The New Gaius

Lawyers, as much as historians and philologists, will be interested in the discovery of two new passages of Gaius, whose Institutes had the most remarkable history of any law book ever written. Ignored by all eminent lawyers for more than a century after its appearance, about 160 A.D., it became the favorite elementary text-book of students of law throughout the Roman Empire and it was not superseded until the Institutes of Justinian were published in 533 A.D. This latter book was avowedly modelled upon it and incorporated large amounts of it almost verbatim.

Through the Institutes of Justinian, the analysis and even the words of Gaius exercised a profound effect on the legal thinking of all Europe, especially since the revival of the formal study of Roman Law about 1130 A.D. And when Niebuhr in 1816 discovered most of the text of Gaius himself in a Veronese palimpsest, the discovery initiated the modern form of historical jurisprudence, a method symbolized for us by the names of Savigny and Henry Maine.

But the jurist whose life history has so completely disappeared that we do not even know where the name Gaius is a personal or a family name, reappears in 1927, when a papyrus from Oxyrhyncus in Egypt gives us a fragment from his fourth book (IV, 57, 68-73) and still more emphatically he reappears in 1933, when a well-known Italian papyrologist, Signora Medea Norsa, discovered five papyrus leaves, containing in part material that was missing in the Veronese palimpsest.

These texts are of first-rate importance. They were first published by Professor Vincenzo Arangio-Ruiz, one of the most distinguished of living Romanists, in the Journal of the Italian Society of Papyrology (P. S. I, No. 1182) and are still being vigorously discussed by Romanists throughout the world. The fullest treatment so far has been that of Professor de Zulueta of Oxford in the Journal of Roman Studies, 34, 168-186; 35, 19-32, dealing with the first text. The final article will doubtless shortly appear.

The first text is III, 154a and contains an account of what Gaius calls the peculiarly Roman form of partnership, the societas ercto non cito. It was created by law and not by agreement and expressed the relationship of the family heirs of a decedent. Apparently only those of his actual descendants who became sui iuris at the time of his death, were included. What particularly marked this form of societas was, first, the fact that the ownership of the socii was joint in the strictest sense, so that—as the illustrative examples specifically tell us—the slave freed by any socius became the freedman of all of them, and property transferred by any one involved vendor's responsibility on all. Even more striking was the fact that the partnership was indissoluble except by a
formal and, as we know from Cicero, extremely technical lawsuit. And, once more to our surprise, the new text tells us that any persons might by a proper suit for that purpose, enter into this form of partnership.

Of the two the second of the new passages is the more important historically (IV, 17a, 17b). This gives us the formulas of two legisactions, the legisaction *per indiciis postulationem* and the legisaction *per condictionem*. Only part of the former had been known before. But the most striking thing is that it also gives us a new provision of the XII Tables. It might be said, in passing that Gaius was probably the last man to write a commentary on the XII Tables.

The Twelve Tables are by way of being the most famous of European Codes. It has been studied continuously for very nearly twenty-four centuries. Its importance is not merely legal. It is a record of a culture which—despite some drastic modern critics—can be dated with a fair degree of precision, *i.e.*, 450 B.C. Side by side with some thoroughly primitive practices—talion, magic—it shows an extraordinarily mature development and this judgment is heightened by the discovery in this new text that the typical Roman contract, the formal stipulation, was already known then.

No mention of the stipulation had been hitherto found in existing "fragments" of the Code. It was, therefore, generally assumed by Romanists that the stipulation was later, especially since a formal obligatory transaction, the *nexum*, was mentioned several times. This conclusion must now be revised, and with it a new conception of the degree of legal development which the Romans had reached in the middle of the fifth century B.C. The legisaction *per iudicis postulationem* was used to enforce a debt created by it and the legisaction *per condictionem* to enforce a debt created in some other way.

If the discovery of the golden ornaments of a heartily unimportant and shortlived Pharaoh revived popular interest in Egyptian archeology, the pious hope may be expressed that a major discovery connected with the Twelve Tables may remind lawyers of the unbroken existence of the greatest of all legal systems.

*Max Radin.*