Institutes Gaiī

Gaius, *Institutes of Roman Law* (ca. 160 CE)

Here is a brief biography of the author by Tony Honoré.

> Gaius, the famous 2nd-cent. CE law teacher, was lecturing in 160/1 and still alive in 178. Though a Roman citizen, he was known, and apparently chose to be known, by the single undistinctive name 'Gaius'. Some phrases in his work read as if written in Rome; others point to an eastern province. The key to the puzzle may be that Caius, who speaks of the school of Masurius Sabinus and C. Cassius Longinus as his teachers (*nostri praeceptores*), had his legal education in Rome but taught and wrote mainly in the east, Berytus (mod. Beirut), since Augustus a Roman colony with Italian status (*ius Italicum*), being a possible location. He is best known for his *Institutes* ('Teaching Course'), elementary lectures for students delivered in 160-1 but probably not published by himself. A 5th-cent. manuscript of these lectures, the most substantial legal work of the Principate to survive, was discovered in Verona in 1816 overwritten by later writing. Despite scribal errors most modem scholars regard the text as largely genuine. It is marked by clarity of style, attention to history, concern for classification, and a critical attitude to legal rules, for example the lifelong tutelage of women (*Inst*. 1.190). It employs a 'Socratic' method of teaching which often leaves unanswered the problem raised. A later work called Res *cottidianae* ('Everyday Matters'), at one time said to be of the 3rd cent. or later but now thought to be a genuine work of Gaius, refines and develops the sometimes loosely expressed text of the Institutes. Gaius was a prolific writer, the author of 30 books (*libri*) *Ad edictum provinciale* ('On the Provincial Edict'), a treatise *Ad legem XII tabularum* ('On the Law of the Twelve Tables'), and numerous other monographs. Justinian's compilers excerpted 521 passages from his works.
>
> Opinions differ as to his merits. He was no casuist; but his classifications are at least in part original. He invented or carried forward new types of legal literature, with an emphasis, natural if he was writing in the provinces, on imperial law. Gaius' *Institutes* were known in Egypt early in the 3rd cent. but, again perhaps because he was a provincial writer, none of his works are cited by later authors such as Ulpian who would be likely to have known of them. In the 4th cent. his work spread to the west, and in 426 was officially recognized by the Law of Citations, which put him on a level with Papinianus, Paulus, Ulpianus, and Modestinus as a writer whose work as a whole possessed authority. In Justinian's time he is affectionately called Gaius *noster* (' our Gaius') and Justinian's *Institutes* ('Teaching Course') are in effect a second edition of his work of that name. Through Justinian his has proved to be the most influential teaching manual for lawyers; and his classifications formed the basis of civil law systems in Europe up to the time of the French and German codes (*Oxford Classical Dictionary*, 3rd Edition, 1996, 620).

1. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members

are peculiar to itself and are called *ius civile*; the rules constituted by natural reason for all are observed by all nations alike and are called *ius gentium*. So, the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be explained in detail in each place as it occurs.

8. The whole of the law by which we are governed relates either to persons, or to things, or to actions; and let us first examine the law of persons.
9. The first division of men by the law of persons is into freemen and slaves.
10. Freemen are divided into freeborn and freedmen.
11. The freeborn [*līberī/līberae*] are free by birth; freedmen [*lībertīni/lībertīnae*] by manumission from legal slavery.
12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order and commence with freedmen assimilated to enemies surrendered at discretion.
13. The *Lex Aelia Sentia* [4 CE] enacts that slaves who have been punished by their proprietors with chains, or have been branded, or have been examined with torture on a criminal charge, and have been convicted, or have been delivered to fight with men or beasts, or have been committed to a gladiatorial school or a public prison, if subsequently manumitted by the same or by another proprietor, shall acquire by manumission the status of enemies surrendered at discretion.
14. Surrendered enemies are people who have taken up arms and fought against the people of Rome and having been defeated have surrendered.
15. Slaves tainted with this degree of criminality, by whatever mode they are manumitted and at whatever age, and notwithstanding the plenary dominion of their proprietor, never become citizens of Rome or Latins, but can only acquire the status of enemies who have surrendered.
16. If the slave has not committed offences of so deep a dye, manumission sometimes makes him a citizen of Rome, sometimes a Latin.
17. A slave in whose person these three conditions are united, thirty years of age, quiritary [civil] ownership of the manumitter, liberation by a civil and statutory mode of manumission, i. e. by the form of *vindicta*, by entry on the censor's register, by testamentary entry on the censor's register, by testamentary disposition, becomes a citizen of Rome: a slave who fails to satisfy any one of these conditions becomes only a Latin.
18. The requisition of a certain age of the slave was introduced by the *Lex Aelia Sentia*, by the terms of which law, unless he is thirty years old, a slave cannot on manumission become a citizen of Rome, unless the mode of manumission is by the form of *vindicta*, preceded by proof of adequate motive before the council.
19. There is an adequate motive of manumission if, for instance, a natural child or natural brother or sister or foster child of the manumitter's, or a teacher of the manumitter's child, or a male slave intended to be employed as an agent in business, or a female slave about to become the manumitter's wife, is presented to the council for manumission.

20. The council is composed in the city of Rome of five senators and five Roman knights above the age of puberty: in the provinces of twenty recuperators, who must be Roman citizens, and who hold their session on the last day of the assize. At Rome the council holds its session on certain days appointed for the purpose. A slave above the age of thirty can be manumitted at any time, and even in the streets, when the praetor or pro-consul is on his way to the bath or theatre.

21. Under the age of thirty a slave becomes by manumission a citizen of Rome, when his owner being insolvent leaves a will, in which he gives him his freedom and institutes him his heir, provided that no other heir accepts the succession.

22. Slaves manumitted in writing, or in the presence of witnesses, or at a banquet, are called *Latini Iuniani*: *Latini* because they are assimilated in status to Latin colonists, *Iuniani* because they owe their freedom to the *Lex Iunia* [19 CE], before whose enactment they were slaves in the eye of the law.

23. These freedmen, however, are not permitted by the *Lex Iunia* either to make a will or to take under the will of another, or to be appointed testamentary guardians.

24. Their incapacity to take under a will must only be understood as an incapacity to take directly as heirs or legatees, not to take indirectly as beneficiaries of a trust.

25. Freedmen classed with surrendered enemies are incapable of taking under a will in any form, as are other aliens, and are incompetent to make a will according to the prevalent opinion.

26. It is only the lowest grade of freedom, then, that is enjoyed by freedmen assimilated to surrendered aliens, nor does any statute, *senatusconsultum*, or constitution open to them a way of obtaining. Roman citizenship.

27. Further, they are forbidden to reside in the city of Rome or within the hundredth milestone from it; and if they disobey the prohibition, their persons and goods are directed to be sold on the condition that they shall be held in servitude beyond the hundredth milestone from the city, and shall be incapable of subsequent manumission, and, if manumitted, shall be the slaves of the Roman people: and these provisions are dispositions of the *Lex Aelia Sentia*.

28. Latins have many avenues to the Roman citizenship.

29. For instance, the *Lex Aelia Sentia* enacts that when a slave below the age of thirty becomes by manumission a Latin, if he take to himself as wife a citizen of Rome, or a Latin colonist, or a freedwoman of his own condition, and thereof procure attestation by not less than seven witnesses, citizens of Rome above the age of puberty, and begets a son, on the latter attaining the age of a year, he is entitled to apply to the praetor, or, if he reside in a province, to the president of the province, and to prove that he has married a wife in accordance with the *Lex Aelia Sentia*, and has had by her a son who has completed the first year of his age: and thereupon if the magistrate to whom the proof is submitted pronounce the truth of the declaration, that Latin and his wife, if she is of the same condition, and their son, if he is of the same condition, are declared by the statute to be Roman citizens.

30. The reason why I added, when I mentioned the son, if of the same condition, was this, that if the wife of the Latin is a citizen of Rome, the son, in virtue of the recent

senatusconsultum made on the motion of the late Emperor Hadrian [117-138 CE], is a citizen of Rome from the date of his birth.

31. This capacity of acquiring Roman citizenship, though by the *Lex Aelia Sentia* exclusively granted to those under thirty years of age who had become Latins by this statute, by a subsequent *senatusconsultum*, made in the consulship of Pegasus and Pusio [ca. 72 CE], was extended to all freedmen who acquire the status of Latins, even though thirty years old when manumitted.

32. If the Latin die before proof of his son's attaining the age of a year the mother may prove his condition, and thereupon both she and her son, if she be a Latin, become citizens of Rome. And if the mother fails to prove it, the tutors of the son may do so or the son himself when he has attained the age of puberty. If the son himself is a Roman citizen owing to the fact of his having been born of a Roman citizen mother, he must nevertheless prove his condition in order to make himself his father's self successor.

32. a. What has been said about a son of a year old, must be understood to be equally applicable to a daughter of that age.

b. By the Visellian statute those either under or over thirty years of age, who when manumitted become Latins, acquire the *ius quiritium*, i. e. become Roman citizens, if they have served for six years in the guards at Rome. A subsequent *senatusconsultum* is said to have been passed, by which Roman citizenship was conferred on Latins, who completed three years' active military service.

c. Similarly by an edict of Claudius [41-54 CE] Latins acquire the right of citizenship, if they build a ship which holds 10,000 *modii* of corn, and this ship or one substituted for it imports corn to Rome for six years.

33. Nero [54-68 CE] further enacted that if a Latin having property worth 200,000 sesterces or more, build a house at Rome on which he expends not less than half his property, he shall acquire the right of citizenship.

34. Lastly, Trajan [98-117 CE] enacted that if a Latin carry on the business of miller in Rome for three years, and grinds each day not less than a hundred measures of wheat, he shall attain Roman citizenship.

35. Slaves who become Latins either because they are under thirty at the time of their manumission or having attained that age because they are informally manumitted, may acquire Roman citizenship by re-manumission in one of the three legal forms, and they are thereby made freedmen of their re-manumitter. If a slave is the bonitary [*gentile*] property of one person and the quiritary [*civile*] property of another he can be made a Latin by his bonitary owner, but his re-manumission must be the act of his quiritary owner, and even if he acquires citizenship in other ways he becomes the freedman of his quiritary owner. The praetor, however, invariably gives the bonitary owner possession of the inheritance of such freedman. A slave in whom his owner has both bonitary and quiritary property, if twice manumitted by his owner, may acquire by the first manumission the Latin status, and by the second Roman citizenship.

36. Not every owner who is so disposed is permitted to manumit.

37. An owner who would defraud his creditors or his own patron by an intended manumission, attempts in vain to manumit, because the *Lex Aelia Sentia* prevents the manumission.

38. Again, by a disposition of the same statute, before attaining twenty years of age, the only process by which an owner can manumit is fictitious vindication, preceded by proof of adequate motive before the council.

39. It is an adequate motive of manumission, if the father, for instance, or mother or teacher or foster-brother of the manumitter, is the slave to be manumitted. In addition to these, the motives recently specified respecting the slave under thirty years of age may be alleged when the manumitting owner is under twenty; and, reciprocally, the motives valid when the manumitting owner is under twenty are admissible when the manumitted slave is under thirty.

40. As, then, the *Lex Aelia Sentia* imposes a certain restriction on manumission for owners under the age of twenty, it follows that, though a person who has completed his fourteenth year is competent to make a will, and therein to institute an heir and leave bequests; yet, if he has not attained the age of twenty, he cannot therein enfranchise a slave.

41. And even to confer the Latin status, if he is under the age of twenty, the owner must satisfy the council of the adequacy of his motive before he manumits the slave in the presence of witnesses.

42. Moreover, by the *Lex Fufia Caninia* [2 BCE] a certain limit is fixed to the number of slaves who can receive testamentary manumission.

43. An owner who has more than two slaves and not more than ten is allowed to manumit as many as half that number; he who was more than ten and not more than thirty is allowed to manumit a third of that number; he who has more than thirty and not more than a hundred is allowed to manumit a fourth; lastly, he who has more than a hundred and not more than five hundred is allowed to manumit a fifth: and, however many a man possesses, he is never allowed to manumit more than this number, for the law prescribes that no one shall manumit more than a hundred. On the other hand, if a man has only one or only two, the law is not applicable, and the owner has unrestricted power of manumission.

44. Nor does the statute apply to any but testamentary manumission, so that by the form of *vindicta* or inscription on the censor's register, or by attestation of friends, a proprietor of slaves may manumit his whole household, provided that there is no other let or hindrance to impede their manumission.

46. If a testator manumits in excess of the permitted number, and arranges their names in a circle, as no order of manumission can be discovered, none of them can obtain their freedom, as both the *Lex Fufia Caninia* itself and certain subsequent decrees of the senate declare null and void all dispositions contrived for the purpose of eluding the statute.

47. Finally, it is to be noted that the provision in the *Lex Aelia Sentia* making manumissions in fraud of creditors inoperative, was extended to aliens by a decree of the senate passed on the proposition of the emperor Hadrian [117-138 CE]; whereas the remaining dispositions of that statute are inapplicable to aliens.

48. Another division in the law of Persons classifies men as either dependent or independent.

49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation.

50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

51. Of persons subject to a superior, let us first examine who are in his power.

52. Slaves are in the power of their proprietors, a power recognized by *ius gentium*, since all nations present the spectacle of masters invested with power of life and death over slaves; and (by the Roman law) the owner acquires everything acquired by the slave.

53. But in the present day neither Roman citizens, nor any other persons under the empire of the Roman people, are permitted to indulge in excessive or causeless harshness towards their slaves. By a constitution of the Emperor Antoninus [138-161 CE], a man who kills a slave of whom he is owner, is as liable to punishment as a man who kills a slave of whom he is not owner: and inordinate cruelty on the part of owners is checked by another constitution whereby the same emperor, in answer to inquiries from presidents of provinces concerning slaves who take refuge at temples of the gods, or statues of the emperor, commanded that on proof of intolerable cruelty a proprietor should be compelled to sell his slaves: and both ordinances are just, for we ought not to make a bad use of our lawful rights, a principle recognized in the interdiction of prodigals from the administration of their fortune.

54. But as citizens of Rome may have a double kind of dominion, either bonitary or quiritary, or a union of both bonitary and quiritary dominion, a slave is in the power of an owner who has bonitary dominion over him, even unaccompanied with quiritary dominion; if an owner has only bare quiritary dominion he is not deemed to have the slave in his power.

82. Consistently herewith the offspring of a female slave and a freeman is by *ius gentium* a slave, the offspring of a freewoman and a slave is free.

83. We must observe, however, whether the *ius gentium* in any given instance is overruled by a statute or ordinance having the authority of a statute.

84. For instance, the *Sc. Claudianum* [52 CE] permitted to a female citizen of Rome having intercourse with a slave with his owner's consent, to continue herself in virtue of the agreement free, while she gave birth to a slave, her agreement to that effect with the owner being made valid by the *senatusconsultum*. Subsequently, however, the late Emperor Hadrian was induced by the injustice and anomaly of the ordinance to re-establish the rule of *ius gentium*, that as the mother continues free the offspring follows her status.

85. By a law (the name of which is unknown) the offspring of a female slave by a freeman might be free, for that law provided that the offspring of a freeman by another person's female slave whom he believed to be free shall be free if they are male, but shall belong to their mother's proprietor if they are female: but here too the late Emperor Vespasian [69-79] was moved by the anomalous character of the rule to re-establish the canon of *ius gentium*, and declared that the offspring in every case, whether male or female, should be slaves and the property of their mother's owner.

86. But another clause of that law continues in force, providing that the offspring of a freewoman by another person's slave whom she knows to be a slave are born slaves, though where this law is not established the offspring by *ius gentium* follow the mother's condition and are free.

[Translation by Edward Poste and E. A. Whittuck, 1904]