

## ROMAN LAW IN CONTEXT

*Roman Law in Context* explains how Roman law worked for those who lived by it, by viewing it in the light of the society and economy in which it operated. The book discusses three main areas of Roman law and life: the family and inheritance; property and the use of land; commercial transactions and the management of businesses. It also deals with the question of litigation and how readily the Roman citizen could assert his or her legal rights in practice. In addition it provides an introduction to using the main sources of Roman law. The book ends with an epilogue discussing the role of Roman law in medieval and modern Europe, a bibliographical essay, and a glossary of legal terms. The book involves the minimum of legal technicality and is intended to be accessible to students and teachers of Roman history as well as interested general readers.

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DAVID JOHNSTON



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For my parents



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## Preface

This book attempts to look at Roman law in its social and economic context. To do so is to court criticism from both historians and lawyers. The attempt, though arduous, is not quite doomed to failure: just over thirty years ago John Crook's deservedly successful *Law and Life of Rome* (1967) appealed to both camps. What need is there for anything more? Two points arise. First, if *Law and Life of Rome* aimed to illustrate the social and economic life of Rome through its law, the concern of the present book is more to understand the law in the light of the society and its economy.

Second, in the last thirty years there have been extraordinary finds of new evidence, especially inscriptions, and there have been remarkable developments in Roman social and economic history. A book which took proper account of all of this would be a good one. Unfortunately, this is not that book. To reflect all the new material would require a much longer treatment, and many years of painstaking composition.

This book therefore presents only a sketch, which may perhaps conjure up a faint image of what would be possible if the final work itself were ever to be executed. The book is aimed at historians rather than lawyers, and the choice of topics, emphasis in discussion, and bibliographical references all reflect that. The topic of commercial law is discussed more fully than the rest, partly because of its intrinsic interest and partly because it (unlike family law) has apparently not yet been much absorbed into the consciousness of historians.

For many constructive comments and suggestions I am most grateful to Peter Garnsey and Paul Cartledge, the editors of the series in which this book appears. The book would never have been finished had I not been able to enjoy the oasis of tranquillity that is the Robbins Collection at the Law School in Berkeley. For their hospitality and help I am glad to be able here to thank its staff and particularly its director, Laurent Mayali.

October 1998



## CHAPTER I

### *Introduction*

#### I WHAT IS NOT IN THIS BOOK

To begin with what is not in this book may seem odd; but it will otherwise remain unknown until the end, which seems unsatisfactory. This is not a comprehensive account of Roman law, or even of Roman law in its social setting. It is highly selective. There is nothing here about criminal law, and next to nothing about public or constitutional law. The focus is on the so-called classical period of Roman law, from about the end of the Roman republic in 31 BC until the death of the emperor Severus Alexander in AD 235. There is nothing here about post-classical law; and there is almost nothing about pre-classical law.

The warning about non-comprehensiveness is seriously intended. Law does not consist in generalities, and it is often said that the devil is in the detail. Undoubtedly that is right. But for present purposes it has been necessary to focus only on details which seem germane to the exploration at hand, of law and society. Many other details are glossed over, so anyone wanting a full account of the rules must look at one of the textbooks on the law. They are cited in the bibliographical essay at the end.

This chapter gives a rapid outline of the sources of Roman law, essentially for the purpose of making the ensuing discussion of substantive law comprehensible (fuller discussion may be found in Jolowicz and Nicholas 1972: 86–101, 353–94). The expression ‘sources of Roman law’ can mean two things: in the first sense it refers to where the law came from, statute, custom, decisions of courts and so forth; in the second it refers to how we know what we know about Roman law, our literary or documentary evidence of the past. The first of these senses is dealt with in this chapter; the second in the next. This chapter also deals briefly with the question how far the law at Rome was also the law in the provinces of the Roman empire.

## II SOURCES OF LAW

From 509 BC the system of Roman government was republican. The popular assemblies elected magistrates, who held office for a year. The leading magistrates were the consuls, of whom there were two at a time, allegedly to prevent autocracy; next after them in the hierarchy were the praetors; and below them a range of other lesser magistrates. A senate of magistrates and former magistrates was the oligarchical element in the constitution, which advised the magistrates, and forwarded proposals for legislation to the popular assemblies.

1. *The Twelve Tables*

What we know of Roman private law begins in about 450 BC with the promulgation of the Twelve Tables. Livy and Cicero describe them as the source of all public and private law (Livy, *ab urbe condita* 3.34.6; Cic., *de oratore* 1.195); Cicero recounts how schoolchildren had to learn them (*de legibus* 2.59). What these Twelve Tables contained was not quite a law code in the modern sense but a list of important legal rules. The rules were extraordinarily laconic and nowadays are hard to understand, not least since the subject of successive clauses changes without warning. An example: 'If he summons him to law let him go; if he does not go, let him call witness; then let him take him' (1.1).

Since the Twelve Tables do not survive, our knowledge of them is extremely fragmentary, and the order in which provisions appeared in them is mostly not known. The provisions which are known indicate that matters of family law, property and succession were prominent, as is perhaps to be expected at this period, but they also attest great concern with setting out the rules for legal process.

2. *Ius*

Apart from the Twelve Tables, the early law of Rome consisted in customary or common law, which had not been created by enactment but was simply recognized as being the law. Some of this, of course, was what was ultimately embodied in the Twelve Tables. This old, unwritten, undeclared law was known as *ius*.

### 3. Statutes

Statutes were passed by the popular assemblies voting on proposals put before them by magistrates. Ancient authors liked to complain about the volume of legislation (Cic., *pro Balbo* 21; Liv., 3.34; Suetonius, *Iulius* 44.2; Tacitus, *Annals* 3.25). But so far as the private law was concerned, very little was made by statute (*lex*). There are notable exceptions, such as the statute on damage to property, the *lex Aquilia* of about 286 BC, and the *lex Falcidia* of 40 BC, which placed restrictions on legacies. But they are exceptions to a clear rule.

Statutes tended to be drafted in a very narrow and literal manner. Presumably this reflected extremely rigid canons of construction. An egregious example is provided by the *lex Rubria* dating from the 40s BC. Here, after setting out a model formula for trying an action which used the stock names ‘Q. Licinius’ and ‘L. Seius’ and the place name ‘Mutina’, the statute goes on to provide that the magistrate ‘shall ensure that the names written in any of the foregoing formulae, and the name “Mutina” shall not be included or adopted in the said action, unless the said names written in any of the foregoing formulae shall belong to the persons who shall be parties to the said action, and unless the said matter shall be dealt with at Mutina . . .’.

None the less, there are clear signs of much bolder construction in other contexts: for example, the *lex Aquilia*, a much more concise statute (whose precise text is not preserved) gave damages for various wrongs including the breaking (*rumpere*) of a thing. Even in the later republic this statute was interpreted rather adventurously: *rumpere* came to be interpreted as damaging or impairing a thing in any way (*corrumpere*), and this interpretation greatly extended the scope of the statute (Ulpian, *D.* 9.2.27.13–35). But neither statutes nor statutory interpretation were characteristic of the development of Roman private law.

### 4. Praetor and edict

The formal source of most of Roman private law was the edict of the urban praetor, an office created in 367 BC which in the hierarchy ranked second only to the consuls. The praetor was the magistrate charged with the administration of justice. At the beginning of his year of office each praetor would publish in the forum his edict, which set out the legal remedies he would grant, together with the formulae for those remedies. How this system worked in litigation is discussed in chapter 6. A person

who wished to raise legal proceedings would come before the praetor and request a particular formula from the edict. Equally, if he had a case which was not covered by an existing remedy in the edict, he might try to persuade the praetor to add a new remedy to the edict. In both the drafting of the initial edict and in its supplementation by new remedies the praetor, who would only rarely have knowledge about the law, would be assisted by the advice of legal experts, jurists. Behind the scenes, it was they who shaped the development of the praetor's edict.

Through his responsibility for granting legal remedies the praetor exercised control over the development of new causes of action. He could also lead to the suppression of old causes of action by refusing to grant remedies based on them, or by developing new defences available against them. The important point is that formally the praetor was not making new (substantive) law, a power which he as an individual magistrate did not have; all he was doing was creating new remedies or eroding old ones, exercising a procedural power. Indirectly, of course, the grant of a remedy in a new case was tantamount to the recognition of a new right; and the denial of an old remedy to the abolition of the right on which it was based. The Romans adhered to the theory that the praetor had no law-making power, but the jurists still referred to these new remedies as *ius honorarium*, 'law made in office', to be contrasted with *ius civile* (the law of the Twelve Tables, custom, and statute). While *ius civile*, which of course the praetor administered at the same time, theoretically ranked higher, in practice it was superseded where the *ius honorarium* took a different path.

The edict was a flexible instrument for reforming and modernizing the law, since changes could be made every year; and rejected again if need be. The greatest activity on the part of the praetors and the heyday of the edict as a source of law appear to have been in the second and first centuries BC. In practice much of the material must have continued unchanged from year to year; stability in the administration of justice required no less. Under the emperor Hadrian the jurist Julian was commissioned to draw up a finalized version of the edict; apparently he added only one clause (Marcellus, *D.* 37.8.3). It would be wrong to suppose that this was a strike by the emperor against the praetor's freedom to make new law; all the evidence suggests that edictal innovation had long since slowed to a trickle.

5. *Jurists*

There grew up a professional class of lawyers. These ‘jurists’ were originally priests, but in the course of the third century BC they came to profess a secular jurisprudence. Their role in the Roman legal system was pivotal: neither the magistrates responsible for granting legal remedies nor the judges who decided cases were lawyers; all looked to the jurists for legal advice. Although the jurists did not in the modern sense practise law, this contact with practice shaped their distinctly pragmatic approach to it. But in debate and in their writing, they also developed a sophisticated analytical jurisprudence; and particularly during the ‘classical’ period of Roman law – from the late republic until the early third century AD – they produced a substantial legal literature. Typical of their works were large-scale commentaries on civil law and the remedies contained in the magistrate’s edict, and books of collected legal opinions. While some of their works played their part in argument of interest only to the jurists themselves, others were suited to, and written to satisfy, the diverse demands of practice or even teaching.

During the early and high classical period, jurists seem to have adhered to one of two schools, the Proculians and Sabinians. In precisely what sense these were schools (of thought, of education) has been much debated; and many have been the attempts to pin them down to divergent political, philosophical or ideological positions. One point, however, is perfectly clear: the two schools differed on a number of quite fundamental legal principles and doctrines (Stein 1972; Liebs 1976; Falchi 1981). Here are two examples:

(1) Oxen and horses and other beasts of draught and burden were *res Mancipi*, a type of property which required formal conveyance. The schools differed on whether an animal became a *res Mancipi* at birth or only when it was actually capable of drawing or bearing burdens. In abstract terms this amounts to a difference over the question whether it is legitimate to describe something in a particular way on purely nominal grounds or whether it must be capable of functioning in the terms described (Gaius, *Inst.* 2.15).

(2) They differed on whether a new product (such as wine) made from someone else’s materials (grapes) belonged to the maker or to the owner of the original materials. It is possible that this difference was founded on philosophical reasoning about the identity of matter (Gaius, *Inst.* 2.79).

Although doctrinal disputes are commonplace in any legal system, it

is difficult completely to suppress the feeling that some of these disputes were tainted by the luxury of self-indulgence and at the same time undermined legal certainty.

It is invidious to single out names, but space allows no alternative. Of the early classical jurists, leading figures were Proculus, Labeo, Sabinus. In the high classical period the leading figure is clearly Julian, head of the Sabinian school and author of a work entitled 'Digest' (*digesta*) in ninety books. His principal rival was Celsus, head of the Proculian school. Other notable jurists of the high-classical period were Neratius, Marcellus, Pomponius, Iavolenus and Scaevola. Gaius, the author of the Institutes, an elementary textbook, is in a peculiar position: unlike other leading jurists, he is not known to have held any political office and, in spite of his evident attachment to Sabinian views, there is little reason to associate him with Rome. But he is spoken of warmly by Justinian (*Gaius noster*), and it may well be that later law paid more attention to him than did his contemporaries.

In the late classical period the names of Papinian, Ulpian and Paul stand out: Papinian, author in particular of books of legal problems (*quaestiones*) and opinions (*responsa*) was regarded as the finest of the jurists. Under the system of ranking legal authorities devised in the fifth century his views were given exceptional weight. Ulpian and Paul were authors, among other things, of extensive commentaries on the praetor's edict (eighty-one and seventy-eight books *ad edictum*, respectively) and on the civil law in general (fifty-one and sixteen books *ad Sabinum*, respectively).

To give a sense of the range and style of juristic work is difficult in a short space; the excerpts from their works which appear in the following chapters may help. Here it must be sufficient to give just three examples. What emerges quite clearly from this is that the jurists were highly individual in style and in manner; this makes it all the more surprising that last century they were regarded as interchangeable or 'fungible'. That view has fortunately faded into history. Here are three opinions, *responsa*, very different in style.

Domitius Labeo to Celsus, greetings. I ask whether a person who is asked to write a will, and who not only wrote it but also signed it, can be regarded as one of the witnesses to it. Iuventius Celsus to Labeo, greeting. Either I do not understand your question or it is exceptionally stupid: it is quite absurd to doubt whether someone is a lawful witness because he also wrote the will himself. (Celsus, *D.* 28.1.27)

I wish the income from the Aebutian farm to be given to my wife as long as

she lives': I ask whether the heir's tutor can sell the farm and offer the legatee an annual payment of the rental income which the testator used to derive from the farm. He replied that he could. I also ask whether she can without penalty be prevented from living there. He replied that the heir was not obliged to provide accommodation. I also ask whether the heir is obliged to maintain the farm. He replied that, if the heir's actions cause a reduction in the income from the farm, the legatee can reasonably claim for that reduction in income. I also ask what the difference is between this legacy and a usufruct. He replied that the previous answers made the difference plain. (Scaevola, *D.* 33.2.38)

After a better offer has been made by a second buyer, the first buyer cannot sue him to recover money which he paid to the seller in advance against the price, unless there has been delegation by means of a promise. (Papinian, *D.* 18.2.20)

These opinions give a sense of the different characters and styles of the jurists. They also demonstrate the self-consciousness with which such opinions are given: Celsus bristles at being asked a stupid question; Scaevola comes close to doing the same. But what the opinions do have in common is an oracular style. Opinions are exactly that: opinions, and they rest on the prestige of the jurist. On that account the jurists can be brief, extremely brief, and they feel no need to give detailed reasons if any at all. Often the recital of the facts takes up most of the text; and the jurists confine themselves to giving an opinion 'on those facts' (*secundum ea quae proponerentur* is a frequent refrain). But they never express an opinion on whether the facts are correct, and they avoid answering factual questions: 'This is not a legal question.' Opinions in one or two words are far from uncommon; even 'why not?' is still an opinion, because it rests on the jurist's authority (Scaevola, *D.* 33.7.20.9; *D.* 34.1.19).

In the ancient world this self-conscious, perhaps arrogant, cultivation of authoritative knowledge about the law was peculiar to Roman legal culture. But legal culture was not, of course, impervious to outside influence. It is clear that in roughly the last century of the republic the jurists were particularly receptive to Greek influence, philosophical and rhetorical. Equally, from the late republic there was also mediation of Greek thought through the philosophical and rhetorical works of Cicero. Characteristic of this influence was a new (if short-lived) concern for system: Cicero is known to have contemplated writing (indeed perhaps he wrote) a work reducing the civil law to an art (*de iure civili in artem redigendo*); while the influence of dialectic is evident in the work of some late republican jurists. Some ideas found in the jurists can be traced back to Greek influence. On the extent of that influence a

lively debate continues (Wieacker 1988: 618–62). However great it was, it is undeniable that the concerns of the Roman jurists were not philosophical: such material as they absorbed was turned to their own purposes, and was necessarily tempered with grosser unphilosophical considerations about reaching a workable result.

It was not only during the republic that the jurists were the key figures behind the scenes in the development of the law. Under the principate, the popular assemblies ceased to meet to pass statutes; in about AD 125 the praetor's edict was frozen in the form which it had then reached. Law which had previously been made by these means was now made by the emperor. But emperors were not lawyers. They too depended on the jurists for advice; and some of the leading jurists served in the imperial administration. Both Papinian and Ulpian had the distinction of holding the highest office of praetorian prefect. And the additional distinction of being murdered in office.

### 6. Emperor

The general term for law made by the emperor is 'constitution' (*constitutio*). This took many forms: if the ruling was made in court, it was known as a decree (*decretum*). Some emperors, such as Claudius and Septimius Severus were apparently fond of hearing court cases themselves (Suetonius, *Claud.* 14–15; Wolf 1994). Here is one of Paul's collection of *decreta* pronounced by Severus, which also gives a sense of the legal debate that might surround the emperor's decision:

Clodius Clodianus made a will and then in a second, invalid, will appointed the same heir: the heir wanted to accept the estate under the second will, since he thought it was valid, but then it was discovered not to be. Papinian thought he had repudiated the estate under the first will, and could not accept it under the second. I said he had not repudiated, since he thought the second will was valid. He [Severus] pronounced that Clodianus had died intestate. (Paul, *D.* 29.2.97)

Emperors might also issue general orders, known as edicts (*edicta*). Or they might reply to official inquiry by letter (*epistula*); or to inquiries made by private petitions, by writing the answer at the bottom of the petition: hence the name 'subscription' given to these replies. (In the third century 'rescript' comes to be the term applied to replies both to petitions and to letters.) Justinian's Code contains constitutions of all these sorts.

The surviving material makes it clear that the volume of material was massive. Two points follow. First, as would be expected, the emperor rarely initiated contact; mostly he merely responded to questions (Millar

1977). Second, the emperor had assistance. He had an office for answering letters and another for petitions; officials known as the secretaries *ab epistulis* and a *libellis* ran those offices, in which other staff worked. It seems likely that run of the mill inquiries would have been dealt with at a low level. The rescripts which survive in the Codes, which on the whole will have raised more difficult and interesting questions, were probably dealt with by the secretary *a libellis* personally, and from time to time the emperor is likely also to have been involved (Honoré 1994: 1–56).

Whenever a constitution required legal advice, it is the jurists who will have supplied it. It seems that under the empire a new class of civil-servant-jurists grew up. But in addition, as already mentioned, the great offices of state were sometimes held by leading jurists, and some (notably Papinian) are known to have held office as secretary *a libellis*.

### III ROME AND THE PROVINCES

In the two and a half centuries of the classical period of Roman law the boundaries of the empire expanded. It covered a vast area, from Asia to Britain. Did the same law apply across this expanse, or was Roman law the law of Rome alone?

This is a difficult question, and a categorical answer to it would be ill-advised. Indeed, even to mention it is perhaps incautious. There must have been local and regional differences in the extent of Romanization. But the following points suggest that, in some areas at least, there were substantial similarities between Roman and provincial practice.

Governors of provinces were responsible for the administration of justice in their provinces, just as the praetors were in Rome. In just the same way they issued edicts. From the republic we have reasonable information about this, since one of Cicero's charges in his speeches against Verres is that he abused his position as governor by tampering with his edict (Cic., II *in Verrem* 1.119–21). That charge itself, while likely to be rhetorically exaggerated, does perhaps hint at an expectation that the provincial edict would remain fairly stable. Indeed, the administration of justice more or less requires that. In the second century AD Gaius wrote a commentary on the provincial edict, and it seems likely therefore that its text had been settled by then, just as had that of the urban edict about AD 125. It seems probable that the governor's edict in essentials mirrored the edict promulgated in Rome by the praetor.

It remains a matter of dispute whether the formulary system of Roman civil procedure (discussed in chapter 6) was applied throughout

the provinces or was essentially confined to those classified as public provinces. The present concern, however, is with the question of Romanization, and it can be said with confidence that Roman legal practices were widely diffused through the provinces. Formulae which are faithful to the practice attested by juristic writings for Rome have been found in the Babatha archive in the province of Arabia, and in Transylvania, as well as in Spain and in the south of Italy (Wolff 1980; Kaser 1996: 163–71).

The Flavian municipal laws, of which substantial remnants survive for various Spanish municipalities, make very frequent reference to Roman practice, and indicate that the same procedures are to be followed in the municipality as in Rome. It is probable, however, that these represent an extreme of Romanization, so to treat them as representative of the rest of the empire would be unwise.

The extent of Romanization in these laws is particularly clear in the recently discovered *lex Irnitana*, a municipal statute originally set out on ten bronze tablets, from a town in Spain so small that it had never previously been heard of. Several chapters contain references to Roman practices for such things as which cases should be heard by single judges and which by several judges (*recuperatores*), and what time limits applied for hearing cases and for adjourning them (*lex Irn.* chs. K=49, 89, 91).

The most striking chapter of all is chapter 93, which provides ‘For matters for which it is not expressly written or provided in this statute what law the citizens of the municipality of Irni should use among themselves, for all those matters let them use the civil law which Roman citizens use and shall use among themselves . . .’.

This is very remarkable. The provisions of Roman law were not merely displayed, laboriously engraved in bronze, but intended to be applied. The same picture is confirmed by two more chapters of the *lex Irnitana*: the first is concerned with setting the limits on the jurisdiction exercisable by the local magistrates at Irni and contains a long list of matters reserved to the higher authority of the provincial governor. What is interesting here is that for a wide range of legal actions it was actually the provincial governor who had jurisdiction: this will have served to reinforce the consistency with which Roman law was applied even in outlying parts of the empire. It is likely that the same would apply to outlying parts of Italy, except that there the higher jurisdiction would be that of the praetor (*lex Irn.* ch. 84).

The second of these chapters provides that the local magistrates are to display and to exercise their jurisdiction in accordance with the ‘inter-

dicts, edicts, formulae, promises (*sponsiones* and *stipulationes*), securities (*satis dationes*), defences, and prescriptions' set out in the edict of the provincial governor (*lex Irr.* ch. 85). Accordingly, even where the local jurisdiction was itself competent for the matter at issue, the local statute required that the citizens and residents of Irni should make use of Roman law as promulgated in the Roman governor's edict.

It cannot be said that the entire Roman empire was run on the footing of Spanish municipalities such as Irni, so it would not be legitimate to conclude that Romanization of this degree was universal. None the less, the formulae from the Babatha archive show that even in Arabia Roman law was being applied: in AD 124–5 Babatha, who was apparently not a Roman citizen, sued in the court of the Roman governor at Petra, where Roman law was applied. But this seems to have been a voluntary decision on her part; apparently the Jewish population made use of foreign laws and practices as well as their own. In short, within the empire there were local variations, places such as Arabia and Egypt where 'indigenous' legal orders survived and were happily tolerated by the Roman administration (Nörr 1998: 98; Cotton 1993: 101, 107; Modrzejewski 1970: 317–47; Kaser 1996: 167–8).

The evidence therefore supports a remarkable penetration of Roman legal culture wide throughout the empire. The grant of citizenship to virtually the whole population of the empire in AD 212 will have consolidated this process. But the role of Roman law in the provinces was not uniform, and our picture of it necessarily remains an impressionistic one.

## CHAPTER 2

### *Sources and methodology*

Chapter 1 dealt with the main sources of Roman private law, in the sense of the formal sources which created it. This chapter is concerned with the use of Roman legal sources by the modern student or scholar. It gives an account of those sources and problems that arise in using them. Nearly all the surviving material of Roman law is transmitted in one or other of the emperor Justinian's compilations. The chapter begins with an account of the sources which survive independently of Justinian; it then moves on to the Digest and (very briefly) other parts of the Justinianic compilations. It concludes with a general discussion of the difficulties of trying to write history based on legal sources.

The emphasis throughout is on questions peculiar to the legal sources. No detail, for example, is given about problems relating to the transmission of texts, since this is not specifically a problem of the legal sources but one which affects all ancient literature.

#### I SOURCES INDEPENDENT OF JUSTINIAN

##### *1. Legal writings*

The most important of the works which survive independently of the Justinianic compilations is the Institutes of Gaius, an elementary introduction to Roman law dating from about AD 160, and still the best introduction to the subject ever written. It contains a clear account of classical law and procedure, and also some valuable historical material of which the Digest preserves no record. It is preserved in a palimpsest discovered in Verona in 1816. It raises essentially the same textual critical problems as any other ancient work, and nothing in particular turns on the fact that it is a work about law.

A number of diverse legal productions survive of which only a few can be mentioned here:

(1) *Pauli sententiae*, ‘the opinions of Paul’, is a short account of Roman private law. Although attributed to Paul, it appears to date from the late third century AD and to derive from Africa (Liebs 1993: 32–43).

(2) Two works related to the Institutes of Gaius survive: (i) an epitome of the Institutes, which appears to date from the late fifth century (Liebs 1987: 175) and (ii) fragments known as the *Autun Gaius*, dating from the late third or early fourth century AD (Liebs 1987: 150). Both of these are western in origin.

(3) A short compendium ascribed to Ulpian, and sometimes known as the *Epitome of Ulpian*, survives, dating from about AD 320.

(4) The *Fragmenta Vaticana*, so-called because they are preserved in a Vatican manuscript, consist of lengthy excerpts of various classical jurists and constitutions on a number of themes. Only a small part of the original appears to survive. The work dates to about AD 320 (Liebs 1987: 151).

The quality of legal argument (if any) in these works is not always high; and the *Autun Gaius* has been the object of particular derision. None the less, all of these works have particular value in that they present a rare glimpse of law which has not been filtered through the eyes of Justinian.

## 2. Codes

The ‘Codes’ gather together the constitutions promulgated by various emperors, mostly arranged chronologically under different subject headings. Justinian’s Code of AD 529 is discussed in section II. The other surviving Code is that of the emperor Theodosius II, published in AD 438. It was preceded by two compilations of the Diocletianic period (AD 284–305), the *Codex Gregorianus* and *Codex Hermogenianus*, neither of which survives.

The Theodosian Code contains relatively little on private law, being much more concerned with public and municipal law, administration and religion. It begins with constitutions of the emperor Constantine, well beyond the end of the period with which this book deals. For both of these reasons the following chapters make little or no use of it.

## 3. Epigraphic and other sources

There is a large number of inscriptions, papyri and other documentary evidence about Roman law, although much of it is fragmentary. This is

invaluable for the task of understanding how Roman law worked in practice. Particularly notable are the collections of tablets from Pompeii and Herculaneum, which preserve records of business and of litigation (Wolf 1985; Wolf and Crook 1989; Gröschler 1997). They are referred to especially in chapter 5. Notable too is the archive of Babatha, which serves a similar role for the near East in the first to second centuries AD (Wolff 1980). Large numbers of papyri provide records of actual cases (see for example those on advocacy collected in Crook 1995). Finally, reference should be made to the *lex Imitana*, the latest in a series of bronze tablets found in Spain. Discovered in 1981, it is the most complete of the various surviving municipal law codes. It is discussed in more detail in chapters 1 and 6.

These documentary sources call for the usual apparatus of epigraphical, papyrological or palaeographical skills; but on the whole the fact that they are about law does not make very much difference to the approach it is necessary to adopt to them.

## II THE JUSTINIANIC SOURCES

Together the legal compilations promulgated by Justinian are known as the *Corpus iuris civilis*. There are four parts to it. Most attention is paid in this section to the Digest, which is the principal source for attempts to reconstruct the law of classical Rome.

### 1. *The Institutes*

This is an elementary work on the model of Gaius's Institutes, on which it depends heavily. It dates from AD 533.

### 2. *The Digest*

The Digest was compiled in the short period of three years between AD 530 and AD 533 on the orders of the emperor Justinian. It is a compilation made from the works of the classical Roman jurists. What the Digest compilers did was make excerpts from the classical works and digest them under a series of chapters or 'titles' in fifty books. So, for example, the first title, Digest book 1 title 1 (or *D. 1.1*), is entitled 'On justice and law' (*de iustitia et iure*) and the last, *D. 50.17*, is 'On various rules of ancient law' (*de diversis regulis iuris antiqui*). More typical titles concern such things as 'On the action for recovery of property' (*D. 6.1 de rei vindicatione*) and 'Hire' (*D. 19.2, locati conducti*).

The Digest was officially promulgated by Justinian with a constitution, *C. Tanta*, setting out some of the detail of the massive work of compilation. This excerpt from that constitution gives some sense of what was involved:

... nearly two thousand books and more than three million lines had been produced by the ancient authors, all of which it was necessary to read and scrutinize in order to select whatever might be best. . . . This was accomplished; . . . we have given these books the name Digest . . . and taking together everything which was brought from all sources, they complete their task in about one hundred and fifty thousand lines. (*C. Tanta* 1)

The compilers of the Digest preserve a reference to the source from which they took each fragment. This so-called inscription is given at the beginning of the fragment; for example, *D. I. I. I. pr.* begins ‘*Ulpianus libro primo institutionum*’ indicating that the fragment was taken from book 1 of Ulpian’s *institutiones*. Since these references to the sources are preserved, we are able to say that the Digest contains excerpts from thirty-nine different classical jurists ranging in date from Q. Mucius Scaevola in the first century BC to the jurists Hermogenian and Arcadius Charisius of the fourth century AD. Most excerpts or ‘fragments’ come from a core period of the mid-first to early third centuries AD, but the distribution between authors is extremely uneven. The work of the jurist Ulpian predominates, occupying just over 40 per cent of the whole; next comes Paul; at the other extreme are jurists represented by a single fragment, Aelius Gallus, Claudius Saturninus, and Rutilius Maximus.

The precise details of how the Digest compilers worked remain uncertain and controversial. What can, however, be said with confidence was said by Friedrich Bluhme in 1820: this is the so-called ‘Massentheorie’. According to this theory, the compilers divided themselves into three groups in order to read and excerpt the works of the classical jurists, which would ultimately appear under the rubric of the various Digest titles. Within each group the compilers read and excerpted the works in a fixed order. When the Digest itself was compiled, the order in which the compilers had read and excerpted the classical works was to a large extent preserved, because each group’s fragments for the most part appear in a single block or ‘mass’. From time to time fragments are displaced from their mass for editorial reasons, for example to place them next to fragments from another mass dealing with the same subject. Most titles within the Digest contain fragments from each of these three masses, which are generally known as Edictal, Sabinian, and Papinian, according to the type of classical work which predominates

within them. There is a fourth, much smaller mass known as the Appendix. Modern editions of the Digest indicate which mass each fragment comes from; and the standard stereotype edition also includes a table at the end setting out Bluhme's order (Bluhme 1820; cf. Mantovani 1987). Although this may seem to – and often does – have little relevance to the historian, none the less attention to Bluhme's order may make it possible to identify the original context of a fragment in the Digest (Johnston 1997a). There is more to say about this under the next heading.

### *Loss of context and palingenesia*

A major difficulty in using the Digest is that it consists entirely of excerpts from jurists' works. The excerpts are arranged in books and titles. But the context from which they were excerpted is necessarily uncertain. This means that some caution is needed in the use of evidence, since what appears now under one heading in the Digest may originally have been said by a jurist in connexion with something quite different.

Here some help is at hand. Because the compilers of the Digest give the source of each fragment, it is sometimes possible to be fairly sure what the original context of the excerpt was. That is true in particular of the main commentaries, those on the edict or on the civil law. There were many such commentaries, and a comparison of their surviving fragments indicates that they were typically lemmatic in form: that is, they followed the order of the work on which they were commenting and dealt with each word or topic in turn. If a fragment from the Digest can be located in a particular book of such a commentary, it follows at least that it is possible to limit the range of possible words or topics with which it may have been concerned; and sometimes the actual word or topic may be identifiable with reasonable certainty.

The fundamental work of retrieving the original context of fragments, usually known as 'palingenesia', was carried out late last century by Otto Lenel and published in his great *Palingenesia iuris civilis* in 1889. Lenel's work is not without flaws but, although corrections have been suggested, it remains an extraordinary achievement and has never been superseded. It is therefore the starting point for trying to identify what the true subject of the excerpts in the Digest actually is.

Here is an example. In the penultimate title of the Digest, 'On the meaning of words' (*de verborum significatione*) the jurist Paul gives a definition of 'crops' (*fruges*) (*D.* 50.16.77). It is removed from its original context. It might be useful to know what that was. That can be done,

since the inscription shows that the text comes from book 49 of Paul's commentary on the edict. The first step is therefore to see what Paul discussed in book 49. From the *Palingenesia* it can be seen that he was talking about water; more specifically, the interdiction on water and the action for warding off rainwater (*actio aquae pluviae arcendae*), which was an action brought where the defendant had constructed something on his land which caused rainwater to damage the plaintiff's land. (This action is discussed further in chapter 4 section III.) This is not at all the obvious context for a discussion of the meaning of 'crops'. But there is a reason for it to be discussed: there was no liability under this action if the thing which the defendant had constructed had been constructed for a legitimate agricultural purpose, such as the gathering of crops (Ulpian, *D.* 39.3.1.7). In this context, it was necessary to determine precisely what 'crops' were. Paul's fragment indicates that there was quite detailed juristic discussion about the definition of this term.

Such questions may typically be of more interest to lawyers than to historians. None the less, to identify the original context in which a definition was put forward or an argument advanced may clearly be of importance in historical argument too.

### *Interpolations*

The most notorious difficulty which faces readers of the Digest, and doubtless the one which has been the greatest deterrent to its use by historians, is the question of interpolations in the Digest (Wieacker 1988: 154–73). The problem itself is easily stated: the Digest is a compilation of excerpts made several hundred years after the works from which it was compiled were written. Just as legal texts nowadays are updated and appear in new editions, so the material published in the Digest was updated to take account of changes in the law. The problem is that for the most part we know nothing at all about the original sources, so distinguishing the old from the new is not straightforward. The problem of interpolation is therefore the question of separating out which strands in a text relate to the law of Justinian's time (the sixth century), which to the law (for example) of Ulpian's day (the early third century), and which may be attributable to any intervening period.

This is not an exact science, and it is one which was practised with such fervour and lack of self-restraint in the early decades of this century that the word 'interpolation' itself remains tarnished. Views still differ (Kaser 1972; Wieacker 1988: 154–73; Honoré 1981; Johnston 1989; Watson 1994). But the fact that there are interpolations is

incontrovertible: not only does the Digest represent a massive abbreviation of the original juristic works – as noted above, according to Justinian it amounts to only 5 per cent of the length of the original works; but apart from this the compilers were expressly authorized in AD 530 to make alterations:

... there is something else of which we wish you to take special account: that, if you find anything in the ancient books which is not well expressed or which is superfluous or incomplete, you should cut down excessive length, make up what is incomplete, and present the whole in proportion and in the most elegant form possible. (*C. Deo auctore* 7)

With this on the historical record, the supine approach to questions about interpolation now in vogue is historically impossible to justify.

The sort of changes the compilers actually did make are many and various. But some general considerations can be set out:

(1) There is evidence that the compilers approached the texts with respect (*C. Tanta* 10), so it is not plausible to imagine that they engaged in wholesale rewriting. Not only do the compilers religiously preserve the inscriptions, the references to the sources from which they took fragments, but they do so even where the fragment consists of only a word or two inserted into a continuing passage taken from another author. Had they not been concerned about accurate attribution, the compilers would surely just have inserted a few words without comment. (See for example *D. 18.1.48*, four words from Paul in the middle of a passage of Ulpian.)

(2) The likelihood in any case is that the major change has been abbreviation, so nuances and details may have been lost. Since the general aim was to make the (surviving) texts more manageable and accessible, it is not very likely that the compilers spent much time writing new material to insert into the classical texts.

(3) It is in general unlikely that substantive alterations will have been made to the texts unless there is a good reason, such as the fact that change in the law made the doctrine of a text incorrect or the institution with which it was concerned obsolete. Where such changes were made by Justinian, we often have independent evidence of them.

(4) The classical jurists spent much time disagreeing with one another; many of those disputes have been suppressed. We know this partly from parallel texts (see below) and partly because Justinian famously embarked on a project of resolving classical controversies, and promulgated a series of laws known as the ‘fifty decisions’, in which the classi-

cal dispute was laid to rest and a single pragmatic solution introduced. It is unfortunate that, owing to Justinian's insistence on establishing clear rules, we are deprived of much of the richness of classical jurisprudence.

(5) The procedural system in Justinian's day was different from that of classical times; although the Digest routinely refers to the classical formula system, the desirability of making reference to the *cognitio* system in use in Justinian's day will have led to significant changes.

### *The detection of interpolations*

As lawyers say, each case turns on its own facts, so there is no guaranteed method for detecting an interpolation. But a few examples of different approaches may help to give a sense of what is involved.

(1) *Parallel texts*. The Digest was intended to supersede the works from which it was compiled, which were to be destroyed. That result appears to have been successfully achieved, and so it is only in the rarest cases that we find a text parallel to the Digest fragment. Such cases are as valuable as they are rare, since they provide crucial information about the sort of changes the Digest compilers did make.

Here is an example from book 17 of Ulpian's commentary *On Sabinus*, which is preserved both in the Digest and in the *Fragmenta Vaticana*. The words which appear only in the Vatican manuscript and not in the Digest are italicized.

[Julian] says that if a usufruct has been left by legacy to a slave who is owned in common and separately left to Titius, if the usufruct is lost by one of the common owners it does not go to Titius but ought to go to the other common owner, as he alone was conjoined in the grant: *Neither Marcellus nor Mauricianus approves this opinion; Papinian in book 17 of his 'Problems' also departs from it. Neratius's view is given in book 1 of his 'Opinions'. But I think [Julian's] opinion is correct, for as long as one of the common owners uses it, it can be said that the usufruct subsists.* (Ulpian, *D.* 7.2.1.2 and *FV* 75.3)

What is striking is that all reference to an apparently lively classical controversy has been struck out and a single clear view preferred.

(2) *Inconsistency*. Sometimes texts are self-contradictory, indicating that they have been altered, but inaccurately. This is one of the convenient consequences of the fact that the Digest was compiled at great speed: there are occasional loose ends which make compilatorial intervention possible to detect. A straightforward illustration is this:

If a procurator has been appointed to defend an action, he is ordered to give security with a promise that the judgment will be satisfied. The promise is given

not by the procurator but by his principal. But if a procurator defends someone, he is personally compelled to give the promise. (Modestinus, *D.* 46.7.10)

Here we are told two conflicting things about procurators. The first is an interpolation; fortunately, we know from Gaius's *Institutes* (*Inst.* 4.101) that it was a different kind of legal representative, the *cognitor*, who did not give the promise personally. *Cognitores* were abolished by Justinian but this trace of their existence lingers on.

(3) *Known innovation.* Sometimes we know that Justinian changed the law, because the constitution by which he did so is preserved. Clear examples are the abolition of the formal conveyance *mancipatio*, with the result that the informal method of *traditio* could be used for all property; alteration of the period of time in which ownership of property could be acquired by possession (*usucapio*); abolition of one form of real security, *fiducia*, and its supersession by another, *pignus*. (The law on these topics is discussed later, in chapters 4 and 5.) These and similar changes lead to absolutely routine interpolation: where the term *mancipatio* appears, it is replaced by *traditio*; where the reference to the period for *usucapio* appears (either one or two years in classical law), it is replaced by a general expression such as 'for the statutory period'; and where *fiducia* appears it is replaced by *pignus* (e.g. *D.* 17.1.22.9; *D.* 41.10.4 pr.; *D.* 13.7.8.3).

(4) *Language.* This is the most notoriously subjective of the possible criteria for detecting interpolation, and one that ultimately led to the downfall of the interpolationist school earlier this century. The unsoundness of the method lay principally in the fact that its practitioners believed they could identify a style and in particular a vocabulary characteristic of the classical jurists. Having identified an 'unclassical word' in one text, the practitioners of this method condemned the other texts in which the word appeared; those texts contained new words which were now regarded as suspect, and led to the condemnation of yet further texts. As Otto Lenel remarked, 'the interpolation bacillus is infectious'.

In itself, however, it seems to make sense to pay close attention to the language, style and grammar of the texts, and provided this is done by taking each case on its own merits, it seems to be a valuable weapon in the search for interpolations. Over the last few decades awareness has grown that the classical jurists have individual stylistic features; if regard is paid to these, then there is a firmer basis for assessing the likelihood of interpolation (Honoré 1981; also the much earlier work of Kalb 1890). It is true – and vital to remember – that oddities in grammar or style may reflect no more than abbreviation; it is not necessary to assume that the legal substance of the text has been affected.

In short, there is no cause to abandon hope: there are reasonably solid principles which can give some guidance in questions of interpolation.

### *Post-classical changes*

Unfortunately, however, this is not quite an end of the matter. There remains the fact that between the writing of the classical works, mostly before about AD 230, and the compilation of the Digest in the AD 530s three centuries intervened. Did the classical works pass through that substantial period unscathed?

The answer to this question must be ‘no’, but the degree of alteration will be very variable. All (or nearly all) classical works will at some point have been copied from the roll form in which they first appeared into book or ‘*codex*’ form, a process that began around the middle of the third century AD; here then is one opportunity for copying errors to be made, for the text to become corrupted, and for marginal glosses to become absorbed into it. In reality, the most popular works will have been copied much more frequently, so potentially increasing the distance between them and the original. On the other hand, some works will not have been much used, and they may well have been transmitted without significant alteration (Wieacker 1988: 165–73).

Nor can we forget about the possibility of forgery, trading off a famous name in order to maximize sales; and perhaps particularly tempting in law in order to obtain the authority accorded to the great names among the jurists. We know that such forgery happened in other areas such as rhetoric and medicine, even when the author was still alive (Quintilian, *institutio oratoria*, pr. 7). And there also survive independently of the Digest some works which can scarcely have been written by the authors to whom they are attributed, such as Paul’s *sententiae*.

For these reasons, what is most important is to be able to trace the history of each work, and attempt to see whether it does appear to be genuine and whether it has been subject to annotation or reworking. This can be done only by close study of its surviving fragments. Studies of this sort attempt to identify different layers in the texts (‘Textstufen’), of which in a difficult case there may be many, ranging from glosses at one date, to substantial additions at another, and ultimately Justinianic interpolation. Isolation of these elements is of course not a scientific process, but depends on arguments drawn from the language, style and structure of the work, the substantive law and level of argument contained in it, and comparison with other surviving material which can be dated. This may sound daunting, and it is. But a good start has been

made in a series of studies originating in Freiburg. Here there is space only to summarize the main general points which have so far emerged from such studies.

(1) Most reworking of texts is likely to have occurred immediately after the end of the classical period, in roughly AD 250–310.

(2) It seems that the post-classical law schools of the fourth and fifth centuries AD, once blamed for wholesale onslaughts on the texts, actually approached them with restraint; their intervention is likely to have been confined to writing glosses on the texts, some of which, it is true, may have been absorbed into them. There is, however, some evidence of substantial additions to works which were used for teaching in the law schools: this applies, for example, to the ‘Problems’ (*quaestiones*) of Paul (Schmidt-Ott 1993).

(3) Early classical works are relatively free of post-classical reworking; they probably went through relatively few editions. This is true, for instance, of the ‘Letters’ (*epistulae*) and ‘Books on Cassius’ (*libri ex Cassio*) of Iavolenus Priscus (Eckardt 1978; Manthe 1982). On the other hand, the works of the great Severan jurists, Ulpian, Paul and Papinian, are more likely to have been subject to much reworking, in the course of regular new editions.

### 3. *Justinian’s Code*

Justinian’s Code was promulgated in AD 529. The Code which survives is the second edition. A first edition had apparently confined itself to excerpting the constitutions of earlier emperors. In the meantime, however, Justinian issued his 50 decisions (see above, pp. 18–19); this led to the preparation of a new edition of the Code incorporating those decisions and consequential amendments to other constitutions in the first edition.

In the Code the references to the consular dates of each constitution are mostly preserved and so are the names of the addressees. This makes it relatively straightforward to know, for example, whether a given constitution was issued in response to an individual inquiry, a request from a governor or other official, or was conceived as an edict addressed by the emperor to a particular person or persons. For the most part, therefore, it can be said that the constitutions represent real responses to real problems.

Questions about selection and interpolation can be dealt with more briefly here. So far as selection is concerned, the compilers of the Code were instructed as follows:

We specially permit them to cut out from the three Codes and subsequent constitutions prefaces which are superfluous, so far as the substance of the laws is concerned, as well as those which are repetitious or contradictory, unless they assist some legal distinction, and those which are obsolete; and to compose laws which are certain and written in a brief form; to bring them under fitting titles, adding and subtracting and even changing their wording when the usefulness of the matter demands it; to collect into one law matters which are dispersed between various constitutions; and to make their meaning clearer; provided, however, that the chronological order of these constitutions appears from the inclusion of dates and consuls and also by their arrangement, the first coming first, the second second, and if there are any constitutions without date and consul in the old Codes or in the collections of new constitutions, to place them in such a way that no doubt can arise as to their general binding force, just as it is plain that those which were addressed to individuals or a community but which are included in the Code because of their usefulness receive the force of a general constitution. (*C. Haec* 2)

This instruction makes it clear that basic sources for Justinian's Code for the period up to AD 438 were the three earlier Codes, the Theodosian Code, which contained general laws (*Cod. Theod.* 1.1.5), and the two Diocletianic Codes. The first of those Codes, the *Codex Gregorianus*, contained rescripts issued in response to the inquiries of individuals and went back as far as Hadrian and up to AD 291. This Code was itself probably based to some extent on earlier collections of rescripts. The second Code, the *Codex Hermogenianus*, appears to have been a sort of supplement to the first, covering the years after AD 291, and to have been published in AD 295 (Turpin 1985). As is clear from the constitution just cited, even private rescripts were, by virtue of their inclusion in Justinian's Code, to have general force.

The fact that Justinian's compilers relied to such an extent on earlier compilations means that in relation to interpolation two main issues arise. The first is the question of changes in the texts between their promulgation and their inclusion in the earlier compilations. Certainly once the texts of these laws had been collected into compilations or codes, there was no real scope for unofficial alterations to be made to them. It is not unlikely that the original constitutions were abbreviated, perhaps by the authors of the earlier codes or the collections on which they themselves relied. But in the absence of a parallel textual tradition the whole matter is extremely unclear.

The second point – changes made by Justinian's own compilers – is much clearer: the fact that there are often parallel texts in the Codes of Justinian and Theodosius means that the activities of Justinian's

compilers can sometimes be observed. Where there is no parallel text, much the same approach has to be followed as for interpolations in the Digest (Wieacker 1988: 173–8).

#### 4. *The Novels*

These are constitutions of Justinian which post-date the promulgation of the Code, the first of them dating from AD 535. Most are in Greek. They are not discussed further in this book.

### III PROBLEMS IN USING LEGAL SOURCES

It would be wrong to suggest that we can tell nothing about actual practice from the writings of the Roman jurists. But the limits of such evidence do need to be clearly appreciated. What we can attempt to draw from the legal material is a picture of how or how well the law facilitated a particular activity, and how it may have influenced choices made by those involved in such activity, by favouring one approach or structure over another. But the results of that sort of investigation do not go much beyond hypotheses, which require to be verified or falsified by looking at the evidence of actual practice, so far as there is any.

A few obstacles in the way of historical investigation require specific mention.

#### 1. *Are the legal cases reported in the Digest real or imaginary?*

A common concern about the evidence preserved in the Digest is that it is not historical but instead a collection of carefully crafted hypothetical cases designed by the jurists to illustrate legal doctrines. There is some truth in this, but it is certainly not the whole truth. It would in any case be surprising if the jurists designed hypothetical cases which were entirely remote from the realities of life in Rome.

Our difficulty arises partly from the fact that the jurists do not concern themselves with whether or how the facts in a case can be proved. They simply discuss the law on the assumption that the necessary facts can be established. Many of the opinions of the jurist Q. Cervidius Scaevola include the phrase ‘on the facts as stated’ (*secundum ea quae proponerentur*). But that limitation, although not express, must apply to the opinions of others too. This reluctance to engage with the facts does tend to distance the jurists’ discussions from untidy reality. But it does not mean that they were not advising in real cases.

How are the real cases to be distinguished from the imaginary? Some guidelines are possible. The most important point is to be aware of the nature of the juristic work from which the case is taken. Some works are self-consciously devised as books of problems (*quaestiones*) and, while their underlying assumptions may (or, less likely, may not) be realistic, they need not arise from a real inquiry or reflect a real practical concern. Other works are designed for instructing students (*institutiones*); here too the emphasis may not be on real cases but on communicating elementary points, which may involve striking examples (Gaius, *Inst.* 3.97a–98).

On the other hand, there are many works which do no more than collect the legal opinions – *responsa* – given by the jurists in actual cases. These tend to appear under the title *responsa* or *digesta*. Here it is usually reasonable to presume that what we are faced with is a real opinion on real facts, delivered to real people. That impression is supported by the jurists' tendency (referred to in chapter 1) to give a bare recital of the facts, based on which they then briefly express an opinion about the law. It certainly seems doubtful that some of their more unhelpful opinions would have been invented; and much more likely that they are real cases (Scaevola, *D.* 34.1.19 and *D.* 33.7.20.9).

In some cases the impression that these are real cases is confirmed by the fact that the parties' names are preserved; in a few cases, where the same case is reported in the Digest more than once, we can see that the real names have been preserved in one report but replaced by typical stock names such as Lucius Titius and Gaius Seius in the other (Scaevola, *D.* 32.38.4 and *D.* 32.93 pr.; *D.* 34.3.28.4 and *D.* 34.3.31.2; *D.* 35.2.25.1 and *D.* 33.1.21.1; also *D.* 14.3.20, where the real names are preserved in the document quoted but replaced in the narrative, and *D.* 45.1.122.1, where the slave of Seius is transformed into the slave of Lucius Titius). This means of course that it is wrong to conclude from the use of stock names that a case in which they appear is a hypothetical one.

There are rather few works which purport to record actual legal proceedings and their outcomes; one of the few is Paul's *decreta*, which records decisions pronounced by the emperor (see, for example, *D.* 29.2.97, cited in chapter 1; *D.* 36.1.76.1; *D.* 49.14.50).

Sometimes too, though rarely, a case is expressly said to have arisen in practice (*ex facto*: Paul, *D.* 2.14.4.3). A particularly interesting example is given by Ulpian, because it indicates not merely the involvement of the emperor, and of the praetor, but also that of the jurist himself in giving advice to the praetor:

... I know from an actual case (*ex facto*) that when the Campanians had extracted a promise from someone by duress, a rescript was issued by our emperor that that person could ask the praetor for the promise to be set aside, and in my presence as assessor the praetor decreed that he could either have an action against the Campanians or else a defence against their action. (*D.* 4.2.9.3)

There will continue to be difficulty in weighing up cases which neither state that they are real cases nor come from any of the genres of Roman juristic writing discussed above. Unfortunately this applies to a significant proportion of the Digest.

The question whether the cases in the Digest are 'real' is part of a larger question. Books about law do not necessarily give a clear picture of law on the ground. A sense of tradition and a respect for authority mean that lawyers fondly continue to use old categories or institutions; for the historian, there can be difficulties in drawing conclusions about the state of society at a particular time from the existence of a particular legal rule. For example, the classical jurists rigorously adhered to a distinction between two types of property, *res mancipi* and *res nec mancipi*, which had to be conveyed by different methods; but at the same time they devised new remedies which meant that if you used the wrong method it did not matter very much (see chapter 4). It is true that in this instance the lawyers were luxuriating in traditions and distinctions for their own sake. But they did not allow that to impede the practical working of the law.

In practice, too, lawyers with experience in court know that there are legal arguments which seem perfectly all right on paper but which no court is ever going to apply. There are laws about offences which no prosecutor is ever going to try to enforce. Can we suppose that there is a good fit between what we read in the books and what really happened?

The answer to this has to be that we cannot. The lively and continuing debate about whether most Romans made wills or died intestate is itself evidence of how little the many books of the Digest devoted to the law of succession can actually tell us about what was happening in real life (Daube 1965; Crook 1973; Cherry 1996). Sometimes we can rely on records of actual cases, and on rescripts answering real inquiries; and we can make as much use as possible of such other evidence as there is. But the link between theory and practice can be forged only by records of actual events; and much of the Digest is material of quite a different sort.

## 2. Bias towards legal problems

It is impossible to use the legal sources to gauge the frequency of a problem. To take an obvious example, there is a lot of law in the Digest about divorce and very little about happy marriages. But this indicates nothing about divorce rates, and reflects simply the fact that in this context most legal problems arise on the point of divorce. This is a crass illustration. But historians often fail to observe the rule to which it points: that the legal sources can indicate which problems arose, but not how often or how pressing they were.

Not only is there a bias in the sources towards issues which cause legal questions to arise, but there is also a bias towards questions which are legally difficult or interesting. Take the peculiarities of a particular type of legacy, which could be left to the testator's heir (legacy *per praeceptionem*; Gaius, *Inst.* 2.216–23). The fact that this legal institution is discussed at great length and in minute detail tells us more about what interested the jurists than what the Roman public chose to write in their wills.

It follows that in order to obtain a reliable historical picture it is particularly important to supplement the evidence of the legal sources with such things as literary, archaeological, epigraphic or other documentary evidence. Familiarity with a wide range of sources is therefore necessary. In the following chapters some attempt is made to use evidence other than the purely legal.

## 3. Cause or effect?

In legal history, a general methodological problem has to be confronted: whether it is the law which influences patterns of social or economic behaviour or it that is shaped by them. Take a simple example: suppose that Roman law has a particularly clear and coherent law of sale. Does the quality of the law bring about flourishing commercial activity? Or is it an active commercial sector which creates the demand for the law to develop such a law of contract? There is no reason why there should not be an element of truth in both of these possibilities. It seems likely that the law would not develop much sophistication unless there were a demand for it; but, as the law becomes more attuned to the needs of commerce, it can itself further the extent of commercial activity.

Here is another example. It is not surprising that actions such as that for warding off rainwater from land (*actio aquae pluviae arcendae*) developed early in Roman law (see p. 17 above, and pp. 72–3): its concern was to

protect agricultural interests (there was not very much else to protect in the fifth century BC). In this case it is certainly more plausible to say that society demanded that the law should protect certain interests, rather than that the law encouraged agricultural activity. We can conclude from this example too that in some cases it may be possible to detect some broad social or economic significance in the order in which different legal remedies are created.

Further instances of these issues crop up in the following chapters; some point one way, some the other. Rather than postulate a dichotomy between the two approaches outlined initially, it seems more accurate to recognize that in law there is a complex relationship between supply and demand.

#### *4. Legal evolution*

There are similar difficulties in accounting for legal change. Developed legal systems tend to take on a momentum of their own, so that changes in the law may be brought about purely by intellectual creativity on the part of the Roman jurists, with the aim of improving or rationalizing the legal system. On the other hand, changes and developments might equally be the result of social pressure or demands to be able to do certain things within the framework of the law. Here too it cannot be said that one view is right and the other wrong; it is likely that in one case the social element will be predominant and in another the technical.

Interestingly enough, the Roman jurists exhibit an awareness of these two aspects. Sometimes they refer to the *elegantia* of a legal rule or interpretation; here they are plainly speaking with admiration of the legal craftsmanship of the institution or rule in question. At other times they speak of *utilitas*, which appears to mean the social utility of a rule, its tendency to promote a desirable policy rather than its logical or technical merit.

#### *5. Conclusions*

This seems a formidable catalogue of methodological problems; so formidable that one might expect this book to end right here. The aim of this chapter, however, has not been to deter. Instead it has been to give a broad outline of some of the difficulties peculiar to legal sources and some of the methods developed over the years for trying to minimize them. Taking due account of these should make it possible to construct

valid arguments from the legal sources, and to see the flaws in those advanced by others (for example in the following chapters). Perhaps, in a single sentence, what it all amounts to is this. To write history using the legal sources alone is inadvisable; whenever possible other evidence should be employed too.