

Gaius or Sextus Pomponius

by David PUGSLEY

(*Exeter*)

In 1816 NIEBUHR discovered the work of a Roman jurist in a palimpsest in the Cathedral library in Verona. The beginning is missing. It presumably gave the title and the full names of the author. The work was the Institutes; the author was the jurist who later, from 426 onwards, was known as Gaius.

Who was Gaius? The most important piece of internal evidence is

G. 1.188: «From all this it is evident how many *species* or varieties of *tutela* there are. But to inquire into the number of *genera* between which these *species* are distributed would involve a long discussion, this being a point on which the older lawyers have been exceedingly doubtful. For our part, having dealt with the matter very carefully in our commentary on the Edict and in our books *ex Quinto Mucio*, we omit the whole discussion. It is enough to observe that some, for instance Quintus Mucius, have said

that there are five *genera*, others, for instance Servius Sulpicius, that there are three, others, for instance Labeo, that there are two, while others have held that there are as many *genera* as there are *species*».

The reference to the commentary on the Edict and the books from Quintus Mucius is capable of two interpretations. Either the author of the Institutes also wrote works on the Edict and Quintus Mucius; or the author of works on the Edict and Quintus Mucius also wrote the Institutes.

As to the first interpretation, we know that Gaius wrote a commentary on the Edict, indeed he wrote commentaries on both Edicts; but of a work by him on Quintus Mucius there is not the slightest trace (1). No such work was known to Justinian's compilers.

As to the second interpretation, there was only one jurist, as far as we know, who wrote commentaries both on Quintus Mucius and on the Edict, and that jurist was Sextus Pomponius. Perhaps therefore he was the author of the Institutes. He lived at the right time: the Institutes were written about 161 A.D., perhaps on the basis of earlier drafts; Pomponius was writing

1) HONORÉ, *Gaius* (1962), pp. 66-67, suggests that it contained between 13 and 26 books and was written in the late 130's, but that is pure speculation. See also HONORÉ, p. 57: "The subject hardly justified two works, and the natural inference is that Pomponius was imitating or attempting to outdo Gaius, rather than the reverse". If the subject did not justify two works, the natural reaction is to doubt whether there were in fact two. Apart from the historical introduction in the Enchiridion, Pomponius *ad Q. Mucium*, and the Institutes, there are no references to Q. Mucius in any other work by Gaius or Pomponius.

under the emperors Hadrian, Antoninus Pius, Marcus and Verus. He was interested in legal history. He was very interested in the two Schools (2) and gave detailed lists of their members. The Institutes give us details of the disputes between the two schools. The two accounts are complementary: it would not be surprising if they were both written by the same man.

This seems to lead to the conclusion that the Institutes were written by Pomponius and were presumably published in Rome under his own name, but that a version circulated in the eastern half of the empire, where we find the earliest evidence of them, under the name of Gaius.

Let us now turn to the commentary(ies) on the praetor's edict. Pomponius wrote an enormous commentary. It was not available to the compilers of Justinian's Digest, and perhaps never circulated in the eastern empire at all. We know about it second hand through the works of Ulpian and, to a lesser extent, Paul, and a fragment each from Marcian and Scaevola (3). In the first half the references frequently give the book number, up to the point where Ulpian 44 *ad edictum* refers to Pomponius book 83 (4). Thereafter there are no book numbers at all (5). But the

2) D. 1.2.2.47.

3) Actually at third hand through the Digest.

4) LENEL, Pomponius no. 142.

5) Paul rarely gives a full reference including book number, only five times in all, of which the last is Paul 38 referring to Pomponius 69. Ulpian frequently refers to earlier jurists by book number up to the end of book 52 (LENEL, Ulpian no. 1264, citing Julian 12 *digestorum*), but never thereafter. HONORÉ, *Ulpian* (1982), pp. 212-213, suggests that Ulpian continued to give book references but that they were suppressed by the compilers working

proportions are clear: roughly 1 book of Ulpian to 2 books of Pomponius. If those proportions were maintained then Ulpian book 83 (6) would correspond to Pomponius book 156. His commentary on the edict was far larger than any work written by any other classical jurist.

Shortly after Pomponius book 83 there is a gap: there should be a section *De Testamentis*, which is missing entirely, there should be a section *De Legatis* (7), and there should be a section *De liberali causa*, which is also missing entirely (8). All three sections appear in Gaius *ad edictum praetoris urbani*. And it is interesting to see the proportions between Ulpian and Gaius: *De Testamentis*, Ulpian 1 book (book 50), Gaius 2 books; *De Legatis*, Ulpian 1.5 books (book 51 and part of 52), Gaius 3 books; *De liberali causa*, Ulpian 1.5 books (book 54 and part of

on the Edictal Mass. This seems unlikely. It seems unlikely that the compilers working on the E Mass should decide unilaterally to suppress book numbers when the compilers working on the other two masses did not do so. The saving was minimal. And in any case the facts do not fit: the break between the S and E Masses comes in the middle of Ulpian book 52; the change in citation comes between books 52 and 53. HONORÉ says: "Suppose that, in reality, the break between the stint of the Sabinian and the edictal committees came half a book later, at the beginning of book 53", but then adds a footnote to say that he doesn't think it did. It seems much more likely that the change in style is due to Ulpian himself: up to the end of book 52 he was working in or near a library where he could check his sources and give a full reference; from book 53 onwards he was working from notes somewhere where the original sources were not available to him.

6) 81 on the praetor's edict and 2 on the edict of the *curule aediles*.

7) There is one fragment, LENEL, Pomponius no. 144, which may.

8) LENEL, Pomponius no. 145 belongs perhaps to E 292 rather than E 175. D. 39.2. draws from both sources.

55), Gaius 2 books. The proportions are roughly 1 to 2, 1 book of Ulpian to 2 books of Gaius, roughly the same as for Ulpian and Pomponius (9). The two works, Gaius and Pomponius, as we have them, are complementary: it would not be surprising if they were one work written by one man.

In that case here again we have a work written by Pomponius and published in Rome under his own name, and a version of part of it which was found by the compilers of Justinian's Digest in Constantinople in 530 A.D. under the name of Gaius.

In support of this view we have

D. 1.2.1 (Gaius 1 on the Law of the XII Tables): «Since I am aiming to give an interpretation of the ancient laws, I have concluded that I must trace the law of the Roman people from the very beginnings of their city. This is not because I like making excessively wordy commentaries, but because I can see that in every subject a perfect job is one whose parts hang together properly. And to be sure the most important part of anything is its beginning.

9) HONORÉ, *Gaius* (1962), pp. 66-67, estimates that Gaius on the Urban Edict contained 60 or 70 books, and suggests that on any topic Pomponius wrote between one-and-a-half and three times as much as Gaius. But that is based on a comparison with the commentary on the Provincial Edict, and it is not clear that that is comparing like with like. HONORÉ also points out that, as far as we know, Gaius on the Urban Edict does not cite other jurists. This is unusual in itself and far from Pomponius' normal practice. On the other hand, we know that Pomponius cited Labeo 5 times in his first 34 books but, as far as we know, never thereafter. Indeed after book 83 he only cites Julian once and Aristo twice in one passage. There may therefore have been a change in style, which would not be surprising in so large a work. Perhaps the second half was written away from a law library.

Moreover, if it is regarded as a sin (so to speak) for people arguing cases in court to launch straight into an exposition of the case to the judge without having made any prefatory remarks, will it not be all the more unfitting for people who promise an interpretation of a subject to deal straight off with that subject matter, leaving out its beginnings, failing to trace its origin, not even, as I might say, giving their hands a preliminary wash? In fact, if I mistake not, such introductions both lead us more willingly into our reading of the proposed subject matter, and, when we have got to the point, give us a far clearer grasp of it».

Gaius' motive in writing his commentary on the XII Tables was not, he tells us, his desire to write a verbose commentary. He was not doing it because he wanted to write a big book. Now, no one reading the works normally attributed to Gaius would say that verbosity was one of his characteristics. He had no need to defend himself against charges of verbosity. But there was a jurist who was verbose, who wrote a commentary on the edict in 156 books, who wrote far more than any other jurist after Labeo. That jurist was Pomponius; and if Gaius and Pomponius were the same person we can understand that he was sensitive on that point.

The same idea appears in G. 1.188, which we have already seen. If we go into this matter, says Gaius, there will be a long discussion, because the old authorities had enormous doubts about it; but we have already dealt with the matter *diligentius* in

our commentary on the edict; we have already said all there is to be said on the matter. That sounds like Pomponius, who probably devoted 4 or 5 books of his edictal commentary to *tutela* (10).

There are, however, two major objections. The first is that Pomponius and Gaius between them wrote too many books for them all to have been written by one man. Let us check the arithmetic.

Pomponius, according to the Index Florentinus, wrote 129 books. To that must be added 156 books on the Urban Edict (which includes 10 books attributed to Gaius), 8 books *de stipulationibus* (of which Gaius 3 *de verborum obligationibus* is probably a shorter version) (11), 26 more books of *variae lectiones* (of which there were at least 41, though there are only 15 in the Index) (12) and 1 book for the single volume *Enchiridion*. Total, 320 (13).

Gaius, according to the Index Florentinus, wrote 86 books. To that must be added at least 7 books for works recorded in the inscriptions to the Digest but not in the Index. Total, 93. From that must be subtracted 10 books on the Urban Edict which have

10) We cannot tell exactly. Ulpian wrote 2 books *De tutelis*, books 35 and 36. Ulpian book 35 cites Pomponius book 68; Ulpian book 40 cites Pomponius book 79: so that the proportions (1 book of Ulpian to 2 books of Pomponius) are fully maintained in this section of edictal commentary.

11) LENEL, Pomponius no. 815.

12) ID. no. 844.

13) HONORÉ, *Gaius*, p. 91: 250 to 300 books; LIEBS, in *Gaio nel suo tempo* (Naples, 1966), p. 65: 300 to 350 books.

already been counted under Pomponius *ad edictum*, and 3 books *de verborum obligationibus* which have already been counted under Pomponius *de stipulationibus*. Total, 80 (14).

The overall total is 400 books. That is certainly not beyond the capacity of a professor of law in a working life of 30 or 40 years, without the distractions of legal practice, which seems a fair description of both Gaius and Pomponius.

400 happens to be the number of *volumina* written by Labeo. The source of our information is Pomponius, who clearly had great admiration for Labeo, whom he cites very frequently in the first half of his writing career (15). The passage is worth citing in full:

D. 1.2.2.47: «Labeo declined to accept office when Augustus made him an offer of the consulship whereby he would have become *consul suffectus* (interim consul). Instead, he applied himself with the greatest firmness to his studies, and he used to divide up whole years on the principle that he spent six months at Rome with his students, and for six months he retired from the city and concentrated on writing books. As a result, he left four hundred manuscript rolls (*volumina*) most of which are still regularly thumbed through».

14) HONORÉ: 140 to 170 books; LIEBS: 120 to 150 books. The difference mainly arises from the method of calculating the commentary on the edict.

15) *Enchiridion*, *ad Quintum Mucium*, *ad Sabinum*, and *ad edictum* up to book 34 (LENEL, Pomponius no. 70).

We may wonder whether Labeo was Pomponius' model. Labeo refused to accept office; Pomponius, as far as we know, never held any office. Labeo taught for six months each year in Rome, and wrote for six months in the country: that is how he managed to write so much. Pomponius may have done the same. Above all he may have set himself a target of 400 books to equal his great predecessor: hence his magnum opus in 156 books on the edict (16).

The second objection to the assimilation of Gaius and Sextus Pomponius, is that Pomponius cites Gaius, which he would not do if they were one and the same person (17):

D. 45.3.39 (Pomponius 22 *ad Quintum Mucium*): «When a slave subject to a usufruct stipulates for his owner by name in connection with the usufructuary's property or his own labour, he acquires for the owner; but we should ask what action the usufructuary can bring to get recovery from the owner. In the same way, if [another's] slave acts as our slave in good faith, whatever he can acquire for us he may acquire for his owner by stipulating for him by name; but we may ask by what action we can recover it. What our learned friend Gaius has said with good

16) In the second half of his writing career Pomponius cites Julian 18 times, Labeo 8 times: see *ad edictum* from book 61, *ex Plautio*, and *epistulae et variae lectiones*. The works of Gaius belong to this period: he cites Julian 41 times, Labeo 7 times.

17) STANOJEVIĆ, *Gaius Noster* (Amsterdam, 1989), pp. 5-6, says that in G. 2.218 Gaius cites Pomponius, but the text says Sextus, which certainly could, and probably does, mean Africanus.

reason is that in each case there can be a *condictio* against the owner».

The crucial words here are our learned friend Gaius, in Latin *Gaius noster*. The expression *Gaius noster* occurs four times in our sources. On three occasions it is clearly Justinianic; here, on the fourth occasion, it might be genuine Pomponius or it might be a compilatorial interpolation (18). LENEL was clear that it was an interpolation, indeed that the whole of the last two lines from "*but we may ask by what action we can recover it*" onwards is interpolated. "I suspect that the hand of Tribonian has intervened here both because of the inept repetition of the question and because of the style" (19). KASER agrees: "I must confess that I have no confidence in the genuineness of this text; and I think the majority of Romanists shares my scepticism" (20). If the words

18) The point is obscured in the standard modern English translations. *Omnem*, 1 (WATSON translation) and *Imperatoriam*, 6, and J. 4.18.5 (BIRKS translation) all have our own Gaius; D. 45.3.39 (WATSON translation) has our learned friend Gaius. The Latin *Gaius noster* is the same in all four cases.

19) LENEL, vol. II, col. 72, n. 4: "Triboniani manum hoc loco intervenisse suspicor et propter quaestionem inepte repetitam et propter genus scribendi (possumus pro possimus!, Gaius noster!, in ... casu!)"

20) *Gaio nel suo tempo*, p. 44. Contra, HONORÉ, *Gaius*, pp. 1-11 (on which see KASER, *loc. cit.*: "On this text HONORÉ has constructed a whole edifice of hypotheses about the origins and position of Gaius, building a whole pyramid, as it were, on its point". Then follows the sentence in the text.) and STANOJEVIĆ, *Gaius Noster*, p. 13: "Some Romanists maintain that *noster* is an interpolation, but they are only a minority", citing the same authorities as HONORÉ. When the minority includes LENEL and KASER it may be right. Put at its lowest it is doubtful whether the text is genuine, and therefore it does not prove that Gaius and Pomponius were different people

Gaius noster were genuine, they would have to refer to his supposed commentary on Quintus Mucius, since none of his extant works was written early enough to have been cited by Pomponius in his commentary on Quintus Mucius. But, as we have already seen, there is no sign of any such work. If, however, the words are due to the compilers, they may refer to any of Gaius' works. LENEL suggested *De verborum obligationibus*, book 3, On slaves' stipulations (21), from which there is an extract, on closely related matters, earlier in the same Digest title. The compiler who was responsible for editing D. 45.3 may therefore have come across that precise point in Gaius at the end of the Papinianic Mass before he reached Pomponius at the end of the Edictal Mass. In that case the expression *Gaius noster*, on all four occasions when it appears, belongs to the year 533 A.D. (22).

We may conclude that Gaius and Pomponius were one and the same person, or more precisely that Pomponius was the author not only of the works which appear under his name but also of the works that appear under the name of Gaius (23).

21) LENEL, vol. I, col. 251, n. 1, referring to Gaius no. 516, D. 45.3.28.

22) *Omnem*, 1, 16 December 533; *Imperatoriam*, 6, 21 November 533; J. 4.18.5 - the Institutes only go up to J. 4.18.12 - October/November 533?; D. 45.3.39 - Book 45 only goes up to D. 45.3.40. It belongs to the last section of the Digest, Books 45-50 (*Tanta*, 8). If all six books were edited simultaneously by different groups of compilers in the hurry to finish the whole work before the end of the year, then D. 45.3.39 was one of the very last texts to be looked at - October/November 533?

23) That explains the curious fact that Gaius, the chauvinistic Sabinian, did not write a commentary *ad Sabinum*: he (Pomponius) did.

Presumably they were all originally published in Rome under the name of Pomponius, and were known to, and cited by, the later classical jurists accordingly (24). Some of them, or parts of some of them, were published in the eastern empire under a different name. That name was Gaius in 426, and it may have been Gaius right from the beginning.

Of course, we do not know exactly what happened, or why. It is unlikely that Pomponius wished his works to be published in the east under a pseudonym. It is more likely that this was a case of intellectual piracy or plagiarism.

After the end of the classical period some of the works of Pomponius spread to the east under his own name, and later on some of the works of Gaius spread back to the West under that name. In the east it was known that Gaius and Pomponius were two names for the same author. In the library that later formed the basis of the Index Florentinus (25) there was no overlap of major works: only one commentary *ad Quintum Mucium*; only one work on *senatusconsulta* (Pomponius), only one work on the *leges Iulia and Papia* (Gaius); and so on. The lists of works by Gaius and Pomponius in the Index are to a large extent complementary.

24) That explains why Ulpian and Paul frequently seem to plagiarize Gaius without ever citing him by name: cp. HONORÉ, *Gaius*, p. 127 and n.1.

25) See "On compiling Justinian's Digest (3): The Florentine Index", in the *Journal of Legal History*, vol. 14 (1993), pp. 94-105.

As is well known Gaius first appears by name in 426 A.D. in the Law of Citations (26):

«(After other matters). We confirm all the writings of Papinian, Paul, Gaius, Ulpian and Modestinus, so that the same authority shall attend Gaius as Paul, Ulpian and the others, and passages from the whole body of his writings may be cited. 1. We also decree to be valid the learning of those persons whose treatises and opinions all the aforesaid jurisconsults have incorporated in their own works, such as Scaevola, Sabinus, Julian, and Marcellus, and all others whom they cite, provided that, on account of the uncertainty of antiquity, their books shall be confirmed by a collation of the *codices*».

Two points should be emphasized. First, not only does Gaius appear as one of the five great jurists, which is surprising enough in itself, but it is expressly added that "passages from the whole body of his writings may be cited", without any indication as to the significance of that provision. Secondly, Pomponius appears nowhere by name, even among the jurists of the second rank, Scaevola, Sabinus, Julian and Marcellus, even though he was cited by his successors, less than Julian it is true, but more than Marcellus and much more than Scaevola and Sabinus (27). The explanation for both these surprising points may be as follows. The authors of the Law of Citations knew that Gaius

26) C.Th. 1.4.3.

27) See HONORÉ, *Ulpian*, pp. 207-235.

and Pomponius were one and the same person and that he was one of the leading jurists of the classical period. They therefore included him among the five great jurists. But the Law of Citations, though nominally promulgated jointly by Theodosius and Valentinian and though addressed to the senate of the city of Rome, is in fact of eastern inspiration and the work of Theodosius, who included it in his Code in 438 A.D. Hence instead of referring to Pomponius (some of whose works had been published under the name of Gaius), as they might have done in the west, they referred to Gaius (some of whose works had appeared under the name of Pomponius), which was the name normally used in the east. The provision that "passages from the whole body of his writings may be cited" was intended to include the works published under the name of Pomponius, and that is why Pomponius does not appear at all by name, even among the jurists of the second rank.

By the time of Justinian the identity of Gaius and Pomponius had been forgotten. That is why the compilers treat them as two separate jurists, and why they can make a reference to *Gaius noster* in a text written by Pomponius (28).

*

* *

Postscript: This is an expanded version of a paper presented at the Oxford Conference of the SIHDA on 21 September 1993 under the title *Gaio e Pomponio, una*

28) D. 45.3.39.

ricostruzione radicale. It was followed by some animated discussion, from which the main points that emerged were the following:

1. Laelius Felix also wrote a commentary on Quintus Mucius: Gellius, 15.27.1; LENEL, *Palingenesia*, vol. 1, 557-8; SCHULZ, *History of Roman Legal Science* (Oxford, 1946), p. 204. It contained more than one book, but we do not know that it was extensive, nor that he wrote a major commentary on the Edict. G. 1.188 fits well with what we know of Pomponius, but not with Laelius Felix.

2. The works of Gaius were very popular in the western empire in the postclassical period, the works of Pomponius were not. This is paradoxical, since Pomponius was well known in Rome at the end of the classical period and Gaius was not. The explanation lies in the Law of Citations, which gave authority in the west to Gaius and all his works, and omitted the name of Pomponius altogether.

3. It may be possible to check whether Gaius and Pomponius are simply two names for one person by comparing their vocabulary and style, and their opinions on questions of substantive law. This will require some care since there may be changes over a period of 40 years. For example, at the beginning of his career Pomponius cited Labeo with great frequency, later on he switched to Julian; Gaius cited Julian much more frequently than Labeo: but the works of Gaius belong to the later period: see notes 15 and 16.