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.

1 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 534 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 Irnitana*, 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.* 1.1.1. 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 interdict 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 formulary 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 534. 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.