> think that she has the right to marry, just as she could if he were dead. But those who take Julian's view say that she does not have the right to marry, because according to Julian, a freedwoman's marriage continues even when her patron is in captivity, because of the respect she owes him. It is clear, however, that if the patron is enslaved in any other way, the marriage is undoubtedly dissolved.

Thus, Julian seems to have regarded marriage of a freedwoman with her patron to continue even during the latter's captivity. The explanation probably is that for Julian a freedwoman did not have the right to divorce her patron.[46]

We need not dwell here on other aspects of postliminium. But, for instance, in contrast to marriage, the paternal power over children was in an uncertain state: if the father died in captivity, the children were regarded as having become free from paternal power at the moment of his capture; if he returned they were regarded as having always been in his power.[47]

Two

Manumission and Citizenship

Roman slavery, viewed as a legal institution, makes sense on the assumption that slaves could reasonably aspire to being freed and hence to becoming Roman citizens or, at least, that the main rules of the institution were framed with those slaves primarily in mind who could reasonably have such an aspiration. And we know from various sources that both in the late Republic and in the early Empire there were tens of thousands of ex-slaves mingling with the freeborn inside the city of Rome itself.[1] Epigraphical evidence indicates that domestic slaves were often manumitted around the age of thirty, and a speech of Cicero tells us in effect that six years was a longer period than careful, hardworking slaves who had been captured in war should expect to serve.[2] Still, in fact, the great bulk of slaves, especially those who were engaged in menial, non-domestic tasks, probably had no realistic hope of changing their status. Typically, as in this instance, legal rules regulate a variety of situations.

Three methods of manumission are usually regarded as classical in the sense that they are mentioned by Gaius, are alone mentioned by Gaius as proper modes of manumission, and give citizenship as well as freedom.

G.1.17. He becomes a Roman citizen in whom these three elements concur: he is over thirty years old; he was held by his owner in full Roman ownership; and is freed by a statutorily recognized mode of manumission, that is, by *vindicta,* by the census, or by testament. But if any of these elements are lacking, he will become a Latin.

The status of Latinity for improperly manumitted slaves will be discussed later in this chapter.

These three methods of manumission all existed as early as the Twelve Tables, though that code, so far as we can tell, mentioned only manumission by will.

Manumission by census was the enrollment of a slave, with his owner's consent, on the census list of Roman citizens. Since the census was so formal and was taken only once every five years, this mode of manumission is unlikely to have arisen if manumission *vindicta* with the full effect of giving citizenship had already existed. According to tradition, the sixth king of Rome, Servius Tullius (578–535), allowed slaves who had been manumitted but who wished not to return to their old country to enroll themselves on the census and become citizens. Hence an earlier form of manumission had not given citizenship, and it was precisely the acquisition of citizenship which was the object of this reform. It is noteworthy, then, that some activity of the state was needed for the acquisition of citizenship. What is not clear for this form of manumission, and is disputed,[3] is whether the censor openly declared he was giving citizenship to the (now ex-) slave or whether he operated under the fiction that the enrolled citizen had always been a citizen. As we saw in the previous chapter, the taking of the census was largely abandoned after 166 B.C., and with it, despite Gaius, would disappear manumission by enrollment in the census. In fact, this mode of manumission is likely to have become rare as soon as manumission vindicta gave citizenship.[4]

Manumission vindicta is a juristic dodge, a particular fictional use of the *vindicatio in libertatem,* "the claim for freedom," which was brought when a free man was wrongfully held as a slave. For this application of the action, the master who wished to free his slave arranged for a friend to bring the claim against him in front of the magistrate; the master put up no defense, and the magistrate

declared the slave free. The cooperation of the magistrate is obviously needed for the dodge to work.[5] Citizenship was also acquired by this mode of manumission, but perhaps not originally. In fact, there is a legal legend—certainly not straight history—reported by Livy, *History of Rome,* 2.3 ff, relating to 509 B.C., the first year of the Republic. A slave, Vindicius, informed the consuls of a conspiracy to restore the Monarchy, and he was manumitted vindicta. Apocryphal although the story is,[6] it seems intended to explain why the private act of the master has public consequences for a slave—namely, the acquisition of citizenship.[7]

Manumission vindicta and perhaps also manumission by the census operated on the false basis that the slave was a free man—with manumission vindicta there was even the appearance of a free man's having been wrongfully held as a slave—and yet the law recognized the true state of affairs and gave to the former master the full rights of a patron.[8] This ability not to extend conclusions to the point of absurdity is typical of Roman law.

Very different is manumission by testament, which did not involve any dodge, though it conferred citizenship, and which, alone of the three, could be conditional. Naturally only a slave belonging to the testator could be given freedom directly by testament. A slave to whom freedom is given conditionally by will is called a *statuliber* until the condition is realized. The status was recognized by the Twelve Tables:

Epitome Ulpiani, 2.4. A slave, ordered to be free under this condition "if he gives ten thousand to my heir," even if he be alienated by the heir will achieve freedom by giving the money to the purchaser. The Twelve Tables order this.[9]

Actually, at the time of the Twelve Tables, Rome had a precoinage culture. The example in the text is therefore anachronistic, and the word *emptor,* translated here properly as "purchaser," had originally the wider sense of "taker." The status of the statuliber is so special that it will be treated separately at the end of this chapter.

At the time of the Twelve Tables there were two forms of making wills, *testamentum calatis comitiis* and *testamentum per aes et libram;* the latter represented an existing practice that was in effect ratified

by the code. Since manumission by will was, as we have seen, clearly established by the time of the Twelve Tables and needed no ratification, it must originally have been possible only by a testamentum calatis comitiis.[10] Later it was standard in the testamentum per aes et libram (and in fact the will calatis comitiis did not long survive). The point is important for the history of manumission because of a vital difference between the two forms of wills. The former had to be made publicly in the assembly called the *comitia calata,* it required the express approval of the members, and it was actually and technically an act of legislation. The latter was a personal and private act. Thus, originally in this form of manumission, too, the conferring of freedom and citizenship required the participation and approval of the state.

For the manumission to take effect, the intention of the testator had to be clear and the gift of liberty had to be expressed in imperative words. The *lex Fufia Caninia* of 2 B.C. required that the slave to be freed be expressly named:

> G.2.239. Likewise freedom, it seems, cannot be given to an uncertain person, since the *lex Fufia Caninia* orders slaves to be freed by name.[11]

There could not, generally speaking, be an implied gift of freedom, even though there was a general principle expressed by Paul in D.50.17.17a (book 16 on *Plautius*):

> When the intention of the manumitter is obscure, liberty is to be favored.

We find texts such as the following:

> D.40.4.2 (Ulpian, book 5 on *Sabinus*). If anyone institutes the heir thus: "Let Titius be my heir. If Titius will not be my heir, let Stichus be my heir. Let Stichus be free." Then according to Aristo, if Titius is heir, Stichus is not free. To me it seems he can be said to be free as if he had not received freedom in any one grade but in two. And this is the law in force.

By "in two," *dupliciter,* Ulpian means that the grant is to be regarded as if it had been written out twice, once for each hypothesis. The wording of the testament does appear to be ambiguous, and whether the testator wished Stichus to be free if Titius was heir is

not clear. This would therefore seem to be a case for favor libertatis, but there is no sign of that in Aristo's decision. Ulpian's very different approach is to hold that in both hypotheses there was an express clause of manumission. Recognition of an implied gift of freedom just does not appear in the text. Such recognition, however, was accepted in two situations by the time of Justinian:

> C.6.27.5.1 (Justinian, A.D. 531). There was matter for doubt where a testator appointed his slave his heir but without mentioning freedom; and this raised such contention among the old jurists that it is scarce possible to see that it was decided. 1a. But this altercation is to be left to antiquity. We have found another method of reaching a decision, since we always follow the traces of the intention of testators. 1b. When we therefore find introduced by our law that if anyone appoints his own slave as tutor to his sons and does not mention liberty, liberty is also presumed to have been granted by the very appointment as tutor so as to favor the pupils; then if anyone appoints his own slave as heir without mentioning freedom, surely he always becomes a Roman citizen?

Justinian's rhetorical question is possibly out of place, because slaves, peregrines, and even Junian Latins could not be tutors. Hence, if the testator wished the appointment of his slave as tutor to be valid, he had to have intended the slave to be free and a citizen. It is easy to imply the gift of freedom here, especially for the reason expressed by Justinian, "to favor the pupils," that is, the freeborn children of the testator who are still under the age of puberty. The case of one's own slave appointed as heir is very different, and the argument for liberty would be something else. The Roman rule was that no one could die partly testate. Hence, if the slave was heir and took the inheritance by will, he himself could not be the slave of the person who would be heir on intestacy. Unless he were free, he would be a slave, but the slave of no one. Hence, his institution as heir also implied a gift of liberty. But the argument from the one case to the other is not straightforward.

In the Republic there was another form of manumission, which does not seem to have survived into the Empire, namely, where the master adopted his slave as his child or gave the slave in adoption to another.[12] The act of adoption gave automatic manumission. Justinian, to some extent, restored the practice: a master who declared

in writing that his slave was his son thereby made him free, but the writing was not sufficient to confer the rights of a son on the ex-slave.

From a text of Cicero we know that in the late Republic informal manumission did not give freedom.[13] The position was regularized by a *lex Junia* whose date is uncertain but which is almost certainly of the reign of Augustus:

> G.3.56. To make this branch of the law clearer we must remember what I have said elsewhere, that those who are now called Junian Latins were at an earlier time slaves by the law of Roman citizens, but were maintained in apparent freedom by the aid of the praetor; and hence their property used to pass (i.e., on death) to their patrons by title of *peculium*. Later by the *lex Junia* all those whom the praetor protected in a state of liberty became free and were called Junian Latins: Latins, because the state made them free as if they were freeborn Roman citizens who, by migrating from the city of Rome into Latin colonies, had become colonial Latins; Junian, because they became free by the *lex Junia* even though they were not Roman citizens.[14]

The continuation of the text and others which describe the condition of Junian Latins will be discussed later. Thus, for some time before the lex Junia, the praetor had intervened to give protection, obviously against actual reenslavement, to a slave manumitted informally or when some other necessary condition was lacking for fully valid manumission. The reign of Augustus also saw two other fundamental statutes in the history of Roman slavery. The earlier was the lex Fufia Caninia of 2 B.C., which is explained by Gaius:

> G.1.42. Moreover, by the *lex Fufia Caninia,* a limitation has been set on the manumission of slaves by will. 43. For a master who has more than two and not more than ten slaves is permitted to manumit up to one-half; he who has more than ten and not more than thirty is permitted to manumit up to one-third of that number; he who has more than thirty but not more than one hundred has the power of manumitting one-quarter; finally, he who has more than one hundred and not more than five hundred is not permitted to manumit more than one-fifth; nor is power given to manumit more to a person who has more than five hundred, for the law provides that no one may manumit more than one hundred. But if a person has only one or even two slaves he is not affected by this law and so he has full freedom of manumission.[15]

The provision tells its own story. Since it envisages that a Roman might have more than five hundred slaves, slaves were obviously extremely numerous.[16] Freedmen must also have become very common, since the point of the provision is to restrict their numbers, and limitations up to one hundred are imposed on manumissions by will. The provision applied only to manumissions by will,[17] hence the damage to be feared occurred only or predominantly in this case. We can assume that most manumissions would be by testament, since that would not deprive the master of the slaves' services during his lifetime and he would have, as the ancient moralists put it, grateful freedmen to attend his funeral. Finally, the provision betrays anxiety about the numbers of freedmen at Rome, yet the limitations are not obviously ungenerous. The provision does not limit manumissions by reference to racial origin or to the qualifications of the slaves. To prevent fraud, the lex Fufia Caninia also provided that the slaves to be manumitted had to be expressly named.

The second relevant Augustan statute was the *lex Aelia Sentia* of A.D. 4, which contained various provisions:

> G.1.18. The requirement relating to the slave's age was introduced by the *lex Aelia Sentia.* For that statute decreed that slaves manumitted under the age of thirty did not become citizens unless they were freed *vindicta* after proof of a just cause of manumission in front of the *consilium* (council). There is a just cause of manumission, for instance, if a person manumits before the *consilium* his natural son or daughter or natural brother or sister or his foster child or teacher, or a slave whom he wants to have as his general agent or a slave woman whom he wants to marry.[18]

> G.1.37. If a person manumits in fraud of creditors or in fraud of his patron he achieves nothing, because the *lex Aelia Sentia* prohibits freedom. 38. Similarly, by the same law a master under twenty is not permitted to manumit except *vindicta* and with good cause for manumission shown before a council. 39. There is good reason for manumission if anyone manumits his father or mother or teacher or foster-brother. Moreover, the reasons I have set out above for a slave under thirty can be adduced also in the present case. Conversely, the reasons I have produced with regard to an owner under twenty can also be applied to a slave under thirty. 40. Since therefore a limitation on manumission was established by the *lex Aelia Sentia* for masters under

twenty, it happens that those who have reached the age of fourteen, although they can make a will and in it appoint an heir or leave legacies, nonetheless if they are under the age of twenty cannot give freedom to a slave. 41. Though the owner under twenty wishes to make the slave a Latin, he must nonetheless show adequate reason before the *consilium* and only then free him before friends (i.e., informally).

G.1.13. It is provided by the *lex Aelia Sentia* that slaves who were put in bonds by their master by way of punishment or have been branded or have been questioned under torture for wrongdoing and found guilty or have been handed over to fight in the arena with men or beasts or have been thrown into a gladiatorial school prison, and then were manumitted by the same or another master, are free men of the status of surrendered enemies. Slaves who have been so disgraced never become Roman citizens or Latins, however they are manumitted and whatever their age, even if they were in the full ownership of their masters. They are always ranked as surrendered enemies.

Persons classed as *peregrini dediticii,* "surrendered enemies (or foreigners)" had the further disability that they were sold into slavery with their goods if they attempted to settle within one hundred miles of Rome. One significant detail in G.1.13 (which appears also in *Epit. Ulp.* 1.11) should be noted. The lex Aelia Sentia's provision on slaves punished by their master takes no account of the guilt or innocence of the slave. To prevent manumission conferring citizenship, it is enough and solely relevant that the slave was bound by the master. It is only for public trials that the slave's guilt has to be established before citizenship is inhibited. There is thus to be no investigation into the justice of the master's treatment of his slave.

None of these restrictions on manumission under the lex Aelia Sentia applied if the owner was insolvent and freed the slave whom he appointed heir by will, and there was no other heir.[19] The reason for the exception is that it was the slave (who could not refuse the inheritance) and not the dead owner who suffered the disgrace of bankruptcy.

Informal manumission, as we have seen, conferred Junian Latinity, but the only effective modes of informal manumission were *per epistulam,* by a letter conferring freedom, and *inter amicos,* which involved a declaration made before friends (or witnesses). Late texts

mention informal manumission at a feast (*in convivio*),[20] but this may simply be a variation of manumission inter amicos.

When the Empire became Christian, a new mode of manumission, *in ecclesia* (in church), was regulated by Constantine, the first Christian emperor. A rescript of 310 declares that it is long settled that a master can free his slave in church, but the manumission has to be before the people, in the presence of the priests, and there must be a writing signed by the owner.[21] The rescript apparently did not give the slave citizenship, but this defect was remedied by another rescript five years later.[22] Henceforward this should be regarded as a formal mode of manumission.[23]

But a slave who, on manumission, became only a Latin might become a Roman citizen in various ways:

G.1.29. To begin with, under the *lex Aelia Sentia,* slaves who are manumitted under thirty and have become Latins, if they take wives who are Roman citizens or colonial Latins or of his own status, and this is attested by not less than seven witnesses who are Roman citizens above puberty, and they beget a son, when this son becomes one year old, the power is given to them to go before the praetor or, in a province, before the governor and prove that he married a wife under the *lex Aelia Sentia* and from her has a one-year-old son. And if the magistrate before whom the case is proved so pronounces, then both the Latin himself and his wife if she too be of the same status, and also the son if he be of the same condition, are ordered by the statute to be Roman citizens.

Not only does this text indicate an absence of any repugnance to the notion that ex-slaves can become Roman citizens, but, since the statute offered an inducement to ex-slaves to procreate, it also indicates a positive desire to welcome the progeny of such into the state. The statute also applied if the child was a daughter and even if the father died before the child became one year old.[24] The *lex Visellia* of A.D. 23 gave citizenship to those who were Latins by manumission and who served six years in the police at Rome. A decree of the senate reduced the period of service to three years.[25] Ex-slaves obviously were thought to include responsible and respectable men. Again, the emperor Claudius declared that Latins became Roman who built a seagoing ship holding at least ten thousand measures of corn, and the ship (or a substitute) carried

corn to Rome for six years.[26] Nero enacted that a Latin whose fortune was at least two hundred thousand sesterces and who built in Rome a house on which he spent at least half of his fortune was to become a Roman.[27] Trajan declared that a Latin who operated a mill in the city for three years and the mill ground not less than one hundred measures of corn daily was to become a citizen.[28] Freedmen, obviously, could be wealthy. Significantly, some of these methods of attaining citizenship were restricted to those ex-slaves who remained in Rome.

It remains to mention, for classical law, manumission by a person who had effective ownership—who had the slave *in bonis*—but not full civil law ownership:

> G.1.35. Thus, if a slave is yours by bonitary ownership and mine by full civil law, he can be made a Latin by you acting alone, but a repeated manumission can be made by me—and not by you—and in this way, he becomes my freedman.[29]

A Roman would have bonitary ownership, have the slave in bonis, if the slave had been delivered to him by the owner without the necessary formalities to effect transfer of ownership. The full civil law owner could not recover his slave. The period of prescription which would give the bonitary owner full civil law ownership was one year. The one situation where in practice there was a real difference between bonitary and full Roman ownership is here: a bonitary owner could not manumit a slave so as to give him Roman citizenship.

The law in the time of Justinian—which, of course, is that relevant for later history—was subject to various changes. One change that affected slavery, though that was not the end in view, was the abolition of the distinction between full civil law ownership and bonitary ownership.[30] Those who formerly had bonitary ownership were now full owners. More directly related to slavery was the very early repeal (in 528) of the lex Fufia Caninia:

> J.1.7.1. By the *lex Fufia Caninia* a limitation was imposed on manumitting slaves by will. We decided that this must be revoked as an impediment to freedom and something insidious; it was inhuman that the living could grant freedom to all their household (unless some other cause obstructed freedom) but that the same license should be taken away from the dying.[31]

Two years later came the repeal of the *senatus consultum Claudianum*.

> J.3.12.1. There was also a wretched universal succession under the *senatus consultum Claudianum* when a free woman mad with love for a slave would lose her liberty under the *senatus consultum*, and, with her liberty, her property. We believed this to be unworthy of our times and hence allowed it to be abolished in our state and not to be inserted in our *Digest*.

Further reforms are recorded in J.1.5.3:

> Formerly there was a threefold status for freedmen: those who were manumitted might acquire full legal freedom and become Roman citizens; or a lesser grade and become Latins under the *lex Junia Norbana;* or a still lower grade and be classed as surrendered enemies under the *lex Aelia Sentia.* But this wretched status of surrendered enemies had long been obsolete,[32] and that of Latins was not common. Therefore in our piety, wishing to improve all things and produce a better situation, we changed this by two constitutions and restored things to their pristine state since from the earliest days of the city of Rome only one straightforward freedom existed, namely, the same that the manumitter had, except that the person freed is a freedman, although the manumitter is freeborn. We abolished the status of surrendered enemies by a constitution[33] that we promulgated among our decisions whereby, on the advice of that exalted man, our quaestor Tribonian, we settled the disputes of old law. At the suggestion of the same quaestor, by another constitution,[34] which shines out among imperial laws, we abolished Junian Latinity and everything connected with it, and, as was once the law, granted Roman citizenship to all freedmen, with no distinction drawn as to the age of the person manumitted or of the owner manumitting, or as to the mode of manumission. We also added many ways by which slaves may achieve freedom, along with that Roman citizenship which alone exists today.

The decisions referred to in the text would seem to be the collection known as the Fifty Decisions which was issued in 530 or early 531 to resolve longstanding and unsettled disputes of the classical jurists. The collection itself has not survived, and not all of the constitutions can be traced. In a long and complicated constitution of the year 531 (C.7.6a.), Justinian regulated informal manu-

mission. Only certain modes of informal manumission had any effect, but these were now all to confer citizenship. Two of these modes were to require witnesses—namely, per epistulam, which needed five witnesses writing their names on the letter in imitation of a codicil,[35] and inter amicos, which also needed five witnesses, the formal recording of the act by the master, and the evidence signed by the five witnesses and by a *tabellio* (who was, in effect, akin to a notary).[36] Slaves who, by order of the deceased or his heir, stood around the funeral couch or walked in the funeral procession wearing the cap of liberty (*pilleus*) were also to be free.[37] A slave woman whose master gave her in marriage to a free man and provided in writing a dowry became free[38]—dowry was an indication of marriage, and only free persons could marry. Again, a master's notification in the official records that his slave was his son bestowed freedom on the slave.[39] Finally, freedom was acquired when the master gave to the slave or destroyed, in the presence of witnesses, the papers that constituted evidence of the slavery.[40]

Something more must be said about the special position of the statuliberi, slaves who, under a pending condition in a will, are to be free. For the status to exist, the will had to be valid.[41] When the status did exist, it continued even if the statuliber was transferred by the heir or if, possessed in good faith by someone else, he was usucapted (that is, title to him was acquired by lapse of time).[42] To become free, the statuliber had to comply with the condition, but if he was prevented from complying by the heir or other successor in title, then he was automatically free.[43] The general tenor of the texts in the relevant *Digest* title (*D*.40.7) shows that the jurists were very protective of the rights of statuliberi.

Three

Freedmen, Patrons, and the State

Roman citizenship, it should be understood, was a highly prized possession that conferred important rights and privileges on the holders. Hence it was jealously guarded, and hence, too, the revolt of Rome's Italian allies in 91–88 B.C., known as the Social War. The objective of the allies was to be granted citizenship.

Rome, in fact, was exceptionally generous in the ancient world (and in more recent times) in granting citizenship to freed slaves. This makes it important to ask why some masters, who could have freed formally, preferred to manumit informally and thus deprive the former slave of Roman citizenship. The answer, as we shall see, lies in the greater succession rights the former master of such a slave had. But first we shall consider the relationship between a patron and his former slave, now a citizen. The rights of a patron fall into three classes: rights of succession on the freedman's death; a right to *obsequium,* let us say "respect"; and a right to *operae,* a fixed number of days of work.[1]

A right of succession on intestacy was given by the Twelve Tables, but only later, by the Edict of the praetor, was a right given to a patron to succeed against the freedman's will.