CHAPTER I

# *Introduction*

When we think of the legacy of classical antiquity, we think first of Greek art, Greek drama and Greek philosophy; when we turn to what we owe to Rome, what come to mind are probably Roman roads and Roman law. The Greeks speculated a great deal about the nature of law and about its place in society but the actual laws of the various Greek states were not highly developed in the sense that there was little science of law. The Romans, on the other hand, did not give much attention to the theory of law; their philosophy of law was largely borrowed from the Greeks. What interested them were the rules governing an individual's property and what he could make another person do for him by legal proceedings. Indeed the detailed rules of Roman law were developed by professional jurists and became highly sophisticated. The very technical superiority of its reasoning, which has made it so attractive to professional lawyers through the ages, has meant that Roman law is not readily accessible to the layman. Inevitably its merits have a less obvious appeal than art or roads. Yet over the centuries it has played an important role in the creation of the idea of a common European culture.

Most of what we know about ancient Roman law derives from a compilation of legal materials made in the sixth century AD on the orders of the Byzantine Emperor Justinian. The texts that he included in this collection were the product of a thousand years of unbroken legal development, during which the law acquired certain features that permanently stamped it with a certain character. During this millennium, roughly from 500 BC to 550 AD, Rome expanded from a small city-state to a world empire. Politically it changed, first from a monarchy to a republic and then, not long before the beginning of the Christian era, to an empire. At the same time its law was adapted to cope with the changing social situation, but all the time the idea was maintained that it was in essentials the same law which had been part of the early Roman way of life.

Justinian's texts have been viewed from different perspectives by

different peoples at different periods in European history. The revival of Roman law started in Italy, which remained the focus of its study and development through the later middle ages. In the sixteenth century, with the advent of humanism, France took over the leading role. In the seventeenth century, it was the turn of the Netherlands to give a new vision to the discipline and in the nineteenth century German scholarship transformed the subject yet again. In each period different aspects were emphasised.

Roman law has had passionate adherents and fierce opponents. As H. F. Jolowicz pointed out in 1947, the latter based their opposition on three main grounds. First, it has been seen as a foreign system, the product of an ancient slave-holding society and alien to later social ideas. Secondly, it has been portrayed as favouring absolutist rulers and as hostile to free political institutions. Thirdly, it has been regarded as the bulwark of individualist capitalism, favouring selfishness against the public good ('Political Implications of Roman Law', *Tulane Law Review*, 22 (1947), 62). Sometimes these notions have been combined. The original programme of the Nazi party in Germany demanded that 'Roman law, which serves the materialist world order, should be replaced by a German common law.' That attitude provoked the great German legal historian Paul Koschaker to warn of the crisis of Roman law and to write *Europa und das römische Recht*, eventually published in 1947.

Fifty years later a certain crisis still affects specialist Romanists but the contribution of Roman law to European culture can be reviewed more calmly. This book does not purport to rival that of Koschaker. It attempts to give an idea of the character of ancient Roman law and to trace the way its texts have constituted a kind of legal supermarket, in which lawyers of different periods have found what they needed at the time. It has indelibly impressed its character on European legal and political thought. How that happened is our theme.

CHAPTER 2

# *Roman law in antiquity*

## 1 THE LAW OF THE TWELVE TABLES

When recorded history begins, Rome was a monarchy, but at the end of the sixth century BC the kings were expelled and a republic was established in their place. At this time, Rome was a small community on the left bank of the river Tiber not far from its estuary. Its people believed that they were descended from refugees from the city of Troy after its sack by the Greeks. Their law was a set of unwritten customs, passed on orally from one generation to the next, which were regarded as part of their folk heritage as Romans. These laws were applicable only to those who could claim to be Roman citizens (*ius civile*, law for *cives*, citizens).

In cases where the application of a customary rule to a particular case was doubtful, the interpretation of the college of pontiffs, a body of aristocrats responsible for maintaining the state religious cults, was decisive. The citizen body was divided into two social groups, the patricians, a relatively small group of propertied families of noble birth, and the plebeians, numerically larger but disadvantaged in various ways. The pontiffs were exclusively patrician and the plebeians naturally suspected that their pronouncements on the validity of particular acts and forms were not always entirely disinterested. The plebeians argued that if the customary law were written down in advance of cases arising, it would be to their advantage. They would then know what their legal position was, without having to consult the pontiffs, whose powers of interpretation would be limited to the text of the laws.

The result of this agitation was the appointment, in 451 BC, of a commission of ten citizens, the decemvirs, charged with the task of preparing a written text of the customary law, on the lines of the famous Athenian laws of Solon. They produced a collection of rules, known as the Twelve Tables, which was formally proposed to the

popular assembly of citizens and approved by them. In giving its approval, the assembly did not feel that it was making new law to replace old law; rather it was fixing more precisely what had always, in general terms, been the law (*ius*). By being enacted in a text, it became *lex* (from *legere*, to read out), the public and authoritative declaration of what was *ius*.

The Twelve Tables mark the beginning of Roman law, as we know it, and its provisions ranged over the whole field of law, including public law and sacral law. The original text has not survived but there were so many quotations in later writings that its contents have been substantially reconstructed. The original order in which these fragments appeared is not clear and the versions of nineteenth-century scholars, which are printed in modern collections, certainly exaggerate the systematic character of the legislation. We do know that it began with the summons of a defendant to begin a legal action and ended with execution of the judgment at the end of an action.

The Twelve Tables did not state what everyone knew and accepted as law but rather concentrated on points that had given or might give rise to disputes. The substance of its rules was not particularly favourable to the plebeians, but the very fact that so much of the law had been put into fixed form meant that now they knew where they stood. In particular the Twelve Tables dealt with the details of legal procedure, what the citizen could do to help himself without invoking a court and what he had to do to start court proceedings. In the early republic there were few state officials to help an aggrieved person get redress for injuries which he claimed to have suffered and he had to do a lot for himself to activate the legal machinery. In certain cases self-help was tolerated, since the community was not yet strong enough to eliminate it. The Twelve Tables show, however, a determination to institutionalise such cases and keep them within strict limits.

When a dispute arose that the parties were unable to settle for themselves, they had normally to appear before a magistrate. The purpose of the meeting was to decide whether the dispute raised an issue which the civil law recognised and, if so, how it should be decided. In very early times, before the foundation of the republic, it is likely that the Romans had recourse to ordeals or oath-taking as a means of settling disputes. In the republic, however, the normal way of deciding any issue under the civil law was to refer it to a private citizen (or sometimes a group of private citizens), chosen by the parties and the magistrate. This single juryman, called the *iudex*, would investigate the facts (perhaps at

first relying on his own knowledge), hear the evidence of witnesses and the arguments of the parties and deliver judgment condemning or absolving the defendant.

The problem for someone who wanted to bring such proceedings was to ensure that his opponent would attend before the magistrate for the first stage of the proceedings. The defendant might cooperate, in order to get the dispute settled, but if he did not come voluntarily, the plaintiff could force him to appear. The precise limits of this power of compulsion were not fixed by the customary law and so the Twelve Tables set out in detail exactly what the plaintiff was entitled to do. If, and only if, the defendant refused, in front of witnesses, the plaintiff's request to come to the magistrate, or tried to run away, the plaintiff could use force to compel his attendance. If the defendant was sick or aged, the plaintiff could not make him come without providing him with a conveyance of some kind, but, the law provided, it did not have to be a cushioned litter. There were certain things a man could do without going first to a magistrate. The Twelve Tables provided that, when a householder caught a thief in the act of stealing at night, or even by day if the thief resisted arrest, he could kill the thief without more ado. In most cases, however, a court ruling was necessary before direct action was allowed. In cases of serious physical injury, the parties were encouraged to reach agreement on the appropriate money payment to be made by the offender to his victim. Failing such agreement, the Twelve Tables authorised talion, that is, the victim could inflict retaliation in kind, but limited to the amount of the injury received ('an eye for an eye'). The possibility of such retaliation would act as a spur to the parties to reach agreement and talion would probably have been exercised only in cases where the offender's family could not or would not help him to find appropriate money payments. For less serious injuries no retaliation was allowed and fixed amounts of compensation were prescribed.

So far we have been concerned with disputes between individuals, but in reality a person in early Rome was more likely to be considered as a member of a group. The unit with which early Roman law was concerned was the family. The law did not deal with what went on within the family. The relations between the members was a private matter which the community had no power to control. So far as those outside the family were concerned, the family was represented by its head, the paterfamilias, and all the family property was concentrated in him. All his descendants in the male line (agnates) were in his power. A

child did not cease to be in his father's power merely by becoming an adult. Until his father died, he could not own property of his own. Consequently all the family property was kept together and the resources of the family as a whole were strengthened. In practice, therefore, a claim by a victim of theft or personal injury committed by a slave or a child in power had to be brought against the family head, since he alone was in a position to satisfy that claim out of the family funds. The Twelve Tables gave him an option of either paying damages or of surrendering the delinquent into the power of the victim or of his family head (noxal surrender).

In cases of homicide there was no civil law action; rather a magistrate took the initiative on behalf of the community as a whole to prosecute the offender, thus avoiding the rise of family vendettas and blood-feuds. Normally, however, the law provided a framework within which the parties were left to settle their differences.

At the time of the Twelve Tables a plaintiff who did not receive payment of what the *iudex* had awarded him within thirty days could put pressure on the defendant up to the point of death. The plaintiff could bring him forcibly before the magistrate (there was no need for a polite request this time) and if he neither paid up nor provided a surety of substance, who would guarantee payment on his behalf, the magistrate would authorise the plaintiff to keep him in chains for sixty days. During this period he had to produce the defendant in the market place on three successive market days, to give publicity to his plight and provide an opportunity for his family and friends to deal with the matter. The ultimate threat, if this procedure failed, was the sale of the hapless debtor into slavery outside Rome and the division of the proceeds of sale among the unpaid creditors. If they preferred, the creditors could kill the debtor and cut him into pieces. The Twelve Tables carefully provided that if a creditor cut more than his share, it should be without liability, thus anticipating Portia's argument against Shylock in Shakespeare's *Merchant of Venice*.

In later times the Romans themselves recognised the primitive features of the law of the Twelve Tables, but it has to be seen in the context of a community which had few resources in terms of state officers who could provide a structure of law enforcement. The legislation provided citizens with a minimum structure within which the parties were left to settle their differences for themselves. Inevitably a party who could call on the assistance of slaves, family and friends was in a stronger position than one with fewer resources at his disposal.

## 2 LEGAL DEVELOPMENT BY INTERPRETATION

During the course of the republic some features of the Twelve Tables were modified. The creditors of a judgment debtor were no longer allowed to kill him but had to let him work off his debts by forced labour and later there was a procedure for making a debtor bankrupt by a compulsory sale of his property for the benefit of his creditors. But even 500 years after the enactment of the Twelve Tables, the Romans liked to look back on the legislation as what the historian Livy called 'the source of all public and private law', and Cicero says that schoolboys had to learn its contents by heart.

The Romans had a strong feeling that their law was of long standing and had been in essentials part of the fabric of Roman life from time immemorial. At the same time they expected it to enable them to do what they wanted to do, so long as that seemed to be reasonable. In the first half of the republic interpretation of the law, whether the unwritten *ius* or the *lex* of the Twelve Tables, was still in the hands of the pontiffs. They could 'interpret' the law in a progressive way, even to produce a new institution which had been quite unknown to the earlier law.

An example of such interpretation is the emancipation of children from their father's power. The power of the paterfamilias over his descendants in his power lasted until either his or their death. At the time of the Twelve Tables there was no legal means whereby he could voluntarily sever the relationship. He could exploit his sons by selling them into forced labour and the Twelve Tables contained a provision, apparently aimed at curbing misuse of this power, that if the father sold the son three times into forced labour, the son was to be free of his father's power. Such multiple sales were possible because, if the buyer of the son set him free, the son would revert to his father's power.

As a result of interpretation the three-sales rule was used to enable a father to emancipate his son. He made a pretended sale of the son three times to a friend; after each sale the friend would set him free, and after the third he was free by virtue of the Twelve Tables rule. So far the interpretation of the rule can be regarded merely as a use of a clear rule for a purpose other than that originally intended. But interpretation went further. The Twelve Tables referred only to sons; where daughters and grandchildren were concerned the paterfamilias could sell them as much as he liked. Once the rule was understood to refer to emancipation, however, it was held to mean that three sales were required in the case

of sons but that so far as daughters and grandchildren were concerned, one sale was sufficient for emancipation.

No doubt many citizens would have seen that what was happening was an adaptation of the Twelve Tables rule for purposes undreamed of by the decemvirs. However, legal conservatives were more comfortable with the idea that emancipation could be presented as something that was at least implicit, if not expressed, in the Twelve Tables than they would have been if it had been proposed as an entirely new reform.

## 3 THE PRAETOR AND THE CONTROL OF REMEDIES

For most of the duration of the republic the law was developed less through legislation and its interpretation than through the control of legal remedies. Originally the first stage of a legal action was formal and technical; there was a limited number of forms of action, which were begun by the oral declaration of set words in the presence of the magistrate and the defendant. A plaintiff who did not follow the precise wording might lose his action. Such *legis actiones* could only be brought on set days. Once again only the pontiffs were familiar with the exact details until the forms and the calendar were published, traditionally around 300 BC, when the pontificate was opened to the plebeians.

The magistrates, originally the two consuls, elected annually, who replaced the king as the head of the state, were responsible for all governmental activities. The administration of justice was only a minor part of their duties and the procedure allowed them little scope for innovation. As Rome expanded, a special magistrate, called the praetor, also elected annually, was established in 367 BC, to deal exclusively with the administration of justice. He had no special training but he was expected to supervise the formal stage of every legal action. The praetor retained the two-stage character of the legal action, the first concerned with the categorisation of the issue in legal terms and the second with the actual trial of that issue. The second stage had always been, and remained, relatively informal. This procedure was very economical of official time. The magistrate was concerned with the first stage, which was essential, but it was the second stage which was by far the more time-consuming. The Romans realised that in many situations quarrels arise not from disagreement about the law, which is clear enough, but from dispute about the facts and that an ordinary citizen, even without experience of the workings of the law, was quite capable of deciding what had happened.

In the second half of the republic an important change in legal pro-

cedure was introduced. When the parties appeared before him, the praetor allowed them, instead of adhering to set forms, to express their claims and defences in their own words. Then, having discovered what the issue was, he set it out in hypothetical terms in a written document, known as a *formula*. This instructed the *iudex* to condemn the defendant, if he found certain allegations proved, and to absolve him, if he did not. The formula, once it was settled by the praetor and the parties, was sealed, so that the *iudex* who opened it could be sure that it had not been tampered with. The *iudex* derived all his authority from the formula and had to act within its terms. So long as he did so, he was allowed great freedom in his conduct of the trial and often took the advice of a *consilium* of friends to help him reach a decision. In the early republic the parties had represented themselves but later they tended to hire professional orators, trained in rhetoric, to present their case to the *iudex*.

The praetor could grant a formula whenever he felt that legal policy justified it, in the sense that he considered that a plaintiff, who could prove his case, ought to have a remedy. The function of the praetors was to declare the law (*ius dicere*) and to give effect to it by their grant of appropriate remedies. Most remedies were concerned with recognised claims, such as that the defendant was detaining the plaintiff's property against his will or that the defendant owed the plaintiff money. The praetor could, however, grant a formula in a situation in which there was no precedent. Officially in such a case he was not making new law; that would have been beyond his powers. In effect he was saying that the claim justified a remedy and so the law must provide it. Although he spoke as if he were just implementing existing law, he was in fact making new law.

Since the new remedies were presented as an expression of the old law, the innovation was disguised. For example, the praetor could not treat as owner of property someone who was not the owner under the civil law, which he was bound to uphold, and so he could not grant such a person the owner's action to recover what was his. He could, however, give a non-owner an alternative action to enable him to obtain physical control of the property, and protect him in that control until he became owner by law through lapse of time. Similarly, he could grant the heir's action to recover the deceased's property only to one who was heir according to the civil law. But he could give a non-heir an alternative remedy to get and keep possession of the property. Such a person enjoyed the property as a possessor rather than as owner. Doubtless for many Romans this was purely a semantic distinction, but for those with

an appreciation of the law it was significant. It enabled the praetor to grant a deserving party a remedy, when he felt that the popular sense of justice required it, while at the same time maintaining the formal integrity of the civil law.

At the beginning of his year of office the praetor published an edict, in which he set out the various circumstances in which he would grant a formula, and eventually appended the appropriate formulae. Prospective litigants would consult the edict and could obtain on demand any formula promised in it. A defendant who disputed the plaintiff's allegations would not be prejudiced by the grant of a formula, as he would be confident that his opponent could not persuade the *iudex* that his allegations were well founded.

The formula was a flexible instrument and could be modified to take account of particular defences put forward by the defendant. For example, where the civil law prescribed a particular form for a legal transaction, it was originally concerned only with whether or not the form had been complied with. It did not look behind the form. An important formal contract, mentioned in the Twelve Tables, was *stipulatio*, an oral question-and-answer form which could convert almost any agreement into a binding obligation. If the form had been carried out, the fact that the promisor might have been induced to make his promise by the fraud or threats of the other party was irrelevant. In the later republic, however, the praetor allowed both fraud and duress to be pleaded in the formula by way of a defence to the plaintiff's claim, and if the promisor could prove his assertions, he would be absolved.

Such a defence, or *exceptio*, was required where the defendant admitted the truth of the plaintiff's allegation (e.g. 'I did make the formal promise') but asserted further facts (e.g., 'but that promise was obtained from me by fraud') which nullified the plaintiff's claim. By allowing the defences, the praetor gave legal recognition to the principle that transactions tainted by fraud or duress were unenforceable. In certain formulae, the *iudex* was told to condemn the defendant only to pay whatever sum he ought to pay 'according to good faith (*ex fide bona*)', and in such cases a specific *exceptio* was not needed. The only award which the *iudex* could make at the conclusion of a legal action was money damages. Once he had given his judgment in favour of one of the parties, his task was over and he ceased to exist as a *iudex*. He could not, therefore, order a party to do something or not to do something, since, when the time came to decide whether or not the order had been obeyed, he would no longer be a *iudex*. A decision that a defendant should pay a particular