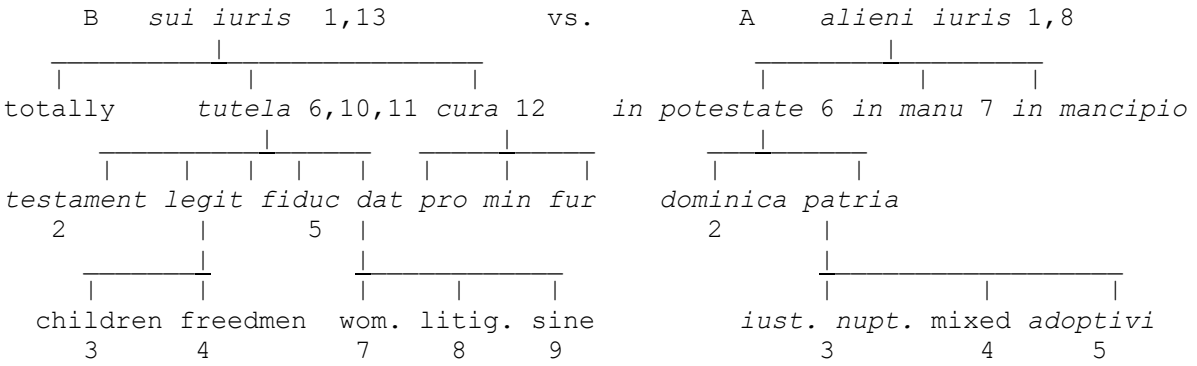
GAIUS' *INSTITUTES* – PERSONS – PART 2 – OF ONE'S OWN RIGHT vs. SUBJECT TO THE RIGHT OF ANOTHER (GI.1.48–200)

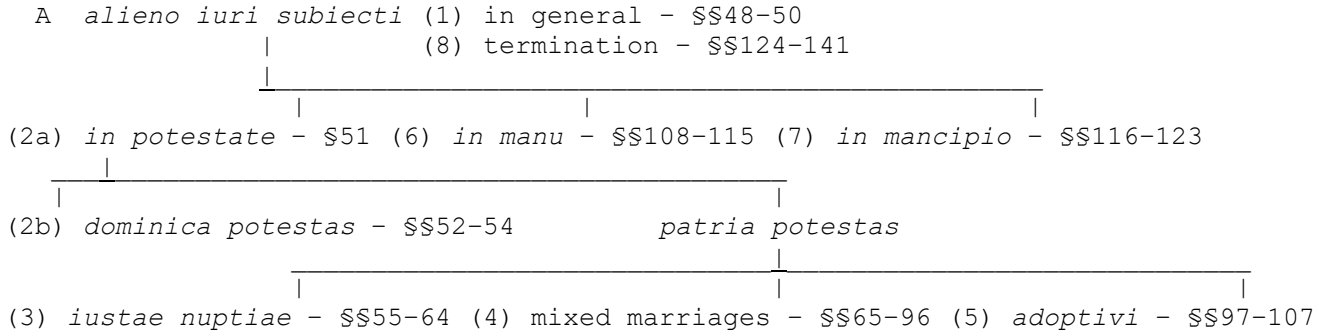
1. There follows a massive graphic on those of their own right (*sui iuris*) and those subject to another's right (*alieno iuri subiecti*, normally shortened to *alieni iuris*):



   a. The numbers indicate the order in which Gaius takes up the topic. The combination of the Latin and the abbreviations necessary to get this all into one graphic make the specifics hard to follow. The point of the graphic is not the specifics, it's the structure.

   b. (On the slide A and B are reversed; this follows the order of the graphic above.) Both sides of the dichotomy have four levels. Levels 1 and 2 deal with categories of persons: level 1 those *sui iuris* and those *alieni iuris*, level 2 those totally *sui iuris*, those in tutelage (*tutela*), those in another form of guardianship (*cura*), those in power (*in potestate*), those literally 'in hand' (*in manu*), those in 'hand-capture' (*in mancipio*). Levels 3 and 4 are mixed dealing sometimes with categories of persons and sometimes with ways of acquiring the status. E.g. testamentary tutelage (*tutela testamentaria*) is a method of getting into *tutela*, whereas prodigals (*prodigi*) are a type of person who are in *cura*. Without regard to whether the catch-phrase describes a type of person or a way that a person gets into a particular category, more space is spent on how to get into the category than on the category itself. The end (A8 and B6, 10–11, B13) returns to a more general level to consider the loss of the status, and in the case of those *sui iuris* the conveyance of *tutela* and actions against tutors and curators.

2. Let us take a look at the content of the major categories, beginning, as Gaius does, with those who are subject to another's right (GI.1.48–141). We can expand the graphic here to make it a bit easier to follow.



   a. The three categories of those subject to the right of another are those in power (*in potestate*), those 'in hand' (*in manu*), and those 'in hand-capture' (*in mancipio*). *Potestas*

and *manus* are both very common Latin words, the former meaning 'power', the latter 'hand', though both have a technical meaning here. *Mancipium*, by contrast, has only a technical meaning. It is formed from *manus* ('hand') and *capere*, the basic Latin verb that means 'to take'. In many cultures, the hand is a symbol not only of power but also of protection. In the Hebrew Bible, the hand of the Lord not only destroys His enemies, but also protects those whom He takes in his hand. It may be significant that when the law comes to classify those in someone else's control, the word that means simply 'power' is used for slaves and children, whereas the 'hand' word or its derivative is used for wives, and children who are working for someone other than their father.

b. *dominica potestas* – Is the power of an owner, *dominus* being the Latin word for 'owner'. Over a slave, Gaius tells us, the owner has the power of life and death, *ius vitae necisque*. He then goes on to say that excessive cruelty to slaves by their owners was limited by Gaius' contemporary the Stoic emperor Antoninus Pius. He closes with the mysterious remark that if the ownership of the slave was divided between a bonitary and a Quiritary owner, the *dominica potestas* belonged to the bonitary owner. The distinction between bonitary and Quiritary is a topic in GI.1.2. The division between the two arose when a slave, which was a *res mancipi*, was conveyed by a method other than *mancipatio*, the conveyance with five witnesses and a scale-bearer described previously. The conveyee in that situation became the bonitary owner, but the Quiritary title remained with the person who had it, normally the conveyor.

c. *patria potestas* – Was extraordinary and extraordinarily conservative. Gaius recognizes this, citing a constitution of Hadrian's that says that only the Romans have it. What is extraordinary about it is not its extent, though that was great – a father had the *ius vitae necisque* over his children and owned all their property. What was extraordinary about it was how long it lasted. Unless the child was emancipated or, if a woman, was married with *manus*, *patria potestas* lasted until the father died, and in Gaius' time neither emancipation nor marriage with *manus* was common. What that meant was that a sixty-year old man with a forty-year old son, a twenty-year old grandson, and a one-year old great-grandson did not have the money to buy himself a cup of coffee because he was in the power of his still-living eighty-year old father. And the sixty-year old's son, grandson, and great-grandson were all in the power of the eighty-year old as well. There had to be ways to get around this, and there were, though they were awkward. The father could constitute what was called a *peculium* for his son, a fund that creditors could look to, and military earnings, called 'camp-*peculium*' (*peculium castrense*) did not fall under the father's control. It has also been argued that only upper-class Romans paid any attention to this, but so far as Gaius is concerned it applied to all Roman citizens, many of whom were certainly not upper-class.

The distinction between private law and public law is important here. A son-in-power could exercise all his rights in public law. He could vote in the assemblies, become a magistrate, command troops in field. We might also add that granted the mortality rate at the time, my hypothetical of the sixty-year old with a great-grandchild and an eighty-year old father – which would be quite unusual today – would be demographically almost impossible in Rome. How the rule of *patria potestas* affected Roman society and social relations remains a topic of debate among historians today.

d. *iustae nuptiae* – Literally 'just nuptials' was a marriage between two Roman citizens or between a couple, one of whom is a citizen and the other of whom has *conubium*, the right to form a Roman marriage with a Roman citizen. Gaius treats the topic here because *patria potestas* arose only over children born of such a marriage. Gaius then recites the not-particularly-extensive rules about incest because an incestuous marriage is void, and does not give rise to *patria potestas*. There is no general section on marriage in GI. He apparently does not regard being married as a category within the law of persons.

What we do get is 29 sections on the topic of mixed marriages: where marriages that are not *iustae nuptiae* may nonetheless produce children in the power of their father. The main points are: (1) mixed marriages by mistake are cured under the *lex Aelia Sentia* and a supplementary SC (§§ 65–75), and (2) the remaining sections (§§76–96) concern manipulation of citizenship and Latin status to achieve the same effect. The basic principle is that absent *conubium* children take the status of their mother as of the time of their birth.

The length of this section has puzzled commentators. GI is a disciplined work. That is one of the things that makes it a good textbook. This is the only section of the book where the treatment of the topic seems way out of proportion with the importance of its contents. Since we know so little of Gaius' biography, some have suggested that the reason for the disproportion of this section is that Gaius was teaching officials in the imperial chancery who were responsible for dealing with cases of mixed marriage.

e. *adoptivi* – Is the generic term for those adopted by one of two methods of adoption: adrogation and adoption properly speaking. Adrogation was the adoption of someone who was *sui iuris*. It had to be done before the *comitia curiata*, which for these purposes was called the *comitia calata* and consisted of 30 representatives of the 30 Roman *curiae*, an old geographical division of the city. The *comitia calata* had a decidedly religious flavor, and it is generally thought that the necessity for its approval arose from the fact that when a man who was *sui iuris* was adrogated, his family religious rites (*sacra familiaria*) were extinguished. Adoption strictly speaking was an adoption of a person who was *in potestate* by the method of three-fold sale described previously. Women who were *in potestate* or *sui iuris* could also be adopted before the praetor. Gaius does not give us the mechanics for doing this.

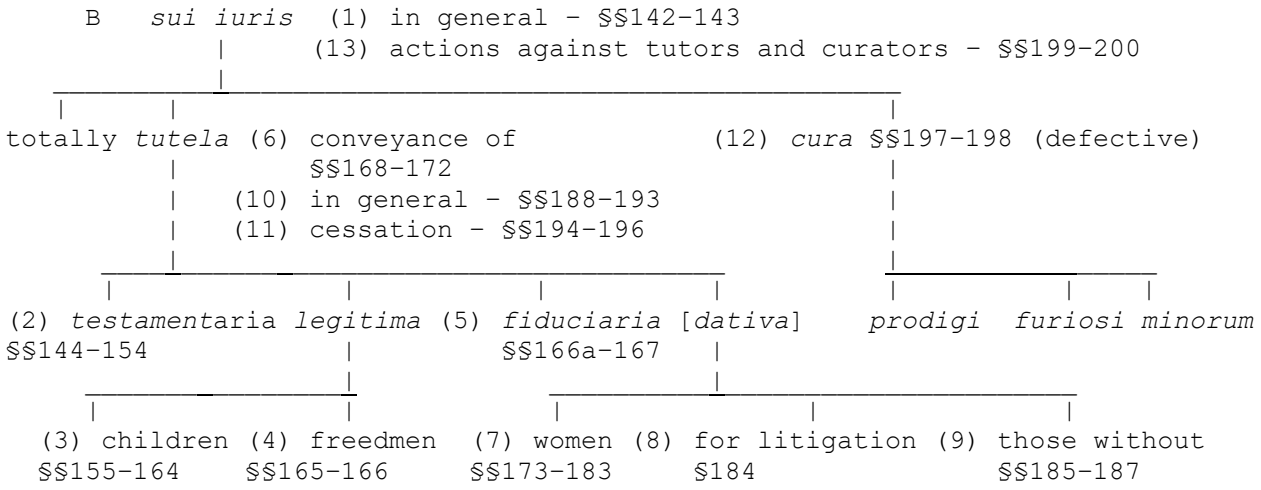
The Romans practiced adoption of adults quite frequently. It was used as an inheritance strategy, particularly by people who were childless, a phenomenon that was common among the Roman upper-classes. Childlessness among the upper-classes was a concern. The elaborate Augustan legislation on marriage seems to have been designed largely in reaction to this problem. Modern forensic archaeologists seem to have found the cause of the problem, one quite unknown to the Romans themselves. Analysis of the skeletons in Roman tombs of the upper classes have found large amounts of lead. Similarly large amounts of lead have not been found in the skeletons of those of lower social status. Lead is not good for fertility. The cause of this lead-differential seems to be that upper-class Romans drank their wine from cups lined with lead; those of more modest means used pottery cups.

f. *manus* – Marriage with *manus*, as noted previously, was an archaic form of marriage in which the woman passed from her natal family to her husband's. In intestacy she would

inherit from him and not from her father, and her husband probably became the owner of any property that she had. Marriage with *manus* had all but disappeared in Gaius' time, though it was still quite common in the late Republic. G. tells us that historically *manus* could be acquired by *confarreatio*, an elaborate religious marriage ceremony confined to patricians; *coemptio*, the fictitious sale of the woman described previously; and *usus*, simply by the wife remaining in her husband's house for a year. *Usus* as a means of acquiring *manus* had dropped out entirely by Gaius' time, as it had by the late Republic. *Confarreatio* was still used by the small group who aspired to be, or were within, the higher priesthoods. *Coemptio* still was used in Gaius' time when a woman wanted to become heir to her husband or when she wanted to change tutors.

g. *mancipium* – Is a somewhat mysterious institution. It may be connected with the archaic *nexum*, a means by which a debtor worked off his debt by working for his creditor. A child or slave who committed a delict could be turned over by his father or owner if he did not want to pay the damages to the person wronged by the delict, a process known as *noxae deditio*. *Nexum* no longer existed in Gaius' time; noxal liability did, but he does not mention it here. What he talks about is emancipation in which being *in manicipio* is one of the stages in the three-fold sale that results in emancipation as described previously. Gaius includes here the basic material on how *mancipatio* worked. It seems clear that he thinks of *mancipium* as deriving from the fact that it results from the *mancipatio* of free person. We are poorly informed about the status of those *in mancipio*. They do not seem to have lost their rights in public law. We are told elsewhere that *iniuria*, a basic delict that includes both assault and slander, can be committed against someone who is *in mancipio*.

3. Gaius' treatment of those who are *sui iuris* (GI. 142–200) has as many levels as does his treatment of those *alieno iuri subiecti*, and more separate steps, but it is only about half as long. Once more we can expand, and hence clarify, the graphic:



a. Gaius defines those who are totally *sui iuris* by exclusion (GI.1.142):

"Now let us pass to another classification of persons who are neither in *potestas* nor in *manus* nor in *mancipium*, some are under *tutela* or under *curatio*, others under neither. Let us therefore see which are under *tutela* and which under *curatio*; so we shall know the others, who are under neither."

b. *tutela* – is frequently translated ‘guardianship’, but it is probably better to use the literal ‘tutelage’. Those who were in power, *in manu*, or *in mancipio* could not be in tutelage. Tutelage only applied to those who were *sui iuris*. Boys were in tutelage until they reached the age of fourteen. There was no age limit for tutelage for women; they were in perpetual tutelage. There is evidence that whatever its historical origins perpetual tutelage of adult women was becoming awkward in Gaius’ time. He mentions a number of ways to get around it.

c. Tutors could be created by testament (*tutela testamentaria*). In the absence of a nomination of a tutor in a testament, tutors could be created by law for those who became *sui iuris* on the death of the person in whose power they were (*tutela legitima*). According to the XII Tables, this would be the nearest male agnatic relative (brother, uncle, etc., on the father’s side). This was still the case for boys in Gaius’ time, but he tells us that a *lex Claudia* (41 X 54 AD) had abolished agnatic tutelage of women. After this, girls were probably in the de facto tutelage of their mothers or other female relatives, but Gaius does not mention this. Perpetual tutelage of adult women still existed, and the *auctoritas* of the tutor was required for certain property transactions by adult women. Much of the rest of Gaius’ discussion tutelage can be seen as outlining the means by which this *auctoritas* was obtained.

   Freedmen had no agnatic relatives. The person who manumitted them (*parens manumissor*) stood in the stead of the closest agnatic relative. Hence, the tutelage of both boys and women descendants of a freedman belonged by law to *parens manumissor* or his heir. Fiduciary tutelage (*tutela fiduciaria*) (GI.1.166a–167) is related to this type of *tutela legitima*, though it is not quite the same thing.

   Tutelages of all types could be conveyed. Gaius here introduces us to the mechanism of *in iure cessio* discussed previously.

   In the absence of a tutor, or where the tutor for some reason proved unsatisfactory, the praetor could appoint one. This is called *tutela dativa*, though the term does not appear in Gaius. Gaius deals with three situations, where a woman needs a tutor and he is absent, where a tutor is required for litigation, and where the person (it could be a boy or a woman) has no tutor. While the praetor’s powers over tutelages were broader than just dealing with the tutelages of adult women, it would seem that this was the situation in which his intervention was most often required.

   The treatment of tutelage closes with a discussion of the classification of tutelages, with some general remarks on the efficacy of certain kinds of tutelage, and with notes on how tutelages are ended.

d. Gaius’ discussion of *cura* or *curatio* is defective, a whole page, and perhaps more, of the text is missing. What was probably there can be reconstructed from later sources. That the insane need a guardian is recognized by almost all societies. Roman psychiatry was deficient by modern standards, but the Romans recognized that some insane people need a guardian both of their bodies and of their property. Such people were called *furiosi*, and as the name might imply, you had to be pretty crazy to qualify. Some insane people are not a danger to themselves or to others, but they cannot be trusted to manage property. Such people were called *prodigi*, our word ‘prodigals’, and the curator dealt only with the property of the *prodigus*. The third category of those *in cura* opens a

possibility that we might use today, though we don't, at least not officially. Fourteen-year old boys can do much that someone fully adult can do, but their judgment, particularly in financial matters, may not be the soundest. The Romans had a category of *minores viginti quinque annis*, literally 'those younger than twenty-five years', but it only applied to those fourteen years of age or older. They could enter into all sorts of transactions, but if they did not obtain the *auctoritas* of their *curator*, they could revoke the transaction when they reached the age of twenty-five. Obviously, someone dealing with a young man aged between 14 and 25 was well advised to see to it that his *curator* authorized the transaction.

4. We suggested in the case of the slave/free distinction that we were dealing principally with the issue of which freedmen would be accepted into the community as citizens. In the case of *sui iuris*/*alieni iuris* distinction we are dealing with the fundamental social stuff within the community. (We can also see the masking effect of the bifurcation slave/free. The issue seems to be who will be accepted into the community, but among those in the community are slaves.) The *constitutio Antoniniana* made the issue of citizenship for the freed largely irrelevant. As to the *sui iuris*/*alieni iuris* distinction we can see a number of movements:

   a. State interference with the treatment of slaves was happening. Gaius addresses it expressly (GI.1.53):

      "**53.** But at the present day neither Roman citizens nor any other persons subject to the rule of the Roman people are allowed to treat their slaves with excessive and causeless harshness. For by a constitution of the late emperor Antoninus [Pius] it is laid down that one who without cause kills his own slave is as much amenable to justice as one who kills another's. And even excessive severity on the part of masters is restrained by a constitution of the same emperor; for, on being consulted by certain provincial governors as to slaves who take refuge at the temples of the gods or the statues of the emperors, he ordained that masters whose harshness is found to be unbearable are to be forced to sell their slaves. Both enactments are just, for we ought not to abuse our lawful right – the principle under which prodigals are interdicted from administering their own property."

   b. The second movement is sometimes called the 'emancipation of women'. It involves *manus* and *tutela*. Gaius has this to say about *tutela* (GI.1.189):

      "**189.** That persons below puberty should he under guardianship occurs by the law of every State, it being consonant with natural reason that a person of immature age should be governed by the guardianship of another person; indeed, there can hardly be any State in which parents are not allowed to appoint guardians to their children below puberty by their will, though, as we have remarked, it seems that only Roman citizens have their children in their *potestas*. **190.** But hardly any valid argument seems to exist in favour of women of full age being in *tutela*. That which is commonly accepted, namely that they are very liable to be deceived owing to their instabi1ity of judgment and that therefore in fairness they should he governed by the *auctoritas* of tutors, seems more specious than true. For women of full age conduct their own affairs, the interposition of their tutor's *auctoritas* in certain cases being a mere matter of form; indeed, often a tutor is compelled by the praetor to give *auctoritas* even against his will."

   c. There was state intrusion into the management of the affairs of others: *tutela* and *cura* (GI.1.199) There is much more on this topic in JI. Here's what G. has to say:

"**199.** Against the destruction or wasting by tutors and curators of the property of their wards or of those in their *curatio* the praetor requires both tutors and curators to give security. **200.** But not in every case. For neither are tutors appointed by will obliged to give security, their trustworthiness and diligence having been approved by the testator himself, nor, for the most part, are curators whose office does not devolve on them by statute, but who are appointed by a consul, praetor, or provincial governor, they of course having been selected as sufficiently trustworthy."

d. There may – of this we can be less sure – be an increase in ways of getting around *patria potestas* for adult sons. Gaius talks only about emancipation here, and we know that emancipation was not very common. Both *peculium* constituted by the *paterfamilias* and *peculium castrense*, which received imperial recognition beginning with Augustus, are dealt with later in GI.

5. Let us briefly compare Justinian and Gaius on the law of persons. Some of this we have already seen.

a. Justinian deals with the origins of slavery (JI.1.3), G. does not. Does this suggest that for J. slavery must has to be justified?

b. JI adds a whole title on those born free (*ingenui*) (JI.1.4).

c. Manumission. GI deals with manumission *vindicta*, *censu*, and *testamentaria.* He does not deal specifically with manumission 'by a letter' (*per litteram*) and 'among friends' (*inter amicos*). He mentions the latter in passing, and both must have existed in his time because they lead to Junian Latin status. J. (JI.1.5) mentions all of these methods and adds manumission by imperial constitution and in a church. J. also abolishes the categories of *dediticii* and *Iunii Latini*, and repeals the *lex Fufia Caninia*, the major restriction on testamentary manumissions. The impression is that citizenship is getting better. The reality may have been quite different, because there existed in J's time a large class of people who were nominally free but bound to the soil (*adscripti glebae*), also known as *coloni*.

d. Of G's three categories of those *alieni iuris*, J. recognizes only the first, those in paternal power, thereby eliminating both those *in manu* and those *in mancipio* (JI.1.9–12). Taking these out, removes G's discussion of the various forms of acquiring *manus*, of fiduciary *coemptio*, of *mancipatio*, and of the distinction between *coemptio* and *mancipatio*. J. substitutes a fuller discussion of the formation of marriage and of incest. He changes the effect adoption to make it affect succession only; it does not does not deprive the father of the adopted of *patria potestas*. Imperial rescript replaces *adrogatio*, judicial authority the elaborate mechanism for achieving *adoptio*. J. frees those who become patricians, a class of nobility created by imperial patent, from *patria potestas*.

e. In the case of *tutela* the main differences are: a lack of emphasis on form of appointment (G.144–154), the absence of G's excursus on agnates and *capitis deminutio* (though J. treats *capitis deminutio* elsewhere), the abolition of the perpetual tutelage of women, and the omission of G's discussion the conveyance of *tutela* by *in iure cessio*. On cessation of *tutela* J. goes back to the Proculean view that it is a matter of calendar age; G. had followed the Sabinnian view that it was a matter of physical maturity. J. is fuller on *cura* and *curatores*, but G's text is bad here. J. is fuller on the posting of security by tutors and

curators. J. adds a long title on the grounds of exemption from being a tutor or curator. J. adds a title on suspect tutors.

f. Overall J. looks more liberal. The moves he emphasizes are moves that create more citizens, moves that protect more people who need protection. He also looks more rational. Acquisition and loss of status becomes more like rules about status. Some of the historical anomalies are removed, though *patria potestas* is retained. The reality may have been different. Perhaps this is something that we could discuss. Whether Justinian is falling into liberal fallacy is certainly something that we ought to discuss.