

# **Great jurists and their impact on history and development of Private Law**

Academic year 2017/2018

Lecture Nr. 2

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Chair of Roman Law and History of Jurisprudence

# Great jurists and their impact on history and development of Private Law

## Roman jurists from the classic period

- *Gaius*
- *Ulpian*
- *Cervidius Scaevola*

[II-III AD]

# Roman private law

- the classic period (I BC-III AD)

- Role/position of jurist
- The path to becoming a lawyer  
(*fame, Latin „fama“*)
- What did they do?
  - I. preparing of legal advices to the given cases  
(case law)
  - II. discussion with other jurists (legal literature)
  - III. didactic

## Literature

### **Legal disputes:**

- *responses* (answers/legal opinions about single cases),
- *quaestiones* („legal disputes”, opinions with theoretical aspects),
- digests (larger works about law – both private as well as public law, based on opinions of the other jurists),
- commentaries to legal acts
- commentaries to edicts
- monographs (dedicated to single issue or office),

### **Educational (didactical) literature:**

- |  |                                      |
|--|--------------------------------------|
| - <i>institutiones</i> („handbooks” for private law) | - systematization                    |
| - <i>regulae</i> (lists of rules, legal maxims)      | - generalization                     |
| - <i>sententiae</i> (legal maxims).                  | - generalization<br>[simplification] |

## Characteristics of the Roman jurists (in the classic period; I BC – III AD)

- focused on „**hard cases**”  
[no special interests in daily routine]
- solving demanding cases; searching for perfect solution
- 4 pillars/foundations of justifications (*rationes decidendi*)
  1. existed regulations (if existed)
  2. participated rules
  3. philosophical and/or moral ideas
  4. argumentative techniques
- discussion about „hard cases” and solutions
- [clash of opinions; law as discussion]

# **Characteristics of the Roman jurists (in the classic period; I BC – III AD)**

## **Pragmatic attitude**

- aversion to excessive generalization

## **Law in action**– without excessive theories

- no „theory of law” (in the modern sense of this concept)

[Hidden motto of Roman jurists:

„we will build a bridge when we come to it”)

## **Secular look at private law**

(important reason of universality of the Roman private law)

## Influence of the Roman jurists on legal practice

- advices for citizens
- opinions which are **valid for judges**

### **G. 1, 7.**

*The answers of jurists are the decisions and opinions of persons authorized to lay down the law.*

*If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses (as is ruled by a rescript of the late emperor Hadrian).*

[question of position of the judge in this system; a judge has to follow the decision/opinion of jurists!; otherwise then in Anglo-Saxon system – *common law*, where a judge plays central role]

## The Roman **system** of private law (in the classic period)

- „movable” system, directed by jurisprudence
- secular system (universal)
- law as discussion (humanities)
- flexibility (adaptability) ↑      stability ↓

Why this period is „important”?

Why „the classic period” lasted only till the end of III AD?



# Great jurists and their impact on history and development of Private Law

## Roman jurists from the classic period

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[II-III AD]



# Gaius

## teacher-guide for the Roman private law

- born during the reign of Caesar Trajan (*Traianus*)  
~98-117 AD, died ~ 180 AD
- the Roman jurists of the classic period (II AD)
- known only from the first name (astonishing);  
probably he descended from the province
- known only from his works, ascribed to him
- (as far as we know) he didn't hold public office
- (as far as we know) he wasn't awarded of „*ius publice  
responendi*” privilege
- (as far as we know) he only taught – Gaius=teacher

## Greatest work

„**Institutes**” [*„Institutes of Gaius”*]

(**handbook**: „*instutuo*”, „*instituere*” – to educate)

Written around 160 AD

(most probably as drawn lectures of Gaius)

Basic lecture on the Roman private law (of the classic period)

## Structure of Institutes of Gaius (160 AD)

Beginning: information about sources of (private) law.  
Then material ordered according to chapters („books”) :

- 1) *ius quod ad personas pertinet* (about „persons”),  
**personae** – concerns mainly family law, personal law
  
- 2) *ius quod ad res pertinet* (about „things”),  
**res** – concerns mainly law of property, law of succession, law of obligations;  
Gaius classified:
  - „things” (objects of law),
  - structure of the law of succession,
  - sources of obligations (contracts, torts/”delicts”, quasi-contracts, quasi-delicts).
  
- 3) *ius quod ad actiones pertinet* (about „actions”/suits).  
**actiones** – concerns *civil suits and* legal (civil) proceedings

Institutes of Gaius are divided into 4 „books” (large chapters).

Way of quotations i.e. **G**, 1, 2

[=Institutes of Gaius, number of book, fragment, sometimes also paragraph]

Outline of the Gaius' handbook

(*personae – res – actiones*)

= who? what? how?

[systematization]

This outline (*personae – res – actiones*) is being commonly used in codifications of private law (Code of Napoleon, German Civil Code – BGB, Austrian Civil Code – ABGB, Polish Civil Code – k.c.).



## Institutes of Gaius (fragments)

G. I, 5

A constitution - is law established by the emperor either by decree, edict, or letter; and was always (there were no doubts) recognized as having the force of a statute(...).

## G. II, 42

„Usucaption” (prescription) of movable property (...) is completed within a year, that of lands and houses within two years; and this was provided by the Law of the Twelve Tables.

## G. II, 44

This regulation seems to have been adopted to prevent the ownership of property from being uncertain for a long period of time.



## **„Carrier” of the Institutes of Gaius**

- for legal education (III-VI AD)
- for „codification” of the Caesar Justinian (VI AD);

Basis for the Institutes of Justinian;

Dozen or more fragments from the Institutes of Gaius in the Digest of Justinian.

**„Second life”** of Institutes of Gaius – XIX AD

Second life of the  
Institutes of Gaius  
- 1816-



**Barthold Georg Niebuhr  
(1776-1831)**



Verona, capitular library

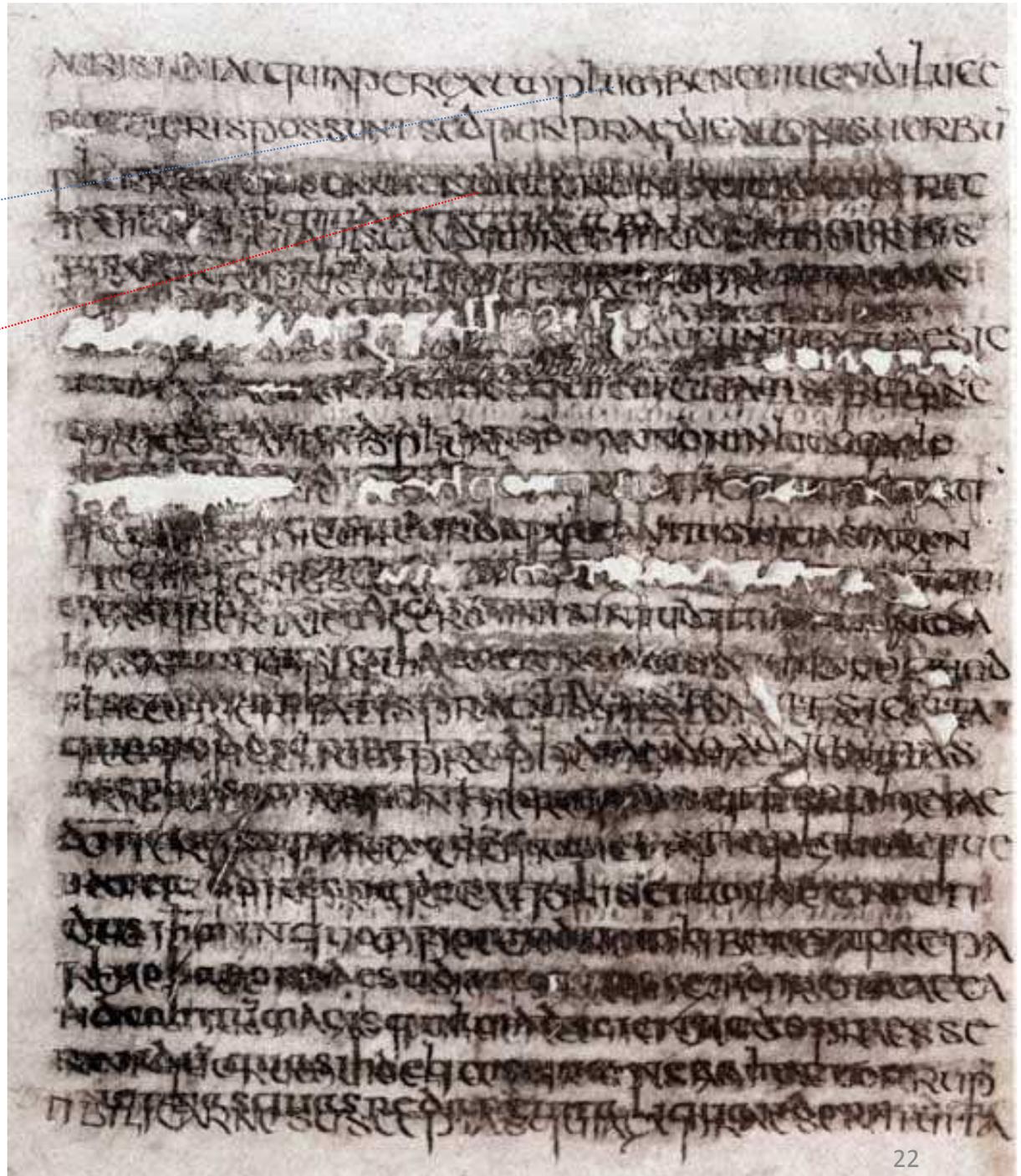
## Parchment

Larger theological  
uncial script

Smaller legal uncial  
script

**Palimpsest** – manuscript  
written over a parchment  
which has already  
contained the other text

Verona,  
Biblioteca Capitolare, Codex XV  
(olim 13),  
fol. 122 *recto* (double rescript)





1<sup>o</sup> PRUERO UEL IN PROUINCIIS A PUT PROCONSULES LEG  
 2<sup>o</sup> TUR MUE ETIAM FEMINAE SOLENT ADOPTARI ITEM  
 3<sup>o</sup> PRUERO A PUT POPULUM ADOPTARI ALIQUANDO P  
 4<sup>o</sup> BIBITUM E ALIQUANDO PERMISSUM EST NUNC EXE  
 5<sup>o</sup> PISTULA OPTIMI IMP ANTONINI QUAM SCRIPIT PRO  
 6<sup>o</sup> TIFICIBUS SI IUSTA CAUSA ADOPTIONIS ESSE IDEM  
 7<sup>o</sup> TUR CUM QUIBUS DAM CONDICIONIBUS PMITTIT. <sup>10</sup> <sup>11</sup> <sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup> <sup>16</sup> <sup>17</sup> <sup>18</sup> <sup>19</sup> <sup>20</sup> <sup>21</sup> <sup>22</sup> <sup>23</sup> <sup>24</sup>  
 8<sup>o</sup> A PUT PRUERO ET IN PROUINCIIS A PUT PROCONSULEM  
 9<sup>o</sup> LEGATUM UEL CUIUS C<sup>o</sup> Q<sup>o</sup> AETATIS ADOPTARE P<sup>o</sup> SUM<sup>o</sup>  
 10<sup>o</sup> ILLI UERO UTRIUSQ<sup>o</sup> ADOPTIONIS COMMUNE E Q<sup>o</sup> A ET  
 11<sup>o</sup> HI Q<sup>o</sup> GENERARE P<sup>o</sup> SUNT Q<sup>o</sup> LES SUNT SPADONES ADO  
 12<sup>o</sup> PTARE P<sup>o</sup> SUNT FEMINE UERO NULO MODO ADOPTA  
 13<sup>o</sup> RE P<sup>o</sup> SUNT Q<sup>o</sup> ANE QUIDEM NATURALES LIBEROS IN  
 14<sup>o</sup> POTESTATE HABENT ITEM SI QUI PER POPULUM SI  
 15<sup>o</sup> UEL A PUT PRUERO UEL A PUT P<sup>o</sup> SIDEM PROUINCIIS ADOPTA  
 16<sup>o</sup> UERIT POTESTATE EUNDEM ALIUM ADOPTIONEM DA  
 17<sup>o</sup> RE SET ILLA QUAE STIO E AN MINOR NATUM MAIORE  
 18<sup>o</sup> NATUM ADOPTARE POSSIT UTRIUSQUE ADOPTIONIS CO  
 19<sup>o</sup> MUNE EST ILLUT PROPRIMUM EST EIUS ADOPTIONIS QU  
 20<sup>o</sup> DE PER POPULUM FIT QUOD SI QUI LIBEROS IN POTESTA  
 21<sup>o</sup> TE HABETS SE AD PROS ANDUM DEDERIT NON SOLUM  
 22<sup>o</sup> IPSE POTESTATI ADOPTORIS SUBICITUR SET ET IA  
 23<sup>o</sup> LIBERI EIUS IN EIUSDEM FIUNT POTESTATE ANQ<sup>o</sup> U  
 24<sup>o</sup> NEPOTES <sup>25</sup> <sup>26</sup> <sup>27</sup> <sup>28</sup> <sup>29</sup> <sup>30</sup> <sup>31</sup> <sup>32</sup> <sup>33</sup> <sup>34</sup> <sup>35</sup> <sup>36</sup> <sup>37</sup> <sup>38</sup> <sup>39</sup> <sup>40</sup>

# Final draft (Reinschrift)

SPK, Ms. lat. fol. 308, Final draft  
 (Reinschrift), s. 27  
 [= fol. 30r = Gai 1.101-107].

L. 2. 25. 1. 2. de adoptionib.

v. 2. 2. 8. 9. 4. 11. 2. de adop.

Ulp. VIII, 4. 6. 8.

Ulp. VIII, 4. 6. 8.

108

27

First edition of  
„Institutes of Gaius”  
(printed in Berlin  
1820)



Second edition

(Berlin, 1824)

G A I I  
INSTITVTIONVM  
COMMENTARII IV.

E CODICE RESCRIPTO BIBLIOTHECAE CAPITVLARIS  
VERONENSIS

A FRID. BLVHMIO ITERVM COLLATO

SECVNDVM EDIDIT

IO. FRID. LVD. GOESCHEN.

ACCREDIT

FRAGMENTVM VETÉRIS IVRISCONSULTI  
DE IVRE FISCI

EX ALIIS EIVSDEM BIBLIOTHECAE MEMBRANIS  
TRANSCRIPTVM.

BEROLINI,

IMPENSIS GEORG. ANDR. REINERL.

MDCCCXXIV.

G A I I  
I N S T I T U T I O N V M

COMMENTARII QVATTVOR

CODICIS VERONENSIS DENO COLLATI  
APOGRAPHVM CONFECIT

ET

IVSSV ACADEMIAE REGIAE SCIENTIARVM BEROLINENSIS

EDIDIT

GVILELMVS STVDEM VND

ACCREDIT PAGINA CODICIS VERONENSIS PHOTOGRAPHICE EFFICTA

PROSTAT

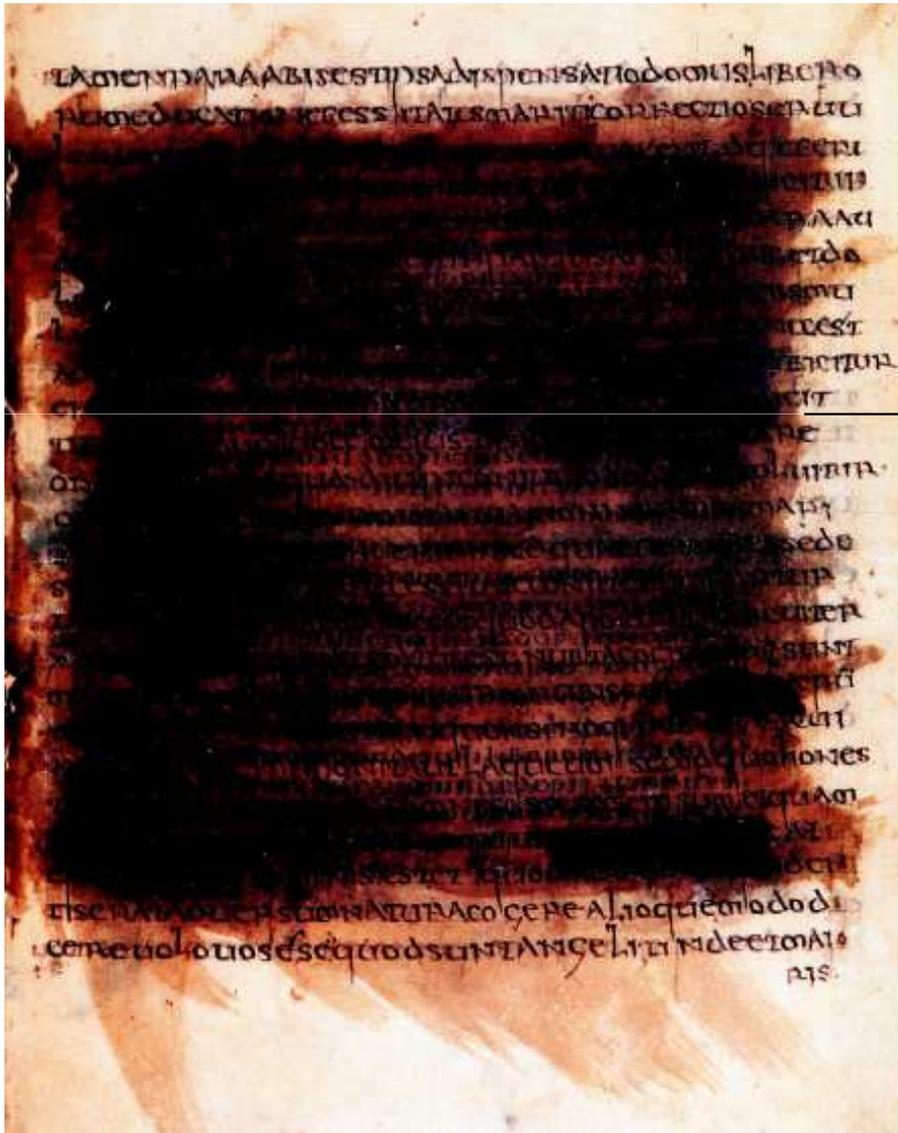
LIPSIAE APVD SALOMONEM HIRZEL

A. MDCCLXXIV.

3. Apograph (copy)  
Latin *apographum*  
of Guilemus Studemund  
(Leipzig, 1874)

1 p̄r̄·uepouelinprouincisarpurconsulesleqa  
2 tur̄m̄ueetiamfeminaesolentadortariitemi  
8 puBeremarpurpopulumadortariialiquandop  
4 hibitumēaliquandopermissumestnuncexe  
5 pistulaortimūp̄r̄antoniniquamscrispitron  
6 tificibussiustacausaadortionisessuideui  
7 tur̄cumquibusdamcondicionibuspm̄iūmē  
8 λarpur̄r̄·uepouetinprouincisarpurproconūle  
9 legatumuecuiusc̄q̄·aetatisadortarep̄sum̄  
10 illiueroutriusq̄ adortioniscommuneēq̄aet  
11 hiq̄generarep̄suntq̄lessuntsp̄adonesado  
12 rtarep̄suntfemineueronullomodoadortare  
13 rep̄suntq̄anequidemnaturalisliberoin  
14 potestatehabent itemsiquisperpopulum  
15 uearpur̄r̄·uelarpur̄sidemprouinciaeadortare  
16 ueritpotesteundemaliinadortionemda  
17 resetillaqualestioē anminornatumliore  
18 natuadortarepossitutr̄iusqueadortionisco  
19 muneestillutp̄ropriumesteiusadortionisqu  
20 aep̄populumfitquodisquiliberosinpotesta  
21 tehabetsiseadrogandumdederitnoniolu  
22 ipsepotestatiadrogatorissubiciturietetia  
23 liberieiusineiusdemfiuntpotestataenquā  
24 nepotes

Further works on parchment (palimpsest) in order to read „blurred” fragments of the Institutes of Gaius.

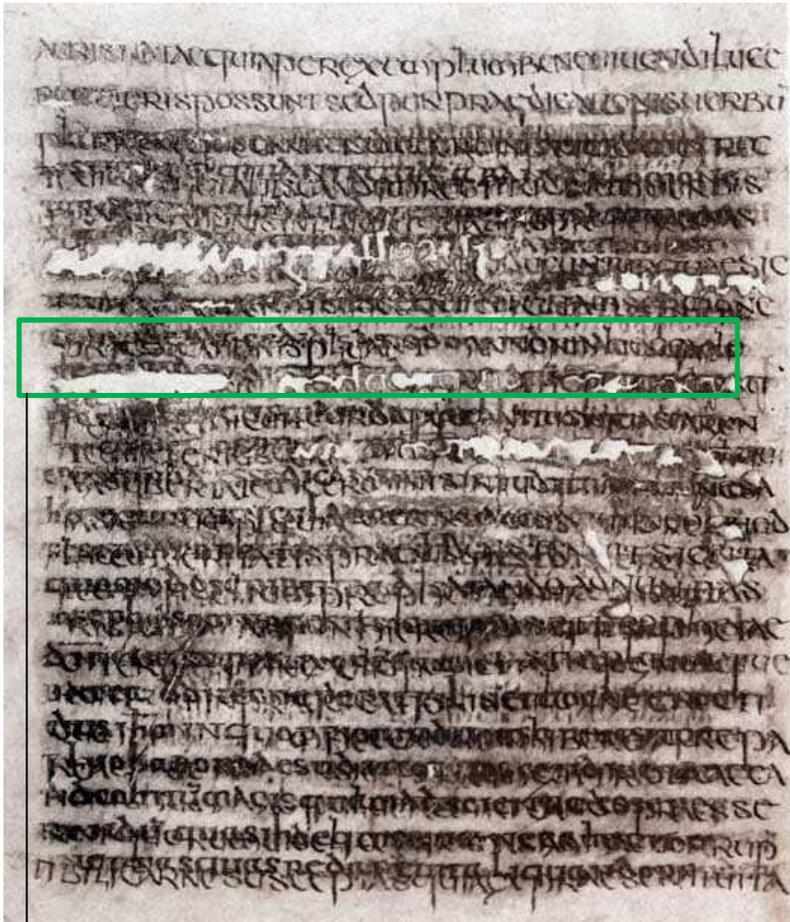


Palimpsest today

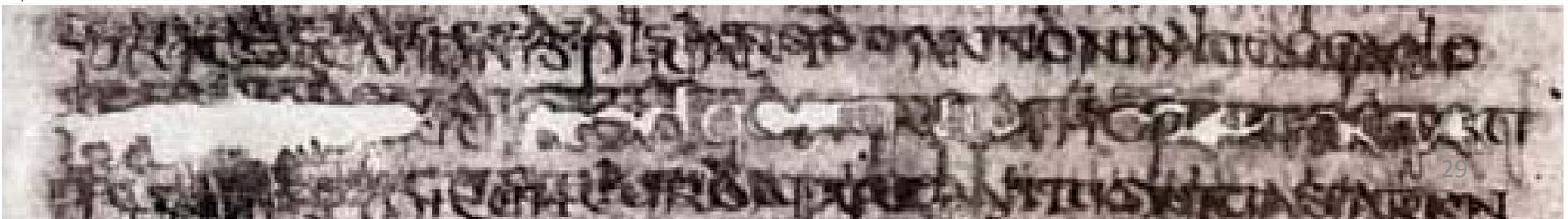
→ **Parchment tanned by chemicals from the 19th century**

Verona, Biblioteca Capitolare  
Codex XV (13)  
fol. 30 *recto*

Capitular library in Veronie  
Codex XV (13),  
fol. 122 *recto* (double rescript)

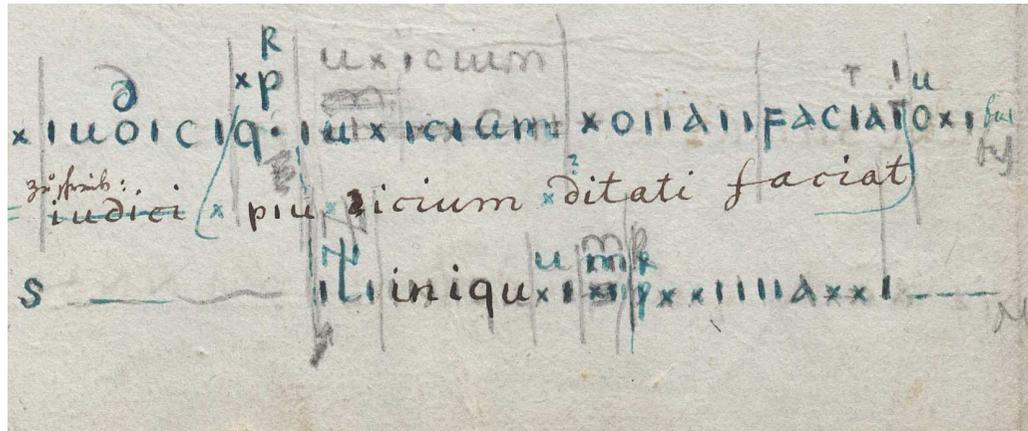


Holes in parchment (result of usage of chemical reagent)

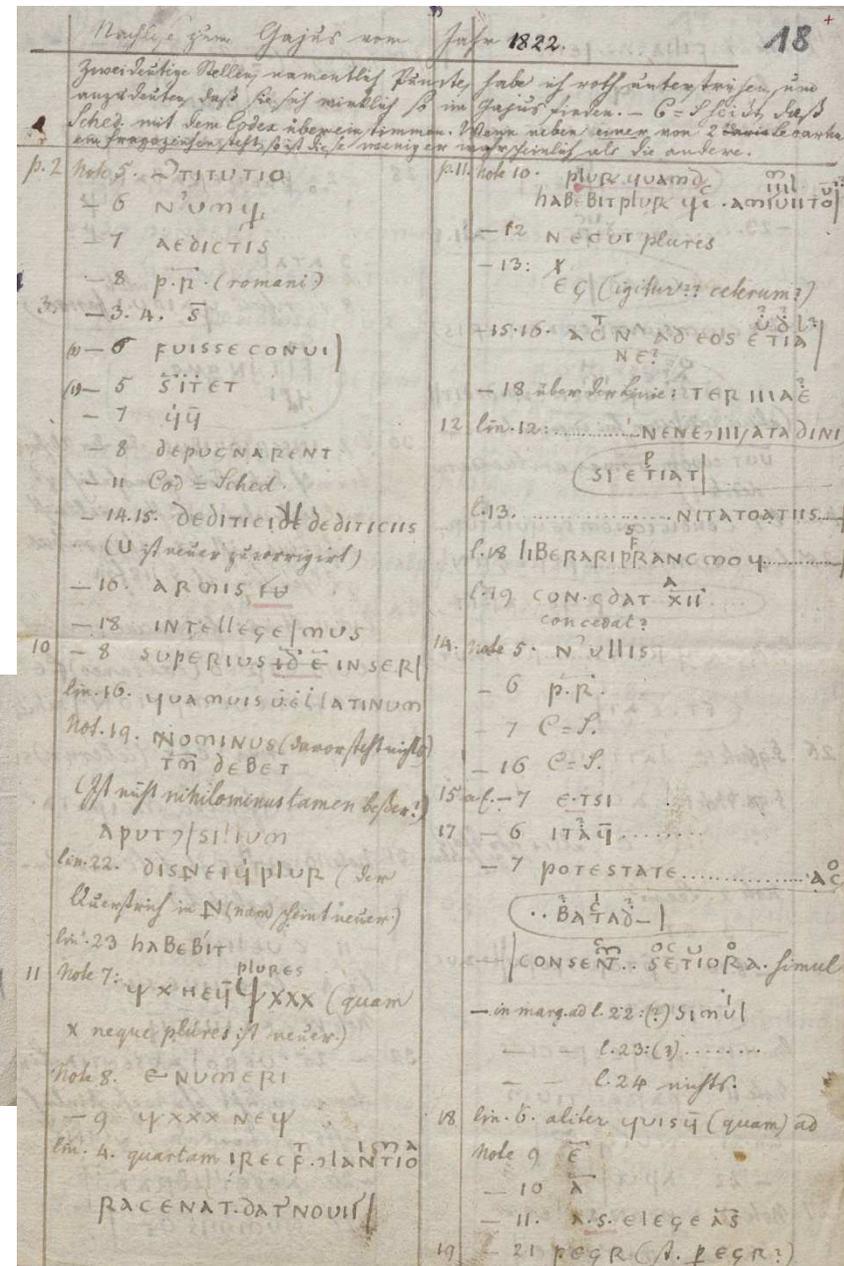


Further works  
on the Institutes of Gaius  
(philological investigations)

# Charts of Göschen: Bouillon with variations of possible readouts



SPK, Ms. lat. fol. 308.



Karty Bluhm'a

Gaiana per D. ... No. 100.  
~~16, 1 uxorem uxore~~ No. 100.  
 22, 2 SASU ~~in CASU~~ No. 100.  
 37, 3 EFFICIENT ~~vs~~ EFFICIENT? No. 100.  
 50, 11 INPUUCRES ~~vs~~ E? No. 100.  
~~78, 10 ALTER ~~vs~~ ALTER? 78, 11 FACI ~~vs~~ ACCEPTOR~~ No. 100.  
 87, 1 ~~vs~~ No. 100.  
 87, 21 ~~vs~~ POTEOM ~~vs~~ NEPTOM (synthesis) No. 100.  
 90, 9 ~~vs~~ IURE ~~vs~~ IURE? No. 100.  
 91, 2 ~~vs~~ MITH ~~vs~~ QUEDAM ~~vs~~ QUEDAM? No. 100.  
 93, 6 ~~vs~~ MITH ~~vs~~ INSTITUTUS ~~vs~~ INSTITUTUS? No. 100.  
 94, 12 ~~vs~~ NEPTI ~~vs~~ NEPTI? No. 100.  
 118, 12 ~~vs~~ MITH ~~vs~~ FIDE ~~vs~~ FIDE ~~vs~~ DISSE? No. 100.  
 121, 7 ~~vs~~ MITH ~~vs~~ HERES ~~vs~~ HERES? No. 100.  
 142, 1 ~~vs~~ ADLTERIUS ~~vs~~ ADLTERIUS? No. 100.  
 146, 6 ~~vs~~ UTISI ~~vs~~ UTISI? No. 100.  
 147, 15 ~~vs~~ MITH ~~vs~~ DEA ~~vs~~ DEEA? No. 100.  
 149, 10 ~~vs~~ MITH ~~vs~~ INUSAD ~~vs~~ INUSAD? No. 100.  
 160, 10 ~~vs~~ MITH ~~vs~~ ADHIBENTUR ~~vs~~ ADHIBENTUR? No. 100.  
 161, 5 ~~vs~~ MITH ~~vs~~ DECLARET ~~vs~~ DEQUA ~~vs~~ DEQUA? No. 100.

SPK,  
 Works of  
 Studemund,

(letter from **Studemund to Mommsen**, Strasburg - 1876;  
doubts about the readout of the manuscript)

Should we add Accusativ to word *empta*

(*w mandatelam custodelamque meam*)? I don't  
understand Ablativ there (by analogy to „*collocare  
ponere*” with Ablativ - there should be „*emere*”?!).

In my opinion word „*mandatela*” in active voice  
shouldn't be there...

I'm still thinking about this phase. Repeated it  
hundreds times... Maybe the theory of Lachmann  
is more probable?

Please write me what do you think about it! “





**Second edition [editio secunda] (1824), s. 371:**

20. opponerentur <sup>22</sup>, qualis illa erat <sup>24</sup> praescriptio:  
 EA RES AGATUR, QUOD <sup>23</sup> PRAE|DICTUM  
 HEREDITATI NON FIAT: quae <sup>26</sup> nunc in spe-  
 ciem exceptionis deducta est, et locum habet,  
 cum petitur hereditatis alio genere <sup>27</sup> iudicii praes-  
 21. iudicium <sup>28</sup> hereditati <sup>29</sup> faciat; velut cum <sup>30</sup> —  
 — — — — — iniquum — — — — — <sup>31</sup>

<sup>22</sup> Sched. praescribunt    <sup>23</sup> Sequitur spatium vacuum  
<sup>24</sup> Sched. He.    <sup>25</sup> Sched. adhibetur    <sup>26</sup> profisciscuntur etc.  
 Haec, excepta voce aliam, in Ed. 1. desiderantur. Sched.: p(vel  
 r)re|s|c|e(?)p(vel r)re|ar olim a — p. i. a(vel o), p(vel r) p(vel  
 r)cc(vel o) p(vel r)p(vel r)re|c|e|a(?)ur. BL: p|s|c|e|c|u|n|t|u|r (prof-  
 ficiuntur) olim a (Leges autem) quaedam et p(pro) reo oppo-  
 nebantur. <sup>24</sup> Sched. erat    <sup>25</sup> Ed. 1.: EA RES AGATUR  
 SCHED.: ea res a. a. adhibetur(?) BL: ea res agatur a(vel  
 r)re|a. Post verbum agatur Heise. legatum existimat si modo.  
 Hollw. in Addendis ad Ed. 1. coniecit quod; et sic nunc in  
 contexto posui. Conf. loci Digestorum hic inferius allegati. BL,  
 liberrimum est q(quod) scripsisse, opinatur. <sup>26</sup> praesudicium

Edition with footnotes to readouts of the given authors Göschen and Bluhm, as well as to hypothesis of Heise (*si modo*) and hypothesis of Bethmann-Hollweg (*quod*)



## **Gaius and his influence**

- Roman jurists from the classic period (II AD)
- brilliant teacher, author of the Institutes

Distinguishing factor

**„luck” (?)**

**Institutes : only handbook – from over a dozen – from the classic period, which we know almost completely**

Moreover – is the only writings (from thousands of that time) – which „survived” as a whole.

Institutes of Gaius today:

- we are „sure” about 80% of content of the Institutes of Gaius (basing on the premise, that there were no distortion made by the scrivener = the one who rewrote the Institutes into the parchment)
- around 20% is „probable”  
(we trust in hypothesis of researchers)

conclusion: our knowledge about the past is based on confidence – to Gaius as author; to the scrivener; to the sources; to researchers

= law is subjective; history is subjective

(on the contrary there are theories that Gaius has never existed or that’s only a nickname of the other jurist)

From the 19th century our knowledge about the Roman law (in the classic period) is „Gai-centric”

We explain the Roman law basing on the Institutes of Gaius (its the only source of the Roman jurisprudence that „survived” as a whole; other sources we know only from the fragments).

**We perceive the Roman law of the classic period with „eyes” of Gaius. He is our guide.**

**But Institutes of Gaius... its only a handbook!**

