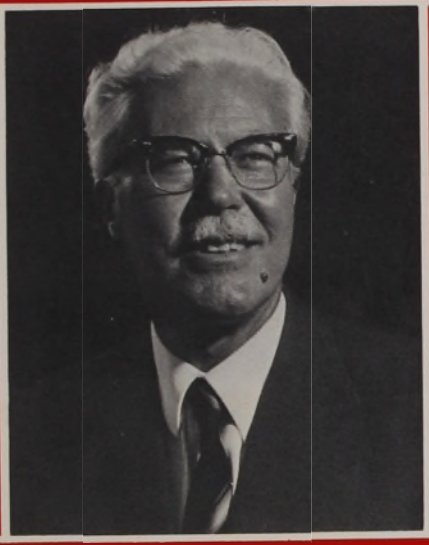
Huldigingsbundel



PAUL VAN WARMELO

Paul van Warmelo se aktiewe betrokkenheid by die regswetenskap strek oor 'n tydperk van bykans vier dekades. In hierdie periode het hy 'n belangrike invloed uitgeoefen, nie alleen op sy studente nie, maar ook op sy vakgenote en, les bes, op die regspraktyk.

Sy studente sal hom altyd onthou vir sy besondere vermoë om die ingewikkeldhede van die Romeinse reg en die regsgeskiedenis helder en duidelik oor te dra. By sy vakgenote dwing hy respek af met sy ongeëwenaarde werkywer wat weerspieël word in sy groot aantal publikasies. Sy invloed op die regspraktyk is hoofsaaklik geleë in die toeganklikmaking van vele Romeins-Hollandse regsbronne — 'n tydrowende en ondankbare taak wat die ontsyfering, vertaling, annotering en indeksering van die manuskripte behels.

Met hierdie bundel wat op sy sewentigste verjaarsdag op 19 November 1984 aan Paul van Warmelo oorhandig word, huldig die Universiteit van Pretoria en die Universiteit van Suid-Afrika hom vir sy bydrae tot die regswetenskap.

For almost four decades, Paul van Warmelo has been actively involved in legal science. During this period he has greatly influenced not only his students, but also his colleagues and, last but not least, legal practice.

His students will always remember him for his outstanding ability to convey the intricacies of Roman law and legal history in a clear and lucid manner. He earns the respect of his colleagues with his unsurpassed diligence as reflected in his long list of publications. His influence in legal practice may primarily be ascribed to the fact that he has rendered many Roman-Dutch sources accessible — a time-consuming and thankless task comprising the deciphering, translation, annotation and indexing of old manuscripts.

With this collection of essays, presented to Paul van Warmelo on the occasion of his seventieth birthday on 19 November 1984, the University of Pretoria and the University of South Africa honour his contribution to legal science.

§. 29.

na goede onderrigting afstand &c. Cessare beneficia ordinis & divisionis, si fidejussores illis renunciaverint, certum est. Quod & ap. Noseboom Keuren van Amsterdam Cap. 49. art. 6. Statutum est, addito hoc effectu, ut si ambobus his beneficiis renunciaverint, fidejussorum unus in solidum & ante debitorem principalem & ante confidejussorem conveniri & excuti possit. Ita tamen, quod additur in seq. art. 7. ut hac electione unius fidejussoris, si forte ejus bona non sufficiant creditori, non amittat creditor facultatem id quod ex credito superest, pro arbitrio suo vel a debitore principali vel a confidejussore exigendi; cujus juris haec ratio est in illo principio, quod ponitur in art. 6. renunciatione utriusque tamen beneficii id effici, ut singuli fidejussores loco debitoris principalis esse incipiant. Si fidejussor uni beneficio ordinis renunciaverit, hic pariter pro reo principali habetur, & primo loco in solidum potest conveniri art. 10. Quin imo si creditor, eo ~~quoque~~ casu, quo fidejussor beneficio ordinis renunciavit, primo egerit adversus debitorem principalem, eumque in judicio vicerit, & ad ipsam executionem pervenerit, causam autem probabilem habeat, cur executionem minus forte commodam, facere nolit, adhuc ipsi licebit fidejussorem aggredi & ab eo integrum debitum petere, uti judicatum est a Curia Hollandica 20 Dec. 1580. ap. Neostad. Cur. Holl. dec. 6. a Groenew. in not. cit. & a Voetio ad t. D. de fidej. n. 20.

Illud quaeritur in specie, quomodo ista renunciatio beneficiis fidejussorum fieri debeat vel possit. Certum est renunciationem specialem valere, & esse tutissimam & ideo a Notariis plerumque adhiberi, qui majoris cautela ergo addere solent iis instrumentis, a quo tamen fidejussores, se de vi & effectu horum beneficiorum certiores factos esse, qua professione etiam satisfit illi Statuti Amstelodamensis requisito art. 10. ut renunciatio fiat met kennisse ende verstand, s. ut Grotius hic loquitur na goede onderrichtinge, qualis expositio sane in personis simplicioribus vel juris imperitis necessaria est. Th. 502

Sed

Grotii Jus Holland. Lib. 3. Part. 3. § 29.

Sed quaeritur an & qualis renunciatio facta omnibus beneficiis fidejussorum non sufficiat. Si Voetium ad t. D. de fidej. n. 16. audias, non valebit haec renunciatio, quod per literam probare annititur. Sed non recte; agitur enim hic de beneficiis Juris, quae certa & finita sunt & generaliter renunciantis animo obversari potuerunt; alia res est in defensionibus, quae ex impedimentis facti nascuntur, quae cum sint infinita et prudentissimos fallere possunt, & ideo in renunciationibus specialiter sunt enarranda; quo pertinet praecipua lex a Voetio objecta L. 4. § 4. D. Si quis caut. jud. sist. Non dubitarem itaque fidejussorem condemnare, si, juris peritus, simpliciter omnibus beneficiis renunciasset, vel forte non peritus juris insuper declarasset, se beneficiorum fidejussoribus competentium certiorem fuisse factum. Alia res est in muliere Senatusconsulto Vellejano renuncianti, in qua cum juris ignorantia praesumatur, speciali explicatione Senatusconsulti Vellejani opus est; adeoque & renunciatione. Praeterquam quod in illis juris nostri locis, ex quibus (et peregrinum in illis [?]) in foro receptum est, ut mulier huic beneficio renunciare possit expressa mentio fiat renunciationis Senatusconsulti Vellejani aut exceptionis ex eo Senatusconsulto L. ult. § pen. D. ad Sc. Vellej. auth. Matri & Aviae C. quand. mul. tut. off. Nov. 118. cap. 5.

…ruimen De fidejussor, qui beneficium ordinis aut divisionis per modum exceptionis non allegavit, & ideo vel ante debitorem principalem, vel, praetermisso confidejussore, in solidum condemnatus est, his beneficiis renunciasse videtur & sibi nocuit. arg. ll. citt. § 4. J. de fidej. L. 26. C. eod.

…ic haar verbinden een voor al &c. in Consuett. Zwoll. art. 20. Th. 503. l.c. Statutum est, ut, si plures se obligaverint elkeen voor al ende als principaal creditor habeat electionem ejus, quem in solidum convenire velit; cujus Statuti verba tam sunt generalia, ut et ad fidejussores referenda sint ita ut hi eo modo beneficiis ordinis & divisionis renunciasse videantur. Plane similia sunt quae habentur in Consuett. Haganis citt. in de Rechtsgeleerdh. Part. 2 cas. 66. p. 157. idem de fidejussoribus diversi. causae in de Costumen van Middelb. rubr. E. art. 8. de instrumentis Scabinalibus & in art. 10. de chirographis privatis ut si praeter debitorem principalem fidejussores obligati

sint

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UNISA 1984

Op 7 September 1984 is die graad
LLD (*honoris causa*) deur die
Universiteit van Pretoria
aan Paul van Warmelo toegeken

Huldigingsbundel
PAUL VAN WARMELO

Aangebied aan professor Paul van Warmelo by geleentheid van sy sewentigste verjaardag op 19 November 1984

Onder redaksie van

JOHANN VAN DER WESTHUIZEN (VOORSITTER)
Ph J THOMAS
Universiteit van Pretoria

SUSAN SCOTT
DEREK VAN DER MERWE
Universiteit van Suid-Afrika

J Th DE SMIDT
R FEENSTRA
Rijksuniversiteit te Leiden

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Inhoud

Voorwoord

Die publikasie van 'n huldigingsbundel ter ere van Paul van Warmelo het sekerlik geen verduideliking nodig nie.

Die gedagte om so 'n bundel saam te stel en by geleentheid van die sewentigste herdenking van sy geboortedag aan te bied, het reeds in 1981 ongeveer gelyktydig by sy voormalige studente en kollegas aan die Universiteit van Pretoria (waar hy byna vier dekades lank as student, dosent, navorser, departementshoof en dekaan werksaam was) en aan die Universiteit van Suid-Afrika ontstaan. Dié twee universiteite het die bundel dus gesamentlik aangepak. Professore R Feenstra en J Th de Smidt van Leiden is genooi om ook op die redaksie te dien.

Die Publikasiekomitee van die Universiteit van Suid-Afrika het aangebied om die bundel uit te gee en die grootste deel van die onkoste te dra. Van die kant van die Universiteit van Pretoria is 'n aansienlike finansiële bydrae gemaak. Beide hierdie universiteite word hartlik bedank.

Persone wat genooi is om bydraes vir die bundel te skryf, sluit veral Paul van Warmelo se oud-studente en voormalige kollegas in, asook ander bekende Suid-Afrikaanse regsgeleerdes wat sy belangstelling en ywer ten opsigte van die Romeinse reg en regsgeskiedenis deel en reeds veel op hierdie gebiede tot stand gebring het. Ook het 'n aantal beroemde Europese Romaniste en regshistorici met groot entoesiasme ingewillig om Paul van Warmelo as 'n persoonlike vriend en 'n geëerde kollega te huldig. Die redaksie bedank al hierdie persone vir hulle besondere goedgesindheid en flinke samewerking.

In die lig van die feit dat die bydraes uit verskeie lande afkomstig is en in verskillende tale geskryf is, is besluit om elke skrywer se styl en verwysingsmetode so ver moontlik onaangeraak te laat. Benewens die feit dat dit haas onmoontlik sou wees om soveel verskillende style en aanbiedingswyses te vereenvormig, was dit ook sommige outeurs se uitdruklike wens dat hulle eie skryfstyl behoue moes bly. Ons glo dat die individualiteit van elke bydrae ook die waarde van die bundel as 'n

persoonlike huldeblyk verhoog. Eenvormigheid is dus slegs ten aansien van die uiterlike voorkoms van artikels nagestreef. Die taalgebruik, styl en verwysingsmetode van elke bydrae is die outeur se eie verantwoordelikheid.

Die redaksie bedank graag almal wat aan hierdie bundel meegewerk of die publikasie daarvan moontlik gemaak het. Die rektor van die Universiteit van Pretoria, professor Danie Joubert, en die rektor van die Universiteit van Suid-Afrika, professor Theo van Wijk, asook meneer Eugene van Heerden, direkteur van die Departement Uitgewersdienste van die Universiteit van Suid-Afrika, verdien besondere vermelding.

Vir ons as studente, kollegas en vriende van Paul van Warmelo was dit 'n voorreg om hierdie bundel te kon saamstel. Mag dit hom waardig wees.

Pretoria
November 1984

Preface

The publication of a volume of legal essays in honour of Paul van Warmelo needs no explanation.

In 1981, former students and colleagues of Paul van Warmelo at the University of Pretoria (where he worked for nearly forty years as student, teacher, researcher, head of department and dean) and at the University of South Africa, decided to compile a volume of legal essays to be presented to him on the occasion of his seventieth birthday. These two universities, therefore, joined forces on the project. Professors R Feenstra and J Th de Smidt from Leyden were invited to serve on the editorial committee.

The Publication Committee of the University of South Africa undertook to publish the volume and to bear the major share of the financial burden. The University of Pretoria also made a substantial contribution towards the costs. To both these institutions, our sincere thanks.

Persons who were invited to contribute essays for this volume, include, primarily, past students and former colleagues of Paul van Warmelo, as well as other well-known South African jurists who share his interest in, and enthusiasm for, Roman law and legal history, and who have accomplished much in these fields. A number of renowned European Romanists and legal historians enthusiastically acceded to our request to honour Paul van Warmelo as personal friend and esteemed colleague by contributing essays. The editorial committee wishes to thank them for their goodwill and close co-operation.

In view of the fact that the contributors come from many countries and wrote in different languages, it was decided to leave unaltered, as far as possible, each writer's style and method of reference. Apart from the near impossibility of achieving uniformity amongst so many differing styles and approaches, some writers particularly requested that their own style be retained. We believe that the individuality of each contribution will enhance the value of this collection of essays

as a personal tribute. Therefore, we sought uniformity only as far as the external appearance of the essays is concerned. Each contributor is responsible for his own language usage, style and method of reference.

The editorial committee wishes to thank everybody who made this volume of essays, and the publication thereof, possible. The Principal of the University Pretoria, Professor Danie Joubert, and the Principal of the University of South Africa, Professor Theo van Wijk, as well as Mr. Eugene van Heerden, Director of the Department of Publishing Services at the University of South Africa, deserve special mention.

As students, colleagues and friends of Paul van Warmelo, we deem it a privilege to have been able to compile this volume of legal essays. May it be worthy of the man.

Pretoria
November 1984

Curriculum vitae

Paul van Warmelo is op 19 November 1914 in Pretoria gebore. Na die voltooiing van sy skoolopleiding in Pretoria, studeer hy aan die Universiteit van Pretoria, waar hy die grade *BA* (in 1935) en *LLB* (in 1937) behaal. In 1940 behaal hy die graad *Doctor Iuris* aan die Rijksuniversiteit te Leiden, met 'n proefskrif getitel *Vrywaring teen Gebreke by Koop in Suid-Afrika*.

Op 1 Februarie 1946 aanvaar hy 'n pos as senior lektor en ook hoof van die Departement Romeinse Reg en Regsleer aan die Universiteit van Pretoria. Hy is reeds vroeër in hierdie pos aangestel, maar kon as gevolg van die oorlog nie onmiddellik met sy werksaamhede begin nie. In 1948 word hy bevorder tot professor. Tot 1973 bly hy die hoof van hierdie departement. Van 1964 tot 1972 is hy ook dekaan van die Fakulteit Regsgeleerdheid aan die Universiteit van Pretoria. Gedurende hierdie periode dien hy ook op die Raad vir die Erkenning van Regseksamens, die Raad vir die Toelating van Advokate, die bestuur van die Vereniging Hugo de Groot, die Regshersieningskommissie en die Biblioteekkomitee van die Universiteit van Pretoria, waarvan hy van 1960 tot 1973 die voorsitter is.

In 1974 word hy professor in die Departement Privaatreg aan die Universiteit van Suid-Afrika. Na sy uittrede in 1979, is hy tot 1983 in 'n tydelike hoedanigheid in die Fakulteit Regsgeleerdheid werksaam en sedert 1 Januarie 1984 is hy professor en hoof van die Departement Privaatreg aan die Universiteit van die Noorde. Van 1974 tot 1978 tree hy ook op as deeltydse dosent in die Regskool van die Universiteit van die Witwatersrand.

Paul van Warmelo het dikwels aan universiteite en institute in die buiteland navorsing gedoen en ook lesings en referate in onder meer Italië, Frankryk, Duitsland, Nederland, België en Brittanje gelewer. Benewens die liggame wat hierbo vermeld is, was hy ook lid van verskeie akademiese en kulturele organisasies, waaronder die *Société de l'histoire de droit* (Parys), die *Société Jean*

Bodin (Brussels), die *Vereinigung deutscher Rechtshistoriker* (Münster), die *Vereeniging tot uitgaaf der bronnen van het oud-vaderlandsche recht* (Amsterdam), die Suid-Afrikaanse Akademie vir Wetenskap en Kuns, die Duits-Suid-Afrikaanse Kulturele Komitee, die Komitee vir Kulturele Ooreenkomste tussen Suid-Afrika, Nederland en België en die loodskomitee belas met die stigting van die Suider-Afrikaanse Vereniging van Regshistorici.

As navorser was hy besonder aktief. Afgesien van die groot hoeveelheid publikasies wat hy die lig laat sien het, was hy ook die promotor van talle doktorale studente. In 1982 is hy aangestel as honorêre professor in die Fakulteit Regsgeleerdheid aan die Universiteit van die Noorde. Eredoktorsgrade in die regsgeleerdheid is reeds deur die Universiteit van Kaapstad (in 1981) en die Universiteit van Pretoria (in 1984) aan hom toegeken.

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Die Mens Paul van Warmelo

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Die Mens Paul van Warmelo

FJ DU T SPIES

Wat weet ek van jou? Wat weet jy van my? Afgesien van die geldigheid of ongeldigheid van wat hierdie twee vrae impliseer, moet ek erken dat ek hom na al die jare nog nie ken nie.

Ek het Paul van Warmelo in Maart 1938 in Leiden ontmoet. Hy het die vorige maand in Nederland aangekom, ek 'n maand later. En soos dit nou maar gaan, was hy vir my en ek vir hom maar een van die Suid-Afrikaanse studente in Nederland. Maar omstandighede sou ons nader na mekaar bring; en die omstandighede was die oorlog. Reeds in 1938 het die trauma begin met gerugte van oorloë en bespiegelings of daar oorlog gaan uitbreek of nie. Hy het later daardie jaar 'n maand of wat in Parys deurgebring en daar 'n besondere liefde vir die Franse kultuur opgedoen. Ek onthou nog hoe ontsteld hy was die middag toe die Duitse oorrompeling van Frankryk bekend geword het.

Die oorlog het ons klompie Suid-Afrikaanse studente in Nederland nader na mekaar gebring. Na die uitbreek daarvan moes elkeen besluit of hy gaan terugkeer terwyl dit nog kon. Sommige het teruggekeer, sommige van hulle op die nippertjie. Onder die wat gebly het was Paul van Warmelo en ek. Teen die middel van 1939 het ons twee, onafhanklik van mekaar en elkeen om sy eie redes, na Den Haag verhuis en daar toevallig in dieselfde straat tereg gekom, die Juliana van Stolberglaan, in huise teenoor mekaar.

Hier was ons feitlik daeliks in mekaar se geselskap. Met die Duitse inval in Nederland, 10 Mei, 1940, toe vliegtuie en afweergeskut ons op ruwe wyse gewek het, het ons deur die vensterrame oor die straat na mekaar gekyk. Ons het daardie middag probeer wegkom maar nie daarin geslaag om die Suid-Afrikaanse ambassade betyds te bereik nie. 'n Paar maande later is ons saam geïnterneer, maar na enkele dae weer saam vrygelaat. Toe die bevel kom dat alle vreemdelinge die kusgebied moes ontruim, het ons albei na Amsterdam verhuis en weer naby mekaar gaan woon. So tussen die studie deur was ons weer dikwels in mekaar se geselskap. Daar het ons die meedoënlose druk van die oorlog op die bevolking aanskou, dit self meegemaak; die ellende en honger sien toeneem, dit self aan die lyf gevoel.

In eindelose gesprekke het ons ons eie tyd probeer na waarde skat, het ons probeer

vooruitsien hoe die oorlog die wêreld en die mensdom gaan verander; ook oor Suid-Afrika, die land wat ons agter gelaat het. Nostalgie was altyd maar vlak onder die oppervlakte. Hy was 'n stadskind, uit Pretoria; ek 'n plaasjapie uit die Vrystaat. Ons het herinneringe met mekaar uitgeruil. So het ons *met* mekaar gepraat, soms by mekaar verby gepraat; in stiltes voortgedink, by mekaar verby gedink; soms elkeen verdiep in 'n boek, elkeen in sy eie gedagtewêreld. Die voortuitsigte, en die gesprekke, was meestal somber.

Maar dit het nie beteken dat ons die lewe van veronregte bannelinge in die buiteland gevoer het nie. Daarvoor was ons te jonk, die lewensdrif te sterk. Daar was ondanks alles baie pret en humor in die lewe wat deur die oorlog ongewone vorms aangeneem het. Teen die einde van die oorlog het hy by sy aanstaande skoonfamilie in Scheveningen gaan woon; ek het by 'n bevriende familie afwisselend in die Vechtstreek en in Gelderland 'n heenkome gevind. So het ons die hongerwinter in Amsterdam ontwyk.

Die vrede en die vrywording het ons dus nie saam belewe nie maar tog per brief voeling met mekaar behou. Onderweg terug na ons land het ons weer saam enkele maande in Londen gewag op vervoer en toe met dieselfde skip na Suid-Afrika teruggekom. Hy het reeds 'n pos aan die Universiteit van Pretoria gehad; ek het enkele maande later ook daar tereg gekom. Ons het huisvriende geword.

Daar was dus genoeg geleentheid om mekaar te leer ken; onder feitlik alle moontlike omstandighede. Wat hom so 'n aangename maat gemaak het, was sy humorsin en sy neiging tot goedige spot en korswil. Hy het fel gelewe, sy emosies soms vlak onder die oppervlakte. Maar by al die oënskynlike vrolikheid was daar in sy wese 'n ondergrond van pessimisme wat hom sy hele lewe bygebly het. Miskien kan die oorsprong daarvan terug gevoer word na die oorlog; miskien is dit maar sy aard, 'n gevoeligheid wat deur die oorlog vererger is. Hy self glo dat die oorlog 'n onuitwisbare merkteken nagelaat het. Soms kan hy baie sinies wees, selfs in so 'n mate dat 'n mens begin twyfel of dit alles eg is. 'n Slagoffer van 'n waandenkbeeld van homself; wie van ons is nie? Ondanks sy ontwyfelbare akademiese prestasies, het hierdie prestasies hom self tog nooit beïndruk nie of bevredig nie. Of gee hy dit maar voor? By dit alles het ek altyd die indruk gehad dat daar 'n terrein is waar selfs sy beste vriende nie toegelaat word nie en waaroor daar nie gepraat word nie. Daarby is die vereensaming wat die klimmende jare meebring; wie van ons ontsnap dit?

Maar om nie op 'n negatiewe noot te eindig nie, wys ek graag op sy buitengewone intelligensie, sy hardwerkendheid – werk het vir hom 'n lewenswyse geword – sy kameraadskap en sy fyn aanvoeling vir musiek en ander vorme van die kuns. Ek onthou een geleentheid toe ons een vroeë lente by Wageningen na die Ryn gekyk het. Die rivier was in vloed. Ons het stil na die kolkende water gekyk. "Dit is mooi", het hy gesê. En dit was vir my asof vir een kort oomblik die geheimenis van die skoonheid deurgebreek het.

Mancipatio by Slaves in Classical Roman Law

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Mancipatio by Slaves in Classical Roman Law*

HANS ANKUM

1. Specialists of Roman social, economic and legal history[1] have underlined the major role played by slaves in Roman commerce. It is important therefore, to know whether slaves had the capacity to acquire civil or praetorian ownership for the *patrimonium* of their masters and for their *peculium*, and whether they could transfer civil or praetorian ownership of things belonging to the *patrimonium* of their masters or to their *peculium*. In this study, dedicated to my friend and colleague Paul van Warmelo, I confine myself to alienations, and more particularly to mancipations, made by slaves.

Alienations were valid only if the slave had acted with the consent of his master (given before or after the act of transfer)[2] or, in cases of transmissions of *res peculiares*, if the slave had received the *libera administratio peculii*.[3] I have already shown[4] that there is unanimity among modern Romanists that, under these circumstances, slaves could alienate things by performing a *traditio*, and that, on the other hand, they could not do so by performing an *in iure cessio*. They could not perform this act, because of their incapacity in legal proceedings.

* Extended version of a paper read in French under the title: "Encore une fois: *mancipatio* par des esclaves en droit romain classique?" during the 34th session of the *Société Internationale "Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité* held in Brussels in September 1980, the central theme of which was "L'esclavage dans le monde antique".

1. Cf. e.g. J. Marquardt, *Das Privatleben der Römer*, I, Leipzig 1886 (R. Darmstadt 1975), p. 150 and p. 160; W. W. Buckland, *The Roman law of slavery*, Cambridge 1908 (R. Cambridge 1970), p. 131; L. Friedländer, *Darstellungen aus der Sittengeschichte Roms*, 10.A besorgt von G. Wissowa, I², Leipzig 1922, p. 130 and p. 162; G. Alföldy, *Römische Sozialgeschichte*, Wiesbaden 1975, p. 121 and F. de Martino, *Storia economica di Roma antica*, Firenze 1980, p. 133 and p. 140.
2. See M. Kaser, *Das Römische Privatrecht* hereafter: *RPR*, I², München 1971, p. 267 A. Claus, *Gewillkürte Stellvertretung im Römischen Privatrecht*, Berlin 1973, pp. 306–315; M. Kaser, "Stellvertretung und 'notwendige Entgeltlichkeit'," in *ZSS* 91 (1974), p. 198 and Ankum, mentioned in note 7, *Acta Juridica* 1976, p. 1.
3. Cf. J. J. Brinkhof, *Een studie over het peculium in het klassieke Romeinse recht*, thesis Nimeguen (Law Faculty), Meppel 1978, pp. 122 sqq. and Ankum, *Acta Juridica* 1976, pp. 1–2.
4. Ankum in *Acta Juridica* 1976, p. 2.

As to the question, whether slaves had the capacity to transmit the ownership of *res mancipi* by means of a *mancipatio*, there is a difference of opinion between modern scholars. Roby, followed by Buckland and Thomas,[5] have argued that they were able to do so. L. Mitteis, followed by Siber, Kaser and Watson,[6] defended the opposite viewpoint. In my article "*Mancipatio* by slaves in classical Roman law?" written in 1978 in honour of Ben Beinart,[7] I showed that the latter view is correct, giving several new arguments to support that view. Shortly after the publication of my article A. Corbino brought out an interesting and profound study, entitled "La legittimazione a *mancipare* per incarico del proprietario",[8] in which he questioned the opinion, that a *mancipatio* could not be effected by someone (whether a slave or a free person) on behalf of another. According to Corbino this theory has not been proved conclusively, and the Roman sources do not force us to accept it. In that study, Corbino was not in a position to consider my arguments. He held the same view in a lecture entitled "Forma librale e volontà negoziale", read in September 1979 at the 33d S.I.D.A.-congress in Palermo, the text of which he has kindly placed at my disposal. In that paper Corbino discussed the interpretation of Cicero, *Ad Atticum* 13.50.2, given by me in my article already referred to. Corbino proposed a different translation and interpretation of that passage.

Corbino has not persuaded me of the correctness of his opinion, that slaves and free persons could transmit the ownership of *res mancipi* for their master, or for another free person. I feel confident that both[9] were not able to do so. As to free persons I refer to my study "Alla ricerca della *repromissio* e della *satisdatio secundum mancipium*", published in 1981.[10] All the texts studied in that essay are readily understood, if one assumes that a *procurator* and a pledge creditor, as all other free persons, were unable to transmit a *res mancipi* by means of a *mancipatio* for someone else. In this paper I shall once again analyse three of the four texts, which led me to the conclusion that slaves did not have the capacity to transmit the property of *res mancipi* by means of *mancipatio* (see nrs. 2–4). I shall also discuss the interpretations of the three texts given by Corbino. As for the fourth text – a passage of the *tabula*

5. H.J. Roby *Roman private law in the times of Cicero and of the Antonines*, vol. I, Cambridge 1902, p. 432, note 1; W.W. Buckland, *The Roman law of slavery* (note 1), p. 159 and "*Mancipatio* by a slave" in *LQR* 34 (1918), pp. 372-379 and J.A.C. Thomas, *Textbook of Roman law*, Amsterdam, New York, Oxford 1976, p. 189.
6. L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* Leipzig 1908, p. 208; H. Siber, *Römisches Recht*, II, Berlin 1928, pp. 412-413; M. Kaser, "Über Verfügungsakte Gewaltunterworfener mit Studien zur Natur der *manumissio vindicta*" in *SDHI* 16 (1959), pp. 59 sqq., *RPR*, I², p. 267 and p. 286 and *ZSS* 91 (1974), p. 198 and A. Watson, *The law of persons in the later Republic*, Oxford 1967, pp. 183–184.
7. Ankum in *Essays in honour of Ben Beinart*, I, Cape Town, etc. 1976 = *Acta Juridica* 1976, (publ. 1978), pp. 1–18.
8. A. Corbino in *IURA* 27 (1976) (publ. 1979), pp. 61–71, quoted hereafter as *IURA* 27 (1976).
9. As to free persons I admit the exception of *tutores* and *curatores* who were *domini loco* and could probably perform a *mancipatio* on behalf of the persons who were *in tutela* and *in curatione*; cf. Kaser, *RPR*, I², p. 266.
10. Ankum in *Atti dell'Accademia Romanistica Costantiniana*, 4° convegno internazionale, Perugia 1981, pp. 741–792.

Baetica[11] – on which Corbino has not expressed himself, I remain convinced, that it gives supplementary support to my view and thus merely refer to what I wrote in my aforementioned paper (which I will henceforth quote as *M.S.* (I)).[12] In nr. 5 I will say a word about Ulp. D.6.1.41.1, invoked by Corbino in favour of his view. In no. 6 I will formulate my conclusion.

2. The first text, from which I inferred that neither a free person nor a slave could transfer the property of a *fundus* by *mancipatio*, is the following passage in a letter, written by Cicero in Tusculum on 23 August 45, B.C. to his friend Atticus:[13]

> Cicero, *Ad Atticum*, 13.50.2.
>
> Vestorius ad me scripsit, ut iuberem mancipio dari servo suo pro mea parte Hetereio cuidam fundum Brinnianum, ut ipse ei Puteolis recte mancipio dare posset. Eum servum, si tibi videbitur, ad me mittes. Opinor enim ad te etiam scripsisse Vestorium.

We know, through two earlier letters of Cicero to Atticus, written in June 45 B.C.,[14] that Cicero had been instituted an heir, together with others, by Brinnius who probably lived in Puteoli, and who had died in June. Vestorius, a rich banker of Puteoli, had written several letters to Cicero concerning the date of the auction at which Brinnius' goods, which did not have much value, had to be sold. The auction had to take place on 13 July. On 23 August, the date of Cicero's letter to Atticus from which the above passage was taken, the auction had taken place. Among Brinnius' goods was the *fundus* which Cicero mentions in our letter. Vestorius, probably in his capacity as *argentarius coactor*, now had the duty to deliver the farm to the buyer, a certain Hetereius. Vestorius has written from Puteoli to Cicero, in Tusculum, about the estate, and Cicero supposes that he had also written about it to Atticus, in Rome. It is clear that Vestorius will be brought into the position that he will be able to convey the *fundus* in Puteoli in due form (*recte*), i.e. by *mancipatio*, to Hetereius. It is also clear that Cicero begs Atticus, if he agrees, to send a slave of Vestorius who is in Rome, to him who is in Tusculum. It is also clear, that the sending of that slave is necessary to give Vestorius the possibility to mancipate the *fundus* to the buyer.

The last English translation of the quoted passage[15] did not translate the word *iuberem* and gave the following translation of the beginning of the passage:

> Vestorius has written to ask me to convey my share in Brinnius' farm to a slave of his for the benefit of a certain Hetereius.

11. See for this text *Fontes Iuris Romani Antejustiniani*, III,[2] ed. V. Arangio Ruiz, Firenze 1969, pp. 296–297 et J. Macqueron, *Contractus Scripturae*, Contrats et quittances dans la pratique romaine, Camerino-Nice 1982, pp. 159–162. See, for my argument that this text lends support to my view that slaves could not perform a *mancipatio: Acta Juridica* 1976, pp. 11–12.
12. *M.S.* (I), pp. 11–12.
13. See *Cicero's letters to Atticus*, ed. by Shackleton Bailey, V, p. 251.
14. See Cicero, *ad Atticum* XIII.12.4 and XIII.14.1. See for references of the sources on which the facts here summarized are based, *M.S.* (I), p. 15.
15. *Cicero's letters to Atticus*, ed. by Shackleton Bailey, V, p. 251.

I tried to avoid this mistake and translated the whole passage as follows:

> Vestorius has written to me to obtain of me that I wish to convey by *mancipatio* my share in the estate of Brinnius to a slave of his for the benefit of a certain Hetereius, so that he himself can convey it to him in Puteoli in the legally prescribed form of the *mancipatio*. If you think that this is right, send that slave to me, for I suppose that Vestorius has written to you too.

From the quoted passage translated in this way I inferred, that Cicero had to perform *himself* (in Tusculum) the *mancipatio* of his share in the Brinnius farm to the slave of Vestorius, and that consequently he could neither give a *iussum* (by letter) to the latter to convey his share to Hetereius, nor give a *iussum* (by letter) to one of his slaves in Rome to mancipate it to Vestorius' slave, who was also in Rome. Both these methods of conveying the share would have been much easier; Cicero would surely have preferred one of them, if they had been possible. I concluded in 1978:[16] "This is ... what can be inferred with certainty from the text: Cicero *himself* had to mancipate; an alienation in the form of *mancipatio* could neither have been performed by a free person in his place (*in casu* Vestorius), nor by one of his slaves."

Corbino has given in his *IURA*-article[17] and in his S.I.D.A.-paper[18] a different interpretation of the text of Cicero, and has criticised in the latter study my translation of the beginning of the text, giving instead this translation:[19]

> Vestorio mi ha scritto affinchè io ordini, tramito un suo schiavo e per la mia parte, che sia mancipato il fondo Brinniano ad un tale Etereio, dimodochè egli possa regolarmente mancipare a lui in Pozzuoli, ...

Corbino[20] adduces three reasons for this translation: 1) The presence of *iuberem* and of the passive form *mancipio dari*, which alludes with certainty to a *mancipatio* not performed but ordered by Cicero. 2) The necessity to consider *servo suo* as an *ablativus instrumenti* and not as a dative, because otherwise in the phrase *ut ... Brinnianum* there would be two datives, which Corbino considers to be impossible. 3) The presence of the words *Hetereio cuidam*, which would have no sense, if the *mancipatio* mentioned in the passage *ut ... Brinnianum* had been done to the slave of Vestorius.

According to Corbino Cicero had to give a written *iussum* for his share to Vestorius to mancipate the *fundus Brinnianus* to Hetereius, and the slave of Vestorius was "il mezzo di trasmissione dell' ordine", so the slave had to bring the written *iussum* to his master, Vestorius.

What should we make of this new translation and the interpretation of our letter, proposed by Corbino?

16. *M.S.* (I), p. 6.
17. *IURA* 27 (1976), pp. 62–69.
18. Corbino, "Forma librale e volontà negoziale", pp. 7–12 of the typescript.
19. Typescript of the paper mentioned in note 18, p. 9.
20. Two of these reasons (1+2) can be found in *IURA* 27 (1976), p. 65; all three have been developed in the paper "Forma librale e volontà negoziale" (1979), pp. 9 and 10 of the typescript.

First of all I would like to suggest that, even if we were to accept his translation and his interpretation, the only necessary conclusion would be, that the banker Vestorius was able to mancipate on behalf of Cicero, but not, that a slave was able to do so. It would be possible to find a reason for a slave not being able to mancipate for his master, which was not equally applicable to a free person, e.g. that a slave could not appear before the *praetor* and the *iudex* to give his *auctoritas* to the buyer.[21] It would even be possible to suppose that there was a special rule, by virtue of which an *argentarius coactor* was able to mancipate a *res mancipi* for the person whose good(s) was (were) sold.[22]

But after long reflection it seems to me, that even if we accept Corbino's criticism of our translation of the passage *ut ... Brinnianum*, our whole interpretation of the text can remain the same.

The three arguments on which Corbino bases his translation and his criticism of the one given by me are of unequal force. Having consulted colleagues who are Latin scholars I have to admit, that the use of the passive *mancipio dari* excludes the possibility that it was Cicero himself who was the subject of the *mancipatio* mentioned at the beginning of our letter. It is understandable, that a Romanist reading in a letter of Cicero in relation to a transfer of ownership the words *iubere ... mancipio dari* is inclined to think immediately of a *iussum* to perform a *mancipatio* which had to be given to someone (viz. Vestorius). However, I have serious doubts whether the word *iubere* really has this technical meaning here. If it were possible for Cicero to send to Vestorius' slave in Rome, a written *iussum* for his master, the easiest way to give this *iussum* would have been to join it to our letter written to Atticus, and to beg the latter to have it given to Vestorius' slave. The impression remains that Cicero himself had to perform the *mancipatio* of his share of the *fundus Brinnianus* to the slave of Vestorius. In my opinion the verb *iubere* has no technical meaning here. Therefore I do not accept Corbino's translation. As I agree that my first translation is not right, I propose the following translation of the beginning of Cicero's letter *Ad Atticum* 13.50.2:

> Vestorius has written to me that I should arrange through his slave the mancipation through him (i.e. Vestorius) of my share in the Brinnian farm to a certain Hetereius, so that he himself can convey it to him in Puteoli in the legally prescribed form of the *mancipatio*, ...

Consequently, Vestorius has written to Cicero, that he (Cicero) should have mancipated him (Vestorius) his share in the *fundus Brinnianus*. That means that he (Cicero) should give him (Vestorius) by means of a slave of his (Vestorius) the opportunity to convey his part of the farm to Hetereius. The method by which Cicero made

21. Cf. *M.S.* (I), p. 13.
22. There were special rules in the field of contractual obligations in so far as the sale made at the auction by the *argentarius coactor* was imputed to the *dominus auctionis*; cf. my study "Quelques problèmes concernant les ventes aux enchères en droit romain classique" in *Studi Scherillo*, I, Milano 1972, pp. 380 sqq.

it possible for Vestorius to do this was not to give him a *iussum* – this would have been possible by a much easier method – but to transfer his share by *mancipatio*[23] to Vestorius' slave. In that way Vestorius received from Cicero and from the other heirs their shares in the *fundus Brinnianus*. After becoming its sole owner he could mancipate it to the buyer Hetereius. In my opinion there never was a *iussum* of Cicero to Vestorius, by virtue of which the latter could perform a *mancipatio* on behalf of someone else.

And what about the possibility of the conveyance of the share of the *fundus* by a slave of Cicero, who was in Rome, to a slave of Vestorius, who was also in Rome, by virtue of a *iussum* given by Cicero? If that had been possible, surely Cicero would have written a letter containing such a *iussum* together with our letter written to Atticus.

The conclusion to which I come after having corrected the beginning of my translation of Cicero, *Ad Atticum*, 13.50.2 therefore remains the same: Cicero *himself* had to mancipate; an alienation in the form of a *mancipatio* could neither be performed by a free person in his place (*in casu*: Vestorius), nor by one of his slaves.

3. The second text which plays a role in the discussion of our problem is § 1 of a long fragment of the 57th book of Julian's *Digesta*, in which he treated of the *actio de auctoritate*,[24] viz. D.21.2.39. In this text Julian has written that a slave *in mancipio dando* could not transmit the property of a slave. This has been shown by Kaser[25] and by myself[26] in studies in which we analysed this § in detail. Corbino does not agree with this view and writes[27] at the end of his interpretation of the text:

> D.21.2.39.1, in definitiva, o è irrelevante per il problema che ci occupa o, ove rilevi, costituisce, semmai, prova in favore della possibilità che uno schiavo, debitamente autorizzato, potesse validamente trasferire mediante *mancipatio* cose del *dominus*.

Consequently we have to analyse this complicated text yet again. Because we have written about it on two previous occasions,[28] we will confine ourselves here to the refutation of Corbino's interpretation. Our explanation of D.21.2.39.1 is nearly the same[29] as that defended by us in our earlier studies:

23. Corbino, *IURA* 27 (1976), p. 64 note 34 states that according to Roman law the *mancipatio* of a share in a *res mancipi* was not possible. I refuted that opinion in *BIDR* 83 (1980), p. 80, note 38. Mention of a *mancipatio* of a share in a *fundus* has been made by Ulpian in D.19.1.13.7. See my study on that text in *BIDR* 83 (1980), pp. 67–107.
24. See O. Lenel, *Palingenesia Iuris Civilis*, I, Lipsiae 1889, fragm. 735, col. 463–464.
25. M. Kaser, "Die römische Eviktionshaftung nach Weiterverkauf", in *Festgabe U. von Lübtow*, Berlin 1970, pp. 482–490.
26. Ankum, *M.S.* (I), pp. 6–10 and "L'*actio auctoritatis* appartenant à l'acheteur *mancipio accipiens* a-t-elle existé?" in *Atti dell'Accademia Romanistica Costantiniana*, 3° convegno internazionale, Perugia 1979, pp. 38–40.
27. *IURA* 27 (1976), p. 60.
28. See my studies mentioned in note 26.
29. There are only three minor points on which we now give a further specification or a different interpretation. These are the following: 1) I accept now that in both the cases of the parts (a) and (b)

D.21.2.39.1, Iulianus, *l.57 digestorum*.

(a)[30] Si servus tuus emerit <et mancipio acceperit> hominem et eundem vendiderit <et mancipio dederit> Titio eiusque nomine duplam promiserit [et tu a venditore servi stipulatus fuerit[31]]: si Titius servum petierit et ideo victus sit, quod servus tuus in [tradendo sine voluntate tua] <mancipio dando> proprietatem hominis transferre non potuisset, supererit Publiciana actio et propter hoc duplae stipulatio non committetur: quare venditor quoque tuus agentem ex [stipulatu] <auctoritate> poterit doli mali exceptione summovere. (b) alias autem si servus hominem emerit et [duplam stipuletur] <mancipio acceperit>, deinde eum vendiderit et ab emptore evictus fuerit: domino quidem adversus venditorem in solidum competebit actio, emptori vero adversus dominum dumtaxat de peculio ...

(a) When your slave has bought <and acquired by *mancipatio*> a slave and when he has sold <and transferred by *mancipatio*> the same slave to Titius and has promised double the price for the case of eviction of this slave [and when you had the seller of the slave make the same promise by *stipulatio*]: when Titius has claimed the slave and has lost the suit for the reason that your slave has not been able to transfer the ownership of the slave by <delivering him by *mancipatio*> [delivering him by *traditio* without your consent], he will still have the *actio Publiciana* and therefore the *stipulatio duplae* will not come into force; and for this reason your vendor will be able to defeat you by opposing the *exceptio doli*, if you claim on the basis of the <*auctoritas*> [*stipulatio*]. (b) The situation is different however, when a slave has bought a slave <and received by *mancipatio*> [has made a *stipulatio duplae*], and subsequently has sold the slave and the latter has been evicted from the buyer: then the master will have an action for the total amount against the seller, but the buyer will have only an *actio de peculio* against the master ...

The facts described by Julian in part (a) of the text can be summarised as follows: A vendor (V) has sold and mancipated a slave (Stychus) to a slave (S) of master M. The slave (S) has sold and mancipated Stychus to T(itius), and he has performed to him a *stipulatio duplae*. T, who had lost the possession of Stychus, had instituted against the possessor the *rei vindicatio*, and had lost his suit because S did not have the capacity to transfer ownership of Stychus by means of a *mancipatio*; nevertheless he had the *actio Publiciana* at his disposal. The condition for the possibility of M instituting the *actio de auctoritate* against V was fulfilled.[32] The condition for the possibility of T instituting the *actio ex stipulatu (de peculio)*, against M, based on the

of the text the slave S has acted with *libera administratio peculii* (which Julian presupposes as present), 2) In both cases V has been a *non dominus* of slave Stychus sold and mancipated by him to S, and 3) in both cases S made to T and to B not only a *traditio* but also a (void) *mancipatio* of Stychus. See hereafter, pp. 69–71.

30. To make the interpretation of this complicated text easier we divide it into two parts: (a) and (b).
31. Correctly, Kaser, mentioned in note 25, p. 487, writes: "In der Tat hinkt im ersten Satz das Stück *et tu a venditore servi stipulatus fueris* nach."
32. Of course the *iudex* will not condemn the vendor in such a case, if he can prove that the only reason why the second buyer had lost his ownership-suit, was a new one with which he had nothing to do, e.g. that his buyer being a slave had performed a void *mancipatio* to the second buyer. This was not the case in our text, because, as we will show, Julian presupposes in the parts (a) and (b) of § 1 that V was not the owner of slave Stychus, sold and mancipated by him to S and by S to T and B.

stipulatio for eviction, was not fulfilled, as he had not yet lost the *habere licere* of the slave, so long as he still had the *actio Publiciana* at his disposal. In this situation Julian considered it inequitable (and hence gave the *exceptio doli* to V) that M could successfully institute the *actio de auctoritate* against V.

In part (b) V has sold and mancipated a slave to S, S has sold and delivered the slave by *mancipatio* to a buyer (B) and has made a *stipulatio duplae* to him, thereupon the owner has evicted the slave from B. In this case of eviction followed by the loss of the *habere licere* of the slave the last-mentioned can bring an *actio ex stipulatu de peculio* against M, and M can institute against V the *actio de auctoritate* (*in solidum*), that means, without the limitations of the *actio ex stipulatu de peculio.*

The inclusion in one § of the two parts (a) and (b) can only make sense, if they are nearly identical and differ only on one point. There was eviction of the slave sold and mancipated by S in both cases, but in part (a) T did not lose the *habere licere* of the slave, whereas in part (b) he did lose it. For the rest the situations in both parts are totally similar. In both parts S has made a *stipulatio duplae*, because the buyers T and B had doubts as to the validity of the *mancipatio* performed by him. In both parts S has sold and delivered the slave having the *libera administratio* of his *peculium*, which is proved by the mention of the *actio ex stipulatu de peculio* in part (b). This *libera administratio* has been presupposed in both parts.[33] If the master had given a *iussum* as to the sale and delivery of the slave, the *actio quod iussu* and not the *actio de peculio* would have been the appropriate action. It is therefore impossible that Julian spoke in part (a) of a sale and delivery performed by S without the consent of M. The compilers added the words *sine voluntate tua*, when they changed the words *in mancipio dando* in *in tradendo*. Had they not added these words, they would have had to eliminate the whole part (a), because in Justinian's law the words *quod servus tuus in tradendo proprietatem hominis transferre non potuisset* would have been nonsense, a slave having the capacity to convey the property of a slave by means of *traditio* according to the law of Justinian.

Corbino[34] gives a totally different interpretation of part (a) of our text, to which he unjustly confines himself. He agrees with Kaser and with me that V has made a *mancipatio* of Stychus to S, but accepts interpolations in the text on a much larger scale than we do. He asks himself, what can have been the reason for the refutation of T's *rei vindicatio* in part (a) of the text. He states that the reasons can be either a) that ownership had not even passed from V to S, or b) that ownership had not passed from S to T because the proper act, which was needed to effect the transfer of ownership had not been used in this case. In the first hypothesis the words *quod*

33. Cf. in the same sense I. Buti, *Studi sulla capacita patrimoniale dei "servi"*, Napoli 1976, pp. 97-98. One of the arguments given by him for this opinion is the possibility of the *actio Publiciana* in part (a) of our text. This argument however is incorrect. As has been shown by Buckland, *L.Q.R.* 34 (1918), pp. 375–379 and by myself *M.S.* (I), p. 16, note 52, even when a slave has sold and delivered a thing without the consent of his master the buyer in good faith can institute the *actio Publiciana*; cf. Alfenus D. 41.3.34.
34. Corbino in *IURA* 27 (1976), pp. 53–60.

servus tuus in tradendo[35] *sine voluntate tua proprietatem hominis transferre non potuisset* will be totally out of place. In the second hypothesis the words *quare venditor quoque tuus agentem te ex stipulatu poterit doli mali exceptione summovere* will be totally out of place, because, if the only reason for the failure of T's *rei vindicatio* was that S had performed an inappropriate act, it is incomprehensible that M could have had any cause of action against V and that, consequently, the latter needed to oppose this *actio* with the *exceptio doli*. Therefore according to Corbino the two affirmations *quod servus ... potuisset* and *quare venditor ... summovere* cannot exist together. One of the two has been added. If the first affirmation was not genuine, the whole text would not be relevant to our problem. If the second phrase was added, the phrase *quod servus ... non potuisset* would be genuine. According to Corbino, the fact that Julian has written *in mancipio dando* forces us to accept that he has also written the words *sine voluntate tua*. If slaves had no capacity to mancipate a slave, they would also have no capacity to transmit the ownership of a slave (slaves being unable to perform an *in iure cessio*), and the jurist would then have confined himself to a mere mention of the fact that slaves could not transmit ownership, and there would have been no necessity to mention the *mancipatio* as a means of transferring ownership. Corbino states, therefore, that *mancipatio* was mentioned as the means by which S transferred Stychus, because a slave had no capacity to transmit ownership only under certain conditions, viz. when the consent of his master was lacking.[36]

This reasoning, though very acute, is totally unacceptable. In particular it is methodologically incorrect. The author did not try first to interpret the text as it has been preserved for us, nor does he explain why and by whom one of the alternative additions would have been made in our text. Corbino is of the opinion that there are two alternative possibilities to explain the failure of the ownership-action brought by T against the possessor of Stychus: a) S was unable to transfer ownership of the slave, as ownership could not be transferred by V, the latter being a *non dominus*; and b) there was something wrong with S's *mancipatio*, though V had transferred ownership (to M). If acceptance of these alternatives leads of necessity to the supposition that one or other passage of part (a) of our text is interpolated, it is better to propose two other alternatives: 1) there was something wrong with the second delivery made by S to T, and the first *mancipatio* made by V to S has led to the transfer of ownership, V being the *dominus* of Stychus, or 2) there was something wrong with the second delivery made by S to T *and* the first *mancipatio* made by V to S has *not* led to the transfer of ownership, because V was not the *dominus* of Stychus. In my earlier publications on D.21.2.39.1, I did not state expressly whether Julian occupied himself with the first or with the second of these two alternatives. In a letter of 23 March 1980, in which he commented on my study on the *actio de auctoritate* mentioned in note

35. Corbino, *IURA* 27 (1976), p. 56 writes *in tradendo*, but on p. 59 we can read that also according to Corbino Julian must have written *in mancipio dando*.

36. It is true that slaves could not, in classical Roman law, transfer ownership of *res mancipi* by *in iure cessio* or by *mancipatio*. However, I still do not understand why Julian cannot have written in this concrete case that S by mancipating Stychus could not transfer ownership of this slave.

26 and expressed his agreement with my interpretation of D.21.2.39.1, my dear departed friend and colleague Hans Julius Wolff wrote to me:

> Was ich nicht verstehe, ist, wie der *dominus* überhaupt eine Klage – egal welche – gegen den *venditor* haben konnte. Der Erwerb durch Sklaven mittels Manzipation war doch völlig in Ordnung; dass der Dritterwerber kein quiritisches Eigentum erweben konnte, lag an die Unfähigkeit des Sklaven, den Manzipationsakt zu vollziehen (unabhängig der Zustimmung oder Autorisierung seitens des *dominus*). Aber das war doch ein Umstand, der nur die Weiterveräusserung betraf und dem Vorverkäufer überhaupt nicht anging. Warum sollte er *auctoritas* leisten? Sollte man vielleicht die Unfähigkeit des Sklaven zur wirksamen Veräusserung eher daraus herleiten, dass schon er seinem *dominus* aus irgendeinem Grunde, für den der *venditor* einzustehen hatte, kein Eigentum erworben hatte? Wenn ja, wäre mir alles verständlich.

This sound reasoning leads us to the decision, that the second of the two alternatives proposed by me is the only one which is correct. Julian has occupied himself with a case in which T had no success with his *rei vindicatio* for two reasons, viz. there was something wrong with the delivery of Stychus made by S to T, S being unable to mancipate, *and* as a result of the first *mancipatio* made by V to S ownership had not passed, V being a *non dominus*. There can, consequently, be no question of the alternative mentioned by Corbino, but rather of an accumulation of the two facts mentioned by him. Only when interpreted in this way does the text receive its real significance and the parallel between the cases of part (a) and part (b) is complete. As for the second part of D.21.2.39.1, Stychus, sold and mancipated by S to B, had been evicted from the latter because V had been a *non dominus*. Also in the case of the first part of our text the reason why the *actio de auctoritate* of M was possible against V in principle, is the fact that V was not the owner of the mancipated slave, and the action was only deprived of its effect by Julian who granted the *exceptio doli* to V, because T still had the *actio Publiciana* at his disposal.

The only possible objection to my explanation of the text seems to be this: Why did Julian write that T had no success in his ownership-action against the possessor of Stychus while S had failed to transfer ownership of this slave by mancipating him, if the real reason for the possibility that the *actio de auctoritate* was available, was that T had been *victus* in the ownership-action, as V was not the *dominus* of the mancipated slave. I think that this difficulty can be avoided if one accepts that Julian, whose point of departure in both parts of D.21.2.39.1 was V's status as *non dominus*, wrote *quod servus ... potuisset* because he mentioned the motivation given by the judge in a real or supposed suit in which T's *rei vindicatio* had been rejected. In this lawsuit the judge asked T (who stated that he was the owner of Stychus), to mention his *modus adquirendi*, and when it came to light, that this was a *mancipatio* performed by the slave S, the judge rejected T's ownership claim at the outset, as this *mancipatio* was invalid, and was not obliged to make an inquiry as to the more delicate problem of whether S's master M or V were *dominus*. The judge rejected the *rei vindicatio* for a reason that was easy to establish: the fact that the *mancipatio* to T had been made by a selling slave.

On the basis of the above considerations I think that Corbino's interpretation of Julian's text D.21.2.39.1 must be rejected, and that we must stick to a slightly modified version of the explanation which I had previously given of the text. According to this explanation, Julian wrote that a slave could not transfer the ownership of a slave by mancipating it. This text therefore lends support to my opinion, that slaves had no capacity to transfer *res mancipi* by means of *mancipatio*.

4. We must now analyse one of the fifteen fragments of Paul's *Manualia* which have been incorporated in the *Fragmenta Vaticana* and are all concerned with problems of *ususfructus*. It gives another textual argument in favour of our view.

> *Fragmenta Vaticana*, 51, Paulus *1.1 manualium*.
>
> Adquiri nobis potest ususfructus et per eos quos in potestate ... habemus, sed non omnibus modis sed legato, vel si heredibus illis institutis deducto usu fructu proprietas legetur. per in iure cessionem autem vel iudicio familiae erciscundae non potest; per mancipationem ita potest, ut nos proprietatem, quae illis mancipio data sit, deducto usu fructu remancipemus.
>
> Usufruct can be acquired by us also through persons who are in our *potestas*; not by all methods however, but by a legacy (*per vindicationem*) of the usufruct, or when these persons have been instituted heirs and the ownership of a thing has been bequeathed (*per vindicationem*) to someone with *deductio* of the usufruct. It cannot be acquired by means of an *in iure cessio* made to the *subiecti* or by a sentence in a suit to divide an inheritance brought by or against them; it can be acquired by means of a *mancipatio* in this way, that we remancipate the ownership of the thing, which has been conveyed to them in the form of a *mancipatio*, and deduct the usufruct for us on that occasion.

In this text, Paul discusses the cases in which a master can acquire a right of usufruct through his slave. He first mentions the case of a *legatum per vindicationem* of the usufruct given to a slave and that in which a slave has been instituted as an heir whereas the *proprietas* of a thing has been bequeathed to someone *deducto usufructu*. In this event, Paul writes, it was impossible to acquire, through a slave, a usufruct by means of an *in iure cessio* or by an *adiudicatio* in a lawsuit in which an *actio familiae erciscundae* has been brought, as a result of the incapacity of slaves in legal proceedings. Finally, Paul speaks of the acquisition of a usufruct by *mancipatio* to a slave followed by a *remancipatio* combined with a *deductio ususfructus* performed by his master. Paul would certainly have mentioned the *remancipatio deducto usufructu* made by the slave, if this had been possible. The fact that he does not do so is an argument in favour of the view that a *mancipatio* and consequently also a *remancipatio* by a slave was impossible. Corbino,[37] however, states that Paul did not intend to treat all the cases in which one could acquire a usufruct through his slave, but only those in which there was no initiative on the part of the *dominus*; because the *remancipatio deducto usufructu* could not take place by a slave *ignorante domi-*

37. Corbino, *IURA* 27 (1976), p. 62.

no,[38] the text would not have mentioned the *remancipatio deducto usufructu* made by a slave. I fail to see why we should admit that Paul wished only to discuss a certain category of methods of acquisition of usufruct by means of a slave, and not of all such categories of acquisition. If he had done so, Paul would have mentioned the *remancipatio deducto usufructu* with the consent of the master, if this had been possible. That he did not do so indicates the correctness of the proposition that the master had to perform the *remancipatio* personally.

5. Finally, we must briefly study a text from the 17th book of Ulpian's commentary on the edict, viz. D.6.1.41.1, which was invoked by Corbino[39] in favour of the idea that a legitimation of a slave to mancipate on behalf of his owner was generally accepted in classical Roman law.

> D.6.1.41.1, Ulpianus *1.17 ad edictum*.
>
> Si servus mihi vel filius familias[40] fundum vendidit et tradidit habens liberam peculii administrationem, in rem actione uti potero. sed et si domini voluntate domini rem tradat, idem erit dicendum ...
>
> If a slave or a *filius familias* having the *libera administratio* of their *peculium* has sold and transferred to me by means of a *traditio* a parcel of ground, it will be possible for me to use an *actio in rem*. The same thing has to be said if a slave delivers by *traditio* a thing with the consent of his master ...

Corbino apparently holds that in this text the original question of a *mancipatio* performed by a slave or by a *filius familias* is discussed. But this supposition is clearly wrong,[41] because the text deals with the case of a *traditio* of a *fundus provincialis*.[42]

6. The conclusion of this study written to honour my friend Paul van Warmelo can be brief. Slaves were unable in classical Roman law to perform the act of *mancipatio*. In his recent article, Corbino collected arguments in support of the opposite view. In this paper we showed that his reasoning is not convincing and that the opinion defended by us in 1978 should be maintained.[43]

38. A comparable reasoning can be found in Buckland's study in *LQR* 34 (1918), p. 377.
39. Corbino, *IURA* 27 (1976), p. 70, note 53.
40. It seems probable to me, that the words *vel filius familias* are a generalising gloss.
41. Another text, to which the defendants of the opposite view could refer, could be Gaius D.41.1.9.4. This text would only be relevant, if Gaius had mentioned in the original text the *mancipatio*. This, however, is impossible. From the context we can infer that Gaius had only in mind the *traditio*; cf. § 3 where the jurist speaks of the *traditio* as a *modus adquirendi* of the *ius gentium*, and § 5 where he treats of the *brevi manu traditio*. See Lenel, *Palingenesia Iuris Civilis*, II, Lipsiae 1889, fragm. 491, col. 25.
42. Buckland states, without justification, in *LQR* 34 (1918), p. 377 that Ulpian would speak here about the *ager vectigalis*; cf. however Lenel, *Palingenesia*, II, fragm. 588, col. 515.
43. I express my profound gratitude to my friend and colleage Professor Peter Stein (Cambridge), who corrected the English of this study.