

Roman law

the law of ancient Rome from the time of the founding of the city in 753 bce until the fall of the Western Empire in the 5th century ce. It remained in use in the Eastern, or Byzantine, Empire until 1453. As a legal system, Roman law has affected the development of law in most of Western civilization as well as in parts of the East. It forms the basis for the law codes of most countries of continental Europe (see civil law) and derivative systems elsewhere.

The term Roman law today often refers to more than the laws of Roman society. The legal institutions evolved by the Romans had influence on the laws of other peoples in times long after the disappearance of the Roman Empire and in countries that were never subject to Roman rule. To take the most striking example, in a large part of Germany, until the adoption of a common code for the whole empire in 1900, the Roman law was in force as “subsidiary law”; that is, it was applied unless excluded by contrary local provisions. This law, however, which was in force in parts of Europe long after the fall of the Roman Empire, was not the Roman law in its original form. Although its basis was indeed the *Corpus Juris Civilis*—the codifying legislation of the emperor Justinian I—this legislation had been interpreted, developed, and adapted to later conditions by generations of jurists from the 11th century onward and had received additions from non-Roman sources.

Development of the *jus civile* and *jus gentium*

In the great span of time during which the Roman Republic and Empire existed, there were many phases of legalistic development. During the period of the republic (753–31 bce), the *jus civile* (civil law) developed. Based on custom or legislation, it applied exclusively to Roman citizens. By the middle of the 3rd century bce, however, another type of law, *jus gentium* (law of nations), was developed by the Romans to be applied both to themselves and to foreigners. *Jus gentium* was not the result of legislation, but was, instead, a development of the magistrates and governors who were responsible for administering justice in cases in which foreigners were involved. The *jus gentium* became, to a large extent, part of the massive body of law that was applied by magistrates to citizens, as well as to foreigners, as a flexible

alternative to *jus civile*.

Roman law, like other ancient systems, originally adopted the principle of personality—that is, that the law of the state applied only to its citizens. Foreigners had no rights and, unless protected by some treaty between their state and Rome, they could be seized like ownerless pieces of property by any Roman. But from early times there were treaties with foreign states guaranteeing mutual protection. Even in cases in which there was no treaty, the increasing commercial interests of Rome forced it to protect, by some form of justice, the foreigners who came within its borders. A magistrate could not simply apply Roman law because that was the privilege of citizens; even had there not been this difficulty, foreigners would probably have objected to the cumbersome formalism that characterized the early *jus civile*.

The law that the magistrates applied probably consisted of three elements: (1) an existing mercantile law that was used by the Mediterranean traders; (2) those institutions of the Roman law that, after being purged of their formalistic elements, could be applied universally to any litigant, Roman or foreigner; and (3) in the last resort, a magistrate's own sense of what was fair and just. This system of *jus gentium* was also adopted when Rome began to acquire provinces so that provincial governors could administer justice to the *peregrini* (foreigners). This word came to mean not so much persons living under another government (of which, with the expansion of Roman power, there came to be fewer and fewer) as Roman subjects who were not citizens. In general, disputes between members of the same subject state were settled by that state's own courts according to its own law, whereas disputes between provincials of different states or between provincials and Romans were resolved by the governor's court applying *jus gentium*. By the 3rd century ce, when citizenship was extended throughout the empire, the practical differences between *jus civile* and *jus gentium* ceased to exist. Even before this, when a Roman lawyer said that a contract of sale was *juris gentium*, he meant that it was formed in the same way and had the same legal results whether the parties to it were citizens or not. This became the practical meaning of *jus gentium*. Because of the universality of its application, however, the idea was also linked with the theoretical notion that it was the law common to all peoples and was dictated by nature—an idea that the Romans took from Greek philosophy.

Written and unwritten law

The Romans divided their law into *jus scriptum* (written law) and *jus non scriptum* (unwritten law). By “unwritten law” they meant custom; by “written law” they meant not only the laws derived from legislation but, literally, laws

based on any written source.

There were various types of written law, the first of which consisted of *leges* (singular *lex*), or enactments of one of the assemblies of the whole Roman people. Although the wealthier classes, or patricians, dominated these assemblies, the common people, or plebeians, had their own council in which they enacted resolutions called *plebiscita*. Only after the passage of the *Lex Hortensia* in 287 bce, however, did *plebiscita* become binding on all classes of citizens; thereafter, *plebiscita* were generally termed *leges* along with other enactments. In general, legislation was a source of law only during the republic. When Augustus Caesar established the empire in 31 bce, the assemblies did not at once cease to function, but their assent to any proposal became merely a formal ratification of the emperor's wishes. The last known *lex* was passed during the reign of Nerva (96–98 ce).

The earliest and most important legislation, or body of *leges*, was the Twelve Tables, enacted in 451–450 bce during the struggle of the plebeians for political equality. It represented an effort to obtain a written and public code that patrician magistrates could not alter at will against plebeian litigants. Little is known of the actual content of the Twelve Tables; the text of the code has not survived, and only a few fragments are extant, collected from allusions and quotations in the works of authors such as Cicero. From the fragments it is apparent that numerous matters were treated, among them family law, delict (tort, or offense against the law), and legal procedure.

A second type of written law consisted of the *edicta* (edicts), or proclamations issued by a superior magistrate (praetor) on judicial matters. The office of praetor was created in 367 bce to take over the expanding legal work involving citizens; later, a separate praetor was created to deal with foreigners. Upon taking office, a praetor issued an edict that was, in effect, the program for his year in office. The *curule aediles*, who were the magistrates responsible for the care and supervision of the markets, also issued edicts. During the later stages of the republic, these praetorian and magisterial edicts became an instrument of legal reform, and *leges* ceased to be a major source of private law.

The Roman system of procedure gave the magistrate great powers for providing or refusing judicial remedies, as well as for determining the form that such remedies should take. The result of this magisterial system was the development of the *jus honorarium*, a new body of rules that existed alongside, and often superseded, the civil law. The *edicta* remained a source of law until about 131 ce, when the emperor Hadrian commissioned their reorganization and consolidation and declared the resulting set of laws to be unalterable, except by the emperor himself.

A third type of written law was the *senatus consulta*, or resolutions of the Roman senate. Although these suggestions to various magistrates had no legislative force during the republic, they could be given force by the magistrates' edicts. In the early empire, as the power of the assemblies declined and the position of the emperor increased, *senatus consulta* became resolutions that endorsed the proposals of the emperor. As the approval of the Senate became increasingly automatic, the emperor's proposals became the true instrument of power. Consequently, emperors ceased referring proposals to the Senate and, not long after the early imperial period, ended the practice of legislating through the Senate.

A fourth type of written law consisted of the *constitutiones principum*, which were, in effect, expressions of the legislative power of the emperor. By the middle of the 2nd century ce, the emperor was, essentially, the sole creator of the law. The chief forms of imperial legislation were edicts or proclamations; instructions to subordinates, especially provincial governors; written answers to officials or others who consulted the emperor; and decisions of the emperor sitting as a judge.

The last type of written law was the *responsa prudentium*, or answers to legal questions given by learned lawyers to those who consulted them. Although law, written and unwritten, was originally a rather secretive monopoly of the college of pontiffs, or priests, a recognizable class of legal advisers, *juris consulti* or *prudentes*, had developed by the early 3rd century bce. These legal advisers were not professionals as such but men of rank who sought popularity and advancement in their public careers by giving free legal advice. They interpreted statutes and points of law, especially unwritten law, advised the praetor on the content of his edict, and assisted parties and judges in litigation. Augustus empowered certain jurists to give *responsa* with the emperor's authority; this increased their prestige, but the practice lapsed as early as 200 ce.

During the early empire, numerous commentaries were written by the great jurists on individual *leges*, on civil law, on the edict, and on law as a whole. In the 5th century a law was passed stipulating that only the works of certain jurists could be cited. Legal scholarship declined in the postclassical period.

The law of Justinian

When the Byzantine emperor Justinian I assumed rule in 527 ce, he found the law of the Roman Empire in a state of great confusion. It consisted of two masses that were usually distinguished as old law and new law.

The old law comprised (1) all of the statutes passed under the republic and

early empire that had not become obsolete; (2) the decrees of the Senate passed at the end of the republic and during the first two centuries of the empire; and (3) the writings of jurists and, more particularly, of those jurists to whom the emperors had given the right of declaring the law with their authority. These jurists, in their commentaries, had incorporated practically all that was of importance. Of these numerous records and writings of old law, many had become scarce or had been lost altogether, and some were of doubtful authenticity. The entire mass of work was so costly to produce that even the public libraries did not contain complete collections. Moreover, these writings contained many inconsistencies.

The new law, which consisted of the ordinances of the emperors promulgated during the middle and later stages of the empire, was in a similarly disorganized condition. These ordinances or constitutions were extremely numerous and contradictory. Because no complete collection existed (earlier codices were not comprehensive), other ordinances had to be obtained separately. It was thus necessary to collect into a reasonable corpus as much of the law, both new and old, as was regarded as binding and to purge its contradictions and inconsistencies.

Immediately after his accession, Justinian appointed a commission to deal with the imperial constitutions. The 10 commissioners went through all of the constitutions of which copies existed, selected those that had practical value, cut all unnecessary matter, eliminated contradictions by omitting one or the other of the conflicting passages, and adapted all the provisions to the circumstances of Justinian's own time. The resulting *Codex Constitutionum* was formally promulgated in 529, and all imperial ordinances not included in it were repealed. This *Codex* has been lost, but a revised edition of 534 exists as part of the so-called *Corpus Juris Civilis*.

The success of this first experiment encouraged the emperor to attempt the more difficult enterprise of simplifying and digesting the writings of the jurists. Thus, beginning in 530, a new commission of 16 eminent lawyers set about this task of compiling, clarifying, simplifying, and ordering; the results were published in 533 in 50 books that became known as the *Digest* (*Digesta*) or *Pandects* (*Pandectae*). After enacting the *Digest* as a lawbook, Justinian repealed all of the other law contained in the treatises of the jurists and directed that those treatises should never be cited in the future, even by way of illustration; at the same time, he abrogated all of the statutes that had formed a part of the old law. An outline of the elements of Roman law called the *Institutes of Justinian* (or simply *Institutiones*) was published at about the same time.

Between 529 and his death in 565, Justinian himself issued a great number of ordinances that dealt with many subjects and seriously altered the law on many points. These ordinances are called, by way of distinction, new constitutions (*Novellae Constitutiones Post Codicem*); in English they are referred to as the *Novels*.

All of these books—the revised *Codex Constitutionum* (the original work was revised four and a half years later), the *Digest*, the *Institutes*, and the *Novels*—are collectively known as the *Corpus Juris Civilis*. This *Corpus Juris* of Justinian, with a few additions from the ordinances of succeeding emperors, continued to be the chief lawbook in what remained of the Roman world. In the 9th century a new system known as the *Basilica* was prepared by the emperor Leo VI the Wise. It was written in Greek and consisted of parts of the *Codex* and parts of the *Digest*, joined and often altered in expression, together with some material from the *Novels* and imperial ordinances subsequent to those of Justinian. In the western provinces, the law as settled by Justinian held its ground.

Categories of Roman law

The law of persons

“The main distinction in the law of persons,” said the 2nd-century jurist Gaius, “is that all men are either free or slaves.” The slave was, in principle, a human chattel who could be owned and dealt with like any other piece of property. As such, he was not only at the mercy of his owner but rightless and (apart from criminal law) dutiless. Even though the slave was in law a thing, he was in fact a man, and this modified the principle. A slave could not be a party to a contract nor own property, but he could be given a *de facto* patrimony, which could be retained if he were freed; if he made a “commitment,” it could ultimately be enforced against his master. A manumitted slave became, in most instances, not only free but also a citizen.

The definition of citizenship was important for the purposes of private law because certain parts applied only to citizens (*jus civile*). Noncitizens could be either *Latini*, inhabitants of Roman settlements that had the rights of members of the original Latin League, or *peregrini*, who were members of foreign communities or of those territories governed but not absorbed by Rome. The great extension of the citizenship by the emperor Caracalla in 212 ce reduced the importance of this part of the law.

Family

The chief characteristic of the Roman family was the *patria potestas* (paternal power in the form of absolute authority), which the elder father exercised over his children and over his more remote descendants in the male line, whatever their age might be, as well as over those who were brought into the family by adoption—a common practice at Rome. Originally this meant not only that he had control over his children, even to the right of inflicting capital punishment, but that he alone had any rights in private law. Thus, any acquisitions made by a child under *potestas* became the property of the father. The father might indeed allow a child (as he might a slave) certain property to treat as his own, but in the eye of the law it continued to belong to the father.

By the 1st century ce there were already modifications of the system: the father's power of life and death had shrunk to that of light chastisement, and the son could bind his father by contract with a third party within the same strict limits that applied to slaves and their masters. Sons also could keep as their own what they earned as soldiers and even make wills of it. In Justinian's day, the position regarding property had changed considerably. What the father gave to the son still remained, in law, the father's property, but the rules concerning the son's own earnings had been extended to many sorts of professional earnings; and in other acquisitions (such as property inherited from the mother), the father's rights were reduced to a life interest (*usufruct*). Normally, *patria potestas* ceased only with the death of the father; but the father might voluntarily free the child by emancipation, and a daughter ceased to be under her father's *potestas* if she came under the *manus* of her husband.

There were two types of marriage known to the law, one with *manus* and one without, but the *manus* type of marriage was rare even in the late republic and had disappeared long before Justinian's day. *Manus* was the autocratic power of the husband over the wife, corresponding to *patria potestas* over the sons.

Marriage without *manus* was by far the more common in all properly attested periods. It was formed (provided the parties were above the age of puberty and, if under *potestas*, had their father's consent) simply by beginning conjugal life with the intention of being married, normally evidenced by the bringing of the bride to the bridegroom's house. The wife remained under her father's *potestas* if he were still alive; if he were dead, she continued (as long as guardianship of women continued) to have the same guardian as before marriage. Both spouses had to be citizens, or if one was not, he or she must have *conubium* (the right, sometimes given to non-Romans, of contracting a Roman marriage). In marriage without *manus*, the property of the spouses remained distinct, and even gifts between husband and wife were invalid.

Divorce was permitted to the husband in early Rome only on specific grounds.

Later, divorce was always possible at the instance of the husband in cases of marriage with manus; in marriage without manus, either party was free to put an end to the relationship. A formal letter was usually given to the spouse, but any manifestation of intention to end the relationship—made clear to the other party and accompanied by actual parting—was all that was legally necessary. The Christian emperors imposed penalties on those who divorced without good reason, including prohibitions on remarriage, but the power of the parties to end the marriage by their own act was not taken away.

Concubinage was recognized in the empire as a “marriage” without a dowry, with a lower status for the woman, and with provisions that the children were not legally the father’s heirs. A man could not have both a wife and a concubine. In the 4th century the emperor Constantine first enacted a law enabling the children of such unions to be legitimated by the subsequent marriage of their parents. Medieval civil law extended this rule to all illegitimate children.

Persons under the age of puberty (14 for males, 12 for females) needed tutores if they were not under patria potestas. Such tutors could be appointed under the will of the father or male head of the household. Failing such an appointment, the guardianship went to certain prescribed relatives; if there were no qualified relations, the magistrates appointed a tutor. Originally, children were considered adults at the age of puberty; but, after a long development, it became usual for those between the ages of puberty and 25 to have guardians who were always magisterially appointed. Originally, all women not under patria potestas or manus also needed tutores, appointed in the same way as those for children. By the early empire, this provision was little more than a burdensome technicality, and it disappeared from Justinian’s law.

Corporations

The Romans did not develop a generalized concept of juristic personality in the sense of an entity that had rights and duties. They had no terms for a corporation or a legal person. But they did endow certain aggregations of persons with particular powers and capacities, and the underlying legal notion hovered between corporate powers, as understood in modern law, and powers enjoyed collectively by a group of individuals. The source of such collective powers, however, was always an act of state.

Four types of corporation were distinguished:

1. Municipia (the citizen body, originally composed of the conquered cities and later of other local communities) possessed a corporateness that was recognized in such matters as having the power to acquire things and to

contract. In imperial times, they were accorded the power to manumit slaves, take legacies, and finally—though this became general only in postclassical law—to be instituted as an heir.

2. The *populus Romanus*, or the “people of Rome,” collectively could acquire property, make contracts, and be appointed heir. Public property included the property of the treasury.

3. *Collegia*—numerous private associations with specialized functions, such as craft or trade guilds, burial societies, and societies dedicated to special religious worship—seem to have carried on their affairs and to have held property corporately in republican times. The emperors, viewing the *collegia* with some suspicion, enacted from the beginning that no *collegium* could be founded without state authority and that their rights of manumitting slaves and taking legacies be closely regulated.

4. Charitable funds became a concern of postclassical law. Property might be donated or willed—normally, but not necessarily, to a church—for some charitable use, and the church would then (or so it appears from the evidence) have the duty of supervising the fund. Imperial legislation controlled the disposition of such funds so that they could not be used illegally. In such cases ownership is thought to have been temporarily vested in the administrators.

The law of property and possession

In Roman law (today as well as in Roman times), both land and movable property could be owned absolutely by individuals. This conception of absolute ownership (*dominium*) is characteristically Roman, as opposed to the relative idea of ownership as the better right to possession that underlies the Germanic systems and English law.

Mancipatio, or formal transfer of property, involved a ceremonial conveyance needing for its accomplishment the presence of the transferor and transferee, five witnesses (adult male Roman citizens), a pair of scales, a man to hold them, and an ingot of copper or bronze. The transferee grasped the object being transferred and said, “I assert that this thing is mine by Quiritarian [Roman] law; and let it have been bought by me with this piece of copper and these copper scales.” He then struck the scales with the ingot, which he handed to the transferor “by way of price.”

In iure cessio was a conveyance in the form of a lawsuit. The transferee claimed before the magistrate that the thing was his, and the transferor, who was the defendant, admitted the claim. The magistrate then adjudged the thing to the transferee. (The sham-lawsuit theory, however, is not acceptable to all

modern scholars, principally because the judgment of ownership was valid against any possible private claimant, not merely against the defendant, as in a true lawsuit.)

Usucapio referred to ownership acquired by length of possession. In early Roman law, two years of continuous possession established title in the case of land, one year in the case of movables. In the developed law, possession must have begun justifiably in good faith, and the thing must not have been stolen (even though the possessor himself may have been innocent of the theft) or acquired by violence.

In terms of occupatio, ownerless things that were susceptible to private ownership (excluding such things as temples) became the property of the first person to take possession of them. This applied to things such as wild animals and islands arising in the sea. In some views, it also applied to abandoned articles.

Accessio worked in this manner: if an accessory thing belonging to A was joined to a principal one belonging to B, the ownership in the whole went to B. For example, if A's purple were used to dye B's cloth, the dyed cloth belonged wholly to B. By far the most important application of this rule asserted that whatever is built on land becomes part of the land and cannot be separately owned.

Specificatio was somewhat different. If A made a thing out of material belonging to B, one school of thought held that ownership went to A, and another held that it remained with B. Justinian adopted a "middle opinion": B retained ownership if reconversion to the original condition was possible (a bronze vase could be melted down); A obtained ownership if it was not (wine cannot be reconverted into grapes).

According to thesauri inventio, or treasure trove, the final rule was that if something was found by a man on his own land, it went to him; if it was found on the land of another, half went to the finder, half to the landowner.

Traditio was the simple delivery of possession with the intention of passing ownership and was the method of conveyance of the jus gentium. If A sold and merely delivered a slave to B, under the jus civile, A remained the owner of the slave until a specified length of time had elapsed. The praetors, however, devised procedural methods of protecting B's possession in such a way that A's title became valueless, and B was said to own the thing in bonis. This was a remarkable triumph for informality in the granting of title. From the phrase in bonis, later writers coined the expression "bonitary ownership." Justinian abolished the theoretical distinction between civil and bonitary ownership.

The ordinary leaseholder had no protection beyond a contractual right against a landlord and could not assign tenancy. But there were certain kinds of tenure that did provide the tenant protection and that were assignable: agricultural and building leases granted for a long term or in perpetuity often enabled leaseholders to enjoy rights hardly distinguishable from ownership.

There were also servitudes, in which one person enjoyed certain rights in property owned by another. Rights of way and water rights were rustic servitudes; rights to light or to view were urban servitudes. Ususfructus was the right to use and take the fruits (such as crops) of a thing and corresponded to the modern notion of life interest. A more restricted right, likewise not extending beyond the life of the holder, usus permitted merely the use of a thing; thus, a person could live in a house but could not let it, as that would be equivalent to “taking the fruits.”

Since ownership was absolute, it was sharply distinguished from possession, which the civil law did not protect as such. Any owner wishing to interfere with an existing possessor, however, had to bring legal action to prove his title. If he interfered on his own authority, the praetor would see that the original state of affairs was restored before adjudicating the title.

Delict and contract

Obligations were classified by classical jurists into two main categories, according to whether they arose from delict or contract. Justinian’s law recognized two further classes of obligation, termed quasi-delict and quasi-contract.

As early as the 6th and 5th centuries bce, Roman law was experiencing a transition from a system of private vengeance to one in which the state insisted that the person wronged accept compensation instead of vengeance. Thus, in the case of assault (*injuria*), if one man broke another’s limb, *talio* was still permitted (that is, the person wronged could inflict the same injury as he had received); but in other cases, fixed monetary penalties were set. Theft involved a penalty of twice the value of the thing stolen, unless the thief was caught in the act, in which case he was flogged and “adjudged” to the person wronged.

By the early empire, reforms had substituted a fourfold penalty in the case of a thief who was caught in the act, and the court assessed all penalties for *injuria* (which by then included defamation and insulting behaviour). The law of damage to property was regulated by statute (the *Lex Aquilia*), which in turn was much extended by interpretation. Additionally, there were situations in which a person could be held liable for damages even though he was not personally responsible. In Justinian’s *Institutes* only four delicts were dealt

with: theft, robbery with violence, damage to property, and verbal or physical assault.

In the early republic, a law of contract hardly existed. There was, however, an institution called *nexum*, of which little can be said with certainty except that it was a kind of loan so oppressive in character that it could result in the debtor's complete subjection to the creditor. It was obsolete long before imperial times. The contracts of classical law were divided into four classes: literal, verbal, real, and consensual. The literal contract was a type of fictitious loan formed by an entry in the creditor's account book; it was comparatively unimportant and was obsolete by Justinian's day. The verbal contract required set words or patterns of words to be spoken. The *stipulatio* was the most important form of verbal contract, for it established a form in which any agreement (provided it was lawful and possible) could be made binding by the simple method of reducing it to question and answer: "Do you promise to pay me 10,000 sesterces?" "I promise." Originally it was absolutely necessary that the words be spoken, but by Justinian's day a written memorandum of such a contract would be binding, even though, in fact, nothing at all had been spoken.

If an agreement was not clothed in the form of a stipulation, it must, to be valid, fall under one of the types of real or consensual contracts. A real contract was one requiring that something should be transferred from one party to the other and that the obligation arising should be for the return of that thing. Real contracts included loans of money, loans of goods, deposits, and pledges. Consensual contracts needed nothing except verbal or written agreement between the parties, and though there were only four such contracts known to the law, they were the most important in ordinary life—sale, hire of things or services, partnership, and mandate (acting upon instructions). In Justinian's day there was a further principle that in any case of reciprocal agreement, such as an agreement for exchange (but not sale), if one party had performed, he could bring an action to enforce performance by the other. In addition to the foregoing contracts, a few other specific agreements were recognized as enforceable, but the general recognition of all serious agreements as binding was never achieved by the Romans.

Quasi-delict covered four types of harm, grouped together by no clearly ascertainable principle. They included the action against an occupier for harm done by things thrown or poured from his house into a public place and the action against a shipowner, innkeeper, or stablekeeper for loss caused to customers on the premises through theft or damage by persons in his service.

Quasi-contract embraced obligations that had no common feature save that they did not properly fall under contract, because there was no agreement, or

under delict, because there was no wrongful act. The most noticeable examples were, first, negotiorum gestio, which enabled one who intervened without authority in another's affairs for the latter's benefit to claim reimbursement and indemnity, and second, the group of cases in which an action (condictio) was allowed for the recovery by A from B of what would otherwise be an unjustified enrichment of B at A's expense, such as when A had mistakenly paid B something that was not due (condictio indebiti). This notion of unjust enrichment as a source of legal obligation was one of the most pregnant contributions made by Roman law to legal thought.

The law of succession

The law of succession is one of the most complex areas of Roman law. Any Roman citizen who was of age could make a will, but several very formal requirements had to be met for the will to be valid. The first requirement was the appointment of one or more heirs. An heir, in the Roman sense of the term, was a universal successor; that is, he took over the rights and duties of the deceased (insofar as they were transmissible at all) as a whole. On acceptance, the heir became owner if the deceased was owner, creditor if he was creditor, and debtor if he was debtor, even though the assets were insufficient to pay the debts. It was thus possible for an inheritance to involve the heir in a loss. Until Justinian's day this consequence could be avoided only by not accepting the inheritance, though certain categories of heirs could not refuse. Justinian made one of his most famous reforms by providing that an heir who made an inventory of the deceased's assets need not pay out more than he had received. Freedom of testation, furthermore, was not complete: a man was obliged to leave a certain proportion of his property to his children and in some cases to ascendants and brothers and sisters.

With regard to intestate succession, or succession without a will, those first entitled in early times were the deceased's own heirs—that is, those who were in his potestas or manus when he died and who were freed from that power at his death. Failing these heirs, the nearest agnatic relations (relations in the male line of descent) succeeded, and, if there were no agnates, the members of the gens, or clan, of the deceased succeeded. Later reforms placed children emancipated from potestas on an equal basis with those under potestas and gradually gave the surviving spouse (in marriage without manus) greater rights of succession. By Justinian's day the system had evolved as follows: descendants had the first claim, and failing these heirs, came a composite class consisting of ascendants, brothers and sisters of full blood, and children of deceased brothers and sisters. Next came brothers and sisters of the half blood and, finally, the nearest cognates (relations in the female line). Husband

and wife were not mentioned, but their old rights were kept alive in the absence of any of the preceding categories. Justinian also gave a “poor” widow a right to one-quarter of her husband’s estate unless there were more than three children, in which case she shared equally with them. If, however, the heirs were her own children by the deceased, she received only a *ususfructus* (life interest) in what she took.

The law of procedure

The earliest law suits (*legis actiones*) were conducted orally in two stages: a preliminary one before the jurisdictional magistrate, in which the issue was developed; and then the actual presentation of evidence to the *judex*, or judge. The first stage required that set forms of words be spoken by the parties and, sometimes, by the magistrate. The parties making an assertion of ownership, for instance, would grasp the thing in dispute and lay a wand on it, after which the magistrate would intervene and say, “Let go, both of you.” So formal was the procedure that a plaintiff who made the slightest mistake lost his case. For the second stage, before the *judex*, there were no formal rules. However, the plaintiff had the burden of proof, was responsible for physically producing the defendant in court and, often, for carrying out the sentence.

Under new procedures developed in the 2nd and 1st centuries bce, the issue at the magisterial stage was formulated in written instructions to the *judex*, couched in the form of an alternative: “If it appears that the defendant owes the plaintiff 10,000 sesterces, the *judex* is to condemn the defendant to pay the plaintiff 10,000 sesterces; if it does not so appear, he is to absolve him.” A draft of these written instructions was probably prepared for the plaintiff before he came into court, but there could be no trial until it was accepted by the defendant, for there was always a contractual element about a lawsuit under both the new and the old systems. Pressure, however, could be exercised by the magistrate on a defendant who refused to accept instructions that the magistrate had approved, just as a plaintiff could be forced to alter instructions that the magistrate had disapproved, by the magistrate’s refusal to otherwise give the order to the *judex* to decide the case.

In late republican times, still another system developed, first in the provinces, then in Rome. Under the new system the magistrate used his administrative powers, which were always considerable, for the purpose of settling disputes. He could command: thus if one person brought a complaint against another before him, he could investigate the matter and give the order he thought fit. As imperially appointed officers superseded republican magistrates, this administrative process became more common. The result was that the old contractual element in procedure disappeared as did the old two-stage

division. Justice was now imposed from above by the state—not, as originally, left to a kind of voluntary arbitration supervised by the state.

Herbert Felix Jolowicz Raphael Powell Maurice Alfred Millner Mary Ann
Glendon Paolo Carozza

Additional Reading