

# Gaius and Pomponius

## Notes on David Pugsley

by Obrad STANOJEVIĆ (\*)

«Any discussion on Gaius' life and work must begin with one text of the Digest... This is D. 45.3.39: Pomponius book 22

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\*) When I was offered to write a contribution for *Studi Hans Ankum* in 1993, I was going through an unusual period of my life. I have resigned from my second term of the deanship. I was invited to teach in the US and a day before my departure I had a fire in my apartment which destroyed all my books, manuscripts and my computer. So at that time I could not "recycle" some of the material. Teaching in America (I have taught Roman Law, Comparative Law, Property, Public International Law, and Persons, which means: Family Law), does not leave much time for the research and writing. So, much to my regret, I did not send the contribution.

For our Hans I have always felt an admiration and, by time, friendship and gratitude. Admiration for his energy, his hability to answer promptly all correspondence by handwriting (not always legible, though). For his skills to teach young romanists how to survive within the Ocean of the literature and how to use the Digest. Friendship and gratitude for his extrovert and kind nature and for his readiness to help. He has not only offered me to publish my book on Gaius, but he has personally corrected my French (minus quam perfect) and has asked another noble character of our Society, Jacques MICHEL to give me a hand in that respect. His club *Forum Romanum* was an inspiration to organize a similar club in Belgrade, which has shown nice results in the last 30 years of existence. Hans has visited our club in many occasions and has spoken about Hugo Grotius, *commodatum*, praetorian ownership and other topics.

This paper, which is a discussion with our dear colleague David PUGSLEY, who had the kindness to correct my English, I am dedicating to Hans ANKUM, to HANS NOSTER.

*ad Quintum Mucium»* writes Tony HONORÉ (1). Almost everyone who has paid some attention to Gaius could not avoid Pomponius. Both have been underestimated by Romanists (2). Not only do they belong to the same period, to the second century AD, they share the same taste for history, the same pedagogical qualities, even the two of them have books with the same titles (3). The compilers of the Digest have united Gaius and Pomponius under the title *De origine iuris et omnium magistratuum et successione prudentium* by taking one large fragment from Gaius' work on the Twelve tables and an enormous fragment from the *Liber singularis enchiridii* written by Pomponius (4). They both wrote commentaries on the praetorian edicts, books with the title *Ad Quintum Mucium*. In the Digest as a whole there are some 5.000 lines taken from Gaius and Pomponius respectively (5). Some authors have held that Pomponius was an inspiration for Gaius (6), others the opposite:

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1) Tony HONORÉ, *Gaius*, Oxford, 1962, p. 1.

2) For Gaius it is a well known fact to which we will return later. For Pomponius see: Hans ANKUM, *Towards a rehabilitation of Pomponius*, *Daube noster*, p. 1 sqq.

3) They both wrote *Regulae, libri ad Quintum Mucium*, commentaries on praetorian edicts.

4) D. 1.2.

5) More precisely: 5.064 lines from Pomponius and 4.494 from Gaius. See: Tony HONORÉ, *Word Frequency in the Study of Roman Law*, *Cambridge Law journal*, 30, 1972, p. 291.

6) KRÜGER, *Geschichte der Quellen und Litteratur der römischen Juristen*, Leipzig, 1912, p. 201, 204; ARANGIO-RUIZ, *Storia del diritto romano*, 6th ed., p. 287. Similar ideas: WAGNER, *Studien zur allgemeinen Rechtslehre des Gaius – ius gentium und ius naturale in ihrem Verhältnis zum ius civile*, Zutphen, 1978, p. 241; KNIEP thinks that Gaius was a disciple of Pomponius (*Der Rechtsgelehrte Gaius und die Ediktcommentare*, Jena, 1910, p. 7-9).

that Pomponius wrote after Gaius on the same topics, but more copious books (7).

In his paper presented at the Oxford Conference of SIHDA in 1993 (*Gaio e Pomponio, una ricostruzione radicale*) (8) David PUGSLEY has suggested a really radical reconstruction. The old dilemma of the relationship between Gaius and Pomponius could be resolved in a rather simple way – works attributed to the two classics are written by the same person, by Pomponius. «The Institutes were written by Pomponius and were presumably published in Rome under his own name, but... a version circulated in the eastern half of the empire, where we find the earliest evidence of them, under the name of Gaius» (9). Not only the Institutes, but other works of Pomponius were published by the same eastern lawyer. It is not clear whether PUGSLEY thinks that this lawyer was Gaius or some anonymous lawyer published Pomponius' works under the invented name of Gaius. In any case it is an example of “intellectual piracy and plagiarism” (10).

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7) DERNBURG, *Die Institutionen des Gaius, ein Collegienheft*, Halle, 1869, pp. 104-107; Peter STEIN, *Regulae iuris*, 1966, p. 83; Tony HONORÉ, *Gaius, op. cit.*, p. 69; ROBLEDA, *Atti del simposio romanistico, Gaio nel suo tempo*, p. 142.

8) An expanded version has been published in *Justinian's Digest and the Compilers*, Exeter, 1995, pp. 83-97. There is an Italian version of the article: *Gaio o Sesto Pomponio*, trad. di Stefania PERTOLDI, 1997.

9) *Op. cit.*, p. 87.

10) *Ibidem*, p. 94.

**I.**

No Roman lawyer has inspired so many controversial hypotheses. His Roman origin, his originality, even his sex has been contested. A century ago SAMTER gathered some evidence showing that Gaius was the male pseudonym of a female lawyer<sup>(11)</sup>. Max KASER had doubts about his classicism<sup>(12)</sup>. HUSCHKE has qualified Gaius' Institutes as "the most admirable work ever written on the *ius civile*"<sup>(13)</sup>. For VIPER Gaius is the greatest reformer of the Roman law<sup>(14)</sup>. HONORÉ considers Gaius the spiritual father of the Justinian codification<sup>(15)</sup> and Donald KELLY has traced the influence of Gaius through Middle Ages up to modern times, concluding that the "gaianism" is one of the pivots of the "Substructure of Western Social Thought"<sup>(16)</sup>. Jacques MICHEL finds "qu'il y a indiscutablement des idées neuves chez Gaius"<sup>(17)</sup>.

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11) SAMTER, *War Gaius das männliche pseudonym einer Frau?*, *Deutsche Juristenzeitung*, 13, 1908, pp. 1386-1391.

12) Max KASER, *Gaius und die Klassiker*, *ZSt*, 70, 1953, pp. 127-178.

13) HUSCHKE, *Iurisprudentia anteiustiniana, praefatio Institutionum*.

14) VIPER, *Prosvetitel'nyj vek Rimskoj imperii* [= The enlightenment Century of the Roman Empire], *Vestnik Drevnej Istorii* [= Journal of Ancient History], 1947, p. 47.

15) Tony HONORÉ, *Tribonian*, London, 1978, p. 130.

16) Donald KELLY, *Gaius noster – Substructure of Western Social Thought*, *The American Historical Review*, vol. 84, n° 3, 1979, pp. 609-648.

17) Jacques MICHEL, *Du neuf sur Gaius?*, *RIDA*, 1991, XXXVIII, p. 215.

Quite the opposite is the evaluation of Gaius given by some eminent names denying any quality of Gaius, placing him on the lower level among the classics – “a third rank star in the sky of the roman jurisprudence” which shines more brightly only because it stays more close to us due to the fact that we are possessing a book written by him (18). In a way the opinion of PUGSLEY is not quite new. Several authors have accused Gaius of plagiarism. Not only “a typical teacher (typische Schulmeister)” whose Institutes are nothing else than “rough lecture-notes” (19), “not endowed with some outstanding talents (*privo di doti eminenti*)” “without scientific qualities (*privo di valore scientifico*)” (20), Gaius is an author without originality. He has borrowed his system of Institutes (famous *personae – res – actiones*) from another jurist, possibly from Pomponius (21). ROBBE thinks that the Institutes are nothing else than the re-elaboration of a textbook used by the Sabinians for a long time (22). Anna Maria GIOMARO even has some doubts about the very

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18) KUNTZE, *Der Provinzialjurist Gaius, wissenschaftliche Abgeschätzt*, 1883; KRÜGER, *Geschichte der Quellen des römischen Rechts*, 2nd ed., Leipzig, 1912, p. 204 sqq.

19) SCHULZ, *History of Roman Legal Science*, Oxford, 1953, pp. 163-164.

20) ARANGIO-RUIZ, *Storia del diritto romano*, 1966, 287-288.

21) KRÜGER, *op. cit.*, p. 201 sqq.

22) ROBBE, *Atti del simposio romanistico, Gaio nel suo tempo*, Napoli, 1966, pp. 114-115.

existence of Gaius <sup>(23)</sup>. For PUGSLEY it is not a doubt, it is an elaborated construction. So – Gaius is not only deprived of originality, of eminent gifts or scientific value, he is deprived of his very existence. There is no Gaius, there is only Pomponius.

I am not entering here into reasons for which, I believe, the existence of that “phantom book” of “Proto-Gaius” has to be rejected, because I did that some six years ago <sup>(24)</sup>. I will try here to emphasize the weakness of PUGSLEY’s hypothesis, to give some arguments proving that Gaius and Pomponius could not be the same person.

**1.** First of all there is an objection to the method used by David PUGSLEY. Sometimes he is starting from his theory as a proven thing and using that presumption as a given fact.

Example number one. In the Institutes (I.188) Gaius tells the reader that he will not enter in details into the problem «since we have dealt with this field quite thoroughly, both in our interpretation of the Edict and in those books which we wrote on Quintus Mucius». PUGSLEY rejects the possible existence of such a work written by Gaius: «...but of the work by him on Quintus Mucius there is not a slightest trace. No such work was known

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23) Anna Maria GIOMARO, *Spunti per una lettura critica di Gaio Institutiones*, II, 1995, p. 11: “...quando si acceda all’opinione della sua reale esistenza”. Maybe she was influenced by PUGSLEY.

24) See my study, *Gaius noster, le plaidoyer pour Gaius*, *Studia amstelodamensia*, Amsterdam, 1989, chapters IV, VI and XII.

to Justinian's compilers» (25). In other words, believing that Institutes were written by Pomponius *quod est probandum*, PUGSLEY rejects the one proof from the Institutes. The fact that Justinian's compilers did not mention the books does not prove much. Does anyone think that the *Index Florentinus* covers the whole body of classical literature? Maybe the compilers were satisfied with the book of the same title, written by Pomponius or they did not possess a copy of it. Is it the only book for whose existence there is only one proof? On the other hand it is strange that PUGSLEY pays so much attention to that detail of the Index, and ignores many others which contradict his thesis such as the long list of works attributed to Gaius, different from the list which compilers considered to have been written by Pomponius.

Example number two. In his calculation of the number of books written by both (or by Pomponius alone – according to PUGSLEY) he reduces the number of commentaries by deducting from the total number those which Gaius presumably took from Pomponius (26). So, once again PUGSLEY proves his theses by taking as a given fact something which has to be proven.

2. Let us pay some attention to the size of the works of the two jurists. Pomponius wrote, according to the *Index Florentinus*, 129 commentaries. With the addition which comes

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25) David PUGSLEY, *op. cit.*, p. 84.

26) *Ibid.*, p. 89.

from other evidence the total would be between 300 and 350 (27). For Gaius PUGSLEY's estimate is 93 books, but, as we have seen, he deducts from that number books that Gaius presumably took from Pomponius, reducing in that way the total to 80 commentaries. So, by squeezing the number of *volumina* PUGSLEY comes to the conclusion that the overall total for both would be 400 books. It could be written by one person, «it is a lot, but not impossible» because that is the number of *volumina* written by Labeo (28).

Labeo lived a century before Gaius and Pomponius. If it is true what Pomponius tells us about his work – most likely it is a rounded figure – Labeo is a champion of productivity among lawyers of the first and second century. For Servius Sulpicius Pomponius gives 180 and all other numbers are much more modest (from 3 to 18 commentaries). There are authors whose opinion about the number of books written by Gaius is much higher, varying between 120 and 150 (29). If we apply those estimates the total number is from 440 to 490 volumes. It is a lot and probably impossible for one person to write. Even with books traditionally attributed to each one of them respectively (Gaius between 93 and 150, Pomponius between 320 and 350), those two are the most fertile authors of their time.

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27) Tony HONORÉ: up to 300 (*Gaius*, p. 91); LIEBS: between 300 and 350 (*Gaio nel suo tempo*, p. 65).

28) *Op. cit.*, p. 90.

29) *Ibidem*, p. 91; LIEBS, *Atti del simposio, Gaio nel suo tempo*, p. 65.



3. It is true that Gaius and Pomponius have much in common. They both belong to the academic circle of *iurisdocentes* and not *iurisprudentes*. For Gaius it is almost certain that he did not have the *ius publice respondendi*, for Pomponius it is a probability. They share the same interest for the *ius civile*, for the praetorian edict, for legal history. Still there are some major differences. One excels in productivity, the other in diversity. Pomponius produced more commentaries, but Gaius had more titles. One of the striking differences is their destiny in legal history. Gaius is ignored by his contemporaries, except maybe, by Pomponius himself, and by lawyers of the two centuries that followed. Pomponius' work met immediate recognition. He was cited by such great names as Julian and he is one of the favorite authors of Ulpian, who cites his works on more than 300 occasions. Ulpian wrote his commentary on the *ius civile* by using as a model Pomponius' work *Libri ad Sabinum*.

Later the situation has changed dramatically. The *Lex citationis* included Gaius in the restricted circle of five paramount authorities. Pomponius appears nowhere, even among the jurists of the second rank, such as Scaevola, Sabinus, Julian and Marcellus.

It would be strange that the drafters of the *Lex citationis* and Justinian's compilers did not know the truth about the alleged plagiarism. Even in case of their ignorance, it is hard to explain the success of the plagiarist and such a modest achievement of the original author. The mere fact that the two were treated so

differently demonstrates that there are considerable differences in the nature of their works.

4. Pomponius is more within the framework of the basic task of the literature of his time: *da mihi facta, dabo tibi ius*. Gaius work has more scientific flavour, in this respect he is really not a “classic”. According to KASER that explains why contemporaries, all pragmatic minded, did not care about Gaius, but they did pay attention to Pomponius <sup>(30)</sup>.

Gaius’ contribution to the theory of law, to classifications and definitions is more important than that of any other Roman jurist. The first system in the history of law, the system *personae-res-actiones* has survived for centuries and can be detected in almost any of modern codifications. Even in a land so removed of Rome and Europe, such as Louisiana, the strange place for the Law of Succession (as a method of the acquisition of the ownership *per universitatem*) could be explained by Gaius’ influence. For HONORÉ Gaius is the spiritual father of Justinian’s codification <sup>(31)</sup>. Although the work of Pomponius is at least twice as voluminous as that of Gaius, in the title *De verborum significatione* there are twice as many definitions taken from Gaius as from Pomponius. The impression is the same if we look at the number of legal maxims or etymologies. Peter STEIN says

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30) Max KASER, *Atti del simposio romanistico, Gaio nel suo tempo*, p. 44 sqq.

31) Tony HONORÉ, *Tribonian*, London, 1978, p. 130.

of his *regulae*: “The two examples of Gaius’ *Regulae* are sufficient to show that they were broader in scope, more general and more academic than, say, those of Neratius or Cervidius Scaevola” (32). STEIN concludes: “In this respect Gaius was ahead of his time. He anticipated the third century jurists’ tendency towards consolidation and classification. Consequently his idea of *Regulae* was broader than that of his contemporaries” (33). Including Pomponius, of course. In the number of etymologies Gaius exceeds all the Roman jurists (34). According to SCHULZ: “Gaius’ broad conception of *contractus* was foreign to the classical lawyers both before and after him... This conception was probably an audacious creation of Gaius like his conception of *obligatio*” (35). He has invented both classifications of obligations which are considered classic: twofold (*contracts–delicts*) and threefold (*contracts–delicts–variae causarum figurae*). He even had some ideas which announced the categories of *quasicontracts* and *quasidelicts* (36). Different classifications of actions, *plus petitio*, *legati*, *interdicts*, *capitis deminutio* are found

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32) Peter STEIN, *Regulae iuris*, Edinburgh, 1966, p. 83.

33) *Ibidem*.

34) CECI, *Le etimologie dei giureconsulti romani*, Torino, 1892, pp. 123-144. We must have in mind that CECI wrote his study before the papyri from Antinopolis have been found, in which there are some more etymologies given by Gaius: *erctum non citum*, *ciere*, *secare*, *condicere*.

35) SCHULZ, *Classical Roman Law*, Oxford, 1954, pp. 467-468.

36) See: D. 44.7.1 pr. DIÓSDI, *Contracts in Roman Law*, Budapest, 1981, p. 114.

for the first time in commentaries written by Gaius <sup>(37)</sup>. Pomponius' contribution of that kind is much more modest. Even Hans ANKUM in his essay of rehabilitation of Pomponius admits that Pomponius is a jurist of eminent rank, but not a Julian or Celsus <sup>(38)</sup>.

5. There are some similarities in their style, which is clear, simple, with some pedagogic flavor <sup>(39)</sup>. But in that respect there are some differences, as well.

For one thing Gaius is famous and unique among the lawyers of his time – on many occasions he does not refer to individual jurists, but to the opinion of the Sabinian or Proculian school <sup>(40)</sup>. There is not a single case of such citation by Pomponius, he is referring exclusively to names. It is obvious that Gaius belongs to the Sabinian school and that he is proud of it. For

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37) I tried to summarize Gaius' achievements in *Gaius noster*, pp. 154-156.

38) Hans ANKUM, *op. cit.*, p. 11. Peter STEIN has an impression that Pomponius lacks the notion of specific 'sources' of the kind. Otherwise he could not have included the *legis actiones* in the scheme (in his review of BREONE's book *Tecniche e ideologie dei giuristi romani*, *Index* 3, 1972, p. 548).

39) KRÜGER, *op. cit.*, p. 201; LIEBS, *Gaius und Pomponius*, *Atti del simposio romanistico*, *Gaio nel suo tempo*, p. 65, Max KASER, *Atti del simposio...*, *op. cit.*, p. 49.

40) *Inst.* I.90, 196 (twice); II.15, 37, 79, 123 (three times), 195, 200 (twice), 220 (three times), 221, 231, 244; III.87, 98, 103, 141, 167a, 168, 178; IV.29, 78, 79, 153.

Pomponius we are not sure. HONORÉ thinks that he is a Proculian<sup>(41)</sup>.

They have different tastes for the authorities. The favorite of Pomponius is by far Labeo, with 52 citations, then comes Aristo with 27, closely followed by Quintus Mucius (26) and Julian (20). Gaius has Julian as no. 1, with 41 citations, Sabinus is next (24), then Cassius Longinus (22) and Proculus (17). It is not surprising that Gaius has an appreciation for Sabinus and Cassius, the two heads of his school. There is only one name, that of Julian, as common to both lists, but even in this respect there is a major difference: for Gaius Julian is the supreme authority, for Pomponius it is the fourth, coming after Labeo, Aristo and Quintus Mucius, which are rather marginal for Gaius: Labeo is mentioned 9 times, Quintus Mucius only three times, Aristo not at all.

6. Even those who do not accept Gaius as an original and first rank authority, admit that his Latin is excellent and his lucidity unsurpassed<sup>(42)</sup>. Although an innovative spirit in the field of classifications, definitions, when he comes to some legal problem, Gaius becomes more cautious. Pomponius does not have the self-confidence of a Julian, but certainly more than

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41) Tony HONORÉ, *op. cit.*, p. 26 sqq. HONORÉ thinks that Pomponius, although a Proculian, later taught at the Sabinian school, but that is highly hypothetical.

42) BONFANTE, *Histoire du droit romain* (version française), 1928, pp. 441-442.

Gaius <sup>(43)</sup>. The usual way of expressing his or others' view for Gaius is *puto, placet, placuit*. Pomponius, too, uses *puto, placebat*, but also *scribit, scripsit* (ca 30 times) or *respondit* (15 times), forms which Gaius is using only occasionally. The forms *aiebat* can be found in more than 80 fragments of Pomponius. Gaius uses *ait* four times only <sup>(44)</sup>.

With all these differences in taste, in the authorities they quote, in style – could it be one person who wrote both the *corpus Gaianum* and *corpus Pomponianum*? I doubt it.

7. PUGSLEY presumes that the Institutes and other books usually attributed to Gaius were written by Pomponius and published in Rome, but a version of the Institutes circulated in the eastern part of the empire, where we find the earliest evidence, under the name of Gaius <sup>(45)</sup>.

There is something strange in the way the late classical lawyers used Pomponius' commentary of the edict: *Libri ad edictum praetoris urbani*. This commentary is the largest of all works written by classical jurists. The compilers of the Digest did not have that book of Pomponius, it was known to them through the works of Ulpian, Paul, and (only through one fragment in each) from Marcian and Scaevola. In the Digest we could find fragments from the first part only. After the commentary 85 there

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43) Tony HONORÉ, *Gaius, op. cit.*, p. 81.

44) Tony HONORÉ, *Gaius*, Tabula laudatoria no. III, IV, V and XI.

45) David PUGSLEY, *op. cit.*, p. 85.

is a gap. There should be a section *De Testamentis*, *De Legatis* which are missing entirely. All three appear in Gaius *Libri ad edictum praetoris urbani*, which the compilers did possess. The two works are complementary. «It would not be surprising if they were one work written by one man» concludes PUGSLEY<sup>(46)</sup>. And that man is Pomponius. The explanation of PUGSLEY is that those books of Pomponius had been removed, published under the name of Gaius. This hypothesis is acceptable under some presumptions: that there was only one copy of the work of Pomponius, that Gaius (or someone else) has stolen physically a part of it and that compilers did have access only to that stolen part of Pomponius's commentary on the praetorian edict. There is an additional reason for the scepticism: in fragments attributed to Gaius no other jurist is cited, whereas Pomponius cites Labeo (5 times), Aristo (twice) and Julian (once). «There may... have been change in style, which would not be surprising in so large work. Perhaps the second half was written away from a law library» says PUGSLEY<sup>(47)</sup>.

The explanation for that gap could be that compilers liked better what Gaius wrote in his commentaries about those topics. It is not unusual practice for them to use only a part of the work, omitting everything which they considered obsolete or of lesser quality. That is the possible explanation for the fact that from Gaius' book *Res cottidianae* they took fragments from the first three commentaries only. Perhaps they considered the additional

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46) *Ibidem*, pp. 86-87.

47) *Ibidem*, p. 87.

four commentaries, treating probably succession and procedure, outdated (48).

We must bear in mind that plagiarism usually is not ordinary theft. It means stealing ideas, not the original work. Even if we take as possible the physical removal of the part of the manuscript, it is hard to believe that there was only one copy of the manuscript. If we take PUGSLEY's theory as true, it means that an oriental has published under his name part of the works of Pomponius. But in Rome and other western provinces the original books of Pomponius most likely also existed. If the original was in Rome and a copy circulated in the eastern part of the empire under some other name, it is hard to believe that jurists from the capital did not know who was the true creator of the Institutes. Textbooks are usually edited (or transcribed) in many copies (that is one of the possible explanations for the survival of the Institutes), and not only in one version. The main manuscript was found in the western part of the empire, in Verona, and all other fragments, except that of Antinopolis, are also from western locations. Of course one could argue that on the manuscript we do not have the name of the author and the title of the work. But from other sources, especially from the Digest and from some western barbaric codifications ("Visigothic Gaius"), it is obvious that these are the Institutes and it was Gaius who wrote them.

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48) Obrad STANOJEVIĆ, *op. cit.*, p. 84 sqq.



8. The well established opinion is that Gaius was not cited by his contemporaries, except, perhaps, by Pomponius once. Of course, we could not be sure of that. The only conclusion we can come to is that in the existing literature from the second, third and fourth century we are not able to find Gaius' name. We must bear in mind that we have access only to a small portion of that literature, mostly through Justinian's Digest. Who can guarantee that some jurist did not quote Gaius in some of his works?

There is a high probability that Gaius cited Pomponius and a possibility that Pomponius cited Gaius. If it is true, PUGSLEY's theory is unacceptable for obvious reasons.

In one fragment of his book *Ad Quintum Mucium*, Pomponius says: ... *et non sine ratione, quod Gaius noster dixit* (D. 45 3.39). PUGSLEY, of course, thinks that the words *Gaius noster* are interpolated (49).

Let me summarize the reasons supporting the genuineness of the text.

First of all, we are out of the period when all troubles in the interpretation of a text of the Digest were resolved by the theory of interpolation. Why should compilers, having an enormous task in front of them bother with a fairly clear opinion of Pomponius by inserting some thought of Gaius which does not change the essence of the text? Pomponius cites Longinus on ten

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49) *Op. cit.*, pp. 92-93.

occasions, always using his nomen: Cassius <sup>(50)</sup>; he never uses his praenomen – Gaius. *Gaius noster* is the usual way of referring to “our Gaius” and it suits better the modest figure of professor, of colleague, than that of Gaius Cassius Longinus, a member of the social and political elite of the time. One additional argument is that Pomponius cites *Gaius noster* in his commentary *Ad Quintum Mucium*. As we have tried to show above, there is some evidence that Gaius wrote the book with that title and there is not the slightest evidence that Longinus ever wrote such a work. One additional argument is suggested by Theo MAYER-MALY. The opinion which Pomponius gives in this fragment is in accordance with the idea of Gaius in *Inst.* II.91-92. This idea Gaius probably repeated in his work *Ad Quintum Mucium* <sup>(51)</sup>.

Gaius, too, cites Sextus:

*Sed Iuliano et Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum* <sup>(52)</sup>.

Sextus Pomponius or some other Sextus, e.g. Sextus Africanus? It is true that this could be Sextus Africanus, because there is one fragment in the Digest where Africanus is referred to as Sextus <sup>(53)</sup>. There are some reasons to believe that it is

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50) D. 4.8.40; D. 22.6.3.1; D. 29.2.99; D. 30.26.2; D. 34.2.21.2; D. 35.1.6.1; D. 35.2.31; D. 41.1.27.2; D. 46 3 17.

51) Theo MAYER-MALY, *Gaius noster*, *Roczniki Teologiczno-kanoniczne*, 10, 1963, pp. 55-63.

52) *Inst.* II.218.

53) In D. 30.32 pr. we find: “...*ita verum esse tam Sextus quam Pomponius putant*”, which means that this Sextus can not be Sextus Pomponius. David PUGSLEY was kind to bring this fragment to my attention.

Pomponius that Gaius had in mind <sup>(54)</sup>. Why? The use of the *praenomen* is a more familiar way, appropriate for a colleague, which probably Pomponius was. Gaius uses *nomen* for Julian, but when he comes to Pomponius, he refers to him in a less formal way, by *praenomen*. But this, of course, is only a possibility.

9. If we accept David PUGSLEY's hypothesis, it would be the only known case of "intellectual piracy" in the history of Roman legal science. The whole atmosphere of the relationship among the lawyers does not fit the idea of plagiarism. Among themselves they behave, as SCHULZ points out, "like gentlemen" <sup>(55)</sup>. The jurists of that time were not under the pressure "to publish or perish", their authority was based predominantly on their knowledge of law, on the value of their opinions, not so much on the books they published. The phrasing of the *Liber Enchiridii* of Pomponius suggests that the books were written mostly for the posterity or for pedagogical purposes: "He left such and such number of books". For many names, such as Aquilius Gallus, Balbus Lucilius, Capito, Massurius Sabinus, Proculus, Caelius Sabinus, Pegasus, Javolenus, Celsus, Aburnius Valens, Tuscianus, Pomponius is not giving the

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54) Theo MAYER-MALY, *op. cit.*; Tony HONORÉ, *Gaius*, p. 3 sqq.

55) SCHULZ, *op. cit.*, p. 125.

number of books they wrote. On some occasions he tells us what public service they exercised, did they have *ius publice respondendi*, what was their attitude toward the *princeps*, what was their importance in the school they belonged <sup>(56)</sup>. To steal a book from someone in a society which paid a lot of attention to morals, would not be so attractive, would be a “combination of high risk and low pleasure” <sup>(57)</sup>.

The drafters of the *Lex citationis* and Justinian’s compilers, having more original manuscripts than we do, more “on the spot evidence” were in a better position to decide whether Gaius existed and wrote the *Institutiones*, *Res cottidianae* and other books. And they gave him the whole credit for the system *personae – res – actiones*, for so many classifications, etymologies and definitions.

## II.

Why have so many authors shown so much distrust, even animosity towards Gaius? They do not accept the evaluation given to him by the *Lex citationis*, they do not believe the compilers of Justinian’s Institutes telling us that they were inspired by Gaius (*Gaius noster*), or Digest considering him, and no other jurist, the creator of the first real system in the history of

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56) D. 1.2.47-53.

57) In the series of jokes in the time of the USSR, called Radio Erevan answers questions, the question: Is it possible to criticize the Central Committee? The answer was: Yes, but (the usual way of answering) it is like kissing a tiger – low pleasure, but high risk.

law. For them each Gaius, even *Gaius noster* is not that Gaius but some other. They don't believe that he is the one who invented so many novelties we find for the first time in the *Corpus gaianum* and nowhere else. For more than a century Romanists are chasing a ghost, a book which served as a model for Gaius. The mere plurality of those hypotheses is a clear sign of their weakness. I agree with SCHULZ that the existence of that "proto-Gaius book" is only "the shadow of a dream" (58).

The attitude of Max KASER is typical. During the symposium in Naples he said: "*Per ricordare un solo merito di Gaio; se è vero che è stato lui che ha creato il famoso sistema delle istituzioni, questo basta per lodarlo oltre ogni misura*" (59). There is some restriction, a condition for that possible "praise above all measure"; if it is true. Maybe it is not true. But in his course of Roman legal history KASER admits that Gaius created the "famous system of the Institutes". One would expect "praise above all measure". Nothing of the kind, there is not even modest recognition. On the contrary KASER has more compliments for Pomponius, repeating that old phrase – the only merit of Gaius is that we have a complete work of him, his text-book, which could not be compared with other classical works, being much inferior. So in the same book where he accepts Gaius as the true creator of that famous system, KASER concludes that he is a third rank star on the sky of classical Roman jurisprudence (60).

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58) SCHULZ, *Classical Roman law*, *op. cit.*, p. 467.

59) Max KASER, *Atti...*, *op. cit.*, p. 43.

60) Max KASER, *Römische Rechtsgeschichte*, 1950, pp. 172-173.

I will try to set out some possible reasons for that attitude towards Gaius, that kind of conspiracy against him.

First of all, Gaius is a strange person, full of contradictions. Is he alone with that feature among the strong and innovative spirits? Over the years KADEN from Geneva has collected proofs showing that Gaius was a weird person, *ein Sonderling* <sup>(61)</sup>. Even those who are aware of some merits of Gaius, label him “*ein Klassiker besonderer Art*” <sup>(62)</sup>, “*fuori della corrente dei classici*” <sup>(63)</sup>. Speaking about his attitudes, they use “*ganz anders Gaius*” <sup>(64)</sup>. HONORÉ, in his biography of Gaius writes: “At bottom Gaius is very much a Roman, tough, lawyerly and independent” <sup>(65)</sup>. For Jacques MICHEL Gaius is not only a Roman citizen, but he was a magistrate, which explains his interest and his knowledge of edicts <sup>(66)</sup>. But, in HONORÉ’s study dedicated to Tribonian, he insists on the hellenistic environment in which Gaius lived <sup>(67)</sup>. He is at the same time very critical when he is describing some aspects of the new regime, even ironical, and at the same time, servile towards

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61) According to KASER, *op. cit.* (*Gaius und die Klassiker*), p. 136. See also his discussion in *Atti...*, *op. cit.*, p. 48.

62) WAGNER, *op. cit.*, p. 270; KASER speaks about *Sondermeinungen des Außenseiters Gaius* (*op. cit.*, p. 136).

63) CASAVOLA, *Atti del simposio, Gaio nel suo tempo*, p. 5.

64) LIEBS, *op. cit.*, p. 71.

65) Tony HONORÉ, *Gaius*, *op. cit.*, p. 97.

66) Jacques MICHEL, *op. cit.*, pp. 186-199.

67) Tony HONORÉ, *Tribonian*, *op. cit.*, pp. 36, 247.

emperors (68). He is one of the rare jurists, together with Pomponius, which is paying some attention to history, but in several occasions he criticizes old rules compared to the new law (69).

This could be one reason, but it is not the most important.

The discovery of the Verona palimpsest is simultaneous with the birth and the rise of the Historical School. SAVIGNY and his followers have provoked two consequences: the mistrust for everything “byzantine” or “postclassical”, forgetting that *Corpus iuris civilis* is a byzantine product, and the myth of classicism, founded on the belief that a classic could not use a bad argument or write a phrase which is not perfect. For the texts which they found in the Digest they had a simple solution – everything which does not fit their idea of “perfect classicism”, which was a product of their imagination, has been spoiled by decadent Justinian’s compilers. It was a “green light”, a starting whistle for “la chasse aux interpolations” which lasted for hundred years and has given mediocre results (at the best) or a distorted picture (as a general rule).

What happened when NIEBUHR found the manuscript of Verona? The followers of SAVIGNY dreamed about that book. But usually it is hard to match reality with the dream.

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68) One well-known example of criticism is given in *Inst.* II.21, of irony: *Inst.* I.81, 94; and D. 38.17.9.

69) I.52-53, 144, 190; describing *perquisitio lance et licio* he adds: *quae res... ridicula est* (*Inst.* III.193).

As Byron said:

*D'you think if Laura had been Petrarch's wife  
He would have written sonnets all his life.*

When the long desired and the only more or less complete book written by a classical jurist appeared, miraculously surviving the disaster which the centuries have done to the written documents of Greece and Rome, some Romanists closed their eyes to minor imperfections and felt the admiration which is appropriate for a Classical Jurist (ZIMMERN, PUCHTA, HUSCHKE). Others were disappointed. All merits attributed to Gaius by postclassical lawyers and legislators were arrogantly ignored. They saved their myth of classical perfection in style and substance by bitterly rejecting Gaius, declaring the Institutes an inferior representative of the great age, judging Gaius a «third rank star», an unoriginal “typical school teacher”. The other consequence of that clash between reality and the phantoms was “la chasse au Proto-Gaius”. The “Proto-Gaius” was supposed to serve as a bridge between the “third-rank teacher” and the seventh heaven of classicism. Whatever was original, innovative, of cardinal importance for the history of law, especially his system of “tripartition”, was considered not to be his, but borrowed from some other, “real classic”.

I think that David PUGSLEY's attitude towards Gaius is a reflection of those attitudes and ideas.