The Judge's Burden. A New Outline of the Roman Civil Trial

Thesis submitted for the degree of
Doctor of Philosophy in law at
the University of Oxford

Ernest Philip Metzger
Brasenose College
Hilary Term 1995



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ABSTRACT

The subject of this thesis is the Roman civil trial before a single judge. This study was prompted by a recent archaeological discovery of great importance. The discovery of a municipal charter in Spain from the first century A.D. has revealed an enormous amount of detailed information on how a lawsuit during the classical period passed through its various stages, a subject on which previously we were very poorly informed. This thesis examines the new material in an effort to learn how a trial commenced and how a judge brought it to a close.

The first half of the thesis discusses intertium, an institution previously unknown. It is suggested that intertium was a device by which a person selected to serve as judge was examined for suitability. The examination was undertaken immediately before the trial, to ensure that the lawsuit would not be suspended or fail for want of a judge.

The second half of the thesis discusses adjournment and judgement. The new evidence suggests that the pertinent rules took great care to distinguish a judge's failure to serve from the proper suspension of the trial by adjournment. A judge might therefore negotiate the rules with little difficulty, and bring the trial to judgement without incurring liability himself for failure to serve.

Acknowledgments

Professor Michael Crawford and Mr J. L. Barton read portions of this thesis and gave me enormously helpful suggestions and corrections. Others gave me advice on certain issues: Mr Gerard McMeel of the University of Bristol, on English judges taking ill, and Dr Claude Eilers of McMaster University, on difficult points of Latin.

Much of my time in preparation was supported by an award of the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom, to which I give my thanks.

To have as my wife a professional editor has been invaluable. If she has given to this thesis the time and expertise that she might otherwise have expended for her employer, then her employer, somewhere, will by now have published 100,000 words of rubbish.

I am more grateful than I can say to Peter Birks, who put me on to the subject of judges and remained to correct my aimless detours, faulty logic, misstatements, misspellings—an enormous number of errors which would have caused me great distress, had they been put right with any less deftness and tact. My own carelessness will ensure that errors remain.

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List of Abbreviations

AE	L'Année Épigraphique.
AHDE	Anuario de Historia del Derecho Español.
BIDR (3rd Series)	Bullettino dell' Istituto di Diritto Romano, 3rd Series.
Bruns (7) I, II	C. Bruns and O. Gradenwitz, edd., Fontes Iuris Romani Antiqui, 7th ed. (Tübingen, 1909), 2 vols.
Buckland, Textbook	W. W. Buckland, A Textbook of Roman Law from Augustus to Justinian, 3rd ed. rev. P. Stein (Cambridge, 1963).
CIL	Corpus Inscriptionum Latinarum, 1893— .
CLJ	Cambridge Law Journal.
D	Digest of Justinian.
FIRA I, II, III	S. Riccobono, J. Baviera, C. Ferrini, J. Furlani, and V. Arangio-Ruiz, edd., Fontes Iuris Romani Antejustiniani, 2nd ed. (Florence, 1941, 1940, 1943), 3 vols.
G	Gaius's Institutes.
González (1986)	J. González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law', Journal of Roman Studies 76 (1986), pp. 147-243.
Hisp. Ant. Epi.	Hispania Antiqua Epigraphica.
Hisp. Epi.	Hispania Epigraphica.
Intertiumjagd	J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', Zeitschrift für Papyrologie und Epigraphik 70 (1987), pp. 173-84.
J. Inst.	Justinian's Institutes.
JRS	Journal of Roman Studies.

Kaser, RZ	M. Kaser, Das Römische Zivilprozessrecht (München, 1966).
Lenel, EP	O. Lenel, Das Edictum Perpetuum, 3rd ed. (Leipzig, 1927).
d'Ors (1986)	A. d'Ors, La Ley Flavia Municipal (Texto y Comentario) (Pontificium Institutum Utriusque Iuris Studia et Documenta, G. Lombardi, ed., no. 7) (Rome, 1986).
d'Ors (1988)	A. d'Ors and J. d'Ors, edd., Lex Irnitana (Texto Bilingüe) (Universidade de Santiago de Compostela, Cuadernos Compostelanos de Derecho Romano, no. 1) (Santiago de Compostela, 1988).
Pauly-Wissowa, RE	Paulys Realencyclopädie der classischen Altertumswissenschaft, ed. G. Wissowa, 1893— .
Pennsylvania Digest	T. Mommsen, P. Krueger, and A. Watson, edd., The Digest of Justinian (Philadelphia, 1985).
R.S.C.	Rules of the Supreme Court [The Supreme Court Practice 1995 (London, 1994), 3 vols.].
Rendiconti Napoli (N.S.)	Rendiconti della Accademia di Archeologia Lettere e Belle Arti, New Series, Naples.
RHDFE	Revue Historique du Droit Français et Étranger.
RIDA	Revue Internationale des Droits de l'Antiquité.
SDHI	Studia et Documenta Historiae et Iuris.
TLL	Thesaurus Linguae Latinae, 1900— .
TR	Tijdschrift voor Rechtsgeschiedenis.
ZPE	Zeitschrift für Papyrologie und Epigraphik.
ZPO	Deutsche Zivilprozessordnung.
ZSS (rom. Abt.)	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung.

Notes on Presentation

Citations to ancient literary works follow the abbreviations suggested in the Oxford Classical Dictionary, second edition. In other respects, citations follow the suggestions in Hart's Rules for Compositors and Readers, thirty-ninth edition.

In order to avoid confusion between references to the chapters of this work and the chapters of ancient laws, references to the latter are given as, e.g., 'chapter 90', and the former as, e.g., 'Chapter Five'.

Quotations from modern works not in English are given in English in most instances. Where a work not in English, either ancient or modern, is quoted in English, it may be assumed the translation is my own unless another translator is cited.

I

Introduction

The subject of this work is the Roman civil trial before a single judge, and in particular the judge himself. The judge is a useful vehicle for providing an outline of the civil trial, as he is the person whose responsibilities describe much of the trial's broad structure. Three matters relating to the judge are treated here: appointment, adjournment, and judgement. From these three matters I hope to describe the trial's beginning and end.

If the outline provided here is new, it has much to do with the abundance of new material on Roman procedure. The recent discovery of a municipal charter in Spain has revealed an enormous amount of detailed information on how a lawsuit during the formulary period passed through its various stages. The latter part of the charter is devoted almost entirely to litigation and comprises an astonishing 2,200 words. Among this new evidence is an institution that was virtually unknown until now, and this institution, intertium, gives the outline presented here much of its novelty. The new evidence also treats the subject of adjournment, described with the words diem diffindere. There is less novelty in diem diffindere than in intertium, as this form of adjournment was already known from other sources. The new evidence nevertheless gives a far clearer picture of how adjournment operated in practice than could be known before.

The lex Irnitana

In 1981, a group of men with metal detectors discovered a number of bronze tablets buried on a hill in the province of Seville, in southwestern Spain. Six tablets and several fragments were recovered. Much of the text on the tablets reproduces verbatim the text of several other leges from Baetica, all

of which are copies of a single Flavian municipal law. The tablets date to 91 A.D.[1] The site of the find was not known as an ancient site before; the tablets refer several times to a 'municipium Flavium Irnitanum', and on this basis it is assumed a city named 'Irni' existed on the site.[2] With the benefit of numbering on the tablets and a closing sanctio on the last tablet, it is clear the new material once occupied ten tablets.[3]

With the lex Irnitana we now possess more than two-thirds of the Flavian law. There are several sources for the law, but virtually all of the content that survives can be reconstructed with only the lex Irnitana and the lex

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1 See González (1986), p. 148. The Flavian law is usually understood to be a part of Vespasian's undertaking to bestow ius Latii on communities in Spain. See W. Simshäuser, 'Stadtrömisches Verfahrenrecht im Spiegel der lex Irnitana', ZSS (rom. Abt.) 109 (1992), pp. 163-64; A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', SDHI 49 (1983), p. 24.

2 The excavation of the site is described in F. Fernández Gómez and M. del Amo y de la Hera, La Lex Irnitana y su contexto arqueologico (Seville, 1990). Further discussion on the circumstances of the find and sources may be found, e.g., at González (1986), pp. 147-50; H. Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', JRS 78 (1988), pp. 78-90; T. Giménez-Candela, 'La "Lex Irnitana": une nouvelle loi municipale de la Bétique', RIDA (3e Série) 30 (1983), pp. 125-40.

3 González (1986), p. 148.

Malacitana.[4] The lex Salpensana,[5] the Italica,[6] Villonensia,[7] Ostippo,[8] and Basilipo[9] fragments, together with at least some of the Lauriacum[10] fragments, reproduce material better preserved in the two first mentioned.

Even with the lex Irnitana, however, the text is not continuous, and predictably the placement of chapters is sometimes uncertain. The chapters of the lex Irnitana are not numbered, but those of the lex Malacitana are, and because the two texts occasionally overlap, most of the chapters of the lex

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4 T. Spitzl, Lex Municipii Malacitani (München, 1984); (= J. González Fernández, Bronces jurídicos romanos de Andalucía (Córdoba, 1990), no. 4); (= FIRA I, p. 208ff.); (= CIL II, no. 1964).

5 FIRA I, p. 202ff.; (= González (1990), above note 4, no. 3); (= CIL II, no. 1963).

6 FIRA I, p. 219; (= Hisp. Ant. Epi. 4-5 (1953-54), no. 544); (= A. d'Ors, Epigrafía juridíca de la España romana (Madrid, 1953), no. 11); (= J. González Fernández, 'Italica, municipium iuris Latini', in Mélanges de la Casa de Velazquez (Paris, 1984), vol. 20, pp. 17-43); (= González (1990), above note 4, no. 5). See also the authorities cited below, Chapter Two, notes 18 to 20.

7 AE (1964), no. 80; (= Bruns (7), no. 31); (= Eph. Epi. 9 (1913), no. 261); (= Hisp. Ant. Epi. 12-16 (1961-65), no. 2014); (= d'Ors (1953), above note 6, no. 10); (= González (1990), above note 4, no. 6).

8 J. González Fernández, Bronces jurídicos romanos de Andalucía (Córdoba, 1990), no. 7; (= Hisp. Epi. 4 (1994), no. 319); (= Hisp. Epi. 2 (1990), no. 360).

9 AE (1984), no. 510; (= J. González, 'La "lex municipii Flavii Basiliponensis" (nuevos fragmentos de ley municipal)', SDHI 49 (1983), pp. 395-99); (= A. d'Ors, 'La ley municipal de Basilipo', Emerita 53 (1985), pp. 31-41).

10 See M. Crawford, Appendix to González (1986), pp. 241-43. Some but not all of the fragments reproduce the content of known portions of the Flavian law, according to Crawford. See also the fragments reconstructed in F. Fernández Gómez, 'Nuevos fragmentos de leyes municipales y otros bronces epigraficos de la Betica en el Museo Arqueologico de Sevilla', ZPE 86 (1991), pp. 121-36.

Irnitana can be assigned a number. The lex Irnitana provides the first part of the surviving law, beginning with chapter 18, treating the powers of the duumvirs.[11] Then follows a discussion of the local magistracies and senate, before the text stops at chapter 31. Twelve unnumbered chapters,[12] largely on embassies, fall after an interval of five or ten chapters (a missing tablet breaks the continuity). After a second gap of perhaps one column, the text is complete to the end, with the lex Malacitana supplying chapters 51 to 58 on local elections, and the lex Irnitana completing the text to chapter 97.

To those interested in civil procedure, the most valuable part of the lex Irnitana is chapters 84 to 93:

Chapter 84 treats the jurisdiction of the duumvirs and aediles, describing which cases may be heard locally and which may be heard before the provincial governor.

Chapter 85 provides that the magistrates should display and administer justice according to the album of the provincial governor.

Chapter 86 treats the album iudicum, describing the qualifications of persons—both within and outside the local ordo—to be placed on the list and to serve as judges over the forthcoming year.

Chapter 87 describes how judges are to be selected for trial.

Chapters 88 and 89 describe (evasively) how and when recuperatores are to be selected for trial.

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11 Unfortunately, Tablet II, which contains chapter 18, has been only partly recovered, and the reconstruction of the text is difficult. See Fernández and del Amo (1990), above note 2, p. 37; F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), p. 269.

12 González (1986) designates them 'A' through 'L'. D'Ors (1988) numbers them 39-50. Galsterer (1988), above note 2, pp. 81-82, numbers them 37 to 48. Cf. id., p. 79 n.6. This work follows González's designations.

Chapter 90 describes something called intertium.

Chapter 91 describes (again, evasively) how intertium, adjournment, and judgement are to be performed.

Chapter 92 treats the conflict between judicial business and public holidays.

Chapter 93 states that, unless the law provides otherwise, the municipes of Irni are to deal with one another under the rules governing Roman citizens.

Texts

The principal texts of the lex Irnitana are these:

J. González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law', Journal of Roman Studies 76 (1986), pp. 147-243: text, English translation by Michael Crawford, commentary, and plates.

L'Année Épigraphique (1986), no. 333, pp. 87-143: González's text, French translation, and brief commentary.

A. d'Ors, La Ley Flavia Municipal (Texto y Comentario) (Pontificium Institutum Utriusque Iuris Studia et Documenta, G. Lombardi, ed., no. 7) (Rome, 1986): text and commentary.

A. d'Ors and J. d'Ors, edd., Lex Irnitana (Texto Bilingüe) (Universidade de Santiago de Compostela, Cuadernos Compostelanos de Derecho Romano, no. 1) (Santiago de Compostela, 1988): text and Spanish translation. Indicates where the lex Irnitana and other copies of the law coincide.

F. Fernández Gómez and M. del Amo y de la Hera, La lex Irnitana y su contexto arqueologico (Seville, 1990), pp. 73-107: transcription, including interpunting, with plates on the facing pages. Includes chapter 18.

J. González Fernández, Bronces jurídicos romanos de Andalucía (Córdoba, 1990), no. 2, pp. 51-99: text with brief commentary.

F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum', (Naples, 1993): text, Italian translation, commentary, bibliography, glossary. Includes chapter 18.

This Work

Much of this work is an attempt to understand what the words of the lex Irnitana reveal about the subject at hand. This is particularly true in the first half of the work, comprising Chapters Two to Six. The subject of this first half is the appointment of the judge, and much of what can be learned about appointment turns on one's interpretation of three chapters of the lex Irnitana. The second half of this work discusses adjournment and judgement, and comprises Chapters Seven to Twelve. Here the lex Irnitana is not at the centre of the discussion, although without it there would be little to talk about. Before the discovery of the lex Irnitana, it was sometimes difficult to know when a given suit, conceptually speaking, would be 'before the judge'. The lex Irnitana treats adjournment and judgement together in such a way as to reveal how adjournment, giving judgement, and failing to serve as judge are to be distinguished from one another.

I should mention that I treat the subject of judgement only for a limited purpose. I am concerned with the fact of a judgement being or not being given, rather than with the form of the judgement. Few people will have any quarrel with the prevailing view that, in form, a Roman judgement included very little, that it gave no reasons for the decision taken, and was by and large a ruling that answered the issue posed in the formula.[13] The event itself, on the other hand, is a matter of considerable interest in any discussion of adjournment. This is because the lex Irnitana and other sources seem to take

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13 See, e.g., P. Birks, A. Rodger, and J. S. Richardson, 'Further Aspects of the Tabula Contrebiensis', JRS 74 (1984), p. 72; P. Birks, 'A New Argument for a Narrow View of litem suam facere', TR 52 (1984), pp. 377-83; P. Stein, Legal Institutions: The Development of Dispute Settlement (London, 1984), pp. 43-44; J. P. Dawson, The Oracles of the Law (Ann Arbor, 1968), p. 103.

pains to distinguish a temporary interruption by adjournment from the proper completion of the trial by judgement.

How Roman?

In trying to draw any conclusions about Roman procedure from the lex Irnitana, one must naturally be careful to step around anything in the statute that is strictly provincial. Fortunately, there is little that raises any suspicion so far as procedure is concerned. Concessions to the relative size of Irni, for example, in the jurisdictional amounts governing lawsuits and the number of decuriae on the album iudicum are discrete and fairly predictable.[14] Aside from these, the statute seems faithfully to reproduce many features of Roman procedure that were already known, as others have pointed out.[15] And in one large 'residuary' chapter, the statute expressly incorporates Roman practice for a broad range of procedural matters.[16]

The three institutions discussed here, intertium, diem diffindere, and judgement, are among the matters discussed in the residuary chapter just mentioned. Accordingly, the problem of determining whether these institutions are Roman is a relatively small one. On intertium, however, there may be some doubts: since intertium is treated outside of the residuary chapter, in particular in chapter 90, there is no reason to assume that

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14 See ch. 19, ll. 14-15; ch. 69, ll. 11-13; ch. 84, ll. 3-4, 25-27; ch. 86, tab. IXC, ll. 16-17; Galsterer (1988), above note 2, p. 83; González (1986), p. 211; Birks (1988), above note 13, p. 37; d'Ors (1983), above note 1, pp. 29-39 & n. 26, 35 & n. 41; also id., pp. 34-35 n. 40 (on the different property qualifications for serving as judge).

15 See, e.g., D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), pp. 63-64; Birks (1988), above note 13, pp. 37-50; M. Lemosse, 'Loi municipale et droit latin', IURA 41 (1990), pp. 91-92.

16 Ch. 91, tab. XB, ll. 3-10, 18-23.

everything the lex Irnitana says about intertium is Roman.[17] Accordingly, while we can describe what a Roman intertium was,[18] we cannot necessarily ascribe every detail about intertium to Rome.

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17 See J. Crook, D. Johnston, and P. G. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', ZPE 70 (1987), p. 183 (Wolf).

18 Cf. d'Ors (1983), above note 1, p. 44.

II

A New Procedural Institution

The latter chapters of the lex Irnitana offer much new information on classical formulary procedure. In many instances the statute adds refinements to procedural subjects that were already well known.[1] One section of the statute, however, is particularly interesting, not because it offers new information on a familiar subject, but because it appears to describe an entirely new procedural institution. The statute here treats something called an intertium, and though it gives no specific definition of the word, it is extremely generous with details. Three chapters address various aspects of intertium: who may grant it, when it must be granted, when it cannot be granted, where and how it must be published, and so on. It may not be obvious at one reading what intertium means, but judging by the trouble the statute takes to describe it, it must be tremendously important to procedural law.

Before the discovery of the lex Irnitana, the word intertium was not entirely unknown. Those earlier sources, however, provided little information from which to decipher the meaning of the word. The new material discusses intertium within a lengthy and uninterrupted treatment of the administration

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1 Most conspicuously it has refined our knowledge of the selection of judges, jurisdiction in private suits, and recuperatores. See, for example, A. Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the Lex Irnitana', ZPE 84 (1990), p. 147; D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), pp. 67, 70 (recuperatores); J. L. Murga Gener, 'La "popularidad" de las acciones en las leyes municipales de la Betica', RIDA (3e Série) 38 (1991), pp. 219ff.; P. Birks, 'New Light on the Roman Legal System: The Appointment of Judges', Cambridge Law Journal 47 (1988), pp. 36ff.

of justice. Thus for the first time we possess a source with sufficient detail to show the operation of intertium with some precision.

The new material nevertheless puts our knowledge in an awkward position. The statute gives a large number of details on the operation of intertium, but in no place states what sort of institution intertium is. The details, moreover, are consistent to some degree with quite different sorts of institutions. Because the statute contains not simply an unknown word but an elaborate procedural plan, the task is to propose a scheme of procedural steps that will explain as much of the text as possible. The current theories of intertium therefore comprise a variety of procedural schemes, some differing a good deal from the rest.

This chapter discusses theories offered by others. It is not the aim of this chapter to discuss at length every point, but generally to present the state of the literature by discussing recent contributions. The next chapter looks closely at one particular theory. Rodger has presented one of the most attractive treatments of intertium to date, and his comments therefore receive closer attention.

Sources

The main sources for intertium are chapters 90 to 92 of the lex Irnitana and two Pompeian tablets. These sources are complementary, as the tablets appear to show the statutory provisions in use in litigation. Two further sources are less useful. The Italica fragment preserves a portion of chapter 90 of the Flavian law that is better preserved in the lex Irnitana, and a fragment from the Antinoopolis papyrus is terse, incomplete, and can be reconstructed only with a good deal of guesswork.

a) Intertium in the lex Irnitana

The portions of the lex Irnitana quoted below are from the 1986 text of González.[2] These excerpts accept the editor's corrections and resolutions of abbreviations. The line divisions are indicated within the text. Crawford's translation accompanies each excerpt.

Of the three chapters of the lex Irnitana that treat intertium, only chapter 90 is primarily devoted to the subject. Accordingly this chapter provides by far the greatest number of details. The thrust of the text is that a magistrate must grant and publish something called intertium. If he does not do so, he will incur a fine.

[tablet 10, column A]

[LXXXX]	[Chapter 90]
Rubrica. De in tertium dando. [27]	Rubric. Concerning the granting of notice for the third day.
Quicumque in eo municipio Iluir iure dicundo praerit, per quos dies ex hac lege ibi [28] iudicia fieri licebit oportebit, in eos dies omnes in terti- [29] um dato. Idque proscriptum in eo loco, in quo ius dicet, maio- [30] re parte cuiusque diei per omnes dies, per quos in tertium [31] dari debebit, habeto ita ut de plano recte legi possint. Item si inter eos, inter [32] quos ambigetur, et iudicem, qui inter eos iudicare debe- [33] bit, in aliquem diem uti in tertium inter eos [34] detur conueniet, neque is di- [35] es propter uenerationem domus	Whatever duumvir is in charge of jurisdiction in that municipium, is to grant notice for the third day for all those days on which it is lawful and appropriate for trials to take place there under this statute. And he is to have that fact published in that place in which he administers justice for the greater part of each day on all those days on which it is right for notice to be granted for the third day, so that they may be properly read from ground level. Likewise, if it is agreed between the parties and the iudex who is obliged to judge between them that notice

2 González (1986), pp. 178-80.

Augustae festus erit feriarumue nu- [36] mero propter eandem causam haberi debebit, in eum diem in tertium inter [37] eos dato. Qui debuerit dare in tertium neque dederit, quiue et proscriptum [38] ex hac lege non habuerit sciens dolo malo, is in singulos dies, quibus debuerit [39] proscriptumue non habuerit, municipibus municipii Flauii Irni- [40] tani HS (sestertia) ∞ (mille) dare damnas esto, eiusque pecuniae deque ea pecunia municipi eius mu- [41] nicipii qui uolet, cuique per hanc legem licebit, actio petitio persecutio esto.

for them for the third day should be granted for a certain day, and that day is not a feast-day because of the worship of the Imperial house nor ought to be placed in the category of festivals for the same reason, he is to grant notice for the third day for them for that day. Whoever is obliged to grant notice for the third day and does not grant it or who knowingly and with wrongful intent does not have it published according to this statute, is to be condemned to pay to the municipes of the Municipium Flavium Irnitanum 1,000 sesterces for each day on which he ought to have granted it or did not have it displayed, and the right of action, suit and claim of that money and concerning that money is to belong to any municeps of that municipium who wishes and who is entitled under this statute.

On its face the subsequent chapter offers no new procedural rules but simply directs the reader, on certain matters, to consult the rules governing private lawsuits at Rome.

[tablet 10, column A]

[LXXXXI]

[Chapter 91]

Rubrica. Quo iure in tertium denuntietur, dies diffindatur diffi- [43] ssusue sit, res iudicetur, lis iudici damni sit, res in iudi- [44] cio esse desinat. [45]

Rubric. According to what law notice for the third day may be served, the day may be postponed or have been postponed, a matter may be judged, a case may be at the peril of the iudex, a matter may cease to be under trial.

Quacumque de re priuata iudices arbitri in eo municipio da- [46] ti subditi addictiue hac lege erunt, is iudicibus arbitrisue et is, [47] quos

In whatever private matter iudices or arbiters have been granted, substituted or assigned in that municipium under this statute, for

inter ii iudices arbitriue dati subditi addictiue [48] hac lege erunt, de ea re in tertium aduersario iudici arbitro- [49] ue in biduo proximo denuntiandi, diem diffindendi, dies [50] diffissos iurandi, antequam iudicent, iudicandi litem ae- [51] stumandi, per quos dies et ubi ex hac lege licebit oportebit, et si [52] neque dies diffissus neque iudicatum fuerit, uti lis iudi- [53] ci arbitroue damni sit, et si intra it tempus, quod legis Iuli- [54] ae, quae de iudiciis priuatis proxime lata est, kapite XII

[tablet 10, column B]

senatusue consultis ad it kaput legis pertine- [2] ntibus conprehensum est, iudicatum non sit, uti res in iudi- [3] cio non sit, siremps lex ius causaque esto adque uti esset si eam rem [4] in urbe Roma praetor populi Romani inter ciues Romanos iudicari iussisset [5] et de ea re, ex quacumque lege rogatione quocumque plebis scito iudicia pri- [6] uata in urbe Roma fient, agi, fieri, denuntiari, diem diffin- [7] di, diem diffissum esse, iudicari, litem iudici damni esse, rem in [8] iudicio non esse oporteret, praeter quam quod per alios dies [9] et alio loco hac lege denuntiari, rem iudicari, diem diffindi opor- [10] tebit. Itaque iis omnibus, de ea re et in eos dies in quos ex hac lege lice- [11] bit, denuntiandi intra it municipium et mille passus ab eo mu- [12] nicipio, aut ubi pacti erunt, diem diffindendi, iudicandi in foro [13] eius municipi aut ubi pacti erunt, dum intra fines eius munici- [14] pi, utique ex isdem causis dies diffindatur, diffissus sit, [15] utique, si neque diffissum e lege neque iudicatum sit per quos di- [16] es quoque loco ex hac lege

those iudices and arbiters and those between whom those iudices or arbiters have been granted, substituted or assigned under this statute, in that matter, for serving notice for the third day to an adversary, iudex or arbiter within the previous two days, for postponing the day, for swearing that the days have been postponed, before they (the iudices) judge, for judging and valuing the case, during those days and in that place which are lawful and appropriate under this statute; and if the day has not been postponed and judgement has not taken place, so that the suit may be at the peril of the iudex or arbiter; and if judgement has not taken place within that time which is laid down in Chapter XII of the Lex Julia which has been most recently passed concerning <u>iudicia privata</u> and in the decrees of the senate which relate to that chapter of the statute, so that the matter be no longer under trial; the statute and law and position is to be as it would be if a praetor of the Roman people had ordered that matter to be judged in the city of Rome between Roman citizens and it was appropriate, under whatever statute or rogatio or plebiscite <u>iudicia privata</u> shall take place in the city of Rome, for that matter to be brought or dealt with, or for it (notice for the third day) to be served, or for the day to be postponed or have been postponed, or for judgement to take place, or for the case to be at the peril of the iudex, or for the matter not to be under trial; except insofar as it is appropriate under this statute for it (notice for the third day) to be served or for a matter to be judged or for the day to be postponed during other days

iudicari licebit oportebit, iudici arbitroue [17] lis damni sit, utique, si intra it tempus quod supra conprehensum [18] est iudicatum non sit, res in iudicio non sit, siremps lex ius causaque esto atque uti si praetor populi Romani inter ciues Ro- [19] manos iudicari iussisset ibique de ea re iudicium fieri oporteret ex [20] quacumque lege rogatione quocumque [21] plebis scito iudicia priuata in urbe Roma fieri oportebit, praeterquam [22] quod per alios dies et alio loco ex hac lege denuntiari, rem- [23] que iudicari, diemque diffindi oportebit. Quaeque ita acta [24] erunt ea iusta rataque sunto.

and in another place. And so for all of them, in that matter and during those days which are lawful under this statute, for serving (notice for the third day) within that municipium and within one mile from that municipium or where they agree, for postponing the day, for judging in the forum of that municipium or where they agree, provided that it is within the boundaries of that municipium; and so that the day may be postponed or have been postponed for the same reasons; and so that the case may be at the peril of the iudex or arbiter if there has been no postponement under statute and judgement has not taken place during the days and the place which are lawful and appropriate under this statute; and so that the matter may not be under trial if it has not been judged within the time which is laid down above; the statute and law and position is to be as if a praetor of the Roman people had ordered judgement to take place between Roman citizens and it was appropriate for a trial to take place there about that matter, under whatever statute or rogatio or plebiscite it is appropriate for iudicia privata to take place in the city of Rome; except insofar as it is appropriate under this statute for it (notice for the third day) to be served or for a matter to be judged or for the day to be postponed during other days and in another place. Whatever has been done in this way is to be legal and valid.

The language here is quite convoluted, and it is worthwhile to take a moment to discuss the chapter's structure. It is certainly appealing to conclude that the text was patched together from other laws. Galsterer, for example,

makes special mention of the variations in style in this chapter, in arguing that the model for the lex Irnitana was put together in Rome out of re-used material.[3] The variations are most obvious in certain discrepancies between the chapter's two main sections, at tab. XA, l. 45 to tab. XB, l. 10, and tab. XB, ll. 10-23. These two sections present parallel clauses, but the corresponding clauses are not entirely uniform.[4] One can compare, for instance, two such corresponding clauses:

> et si neque dies diffissus neque iudicatum fuerit, uti lis iudici arbitroue damni sit (ll. 51-3)
>
> utique, si neque diffissum e lege neque iudicatum sit . . . , iudici arbitroue lis damni sit (ll. 15-17)

Aside from the difference in word order, the first clause uses the impersonal iudicatum with the future perfect, while the second clause uses both diffissum and iudicatum impersonally with the present subjunctive. This sort of stylistic unevenness occurs throughout the chapter. González cites another example at lines 11-18, where the text begins with denuntiandi, diffindendi, etc., but then switches to ut with the subjunctive at line 14.[5]

Some explanation for this unevenness is in the fact that the chapter does not set out to describe every matter it raises, but incorporates rules from other sources. Each half of the chapter is constructed largely as an appeal to the

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3 H. Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', JRS 78 (1988), p. 89. See also H. Galsterer, 'La loi municipale des Romains: chimère ou réalité?', RHDFE 65 (1987), pp. 181ff., where the author argues that, though the lex Irnitana does not draw on any specific lex municipalis, it does draw on 'un corpus des prescriptions partout obligatoires'. Id., p. 203.

4 González (1986), p. 235.

5 Id., p. 236.

rules governing lawsuits in or within a mile of Rome and between Roman citizens. This fiction contains, of course, two of the requisites for a iudicium legitimum recited by Gaius;[6] because the chapter as a whole applies only to suits before iudices and arbitri (the third such requisite), the fiction amounts to a decree that, as to the listed matters, citizens of Irni must follow the rules of iudicia legitima.[7] This wholesale incorporation of other rules accounts for a certain amount of stylistic unevenness, but the unevenness is made all the more pronounced by the fact that the chapter sometimes retreats from the fiction it creates. Johnston notes, for example, that the chapter assimilates Roman practice but then modifies it; the time and place restrictions of iudicia legitima apply to the announcing of intertium, the dividing of the day, etc., 'except where this law permits [these matters to take place] on other days or in another place' (tab. XB, ll. 8-10, ll. 21-3).[8]

A more radical explanation for the style of the text is given by d'Ors. He argues that the text in fact originally comprised two chapters, the first treating the announcing of intertium and the second diem diffindere, and that the uneven style is the result of combining the two subjects into one chapter. This

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6 G.4.104.

7 Johnston, above note 1, p. 63; W. Simshäuser, 'Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana', ZSS (rom. Abt.) 109 (1992), pp. 175-76; G. Zanon, 'De intertium dando', SDHI 58 (1992), p. 320 n.47. Of course this is not to say that trials at Irni were in fact iudicia legitima, as Lemosse is right to point out. M. Lemosse, 'Loi municipale et droit latin', IURA 41 (1990), p. 92 n.13.

8 Johnston, above note 1, p. 63; see also Simshäuser (1992), above note 7, p. 175 & n.32; F. La Rosa, 'La "lex Irnitana" e la nomina del guidice', IURA 40 (1989), p. 72.

leads him to conclude that chapter 91 was drawn from an urban model, but adapted with a certain amount of roughness to provincial municipia.[9]

The uneven style in this chapter, I believe, should not be taken as evidence that the text was heavily drawn from other laws. The draftsman has been fairly deliberate, and if the text seems to be patched together, it is probably because his intentions are not always obvious. Generally, the style appears uneven because the text is at cross purposes with itself: it avoids mentioning substantive rules by referring the reader to other sources but, perhaps not trusting the reader to have those sources to hand, reveals in many instances the rules those sources contain.

The chapter can be paraphrased in a single sentence: 'The rules for announcing intertium, adjourning, and judging, shall be the same as those for iudicia legitima, except that time and place limitations may be varied by agreement.' The text expresses this relatively simple idea in two lengthy sentences, the first from quacumque (tab. XA, l. 45) to oportebit (tab. XB, ll. 9-10), and the second from itaque (tab. XB, l. 10) to oportebit (tab. XB, l. 23). The first sentence states the fundamental point: the three matters are to be treated as if they arose in a iudicium legitimum. The second sentence, strictly speaking, adds almost nothing of substance to the information conveyed in the first sentence. For the most part it devotes itself to explaining the consequences (it is introduced emphatically by itaque) of the fiction recited in the first sentence, setting forth certain limitations that the rules of iudicia legitima demand. Those rules demand, for example, that the announcement of intertium be in or within one mile of the municipium, and that the trial phase

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9 A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicciòn municipal', SDHI 49 (1983), pp. 40-44. D'Ors sets down a provisional restoration of the original chapters at id., p. 41 n.61.

take place in the forum. None of this elaboration actually adds anything new to what is said in the first sentence, and seems to have been added in an effort to be helpful: on some matters a litigant at Irni is saved the trouble of consulting other sources to determine how he would conduct himself, were he engaged in a iudicium legitimum at Rome.

The second sentence does add one new matter: it acknowledges that the place limitations governing the announcing of intertium and the conduct of trial may be varied by agreement (tab. XB, ll. 12, 13). These clauses allowing variation by agreement (together with several similar clauses in other chapters[10]) have prompted the draftsman to be cautious. Because the text first incorporates other rules, but then relaxes those rules in the event of agreement, for the sake of clarity the draftsman has appended two subordinate clauses (each introduced by praeterquam, tab. XB, ll. 8-10, 21-23) to the two siremps clauses, to show that the fiction of the iudicium legitimum is subject to agreement. The expanded siremps clauses may be paraphrased as follows: 'the rules of iudicia legitima are to govern, in order that pertinent matters be treated as in iudicia legitima except insofar as this law permits times and places to be altered'.[11] The need for cautious drafting here accounts for the

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10 Cited below note 12.

11 The first clause is introduced by uti esset si at tab. XB, l. 3, and the second by uti si at tab. XB, l. 18. The second clause probably requires an esset as well, as the condition is missing an apodosis.

otherwise cumbersome repetition of each of the acts (diffindere, iudicare, etc.) under discussion.[12]

Even to this point the drafting is more complicated than it might have been. The text expresses in two sentences what might have been expressed in one: it might simply have recited that the fiction of a iudicium legitimum prevails except where the participants vary the time and place limitations by agreement. The straightforwardness of the statute's central message suffers from the draftsman's inclination to be helpful. Not satisfied to refer the reader to other sources and leave it at that, the draftsman sets out to describe in the second sentence some of the consequences of the fiction established in the first sentence.[13]

But the draftsman's helpfulness then becomes particularly burdensome to the reader. He again reveals that he does not trust the reader to possess all of the sources of law the chapter relies on. He reveals his mistrust by describing for the reader the consequences of failing to observe the rules for adjourning and giving judgement that govern in iudicia legitima. This results in several unwieldy digressions, framed as result clauses: et si (tab. XA, l. 51) to sit (tab. XB, l. 3), and utique (tab. XB, l. 14) to sit (tab. XB, l. 18). These digressions are naturally immensely valuable (both to a litigant in Irni and to us) in showing what iudicia legitima require, but stylistically they distract from the

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12 I believe La Rosa reads the 'praeterquam' clauses a little too broadly, to allow departures from Roman practice for the 'special demands' of the municipium. La Rosa, above note 8, p. 72. The words per alios dies et alio loco appear to me to answer specifically the provisions allowing times and places to be varied by agreement, i.e., ch. K, ll. 37-40; ch. 90, ll. 31-37; ch. 91, tab. XB, ll. 12, 13; ch. 92, ll. 36-7, 42-4, 47-9.

13 It is arguable that, if this chapter were to give participants the opportunity to vary time and place limitations, the draftsman practically had no choice but to describe the time and place limitations in iudicia legitima that should govern in the absence of agreement.

otherwise straightforward point of the text, and add to the impression that the chapter was patched together from other laws.

My aim in describing generally each of the divisions of chapter 91 is primarily to show that too much should not be made of the apparent patchiness of the text, that the patchiness is due primarily to the draftsman's caution and inclination to be helpful, and perhaps less to careless borrowings from other statutes. The structure makes clear that the draftsman, to his credit, has taken several opportunities to reveal to the citizens of Irni what the rules of iudicia legitima require, and does not leave them in every case to consult other sources of law.[14]

Chapter 92 in general clarifies the information given in chapter 90 by stating with greater precision when intertium may and may not be given.

[tablet 10, column B]

[LXXXXII]	[Chapter 92]
Rubrica. Quibus diebus res ne iudicentur et in quos in tertium [26] ne detur. [27]	Rubric. On what days matters may not be judged and for what days notice for the third day may not be granted.
Ne quis qui in eo municipio iure dicundo praerit is diebus iudicem arbitrum recipera- [28] tores rem priuatam iudiare sinito, neue in eos dies in teri- [29] um dato, quos dies propter uenerationem domus Augustae festos [30] feriarumue	Whoever is in charge of the administration of justice in that municipium is not to allow a iudex or arbiter or recuperatores to judge a private matter on those days nor is he to grant notice for the third day for those days which it is or will be

14 Cf. Johnston, above note 1, pp. 65-6; M. Crawford, 'The Laws of the Romans: Knowledge and Diffusion', in Estudios sobre la Tabula Siarensis, ed. J. González and J. Arce (Madrid, 1988), p. 128; W. Simshäuser, 'La juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), p. 64.

numero esse haberique oportet oportebit, quibusque di- [31] ebus ex decurionum conscriptorumue decreto spectacula in eo [32] municipio edentur, epulum aud vesceratio municipibus aut ce- [33] na decurionibus conscriptisue municipium inpensa dabitur, qui- [34] busque diebus comitia in eo municipio erunt quique dies hac lege con- [35] stituti erunt per quos messis et uindemiae causa res prolatae [36] sint, nisi si iudex arbiterue aut reciperatores et quorum res [37] agetur omnes dum de ea re agi volent, neque is dies erit quem prop- [38] ter uenerationem domus Augustae festum feriarumue nume- [39] ro esse haberiue oportebit. Neue quis iudex neue arbiter neue [40] reciperator per eos dies, quibus supra scriptum est, rem privatam iudicato [41] neue litem aestumato neue per eos dies operam iudicandi cau- [42] sa dato neue sententiam iudicandi causa dicito, nisi si iudex [43] arbiterue aut reciperatores et quorum res agetur omnes dum [44] de ea re agi volent, neque is dies erit quem propter uenerationem [45] domus Augustae festum feriarumue numero esse haberique [46] oportebit. Neue quis in eos dies adversario in tertium iudici ar- [47] bitroue in biduo proximo iudicandi causa denuntiato, nisi si iu- [48] dex arbiterue et quorum res agetur omnes tum de ea re agi [49] volent, neue is dies erit quem propter uenerationem domus [50] Augustae festum feriarumue

appropriate to have or regard as feast-days or in the category of festivals because of the worship of the Imperial house, and on the days on which games are given in that municipium by decree of the decuriones or conscripti or a meal or distribution of meat is given to the municipes or a dinner to the decuriones or conscripti at the expense of the municipes, and on the days on which there are assemblies in that municipium, and on the days which are fixed under this statute as the days on which business is postponed because of harvest or vintage; except if the iudex or arbiter or recuperatores and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. No iudex or arbiter or recuperator is to judge a private matter on those days which have been laid down above or value a case or devote attention for the sake of judging or express an opinion for the sake of judging, except if the iudex or arbiter or recuperatores and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. And no one is to serve notice for the third day for those days to an adversary or a iudex or arbiter

numero esse haberiue oportebit. [51] Quod adversus ea factum erit id ratum ne esto.

within the previous two days for the sake of judging, except if the iudex or arbiter and those whose case is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. Whatever is done contrary to these rules, is not to be legal or valid.

b) Intertium in the Pompeian Tablets

The second chief source for intertium is the Pompeian Tablets. These wax tablets, discovered in 1959 in the area of Murécine during the construction of a highway, have provided an immense amount of information on private procedure.[15] The word intertium appears once on each of two tablets, TP 9 and TP 24. The two tablets convey the same substance (TP 24 is slightly more extensive) but recite the names of different persons. TP 9 dates to 48 A.D.

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15 Much of the work on the tablets is cited in T. Giménez-Candela, 'La contribution des tablettes Pompeiennes au droit Romain', Puteoli 7-8 (1983-84), pp. 71-77, and A. d'Ors and T. Giménez-Candela, 'Fianza parcial', RIDA (3e Série) 30 (1983), p. 101 n.1. The tablets largely comprise legal materials relating to ancient Puteoli, and appear to be the private archive of a banker, Caius Sulpicius Cinnamus. Giménez-Candela, op. cit., p. 71. The events surrounding the find are described at J. G. Wolf, 'Aus dem neuen pompejanischen Urkundenfund: Die Kondictionen des C. Sulpicius Cinnamus', SDHI 45 (1979), pp. 141-42, and L. Bove, Documenti processuali dalle tabulae Pompeianae di Murécine (Naples, 1979), pp. 2-5. A list of the individual tablets with the TP designations, together with citations to the initial restorations of Sbordone, Giordano, and Bove, may be found at C. Giordano, 'Quarto contributo alle tavolette cerate Pompeiane', Rendiconti Napoli (N.S.) 47 (1972), pp. 316-18. Most of the recent work on the tablets has been performed by Camodeca, who has produced an excellent collection and commentary to some of the tablets. G. Camodeca, L'archivio puteolano dei Sulpicii I (Naples, 1992). Camodeca has in places assigned the new designation TPSulp. (Tabula Pompeiana Sulpiciorum) to some tablets. Cross-references to the older designations are at id., pp. 291-93.

TP 9:[16]

[Actum] Puteolis
[A(ulo) Vi]tellio, L(ucio) Vipsta(no)
Poplicola cos.
C(aius) Sulpicius Cinnamu[s]
intertium [sumpsit]
cum C(aio) Vario Ca[...]
quibus [de rebus]
inter [se et] eu(m)
L(ucius) Cocceius Anth[us]
iudex esse dic[eretur].

TP 24:[17]

C(aius) Sulpicius Cinnamus inter-
tium sumpsit cum Q(uinto) Laberio
Philippo quibus de rebus
inter se et eum Q(uintus) Laber[ius]
Cerdo Ma[ior i]udex esse

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16 Giménez-Candela, above note 15, p. 76. Giménez-Candela adopts the reconstruction of C. Giordano, 'Su alcune tavolette cerate dell' agro Murécine', Rendiconti Napoli (N.S.) 41 (1966), p. 119, but makes further progress with the benefit of TP 24. Crook has proposed a similar reconstruction in light of TP 24. J. Crook, 'Working Notes on Some of the New Pompeii Tablets', ZPE 29 (1978), p. 231.

17 Giménez-Candela, above note 15, pp. 76-77. See also Bove, above note 15, p. 115. Bove adopts the reconstruction of F. Sbordone, 'Nuovo contributo alle tavolette cerate Pompeiane', Rendiconti Napoli (N.S.) 46 (1971), p. 176, with minor alterations. The most serious difference between Bove's and Giménez-Candela's reconstruction is Bove's inclusion of the word ex before die in the penultimate line. Giménez-Candela apparently follows the advice of Manthe that no ex is legible. U. Manthe, [Review], Gnomon 53 (1981), p. 153 (reviewing Bove).

diceretur [atque] die
perendino iudicare.

Because TP 9 is identical to TP 24 but for proper names and, in the latter, the additional phrase die perendino iudicare, a translation of TP 24 will serve both tablets: 'Caius Sulpicius Cinnamus undertook an intertium with Quintus Laberius Philippus regarding matters in which Quintus Laberius Cerdo Maior would be appointed as judge between himself and him [Philippus] and serve as judge from the day after the next.'

c) Intertium in the Italica fragment

A bronze tablet discovered near Cortegana in 1888 preserves a portion of chapter 90 of the Flavian law, and dates from perhaps the second or third century. The tablet is often attributed to the Baetican municipium of Italica,[18] though this provenance may be wrong.[19] The fragment could not receive an

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18 A. d'Ors, Epigrafía jurídica de la España romana (Madrid, 1953), p. 345; J. González Fernandez, 'Italica, municipium iuris Latini', in Mélanges de la Casa de Velazquez 20 (Paris, 1984), pp. 19-20.

19 L. A. Curchin, The Local Magistrates of Roman Spain (Toronto, 1990), p. 14; A. M. Canto, 'A propòs de la loi municipale de Corticata', ZPE 63 (1986), pp. 217-18. Curchin notes that it is hard to account for a Flavian charter if in fact Italica became a municipium under Augustus, and further, that as Italica became a colonia under Hadrian, the copy of the charter should not date (as it does) to the second or third century. Canto suggests that the inscription may be attributed to the municipium Corticata (see Ptol. Geogr. 2,9,10, ed. C. Müller (Paris, 1888), p. 122), which was perhaps situated no more than a few kilometres from where the tablet was discovered. González takes issue strongly with Canto's conclusions. He finds no site in the region of Cortegana to correspond to an oppidum, 'not even a small one'. He insists that Italica is still the most likely place of origin, though doubts remain. J. González, 'More on the Italica Fragment of Lex Municipalis, ZPE 70 (1987), p. 220.

adequate reconstruction until the discovery of the lex Irnitana. The reconstruction below is that of González Fernandez.[20]

> [Quicumq(ue) in eo municipio IIuir i(ure) d(icundo) p(raeerit), per quos d]IES H(AC) L(EGE) IBI IUDICIA FIERI LICEBIT OPOR[tebit, in eos dies omnes intertium dato, e]OQ(UE) PROSC<R>IPTUM IN EO LOCO, IN QUO IUS DICET [maiore parte cuiusq(ue) diei per omnes dies, per] QUOS INTERTIUM D(ARI) D(EBEBIT), HABE<TO>, I(TA) U(TI) D(E) P(LANO) R(ECTE) L(EGI) P(OSSIT), ITEM SI [inter eos, inter quos ambigetur, et iudic]EM QUI INTER EOS IUDICARE DEBEBIT, IN ALIQUEM [diem, uti intertium inter eos detur, con]UENIET NEQ(UE) IS DIES PROPTER UE<N>ERATIONEM DOMUS [Augustae festus erit feriarumue numer]O PROPTER EANDEM CAUSAM HABERE DEBEBIT, IN EUM [diem intertium inter eos dato.]

d) Intertium in the Antinoopolis Papyrus

The leaf of a parchment codex dating to the fourth century A.D. was discovered in Sheikh Abâda and first published in 1950.[21] The text on the recto discusses the edict quod eo auctore, and may be part of Ulpian, ad Edictum, book 12.[22] The text on the verso, where intertium appears, may or may not be a continuation of the discussion on the recto. Giménez-Candela has reconstructed the verso text as follows:[23]

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20 González Fernandez, above note 18, p. 20. It is possible the bronze reads INTIRTIUM in the third line. See J. González Fernández, Bronces jurídicos romanos de Andalucía (Córdoba, 1990), no. 5, p. 125. An earlier reconstruction, without the benefit of the lex Irnitana, is at FIRA I, p. 219.

21 Egypt Exploration Society, The Antinoopolis Papyrus, ed. C. H. Roberts (London, 1950), part I, no. 22.

22 D.27.6.1.1; D.h.t.1.6. See the commentary of de Zulueta in the Antinoopolis Papyrus, above note 21, p. 48, and Lenel, EP, pp. 119-20. This text is discussed at length below in Chapter Eleven.

23 T. Giménez-Candela, 'Una revision de Pap. Ant. 22', in Estudios de derecho romano en honor de Alvaro d'Ors (Pamplona, 1987), vol. 1, p. 563. An

(continued)

Idem ait restitutionem fu-
turam si, cum iud(icium) leg(e) ac(ce)p(tum)
sit, c(um) et(iam) e(a) r(e) ante [d]iem pet(ita)
e(ss)et, q(ui)d(em) acceptum, factu(m)
t(ame)n intertium mox ei de-
nuntiatum non erit

Following Arangio-Ruiz, Giménez-Candela argues that the fragment addresses the restitutio of a iudicium acceptum. This is a subject relating to the text on the other side of the parchment, which speaks about the relief given to a plaintiff when he unknowingly sues a pupil who lacks the authority of a tutor. The text reproduced here, according to Giménez-Candela, takes up this subject, stating that a plaintiff may receive restitutio even after being granted a trial in a suit against a pupil sine tutore auctore, notwithstanding the fact that the trial date, the intertium, had been arranged though not announced.[24] The following is an attempted English translation of this reconstruction: 'Again, he says that there will be restitution after a trial has been accepted under the law, even when restitution has been sought in that matter before the day (the trial was accepted), if, though the trial be accepted, the trial date (intertium) has been arranged but nevertheless not subsequently announced to him.'

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unreconstructed transcription of the text may be found at Roberts, above note 21, pp. 49-50. An earlier reconstruction, attempted without the benefit of the lex Irnitana, may be found at E. Seidl, 'Juristische Papyruskunde', SDHI 18 (1952), pp. 344ff. Another attempt to decipher the text may be found at V. Arangio-Ruiz, [Recensioni Critiche], IURA 2 (1951), pp. 346-47.

24 Giménez-Candela, above note 23, pp. 573-75.

e) Other sources

Three other sources are less certain and therefore not useful to the present work. (1) Tabula Herculanensis 80:[25] Both Crook and González have cited this tablet as a source bearing on intertium.[26] They allude to the phrase L. COMINIUS PRIMUS INTE[ ] L. APPULEIUM PROCULUM, which the editors cited below have plausibly restored, not with INTE[RTIUM], but with INTE[RROGAVIT]. (2) Lex Irnitana, chapter K:[27] This chapter forbids, among other matters, the granting of vadimonia for appearance during the postponement of business, except in matters in which it is permitted in Rome. In the case of 'other matters' (de ceteris), the duumvirs may permit appearances only after the period of postponement. In González's text the words de ceteris at line 42 have been emended to de <interti>is. Johnston convincingly argues that this is an unlikely correction because, among other reasons, the text would then contradict the provisions of chapter 92, and in any event de ceteris is perfectly suitable to the context.[28] (3) Lex Irnitana, chapter 18: A small portion of chapter 18 of the lex Irnitana was reconstructed and first published in 1990.[29] The chapter appears to address the powers and

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25 V. Arangio-Ruiz and G. Pugliese Carratelli, 'Tabulae Herculanenses', La Parola del Passato 10 (1955), pp. 456-57.

26 Crook, Working Notes, above note 16, p. 231; González (1986), p. 234. Cf. Zanon, above note 7, p. 312 n.16.

27 Chapter K, l. 42 (González (1986), p. 162).

28 Johnston, above note 1, p. 70 n.45. The tablet shows DECRETIS, with ETER written above it.

29 F. Fernández Gómez and M. del Amo y de la Hera, La lex Irnitana y su contexto arqueologico (Seville, 1990), p. 37. Lamberti offers a reconstruction as well. F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), p. 269.

duties of the duumvirs. One portion of the chapter reads PROLATIONEM PRO IN++++++M. Lebek has suggested PROLATIONEM PRO INT[ertiu]M, followed by sumendo or dando. He argues that a prolatio pro intertium sumendo would constitute an adjournment in the proceedings in iure, to allow the judge and parties to agree upon a date for the commencement of trial.[30] Lebek's suggestion is perfectly satisfactory, but the bronze unfortunately is too badly preserved here to permit much faith in any particular reconstruction.

One Word or Two?

It is annoying that we cannot be certain whether intertium should be written 'intertium' or 'in tertium'. The various editions of the lex Irnitana give one or the other,[31] and the several reconstructions offered for the Pompeian tablets show the same discrepancy.[32] The sources, unfortunately, do not give a firm answer.

The Pompeian tablets simply contradict one another. An apograph of TP 9[33] shows a single word fairly clearly. In the photograph of TP 24[34],

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30 W. D. Lebek, 'Domitians Lex Lati und die Duumvirn, Aedilen und Quaestoren in Tab. Irn. Paragraph 18-20', ZPE 103 (1994), pp. 279-80.

31 González (1986): in tertium; d'Ors (1986): intertium; d'Ors (1988): intertium; Lamberti (1993): intertium. Rodger adopts the reading in tertium for the lex Irnitana and the Pompeian tablets, and his interpretation of intertium rests to some degree on this reading. A. Rodger, 'The Lex Irnitana and Procedure in the Civil Courts', JRS 81 (1991), p. 75.

32 Giordano, Rendiconti Napoli (N.S.) 41 (1966), p. 119: interiueo (TP 9) (without the benefit of the later restoration of TP 24); Sbordone, Rendiconti Napoli (N.S.) 46 (1971), p. 176: in tertium (TP 24); Crook, above note 16, p. 231: intertium; Giménez-Candela, above note 15, pp. 76-77: intertium.

33 Giordano, Rendiconti Napoli (N.S.) 41 (1966), Figure 13 following p. 120.

34 Sbordone, Rendiconti Napoli (N.S.) 46 (1971), Table IV following p. 176.

however, there may be sufficient space between the n and the t to suggest two words.[35] In the lex Irnitana the word appears as one throughout: word divisions are often (but not always) indicated by points, and in its many occurrences no point appears between in and tertium. Yet the engraver often omits to indicate division between some prepositions and the words immediately following.[36] The words in eo at chapter 90, l. 29 and chapter 92, l. 27, for example, appear as 'ineo', and at chapter 91, l. 21, in urbe appears as 'inurbe'. The lex Irnitana therefore leaves us in no better position than the Pompeian tablets.[37]

The only other source that might give some guidance is the Italica fragment. The fragment has interpunting, but unfortunately the points are erratic. Possibly, there is a point between in and tertium (González Fernandez observes a point there, according to a transcription he provides[38]), but the fragment also shows VENI·ET, C·AUSAM, and DEBEBI·T. As the fragment shows these sorts of vagaries, the point within intertium (if it exists) does not necessarily indicate a word division.

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35 Lamberti mentions that in looking into this very problem she sought the advice of Camodeca, who has produced a great deal of work on the Pompeian tablets. Lamberti, we are told, was assured that 'in the material at [Camodeca's] disposal', intertium appears as a single word. Lamberti, above note 29, pp. 185-86 n.146. We are not told what material was at Camodeca's disposal when he made this comment.

36 This observation was brought to my attention by Peter Birks, who himself learned of it during an informal seminar in the spring of 1991.

37 Cf. Zanon, above note 7, p. 313 n.21, who takes the lex Irnitana as evidence that intertium is a 'sostantivo unico'. For an exact transcription of the bronze including points, see Fernández Gomez and del Amo, above note 29, pp. 73-107.

38 See González Fernandez, above note 18, p. 18.

Lamberti has recently argued strongly that intertium is one word, as it appears as one word in both the lex Irnitana and the Pompeian tablets.[39] It is certainly true that these sources may show intertium this way. In the lex Irnitana, however, the manner of interpunting adopted by the engraver—no indication of word division between in and the subsequent word—prevents us from knowing whether the word would ordinarily be written as two words. Moreover, we must also take into account the Italica fragment, which at least according to one editor shows a point between in and tertium, as mentioned above.

Perhaps the more cautious conclusion is that in antiquity intertium was written as both one word and two, and that the discrepancies in our sources illustrate uncertainty on the part of the various writers and engravers regarding its syntax. Many now agree that intertium functions as an indeclinable substantive, but that it is derived from the phrase in tertium diem.[40] Modern editors show a preference for one spelling or the other to emphasize respectively the syntax or the derivation, and the disagreement is perhaps no less pardonable in antiquity than now. A defective noun with a peculiar history will cause confusion.

In the present work intertium will appear as a single word. This is not intended to be taken as the definitive spelling, since it is hardly clear that a definitive spelling exists. I use this spelling to emphasize that the word functions as a substantive.[41]

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39 Lamberti, above note 29, pp. 185-86 n.146.

40 See below note 45 and accompanying text.

41 For the proposition that intertium was simply written differently at different times, see Zanon, above note 7, p. 311 n.14.

Recent Theories of intertium

As the discovery of the lex Irnitana is quite recent, it is hardly surprising that there is only a limited consensus on the meaning of intertium. Several issues lately under discussion illustrate at what an early stage the investigation stands. It remains unresolved, for example, how to describe the syntax of the phrases intertium dare and intertium denuntiare, whether intertium carries the same meaning when accompanied by dare or denuntiare, and whether in the order of proceedings the dare precedes the denuntiare.[42] One proposition on which there is general agreement relates to the crucial question of how this institution developed. This subject is treated below[43] in far greater detail, but a sketch is useful now.

In discussing the legis actio sacramento Gaius, in the Institutes, mentions that under the legis actio procedure the trial was ordinarily delayed for a few days after the judge was appointed: postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem venirent, denuntiabant (G.4.15). The 'comperendinatio', as it is often called, appears in many pre-classical and classical sources, and literally signifies some event occurring on 'the day after the next'. There is evidence that intertium, perhaps an abbreviated form of in tertium diem, is related to comperendinatio. The relationship is based chiefly on two sources. First, Festus defines res conperendinata as iudicium in tertium diem constitutum, which makes a substantive link between comperendinatio and in tertium diem. Second, Probus gives the following abbreviation: I. D. T. S. P. in diem tertium siue perendinum. This indicates that the phrase in diem

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42 The subject of intertium has benefited greatly from a 1987 colloquium, at which the participants identified a vast number of issues and offered three separate interpretations. J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana', ZPE 70 (1987), pp. 173ff.

43 See Chapter Six below.

tertium may have become common in legal usage.[44] The belief that some relation exists between comperendinatio and intertium is now widely held.[45]

There is less agreement on how far in practice intertium departed from comperendinatio. Certain authors have pointed out that intertium conspicuously differs from comperendinatio by virtue of the role the lex Irnitana assigns to the magistrate: Gaius's comperendinus dies is fixed without any participation of the magistrate, while under the lex Irnitana the magistrate's datio is essential to the operation of intertium. Accordingly González, for example, argues that there is 'some relation' with comperendinatio, but suggests that the statute appears to describe two different forms of intertium, one imposed by the magistrate and the other created by the denuntiatio of the parties or the judge.[46]

Johnston puts particular emphasis on the participation of the magistrate in giving intertium, and though his theory of intertium differs a good deal from those offered by others, it does take account, perhaps better than other theories, of the significant role of the magistrate and the apparent departure

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44 Festus, de Verborum Significatu, s.v. res conperendinata (Bruns (7) II, p. 32); Probus, de notis iuris fragmenta 4.9 (FIRA II, p. 456).

45 González (1986), p. 234; Intertiumjagd, above note 42, pp. 175, 177; d'Ors (1983), above note 9, p. 40; Giménez-Candela, above note 15, p. 77; F. de Martino, 'Litem suam facere', BIDR (3rd Series) 30 (1988), p. 18; Rodger (1991), above note 31, pp. 79-80; F. La Rosa, 'La "lex Irnitana" e la nomina del giudice', IURA 40 (1989), p. 72 n.27; J. L. Murga, 'Las acciones populares en el municipio de Irni', BIDR (3rd Series) 27 (1985), p. 240 n.81.

46 González (1986), p. 234. It was beyond the scope of González's commentary to discuss the proceeding for which intertium was given or announced. Wolf, Zanon, and Simshäuser also make mention of the unusual role of the magistrate. Intertiumjagd, above note 42, p. 177 (Wolf); Zanon, above note 7, p. 319; Simshäuser (1989), above note 14, p. 632.

from comperendinatio. By various means he reasons that intertium relates to proceedings before the judge, that in practice the denuntiatio precedes the datio, and that intertium appears to be something associated both with hearing a case and suspending it. He dismisses any close connection between intertium and Gaius's comperendinus dies, asking pointedly why, assuming the institutions are analogous, the magistrate needs to be involved in making arrangements for the parties to appear before the judge. He suggests instead that intertium dare and intertium denuntiare describe a scheme for adjourning the trial before the judge after the trial had already commenced. One party would notify the other of his intention to seek an adjournment (the denuntiatio), and the matter would be brought before the magistrate for disposition. This sequence of events, at least, would explain why the lex Irnitana gives such prominence to the magistrate: if the magistrate's iudicare iubere contained details as to the time and place of trial, then adjournment might require modification of that decree, and hence the magistrate's participation.[47]

Most writers, however, have followed d'Ors and concluded that intertium is little changed from comperendinatio. D'Ors suggests that intertium was a type of notice for appearance at trial: the magistrate would grant and publish intertium for days on which it was appropriate. The plaintiff would then announce the intertium to the judge and his adversary in biduo proximo, that is, before the close of the day after its publication. The trial would begin the day after that.[48] D'Ors does propose one striking interruption in the

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47 Johnston, above note 1, pp. 70-74. Johnston's argument is perhaps open to the objection that a magistrate's involvement in scheduling the trial is not so problematic if the details of time and place of trial were in fact a part of the iudicare iubere.

48 D'Ors (1983), above note 9, pp. 40-43.

development from comperendinatio to intertium. He argues that intertium dare and denuntiare did not exist at Rome, but were specially adapted to municipal practice. He suggests these institutions were substitutes for the in ius vocatio and vadimonium in use at Rome.[49]

The notion that in granting intertium the magistrate is in some way fixing the trial date is by far the most accepted explanation for intertium, and for the most part those writing after d'Ors have stayed close to his suggestions. Simshäuser, Lamberti, and Zanon all write that the duty to grant intertium is a duty to fix the first possible day for trial. Ordinarily this would be the third day after the completion of the proceedings in iure, but if that day were prohibited under the terms of chapter 90, the trial would begin on the third permissible day after that. Also, the parties and judge might agree to a different trial date if that date suited them better.[50]

It is generally agreed, then, that intertium served as a 'bridge' between the two phases of a lawsuit.[51] There are different views, however, on how a key part of this bridge—the denuntiatio—operated in practice. The statute says that intertium is announced (presumably by the plaintiff[52]) to one's opponent

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49 Id., p. 44.

50 W. Simshäuser, [Literatur], ZSS (rom. Abt.) 107 (1990), pp. 549-53; Simshäuser (1989), above note 14, pp. 631-35; Simshäuser (1992), above note 7, pp. 196-97; Lamberti (1993), above note 29, pp. 185-87; Zanon, above note 7, pp. 322-25. Similarly, T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), p. 13.

51 Simshäuser (1992), above note 7, p. 169; Zanon, above note 7, pp. 318-19; Intertiumjagd, above note 42, p. 174 (Wolf).

52 It is certainly one of the parties who announces—the announcement is made to one's 'adversarius'—but admittedly there is nothing that expressly points to the plaintiff. At the 1987 colloquium it was also pointed out that, strictly speaking, chapter 91, tab. XA, l. 46, would give the judge as well as the plaintiff the power to announce intertium. Intertiumjagd, above note 42, p. 180. This is probably just carelessness, as this chapter is generally

(continued)

and to the judge, and that this denuntiatio is performed in biduo proximo (ch. 91, tab. XA, ll. 48-49; ch. 92, ll. 46-47). Unfortunately, as was pointed out at the 1987 colloquium, the statute does not reveal the point of reference for proximus nor the direction of the reckoning of days.[53] If one accepts, as most do, that a magistrate who grants intertium is fixing the trial date, then the point of reference will probably be the magistrate's datio: the plaintiff will announce what the magistrate has granted.[54] If one also accepts that, in the absence of any agreement to the contrary, the trial would take place on the third day after the granting of intertium, then the words in biduo proximo would seem to refer to the two days after the datio: a denuntiatio performed within two days of the datio would allow at least some notice in advance of the trial.[55] This is how most writers understand the operation of intertium denuntiare.

Another view recently put forward accepts that in granting intertium the magistrate is scheduling the trial for the third day following, but understands in biduo proximo to refer to the two days preceding the trial. Burdese argues

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listing many separate matters for the purpose of referring the reader to other sources of law.

53 Intertiumjagd, above note 42, p. 179.

54 D'Ors (1983), above note 9, pp. 42-43; Lamberti, above note 29, p. 187; Simshäuser (1989), above note 14, p. 635; Giménez-Candela, above note 50, pp. 27-28. This is particularly appealing if one deduces from the order in which the statute takes up these subjects that the denuntiare follows the dare. See Simshäuser (1989), p. 634; Zanon, above note 7, p. 319. Cf. Intertiumjagd, above note 42, p. 179 (Wolf); Johnston, above note 1, p. 72.

55 It is true, as Birks says, that chapters 91 and 92 do not relate the biduum to the magistrate's datio. Intertiumjagd, above note 42, p. 180. Yet in all matters concerning intertium denuntiare it is worth keeping in mind that the lex Irnitana tells us next to nothing about how the denuntiatio operates. At bottom we know little more than that something called intertium denuntiare existed.

that this is preferable to the usual interpretation, because under that interpretation it would not be possible to give notice on the second of the two days, if in fact the trial is scheduled to begin on that day, it being the next day but one after the datio.[56] It is possible that this objection does not account for the Roman reckoning of days, in which the tertius dies is to us the second day, and in biduo proximo would include the day of the datio.[57]

I have omitted to this point discussing Rodger's contribution to the subject of intertium, as that contribution receives a chapter to itself.

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56 A. Burdese, [Recensiones Librorum], SDHI 57 (1991), p. 451 (reviewing Giménez-Candela, Los llamados cuasidelitos). Zanon adopts Burdese's argument. Zanon, above note 7, pp. 321, 324.

57 See Pauly-Wissowa, RE IV (1901), s.v. 'Comperendinatio' (Kipp).

III

Rodger's in tertium (diem) (iudicium) dare

The theory of intertium put forward by Rodger[1] needs closer analysis, not only because the theory is carefully and convincingly argued, but also because it relies heavily on the 'legislative design' of the statute: Rodger reaches many of his conclusions about intertium by examining the order in which the subjects fall in the latter chapters of the statute and by deducing a certain scheme of drafting in this order. If Rodger's observations in this respect are correct and if intertium is presented in the statute consistently with this legislative design, every theory of intertium—no matter how far it may depart from Rodger's—must take account of the design. The discussion of Rodger's theory below therefore gives special attention to his conclusions on the order of the subjects in the statute. This means that the discussion must look somewhat mechanically at the statute's organization, in attempting to show to what extent the statute fits the design Rodger proposes for it.

At bottom Rodger concludes that the phrase in tertium dare (as he has it) means 'to grant a iudicium for the third day'. In announcing in tertium do the magistrate is employing a term of art and an ellipse of both diem and iudicium is understood by the listener.[2] The diem is supplied easily enough through the association between in tertium and comperendinatio. The iudicium is supplied through a more delicate and ingenious argument, one that forms the core of

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1 A. Rodger, 'The Lex Irnitana and Procedure in the Civil Courts', JRS 81 (1991), pp. 74-90.

2 Id., p. 79.

Rodger's work. In a portion of chapter 84 Rodger has discovered what he believes is a 'plan' for the latter chapters of the statute, a plan that describes the subjects of those chapters. From this plan he deduces that the granting of trials is the subject of chapter 90.

Chapter 84 discusses the jurisdiction of the local magistrates, and after describing the actions which may be heard at Irni the text reads as follows:[3]

> Duumuiri qui ibi iure dicundo praeerit, iuris dictio, iudicis arbitri reciperatorum, ex is qui ibi propositi erunt, iudici datio addictio; item eadem condicione, de eo quod sestertium mille minorisue erit, aedilis qui ibi erit iuris dictio iudicis arbitri reciperatorum ex eodem genere iudicique datio addictioque esto.
>
> The duumvir who is in charge of the administration of justice there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from those (whose names are) displayed there, and a trial. . . . And likewise the aedile who is there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from the same group and a trial, under the same conditions, concerning anything which is worth 1,000 sesterces or less.

Rodger first gives a list of the separate powers described in the text, drawing from the two sets of identical phrases enumerating those powers for the duumvirs and aediles respectively. As the language is quite condensed, he separates the different acts from one another but leaves them in the same order in which they appear: iuris dictio, iudicis arbitri datio addictio, reciperatorum datio, iudici datio. He then observes that each of the matters discussed in the six chapters following chapter 84 corresponds to an item in this list, and that together these subjects follow the same sequence as the items in the list. Thus chapter 85, which contains certain guides to the magistrates' jurisdiction, corresponds to the first item, iuris dictio. Further, consistent with

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3 Ch. 84, ll. 23-28. Crawford's translation follows. González (1986), p. 195.

the order of items in the list, chapters 86 and 87 treat the selection and appointment of iudices and arbitri and chapter 88 the appointment of reciperatores. There is perhaps a small deviation from the order in chapter 89, which returns to the subject of iudices and arbitri in treating together the appointment of iudices, arbitri, and reciperatores.[4]

In the course of his discussion Rodger points out that, not only do the subjects of the respective chapters correspond to the list, but variants of the words used in the list appear repeatedly in both the text and the rubrics of the various chapters. Thus the rubric to chapter 85 uses the words ius dicant, while the subject matter of that chapter corresponds to the words iuris dictio in the chapter 84 list. Similarly chapter 87, the subject of which corresponds to iudicis arbitri datio addictio in the chapter 84 list, requires at lines 48-49 that the magistrate iudicem arbitrumue dato addicito.[5]

The last item in the list, iudici datio, corresponds to chapter 90. Although neither the text nor rubric contains the words iudici datio, Rodger finds sufficient traces of these words in the dando of the rubric and the many instances of dare in the text. This leads him roughly to equate iudicium dare with in tertium dare: in his view the pattern established by the chapter 84 list and the subsequent chapters suggests that in the phrase in tertium (diem) dare we should understand an ellipse of iudicium, to produce the meaning 'grant a iudicium for the third day'. An ellipse of iudicium, Rodger explains, is not surprising if one imagines that the phrase in tertium dare was used repeatedly as a term of art among jurists, pleaders, magistrates, and judges.[6]

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4 Rodger (1991), pp. 76-77.

5 Id., p. 77.

6 Id., pp. 77-78.

The plan does not serve beyond chapter 90. This is because the relationship between the plan and the events described in the subsequent chapters, according to Rodger, follows a 'division of authority' in the statute. Chapters 84 to 90 address the in iure stage of the lawsuit, and culminate with the magistrate's final act, iudici datio. Commencing with chapter 91 the statute moves on to the apud iudicem stage. Accordingly the chapter 84 plan, because it describes the magistrates' powers, appropriately finishes with chapter 90.[7]

Syntax

In proposing an ellipse of diem and iudicium in the phrase in tertium dare, Rodger departs from what is now the common view: that intertium is a substantive.[8] The common view is not without problems, however, because if intertium is a substantive, judging by the sources it is at least defective and perhaps indeclinable.[9] It is now usually assumed that diem was at one time a

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7 Id., p. 78.

8 J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana', ZPE 70 (1987), p. 175; A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicciòn municipal', SDHI 49 (1983), p. 40; D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 70 n.44; T. Giménez-Candela, 'La "Lex Irnitana": une nouvelle loi municipale de la Bétique', RIDA (3e Série) 30 (1983), p. 135; J. L. Murga Gener, 'La "popularidad" de las acciones en las leyes municipales de la Betica', RIDA 38 (3e Série) (1991), p. 264 n.83; W. Simshäuser, 'La juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), p. 629; F. Lamberti, 'Tabulae Irnitanae': municipalità e 'ius Romanorum' (Naples, 1993), p. 186 n. 146; G. Zanon, 'De intertium dando', SDHI 58 (1992), p. 323.

9 Evidence for the syntax, unfortunately, is not altogether complete, because with one exception intertium (assuming it is a declinable substantive) appears in either the nominative or accusative case. The one exception is the rubric to chapter 90, de intertium dando. I am grateful to Michael Crawford for his guidance on this point.

part of the phrase in tertium dare, and that at the time of its appearance in the lex Irnitana, in tertium had not yet evolved into a proper, declinable substantive. In this light Rodger's proposal is not a great departure from the common view, but merely assumes an earlier stage in the evolution of the phrase in tertium dare.

Yet in proposing that in tertium is an adverbial phrase, Rodger has left in tertium dare without an expressed direct object. He assumes that in tertium dare needs no object because the phrase became a term of art: dare represents iudicium dare.[10] This is a satisfactory explanation in instances in which dare appears in the active voice. Where dare appears in the passive voice, however, an ellipse of iudicium means that the verb has no subject:

> per omnes dies, per quos in tertium dari debebit (chapter 90, ll. 30-31)
>
> si inter eos . . . in aliquem diem uti in tertium inter eos detur conveniet . . . . (chapter 90, ll. 31-34.)
>
> Quibus diebus res ne iudicentur et in quos in tertium ne detur. (chapter 92, rubric.)

Rodger must intend detur to be taken as an impersonal form,[11] but it is not certain that a term of art 'in tertium detur' would be understandable if it were expressed impersonally in this way. The phrase in tertium detur in the rubric

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10 Rodger (1991), above note 1, p. 77. On some of the difficulties with this syntax, see Zanon, above note 8, pp. 310-11 n.9.

11 As an impersonal form datur ordinarily means something like licet. J. Hofmann & A. Szantyr, Lateinische Syntax und Stilistic (München, 1965), p. 345. In the phrase per quos in tertium dari debebit quoted above, dari is not an impersonal form, and if this reading is correct, intertium must be a substantive. On the other hand, the photograph of tablet XA (González (1986), plate XX) shows that the statute is not very well preserved here, and dari perhaps might be read dare.

to chapter 92 just quoted, for example, can be understood in this way only with great effort. The rubric is most easily understood to contain two parallel clauses, in tertium being the subject of detur as res is the subject of iudicentur.[12]

To read in tertium dare as a term of art brings further problems. Rodger is correct in arguing that iudicium dare, being the common, technical expression for granting a trial, might easily provide the foundation for an abbreviated term of art.[13] But could the expressions iudicium denuntiare and iudicium sumere as easily provide the basis for further terms of art, intertium denuntiare (as in chapters 91 and 92) and intertium sumere (as in the Pompeian tablets)? And if an ellipse of the word iudicium were so pervasive, why do references to iudicium dare persist in the lex Irnitana?[14] These questions could be avoided by the relatively simple explanation that in tertium/intertium is a substantive.

I do not wish to overemphasize any difficulties in the syntax by which Rodger proposes to explain intertium dare. Rodger's primary thesis follows from his interpretation of chapter 84, and his suggestion intertium dare = in tertium (diem) (iudicium) dare complements his primary thesis, but is not essential to it.

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12 The lex Irnitana, admittedly, does pair passives and impersonals, though without the clumsiness and ambiguity that the chapter 92 rubric would show, were it construed in this way. For example, chapter 69, line 30, includes [pecunia] quae peteretur deue qua ageretur. See also ch. 69, ll. 26-27; ch. 87, l. 38.

13 Rodger (1991), above note 1, p. 79.

14 Lex Irni., ch. 84, ll. 24, 27; ch. 85, l. 40.

Shortcomings in the Chapter 84 Plan

Rodger may be correct that some relation exists between lines 23-28 of chapter 84 and the subject matter of the chapters that follow. Chapters 84 to 90, while they address a variety of subjects, are concerned collectively with the duties of magistrates, and because the five lines Rodger identifies provide an outline of the magistrates' powers, chapter 84 perhaps illuminates the succeeding chapters in some way. Rodger, however, insists on much more than some indefinite association. He argues that a one-to-one relation exists between lines 23-28 and the subjects of the subsequent chapters, that a given chapter taken as a whole corresponds to an item in the plan. It is only by pairing whole chapters with specific items that he is able to associate chapter 90 with iudici datio. I believe that Rodger is correct to point out that a relation of some degree exists, but that the one-to-one relation he suggests is incorrect.

To understand the shortcomings in this one-to-one relation, it is useful first to look at how Rodger has divided the text of lines 23-28 to produce his list. When this text is divided into individual items, it does not yield a firm list of items in a specific order. On the contrary, the list of items is capable of a good deal of variation, and Rodger has selected a certain method of separating the individual subjects in the list.

The words as they appear in the text are capable of resolution into pairs composed of a genitive object and an abstract verbal noun;[15] each pair forms a subject: iuris dictio, iudici datio, iudicis addictio, and so on. Some latitude is available in assembling the pairs and putting the pairs in a certain order. For example, when one compares the words as they appear in the text with the list

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15 The latter does not seem to have a more formal designation. Hofmann and Szantyr call it a Verbalsubstantivum. Hofmann & Szantyr, above note 11, pp. 742-43.

Rodger derives from the text, it becomes clear that Rodger has chosen the genitive objects to determine the order of the subjects in the list he derives. In both the text and Rodger's derivation, the genitive objects appear in the order iuris, iudicis, arbitri, reciperatorum, iudici. It is also clear that, having decided what order to adopt, Rodger then determines how the pairs are to be assembled. Both datio and addictio are paired with iudicis arbitri, while reciperatorum is set off and paired with datio only; when describing the relation between the list and chapter 89, Rodger must then regroup the three categories of judge together again as iudicis arbitri reciperatorum datio addictio. This method of pairing the genitive objects with the verbal nouns produces the list iuris dictio, iudicis arbitri datio addictio, reciperatorum datio, (iudicis arbitri reciperatorum datio addictio), iudici datio.

By pointing out that Rodger has exercised certain choices in constructing his list, I do not wish to imply that he is necessarily wrong for that reason, but only that his method of creating a list from the text is somewhat deliberate. It is probably impossible to avoid being deliberate in assembling the list of subjects, since the matters mentioned at lines 23-28 do not fall naturally into certain pairs and a certain order unless a reader exercises some judgement in assembling the words.[16] Nevertheless, to discover the relation between these lines and the subsequent chapters requires at the outset an adequate list, and any possible variation in the pairs or their order should be considered.

Suppose that we choose the verbal nouns to determine the overall order of the list, instead of the genitive objects as Rodger has done. If this method is followed the primary division of the various subjects in lines 23-28 is not ius,

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16 See below notes 18 to 22 and accompanying text.

iudex, arbitri, etc., but rather dictio, datio, and addictio.[17] If we then associate the appropriate genitive objects (with certain allowances, noted below) the following list results: iuris dictio, iudicis arbitri reciperatorum datio, iudici datio, iudicis arbitri addictio. This modified list is much the same as Rodger's, with the exception that iudicis arbitri addictio follows iudici datio.

The list I offer here omits two possible pairings, reciperatorum addictio and iudici addictio, and in this respect follows Rodger's list. This first of these is omitted simply because, as Birks has noted, the reciperatores in the lex Irnitana are always dati, never addicti.[18] To omit the second pairing, however, may seem unnecessarily cautious. At one time it was assumed that iudicium addicere, in the sense of 'ordering a trial', could be found only in reference to the legis actio procedure.[19] The discovery of the Tabula Contrebiensis, however, brought firm evidence of iudicium addicere in the text of a formula itself.[20] For this reason it might seem that, in dividing the pertinent provisions of chapter 84 into a list of powers, one could safely pair iudicium with addictio.

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17 It is tempting to argue that a division of these clauses based on dictio datio addictio is preferable because the division is based on the tria verba. But whether this fact actually makes any difference is not clear to me.

18 P. Birks, 'New Light on the Roman Legal System: The Appointment of Judges', CLJ 47 (1988), p. 40 n.14; M. Lemosse, 'Loi municipale et droit latin', IURA 41 (1990), p. 92.

19 See Varro Ling. 6.61; Trebatius in Macrob. Sat. 1.16.28; Kaser, RZ, p. 57 n.31; Pauly-Wissowa, RE I (1893-94), s.v. 'addicere' (Wlassak).

20 Tab. Contreb., l. 14, in P. Birks, A. Rodger, and J. S. Richardson, 'Further Aspects of the Tabula Contrebiensis', JRS 74 (1984), p. 45. The words appear at the very end of the formula proper, before a description of the judgement rendered: Iudicium addeixit C. Valerius C. f. Flaccus imperator.

I nevertheless believe Rodger is correct in pairing iudicium with datio alone. The lex Irnitana provides abundant confirmation that addicere may be paired with iudex,[21] but not a single instance (aside from the disputed provisions under discussion) of addicere paired with iudicium. In the one available example, the statute declares that iudicia dentur—not addicantur or dentur addicantur—in accordance with the governor's album (ch. 85, l. 40). The lex Irnitana therefore cannot confirm the evidence of the Tabula Contrabiensis that iudicium addicere ('order a trial') appeared in the formulary period.[22]

The modified list, I believe, illustrates a more useful division of the text of lines 23-28 than the list Rodger offers. This division is not more useful because the method used is superior in any way to Rodger's, but because the modified list is a more accurate outline of the procedure described in the latter chapters of the statute. As discussed below, Rodger's list cannot maintain the exacting degree of relation to chapters 85 to 90 he ascribes to it. I suggest a more modest relation, based on the modified list: that chapter 85 to 90 treat questions of procedure in roughly the same order as they occur in a lawsuit,[23] and that lines 23-28, too, set out the magistrates' powers in roughly the same order as those powers would be exercised in a lawsuit. In this circumstance, not surprisingly, the magistrates' powers coincide at many points with the

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21 Lex Irni., ch. 19, l. 15; ch. 86, ll. 25-26; ch. 87, ll. 48-9, 49-50.

22 I therefore disagree with Simshäuser's assertion that iudicium addicere in the lex Irnitana emphasizes the handing over of the judicial function to the judge. W. Simshäuser, 'Stadtrömisches Verfahrenrecht im Spiegel der lex Irnitana', ZSS (rom. Abt.) 109 (1992), p. 183.

23 That the latter part of the lex Irnitana seems generally to address trial matters in chronological order is often remarked on. See, e.g., Simshäuser (1989), above note 8, p. 638.

matters taken up in the respective chapters. The modified list, however, does not assume any significance in these coincidences.

The One-to-One Relation

The one-to-one relation that Rodger observes between lines 23-28 and chapters 85 to 90 is difficult in several respects, but in essence the problem is this: the plan does not accurately predict the contents of the chapters, and it must do so if we may depend upon it to predict the contents of chapter 90.

a) The order of events

The first difficulty concerns the order of events described in the chapter 84 plan. The order is obviously crucial to the plan, since under the plan the fourth item, iudici datio, must pair itself with the fourth event described in this series of chapters, in tertium dare. It is fortunate that we possess in the Pompeian tablets an independent source for in tertium, as the tablets help to determine what point in a lawsuit in tertium dare looks to.

Rodger uses the following text, and provides the following translation, for TP 24:[24]

> C. Sulpicius Cinnamus in ter-
>
> tium sumpsit cum Q Laberio
>
> Philippo quibus de rebus
>
> inter se et eum Q Laber[ius]

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24 Rodger, above note 1, p. 81. He does not treat TP 9. For TP 24, he follows the reading of F. Sbordone, 'Nuovo contributo alle tavolette cerate Pompeiane', Rendiconti Napoli (N.S.) 46 (1971), p. 176, but supplies the words de eis rebus for the lacuna in the sixth line. This addition follows in part the suggestion of Crawford, eum de eis rebus. Intertiumjagd, p. 182. The literature on the tablets and variant readings are set down above, Chapter Two, notes 15 and 17.

> Cerdo Maior iudex esse
>
> diceretur [de eis rebus] ex die
>
> perendino iudicare.
>
> C. Sulpicius Cinnamus agreed with Q. Laberius Phillippus for the third day, that Q. Laberius Cerdo Maior would hold a hearing on the day after next in respect of those matters as to which he would be appointed to be the judge between himself and him (i.e. Q. Laberius).

At bottom the difficulty here is that this tablet describes a sequence of events at odds with the sequence described in Rodger's chapter 84 plan. At the time at which the tablet speaks, intertium has been granted.[25] Accordingly, iudici datio will have taken place, if we assume in tertium dare is equivalent to in tertium diem iudicium dare as Rodger argues. Yet the appointment of Cerdo as judge has not taken place: the diceretur is provisional, and it is intended that the appointment shall take place in the future. The tablet therefore would describe a lawsuit in which iudicis addictio follows iudici datio, the reverse of what the chapter 84 plan describes.[26]

Rodger avoids this result by arguing, first, that in tertium sumere describes an agreement by the parties that in tertium should be granted for a certain day, and second, that this agreement took place before the parties approached the magistrate and were granted a trial. The events would therefore occur in this order: on the first day, an agreement on the trial date; on the second day, iudicis addictio and iudici datio; on the third day, trial. Rodger explains that,

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25 See below note 29.

26 This assumes that the tablets express by dicere what the lex Irnitana expresses by addicere. Cf. Intertiumjagd, p. 182 (discussing the possibility that diceretur expresses the writer's uncertainty that the appointment actually took place). See also Festus 13: 'Addicere est proprie idem dicere et approbare dicendo.'

though trial would ordinarily commence on the third day after iudici datio, the tablets suggest that perhaps the earlier date suited the parties better.[27]

The evidence of the lex Irnitana, however, ought to discourage the idea that in tertium sumere describes an agreement on intertium rather than the granting of intertium. As Rodger himself notes, in interpreting in tertium sumere as an agreement, he is looking to an interpretation that was common before the discovery of the lex Irnitana. Sbordone, writing in 1971 and without the benefit of the lex Irnitana, suggested that the tablet described an agreement on the designation of a judge and the date of trial, and similarly Bove, in 1979, stated that the tablet records the conditions under which the parties agreed to submit the matter to the judge.[28] It is true that the discovery of the lex Irnitana brought confirmation that agreements on intertium existed, but at the same time chapter 90 of the statute reveals to some degree what an agreement looked like, and the tablet simply does not meet the description. Chapter 90 permitted the parties and judge to agree on a day for intertium if the next day but one did not suit them. TP 24 makes no mention of the judge taking part in an agreement, though the person to serve as judge is known. Moreover, the appointed day named in the tablet is apparently not a day the parties and judge have chosen, but the customary 'next day but one' scheduled by the magistrate in default of an agreement. The better conclusion, therefore, is that in the phrase in tertium sumere we have the obverse of in tertium dare,[29] rather than an agreement on the date for in tertium.

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27 Rodger (1991), above note 1 , pp. 81-82.

28 F. Sbordone, 'Nuovo contributo alle tavolette cerate Pompeiane', Rendiconti Napoli (N.S.) 46 (1971), p. 176; L. Bove, Documenti processuali dalle tabulae Pompeianae di Murécine (Naples, 1979), p. 114.

29 Specifically, intertium sumere cum aliquo would correspond to intertium dare inter aliquos, as Wolf has suggested. Intertiumjagd, above note 8, p.

(continued)

Accordingly, if Rodger is correct that in tertium dare means 'grant a iudicium for the third day', then Q. Laberius Cerdo will be appointed as judge at some time after iudici datio, an order of events at odds with Rodger's chapter 84 plan.[30] It will be recalled that, according to Rodger, chapter 90 is the final chapter that addresses the stage in iure, and that both the plan and chapter 90 culminate with iudici datio. The tablets, to the contrary, would indicate that iudicis addictio, not iudici datio, should culminate the list of the magistrates' powers. The discrepancy suggests that Rodger's chapter 84 plan does not show the events in the proper order. As in tertium dare and iudicium dare are equated on the basis of the order of events in the plan, the plan cannot necessarily be trusted to explain the meaning of in tertium dare.

b) The different classes of magistrate

A second shortcoming in the one-to-one relation involves the plan's failure to recognise the duties of the different classes of magistrate. Recall that Rodger relies on two lists of subjects in chapter 84, one list pertaining to the duumvirs and the other to the aediles. As they appear in the text, the lists are identical and set out separately for the two classes of magistrate. Because Rodger argues in favour of a one-to-one relation between these two lists and

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182. On sumere and dare, see also F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), p. 189, and Zanon, above note 8, p. 312 n.15.

30 Sbordone has concluded TP 24 is part of a diptych, the second part of which is lost. He has suggested that the lost portion perhaps dealt with the substance of the dispute, the meeting place, or the date of the transaction. Sbordone, above note 24, p. 176. With the benefit of the lex Irnitana, and with the knowledge that the parties in the tablet have been before a magistrate, it is interesting to speculate whether the lost portion might have held a draft formula, such as Wenger's 'dare-Dekret'. See L. Wenger, Praetor und Formel (Sitzungsberichte der Bayerischen Akademie der Wissenschaft, 3 abh.), (München, 1926), pp. 64-66.

the contents of the subsequent chapters, this relation must exist independently for each list. That is, if the list of powers enjoyed by one class of magistrate does not constitute a plan, there is no reason to believe that the list of powers enjoyed by the other—an identical list to the first—constitutes a plan either.

The aediles are not treated in two places where they ought to be treated according to Rodger's plan. Chapter 89 discusses a duumvir's duty to grant iudices, arbitri, and reciperatores in certain cases. According to Rodger this chapter corresponds to iudicis arbitri reciperatorum datio addictio. The aediles are nowhere mentioned in the chapter as the plan suggests they should be. Admittedly, the omission may be due to careless drafting, but it illustrates the general problem: it is difficult to treat the two lists as tantamount to a table of contents when to do so one must selectively ignore one or the other list.

The more important omission is at chapter 90, which is of course the chapter central to Rodger's argument. Chapter 90 addresses the obligation of the duumvirs to give intertium, and does not mention the aediles in any way.[31] If iudici datio and intertium dare describe the same event, then the aediles, empowered to grant iudicia with the same words as those empowering the duumvirs, should be mentioned in chapter 90. The fact that the statute takes the trouble to mention both classes of magistrate with respect to iudici datio and mentions the duumvirs only with respect to intertium dare suggests that iudici datio and intertium dare are not the same act.

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31 González suggests that this is a drafting error. González (1986), p. 201. The discussion below, to the contrary, argues that chapter 90 has reason to mention only the duumvir. See below Chapter Five, notes 18 to 28 and accompanying text.

c) An omission from the list

The chapter 84 plan does not include the matters taken up in chapter 86: the choosing of judges for service during a forthcoming year and the publication of the album iudicum. The omission here is not trivial. This is not a case in which the plan fails to include a small matter receiving only brief treatment in the statute. Chapter 86 does not merely raise in passing the choosing of judges and the album, but is entirely devoted to these two subjects. It describes at length when the album must be compiled, the qualifications required of the men to be included, and how the album is to be displayed.

According to the plan chapter 86 corresponds to the subject iudicis arbitri datio addictio. Unlike chapters 87 to 89, the rubric to this chapter, De iudicibus legendis proponendis, does not repeat the appropriate words of the chapter 84 plan. There is, in fact, only one reference to the 'granting and appointing of the judge or arbiter' in this chapter. At the end of the chapter, after the rules for compiling and publishing have been carefully set down, the text says in closing that the judges or arbiters are to be granted and appointed from the judges whose selection has just been described.[32] It is these words that Rodger relies upon to bring chapter 86 within the chapter 84 plan.

These words, however, amount to no more than a flourish at the end of a very detailed treatment of the album. They do not alter or obscure the true subject matter of chapter 86: selection and publication. The preceding chapter, for example, has precisely the same structure. It is largely devoted to describing the basis of the magistrates' jurisdiction, yet in closing declares that iudicia dentur in accordance with the governor's edicts and formulae. This declaration does not somehow eclipse the rest of the language, so that the chapter could be said to treat iudici datio rather than iuris dictio. So also with

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[32] Ch. 86, ll. 23-26.

chapter 86. In this instance the plan is particularly unreliable, because not only does the one-to-one relation fail, but the plan, having omitted iudicum lectio propositioue from its list of magistral powers, is plainly not a comprehensive list, and therefore cannot be trusted to have included intertium datio.[33]

An 'Ancillary' Statute

The discussion to this point has attempted to show in a somewhat mechanical way that Rodger's plan cannot be relied upon to predict the contents of chapter 90. In the course of these mechanical arguments I hope the larger point will not be lost: that the lex Irnitana is not the sort of statute Rodger's argument presumes it to be. The chapters on the administration of justice do not constitute a complete and entire program for civil procedure; they have many omissions. Thus chapter 84, which itself purports to be comprehensive in describing the judicial powers of the magistrates, cannot be expected to provide a plan or index for those chapters.

Several of the omissions in chapters 84 to 92 are mentioned above, but there are many more: the magistrates must administer justice according to the edict of the governor to the extent it affects their jurisdiction;[34] the governor determines the number of judges who shall serve during that year;[35] the type of lawsuit calling for recuperatores is undefined aside from a reference to the practice at Rome;[36] on the matter of mors litis the statute refers the reader to

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33 I suggest intertium datio on the example of the rubric to chapter 90, De intertium dando.

34 Ch. 85, ll. 30-35.

35 Ch. 86, ll. 47-48.

36 Ch. 88, l. 3; ch. 89, ll. 22-25; Johnston, above note 8, p. 67.

a lex Iulia and relevant senatus consulta;[37] there is a reference to adjournment e lege;[38] chapter 91 requires that numerous procedural matters be treated as if they arose in Rome between Roman citizens.[39] Certain crucial matters such as indefensio and confessio in iure, as Lemosse points out, are not treated at all.[40] From a practical point of view, a person in Irni who wished to engage in litigation would have needed to consult a large number of other legal sources.[41] Any attempt to determine some guiding principle for the omission or inclusion of a given matter in the lex Irnitana will be difficult. Johnston notes:[42]

> Evident too is the striking extent to which the Lex Irnitana settles matters by reference to Roman practice. In this respect it is a law ancillary to the main Roman statute governing court procedure, the Lex Iulia de iudiciis privatis. Nonetheless, the Lex Irnitana is not limited to a purely subsidiary role, since it provides for matters which are also dealt with in the Lex Iulia, and so far as can be seen not only in cases where introducing a different municipal provision. Most likely the criteria governing inclusion in the municipal law are practicality and economy of effort: the more important matters are displayed in detail, but the availability of certain rights need only be mentioned and its details supplied on demand.

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37 Ch. 91, tab. XA, l. 53 - tab. XB, l. 2.

38 Ch. 91, tab. XB, l. 15; Johnston, above note 8, pp. 62-63.

39 Ch. 91, tab. XB, ll. 3-6, 18-21.

40 Lemosse, above note 18, p. 92.

41 M. Crawford, 'The Laws of the Romans: Knowledge and Diffusion', in Estudios sobre la Tabula Siarensis, edd. J. González and J. Arce (Anejos de Archivo Español de Arqueologia, vol. 9) (Madrid, 1988), p. 128.

42 Johnston, above note 8, pp. 65-66.

Simshäuser modifies this somewhat, suggesting that four matters are singled out for detailed discussion because the magistrate would encounter them regularly.[43]

> Finally it's worth asking why the Roman legislator in a whole series of cases has adopted a particular, detailed system of municipal law but in other instances has availed himself of simple references or fictions. Certainly practical considerations and reasons of economy played a role. But is it good enough simply to state that 'the more important matters are displayed in detail'? We have a system of municipal laws that is quite detailed concerning powers, availability of actions, nomination of the judge, the transition to the procedural stage apud iudicem, as well as judicial furlough. All of these rules must have been respected and followed regularly by the magistrate as long as all ordinary civil proceedings were taking place normally.

A given subject is therefore included among these chapters because of its importance, the frequency with which it would arise in litigation, its uniqueness to municipal practice, or perhaps for some other reason—but clearly not with the intention of creating a comprehensive code of civil procedure.[44] Yet a comprehensive code is what Rodger's chapter 84 plan presumes. Rodger has proposed a certain legislative design in which the drafter has enumerated the powers of the magistrates in a list of items and then elaborated on those powers by devoting each subsequent chapter to a

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43 Simshäuser (1989), above note 8, p. 641. See also H. Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', JRS 78 (1988), p. 88, who comments that matters we would consider central to the purpose of the law of Spanish municipia appear to be treated marginally or not at all.

44 Birks has written that the statute may be read virtually as a code of first century Roman procedure. Birks, above note 18, p. 60. He does not appear to intend 'code' to be taken in the same way as I have used it above.

specific item in the list. As the subsequent chapters are an incomplete patchwork of rules, no such legislative design can exist.

The Modified Plan

The three shortcomings outlined above suggest that Rodger insists on too close an association between chapter 84 and the chapters that follow. We cannot assign significance to the placement of iudici datio in the plan if, as I have argued, the proposed order of events is not correct, the events do not exhaust the plan, and the plan does not exhaust the events. Rodger, I believe, is nevertheless correct to suggest that lines 23-28 of chapter 84 constitute a plan, in the sense that the drafter seems consciously to have set down the magistrates' powers in the order in which they would be exercised in litigation. For this reason I have suggested a modified plan that appears to follow chronologically the course of a lawsuit at Irni.

IV

A Divided Proceeding in iure

The several explanations for intertium that have appeared to date are in agreement that intertium, whatever it may mean, relates to the trial phase rather than to the in iure phase of a lawsuit.[1] There are good reasons for the consensus. Most writers associate intertium with Gaius's comperendinus dies (G.4.15), and Gaius states outright that this three-day gap took place 'after the judge had been granted'. Also, the arrangement of subjects in the latter chapters of the lex Irnitana appears to follow the chronology of a lawsuit, and chapter 90, where intertium first appears, is placed after the chapters that treat the selection of judges. Chapter 90's place in the statute, together with the fact that chapters 90 to 92 refer expressly to the presence of a judge, suggests that intertium comes into play after the judge has been selected and the proceedings in iure completed.[2]

As intertium is believed to refer in some way to the trial phase, it is not surprising that most writers roughly equate intertium dare with iudicium dare. The lex Irnitana, in fact, makes it quite clear that intertium and trial have a good deal to do with one another. The magistrate is required to grant intertium for the same days on which trials may be granted (ch. 90, ll. 27-9;

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1 This was a point of agreement, for example, among the participants at the 1987 colloquium on intertium. J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', ZPE 70 (1987), p. 176. See also D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 75.

2 W. Simshäuser, 'La juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), pp. 631-32; A. Rodger, 'The Lex Irnitana and Procedure in the Civil Courts', JRS 81 (1991), p. 78.

ch. 92, ll. 27-39), and this at least suggests a close relationship between intertium and trial. Chapter 92 speaks even more plainly on the relationship: intertium may not be announced for certain days unless the parties and judge wish the suit to be heard on those days (tum de ea re agi volent, ch. 92, ll. 46-49). If announcing intertium amounts to initiating trial, then intertium and trial seem to be much the same thing.

My aim in the discussion below is not to disprove the association between intertium and trial, but to refine it. That intertium has something to do with initiating a trial is clear enough, but that granting intertium and granting a trial is the same—or that a trial necessarily follows the granting of intertium—is not so clear. I attempt to show that intertium is concerned primarily with the close of the phase in iure, and not with the trial phase. As the in iure phase would often culminate in the granting of a trial, it is not surprising that the lex Irnitana in places should suggest an association between intertium and trial. But to conclude that intertium must relate to the trial itself passes over the fact that, under our sources, the granting and announcing of intertium may take place before it is determined that a suit will go to trial.

This chapter presents the following arguments: (1) The magistrate's duty to grant intertium under chapter 90 of the lex Irnitana is drawn in such a way to show that the law is seeking to ensure, not simply an efficient bridge to the trial phase, but the magistrate's diligence in completing the proceedings in iure. (2) In setting out the rules for granting intertium, the statute is tentative in the way it describes the status of the parties and the judge, confirming that chapter 90 speaks from before the proceedings in iure are completed, before it is certain the parties will engage and the judge be appointed. (3) As brief as our information is, the lex Irnitana reveals enough about the publishing and announcing of intertium to show that these two additional steps are in some cases anticipating the resumption of the hearing in iure. The thrust of this chapter is that the rules for intertium require the magistrate to divide the first

phase of trial for the benefit of parties who cannot complete those proceedings in one hearing. When the proceedings can be completed in one hearing and the parties have a suitable judge, the trial may take place on a day on which the parties and judge agree.

A Proceeding

Much about intertium is disputed, but certain aspects are clear enough at the outset. First, intertium refers to an event in some way. Chapter 90 states that the duumvir gives intertium 'in eos dies' (l. 28) and 'in aliquem diem' (l. 34), and the use of in with the accusative tells us, at the very least, that something will take place on those days.[3] Second, the event seems to be a proceeding of some sort. The judge and parties are permitted to agree on a day for intertium, even if that day is given over to games, a distribution of meat, assemblies, or the harvest or vintage.[4] This suggests that the participants will meet on the agreed day. Admittedly, this provision might have been added for no other reason than to allow the participants to control the time for intertium. Johnston, for example, argues that this language allowed the participants to choose a time for adjournment over the magistrate's choice.[5] But the simplest explanation is that the statute here

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3 It refers to an event rather than, for example, a person. Without the benefit of the lex Irnitana Crook deduced that intertium in the Pompeian tablets might bear some relation to intertiare, a late word meaning 'to place in the hands of a third person'. J. Crook, 'Working Notes on Some of the New Pompeian Tablets', ZPE 29 (1978), pp. 231-32. See J. F. Niermeyer, Mediae Latinitatis Lexicon Minus (Leiden, 1976), p. 552, s.v. 'intertiare'.

4 See below note 32.

5 Johnston, above note 1, p. 76.

sought to allow the participants, if they wished, to forgo any conflict with certain public events and agree to appear together at some time.[6]

Duty to Grant intertium

If intertium seems to relate to a proceeding of some sort, and if certain provisions of the lex Irnitana suggest that intertium is associated with the apud iudicem phase, then ostensibly intertium must relate to the iudicium. The principal difficulty is that this view is hard to reconcile with the magistrate's duty to grant intertium. Chapter 90 describes in detail how, and to some extent when, the magistrate is required to grant intertium. The duty described there is drawn in such a way to suggest that a trial is not yet in prospect at the time chapter 90 speaks. I suggest that this duty is better understood as a device to ensure the magistrate's diligence in completing the in iure phase, in cases where that phase cannot be completed in one hearing.

a) Two duties

In discussing the magistrate's duty to grant intertium, there is the immediate problem that chapter 90, for all it tells us about intertium, is evasive about the circumstances under which a magistrate is required to grant it. Most of the text is devoted to describing the magistrate's duty to grant intertium for certain days, and tells us next to nothing about what provokes intertium dare in the first place. Thus the opening of the chapter states that so long as a day is proper for court business, the magistrate shall intertium dare for that day (ll. 27-29). Oddly, the text makes it appear that the duty is independent of the

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6 A proceeding of some kind is perhaps suggested also by the fact that the magistrate grants intertium 'inter' the litigants, never simply 'to' or 'for' them. Rodger incorporates this into his suggestion that, in granting intertium, the magistrate is granting a iudicium 'between the parties'. Rodger (1991), above note 2, pp. 75, 80. Cf. lex Irni. ch. K, ll. 38-39, quos inter it iudicium erit.

particular circumstances of a case. There is no suggestion, for example, that intertium is reserved for cases in which a formula is granted.[7] On the contrary, the text says plainly that, for those days on which it is lawful and appropriate for iudicia to take place, 'in eos dies omnes intertium dato' (ll. 28-29). As Wolf remarks, 'the only requirement for the datio is that the day requested should be one of those permitted by the law.'[8] The difficulty in accepting the language at face value is that a direction to grant intertium 'for every day' could not be taken literally under any theory of intertium. The law could not assume that opportunities to give intertium would occur regularly. It was perhaps for this reason that certain other members of the 1987 colloquium disagreed with Wolf's observation, arguing that chapter 90 'is about dates and dates alone', and that other requirements to granting intertium would not be mentioned, being irrelevant to the chapter's immediate purpose.[9]

While it is certainly correct that chapter 90 does not set out any conditions for granting intertium, and generally leaves us to speculate about when and under what circumstances a magistrate was required to do it, it does not follow that chapter 90 is concerned only with fixing the proper dates for intertium. The magistrate's duty to grant intertium, properly speaking, comprises two

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7 This is the usual (unstated) assumption. Rodger, for example, in explaining the severity of the fine for failure to grant intertium, says 'The failure to grant an action in an appropriate case would strike at the very heart of the legal procedure . . . .' Rodger (1991), above note 2, p. 80 (emphasis added).

8 Intertiumjagd, p. 177 (Wolf). He nevertheless concludes that intertium was the trial date before the judge. Id., p. 174. The broad language of this chapter is often noted. Crook and Simshäuser, for example, suggest that, because chapter 90 used such general phrasing, intertium must have been relevant to every trial. Intertiumjagd, p. 173 (Crook); Simshäuser (1989), above note 2, p. 629.

9 Intertiumjagd, p. 177 (Crawford, Crook).

separate duties, and the duty to grant intertium for certain days is only one of these. The second duty extends the reach of the chapter beyond the matter of dates. At lines 37-40, the chapter imposes a fine of 1,000 sesterces for each day on which the magistrate ought to give intertium but does not. Specifically, a magistrate is fined for each day 'quibus', rather than 'in quos', he ought to give intertium but does not (l. 38). The statute is therefore alluding to an obligation on the magistrate's part to give intertium on certain days, over and above an obligation to give intertium for certain days, as above.[10]

This provision explains to some extent the broad and unconditional language that precedes it. The conditions that would give rise to intertium dare remain unexpressed, but we know at least that, on a certain day, the magistrate was required to grant intertium, and he will have breached his duty if he grants intertium either on the wrong day, or for the wrong day. The fine provision therefore tells us plainly that the law is concerned to ensure that intertium be granted, not simply that it be granted for certain days.[11]

b) Averting delay

The knowledge that the magistrate must grant intertium on a certain day, considered together with the daily increasing fine, reveals a great deal about intertium, because whatever the duty to grant intertium denotes, breach of

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10 The 'quibus' cannot be due to carelessness in drafting, as the fine provision would make no sense if 'in quos' were substituted. In a given suit, the provision would either be punishing the magistrate for the one day for which he ought to have given intertium but did not, in which event the daily cumulation is pointless, or punishing the magistrate for the innumerable other days for which he might have given intertium but did not, in which event the fine cannot be calculated.

11 The words in singulos dies quibus give the clearest indication that intertium had to be granted on a certain day, but there is other language that points more generally to a duty to grant intertium, i.e., dies per quos intertium dari debebit (ch. 90, ll. 30-31); qui debuerit dare intertium (ch. 90, l. 37).

that duty must amenable to punishment under the terms of the fine provision. It is worth mentioning in passing that one of the virtues of Johnston's explanation of intertium over other explanations is that it provides an offence that is appropriately punished by a fine that accumulates daily in this way. A magistrate's failure to grant (as Johnston has it) an adjournment at the litigants' and judge's request calls for an increasing fine: 'the prejudice caused to [a party's] case in this way could be exacerbated day by day, so it is not inappropriate that the penal liability of the magistrate should increase day by day.'[12] Johnston's explanation correctly takes account of the fact that, in punishing the magistrate for each day he fails to give intertium, chapter 90 is concerned with some disadvantage brought on by delay.

If the lex Irnitana is seeking to prevent delay in granting intertium, it makes little sense to conclude that intertium dare denotes the granting of a trial as, for example, Rodger argues.[13] It is hard to imagine how chapter 90 could treat a delay in granting a trial as an 'administrative' matter subject to a fine. The grant or denial of a formula is a matter to which the magistrate applies his judgement and discretion in accordance with the provincial governor's album.[14] If chapter 90 required a magistrate to grant a trial on a certain day, it would be imposing an obligation that a magistrate might obey or ignore as he liked. That is, a magistrate who, from some improper motive, did not wish to grant intertium on a certain day might simply deny a formula. Similarly, a

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12 Johnston, above note 1, p. 76. Cf. F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), p. 187 n.151, to whom the increasing fine is simply a guarantee that justice be administered quickly.

13 Rodger (1991), above note 2, p. 77.

14 Chapter 85, ll. 37-40: . . . ad ea interdicta edicta easque formulas sponsiones stipulationes satis acceptiones exceptiones praescriptiones in eo municipio ius dicatur iudiciaque dentur fiant exerceanturue . . . .

magistrate who had denied a formula out of the honest conviction that a case ought not go to trial might be improperly held to account by a dissatisfied plaintiff for failure to grant intertium.[15] In either case, any delay in granting a trial becomes a matter for an appeal of sorts, because the imposition of a fine for failure to grant intertium, as well as a claim for the fine as part of the pecunia communis, are issues for review before the local ordo under chapters 66 and 69, respectively. Chapter 90 cannot conceivably be assuring a plaintiff the opportunity for an appeal from the denial of a iudicium.[16]

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15 A clause at the opening of the chapter might suggest to some that the magistrate's duty to grant intertium applies only in cases where a trial is granted. There, the text states that the magistrate must grant intertium 'per quos dies ex hac lege ibi iudicia fieri licebit oportebit' (ll. 27-28). This condition, however, does not limit intertium to lawsuits, but rather to days, that are lawful and appropriate. Also, ex hac lege makes it clear that the chapter is addressing iudicia permitted under the statute, not iudicia permitted by virtue of the magistrate's authority. See Rodger (1991), above note 2, p. 78, who observes that ex hac lege directs the reader to chapter 92.

16 A comparison with the edict de albo corrupto is useful here. The edict punished one who id, quod iuris dicundi causa in albo propositum erit, dolo malo corruperit, and gave an actio popularis against him. Lenel, EP, p. 57; D.2.1.7.pr. (Ulpian, Edict, book 3). Naturally a magistrate himself, or someone at his direction, might run the risk of technically 'spoiling the album' simply in carrying out his duties, if it were not for the addition of the words dolo malo. Ulpian explains that dolo malo is included because, among other reasons, a person might be acting on the orders of the praetor. D.h.t.7.4. It is therefore significant that chapter 90 of the lex Irnitana, while it imposes a fine on a magistrate who fails dolo malo to publish intertium, omits the requirement of malice for the offence of failing to give intertium on a certain day. Surely if intertium dare denoted the granting of a trial—a matter ordinarily within the magistrate's discretion—the offence of failing to grant intertium would require malice as well. (But cf. G. Zanon, 'De intertium dando', SDHI 58 (1992), p. 313, who understands dolo malo in chapter 90 to refer both to the publication and to the grant of intertium.)

It is only a little improvement to argue that intertium dare refers to the granting of a trial date, rather than the granting of the trial itself.[17] Under this argument a magistrate will be sanctioned for any delay in setting the trial date. Here, the fine is not unworkable, but simply inappropriate to the offence. To assess against a magistrate a fine of 1,000 sesterces for each day he delays in granting a trial date is to impose a sanction far out of proportion to the problem the statute would seek to remedy. As I discuss in greater detail below, 1,000 sesterces is, roughly speaking, the full value of a lawsuit that may brought in Irni.[18] It can be no accident that the fine for failure to grant intertium is fixed in this amount. In assessing a fine of precisely 1,000 sesterces for each day of delay, the statute is revealing that the delay of a single day in granting intertium may cause an entire suit, up to its full value, to be lost.[19] A plaintiff is hardly likely to suffer the loss of his entire suit simply because the magistrate delays by one day in declaring what the trial date shall be. After litis contestatio, a plaintiff in Irni will have eighteen months in which to pursue his suit.[20] It seems unlikely that mors litis would pose such a danger as to justify a penalty that increases for each single day of delay.[21]

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17 See Intertiumjagd, above note 1, p. 174 (Wolf); W. Simshäuser, 'Stadtrömisches Verfahrenrecht im Spiegel der lex Irnitana', ZSS (rom. Abt.) 109 (1992), p. 196; A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', SDHI 49 (1983), pp. 41-43.

18 See lex Irni., ch. 19, ll. 13-16; ch. 84, ll. 1-4, 25-28; ch. 89, ll. 16-21.

19 See below Chapter Five, notes 19 to 28 and accompanying text.

20 Under the lex Irnitana, trials at Irni are treated as iudicia legitima. See ch. 91, tab. XA, l. 53 - tab. XB, l. 4, ll. 17-19, and the discussion above at Chapter Two, notes 3 to 14 and accompanying text.

21 Cf. Zanon, above note 16, p. 320.

Before litis contestatio, however, the consequences of delay are great, and on the assumption that litis contestatio has not yet occurred at the time chapter 90 speaks, the purpose of the daily fine becomes clearer. At D.2.12 Ulpian describes some of the ways in which delay in pursuing a suit might cause the action to be lost, and how an oratio of Marcus Aurelius sought to avoid this result in certain cases by bringing forward the time for litis contestatio. Delays that might occur before litis contestatio include those caused by the death of a party, the loss of the subject matter of the action, and loss of the action through limitations.[22] To avoid such a loss a party might be compelled, if necessary, to appear before the praetor even at the time of the harvest or vintage, and further, at any other time he might be compelled to appear early for litis contestatio if the matter were sufficiently urgent. It is difficult to know how much of this oratio supplemented the remedies existing at the time of the lex Irnitana; the important point is simply that the problem of losing a suit through delay was a real one, and that a sanction of one suit's value for failure to grant intertium looks very much like an attempt to meet the problem.

Limitations provides the simplest example. The praetor ordinarily observed a limitations period of one year for actions founded on his own jurisdiction.[23] Not every praetorian action was limited in this way,[24] but in those actions in

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22 D.2.12.1.2 (Ulpian, All Seats of Judgment, book 4); D.h.t.3.pr. (Ulpian, Edict, book 2). See generally Kaser, RZ, p. 146.

23 G.4.110: Quo loco admonendi sumus eas quidem actiones, quae ex lege senatusue consultis proficiscuntur, perpetuo solere praetorem accommodare, eas vero, quae ex propria ipsius iurisdictione pendent, plerumque intra annum dare. Justinian mentions the same distinction, borrowing heavily from Gaius's words. J. Inst. 4.12.

24 It is not known exactly what aspect of a given praetorian action would cause it to be classified as either perpetual or temporary. In the first century Cassius suggested that reipersecutory actions ought to be perpetual

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which the one-year limit did hold, a plaintiff might easily be pressed for time to bring his case to litis contestatio.[25] Accordingly, any delay on the magistrate's part in ensuring that the suit passed promptly to litis contestatio might cause the entire suit to fail—even the delay of a single day. If chapter 90, therefore, in requiring a magistrate to grant intertium, were requiring him to bring a suit to litis contestatio, a fine of 1,000 sesterces is a sensible and appropriate fine under the circumstances. It is precisely the right amount to ensure the magistrate's diligence in concluding the phase in iure.[26]

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and penal actions temporary. See D.44.7.35.pr. (Paul, Praetorian Edict, book 1); F. Schulz, Classical Roman Law (Oxford, 1951), p. 46-47. Buckland discusses at length the problems with this distinction. Buckland, Textbook, pp. 689-90. Under another theory, a praetorian action 'contra ius civile' would be temporary (according to Paul, D.44.7.35.pr.), and one which 'imitatur ius legitimum' would be permanent (according to Gaius, 4.111). This distinction is not free from problems either. See F. de Zulueta, The Institutes of Gaius (Oxford, 1958), vol. 2, p. 279. That Gaius and Cassius differed on the question may simply reflect the periods in which they wrote. M. Amelotti, '"Actiones perpetuae" e "actiones temporales" nel processo formulare', SDHI 22 (1956), p. 191.

25 The limitations period for a temporary action in the classical law was reckoned to litis contestatio; after that point the action was 'perpetuated'. D.12.2.9.3 (Ulpian, Edict, book 22); D. 27.7.8.1 (Paul, Replies, book 9). See also Buckland, Textbook, pp. 562-63. Admittedly, it is strange, as Thomas points out, that J. Inst. 4.12 should refer to the praetor's one-year term of office, as if this fact in some way explained the one-year limitations period. If litis contestatio perpetuated the action, the praetor's term ought to be beside the point. J. A. C. Thomas, The Institutes of Justinian (Amsterdam, 1975), p. 313.

26 Lamberti mentions prescription as a danger which the sanction may have been designed to avoid, Lamberti (1993), above note 12, p. 187 n.151, but does not question whether a delay in setting the trial date—as opposed to bringing the matter to litis contestatio—would in fact pose any danger. With respect to the calculation of the fine, Lamberti sees the daily cumulation as a guarantee of swift justice, rather than a device to avoid a plaintiff's entire loss of a case. Id. On a magistrate's vulnerability to corruption, see Rodger (1991), above note 2, p. 84.

A short illustration will be useful. A plaintiff who believes he has suffered an act of fraud by another but delays in bringing an action faces the one-year limit of the actio doli.[27] If the time is nearing one year from when the suit might first have been brought, he must see to it that his suit reaches litis contestatio before the time limit passes. Unfortunately, the local magistrate has an opportunity to make trouble here, because it is within his power to delay litis contestatio and frustrate the plaintiff's suit. If the magistrate does delay litis contestatio, the plaintiff stands to lose up to 1,000 sesterces, a claim of that amount being the largest that may be tried locally without the plaintiff's express agreement. The threat to the plaintiff is quite real, as the magistrate may have a personal interest (up to the full 1,000 sesterces) in the outcome of the suit, or may even have been offered up to 1,000 sesterces by the plaintiff's opponent for the very purpose of frustrating the suit. In either case, however, the magistrate knows that if he delays by even a single day in entertaining the parties for litis contestatio, the 1,000 sesterces he stands to gain by his delay will be lost in the 1,000-sesterces fine, and for his part the plaintiff, for his lost actio doli, will have the opportunity to claim the 1,000 sesterces in an actio popularis under chapter 69. The magistrate will therefore be discouraged from delaying.[28]

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27 Lenel, EP, p. 114; D.4.3.1.1 (Ulpian, Edict, book 11).

28 The threat of a conflict of interest was a genuine one. A local magistrate might have held property widely in the community, and might indeed have owed his magistracy to his wealth. See L. Curchin, The Local Magistrates of Roman Spain (Toronto, 1990), pp. 71-84; L. Curchin, Roman Spain: Conquest and Assimilation (London, 1991), pp. 68, 82. This is apparent particularly in the extent of beneficence that was expected of a magistrate. L. Curchin, 'Personal Wealth in Roman Spain', Historia 32 (1983), pp. 235-43. Bribery was also certainly possible in this context, as Rodger (1991), above note 2, p. 84, has noted. On the declining standards in the praetorship, see J. Kelly, Roman Litigation (Oxford, 1966), pp. 85-101. On bribery in particular, see the discussion of sources in G. MacCormack, 'The

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The lex Irnitana therefore requires litis contestatio to take place within a fixed number of days. To avoid the consequences of delay, the magistrate must grant an interval of a certain length—ordinarily three days[29]—at the end of which proceedings in iure will resume and litis contestatio (if otherwise appropriate) will take place.[30] The trial commences at the conclusion of litis contestatio. This sequence of events is, in some respects, not a great departure from the sequence of events under the prevailing interpretation of intertium. The lex Irnitana in places does indeed suggest that the day for which intertium is granted will coincide with the day of trial.[31] For the most part the interpretation offered here differs only as to the placement of the interval that intertium describes.

Tentative Language

To argue that a fixed interval of time before litis contestatio will protect against delay assumes that a postponement is necessary in the first place; the same protection is accomplished if the law requires litis contestatio to take

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Liability of the Judge in the Republic and Principate', in H. Temporini and W. Haase, edd., Aufstieg und Niedergang der römischen Welt (Berlin, 1982), vol. 14, pp. 6-14, and D. Stockton, Cicero: A Political Biography (Oxford, 1971), pp. 35-36 ('. . . bribery was an ever-present factor in Roman trials.').

29 If the third day were a day on which business could not be conducted, it is usually assumed that the first available day after the third day would be used. See above Chapter Two, note 50 and accompanying text.

30 The magistrate grants intertium 'to' certain days (in eos dies, ch. 90, l. 28; in aliquem diem, id. l. 33; in eum diem, id. l. 36) just as, in chapter K, a vadimonium is granted 'to' certain days (inque eos dies, ch. K, l. 40). Several other instances in which statutes take care to ensure that a magistrate does not delay litigation are cited in A. Lintott, Judicial Reform and Land Reform in the Roman Republic (Cambridge, 1992), p. 149.

31 See above page 57.

place immediately. The need for a postponement is discussed below in this chapter and in the chapters that follow. It is useful here to introduce one of the principal items of evidence on postponement, evidence that suggests both when the postponement would fall and why it was necessary. The evidence is found at chapter 90, lines 31-37, where the law permits the parties to agree on a date to which the postponement is granted. Ordinarily, as already mentioned, intertium would not be permitted for days on which certain events took place:[32]

> Item si inter eos, inter quos ambigetur, et iudicem, qui inter eos iudicare debebit, in aliquem diem uti in tertium inter eos detur conueniet, neque is dies propter uenerationem domus Augustae festus erit feriarumue numero propter eandem causam haberi debebit, in eum diem in tertium inter eos dato.
>
> Moreover, if the persons between whom the dispute exists and the judge who will be obliged to adjudicate their dispute should agree that their three days' postponement might be granted to a certain day, and that day is not a feast day devoted to the worship of the domus Augustae nor ought to be deemed a festival day for the same reason, then he shall grant their three days' postponement to that day.

a) The time at which chapter 90 speaks

The quoted passage refers to the litigants and judge in an unusual way. The language is tentative, as if the litigants had not yet reached the status of litigants, nor the judge the status of judge. The litigants are described as 'disputants' and the judge as a 'judge-to-be'.[33] If, as usually believed, chapter

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32 The opening of chapter 90 (ll. 27-28) states generally that a duumvir is to grant intertium for days on which trials may take place. Chapter 92, ll. 30-36, describes the days on which trials may not take place, absent an agreement to the contrary.

33 The word debebit might conceivably be understood to express the future only in relation to the moment at which the statute speaks, as would be

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90 speaks from after litis contestatio, there is no reason why the statute should be so coy in the way it refers to the participants. In comparable provisions elsewhere in the statute, the language is quite direct. Chapter 92, for example, allows trials to take place on prohibited days si iudex arbiterue aut reciperatores et quorum res agetur omnes dum de ea re agi volent (ll. 36-37, 42-44).[34] With a trial in prospect, the litigants and judge are described in a straightforward way. Chapter K is similarly straightforward: res iudicari per eos dies, nisi inter omnes, quos inter it iudicium erit, et iudicem reciperatoresue eorum conveniet, ne sinunto (ll. 37-40).

The way in which the litigants and judge are described in chapter 90 betrays the point in time from which chapter 90 speaks. This is clearest in the case of the litigants. Litigants described with the word ambigere have not yet passed litis contestatio and become formal adversaries; the word shows a deliberate attempt to lessen their status as litigants. This may be apparent from the tenor of ambigere alone, though an example is useful. In the pro Caecina Cicero uses ambigere in describing Aebutius's preparations to eject

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usual in legislation in a subordinate clause. Intertiumjagd, above note 1, p. 177 (Crawford). For reasons discussed below, however, I prefer the literal translation 'will be obliged'.

34 The agreement described in the quoted language allows the magistrate to order a trial for certain days and the judge to preside on those days. Trials are therefore clearly anticipated. I should mention, however, that the agreement described in this language also allows a magistrate's intertium dare. The directness of the language therefore does not show the same sensitivity to the context that the analogous chapter 90 language shows. A likely explanation is that intertium dare was included together with trial matters in chapter 92 only as an afterthought: the quoted provision on agreement mentions recuperators alongside judges and arbiters, and was therefore probably drafted without intertium in mind.

Caecina from a disputed piece of land. The ejectment would serve as a predicate to Caecina seeking an interdict de vi armata:[35]

> Atque iste [Aebutius] ad omnis introitus qua adiri poterat non modo in eum fundum de quo erat controversia, sed etiam in illum proximum de quo nihil ambigebatur armatos homines opponit.
>
> [Aebutius], then, stationed armed men at every possible way of approach not only to the estate under dispute but even to the adjoining one about which there was no contention.

The words nihil ambigebatur were perhaps chosen here to convey 'no quarrel', appropriate words to describe the status of the dispute in advance of the granting of the interdict.[36]

To understand why chapter 90 describes the litigants in this way, it is helpful to look at other instances of ambigere in the lex Irnitana. Chapter 84 sets out the jurisdiction of the duumvirs and aediles in various matters. It excludes a large number of matters from their competence, but makes an exception if both litigants are willing to have those matters heard. It forbids

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35 Cic. Caec. 8.21 (Ciceronis Orationes, ed. A. Clark (Oxford, 1948), vol. 4). The translation is that of the Loeb Cicero, trans. H. Hodge (London, 1979), vol. 9. On the requirement of ejectment, see B. Frier, The Rise of the Roman Jurists (Princeton, 1985), pp. 171-83.

36 At this stage in the dispute, for example, Caecina might have forgone seeking an interdict and pursued an actio iniuriarum. Frier, above note 35, p. 34.

Cicero provides another example of this use of ambigere. In the prosecution of Verres he cites portions of Verres' edict, which begin si de hereditate ambigitur or si de hereditate ambigetur. Cic. II Verr. 1.45.116-117. A similar (though not perfectly analogous) use of ambigere appears in Ulpian, where the gentle 'disagree' is used to describe a question arising before the magistrate regarding the proper action to be granted: . . . quotiens enim de nomine contractus alicuius ambigeretur, conveniret tamen aliquam actionem dari, dandam aestimatoriam praescriptis verbis actionem . . . . D.19.3.1.pr. (Ulpian, Edict, book 32).

the magistrates, for example, from hearing certain actiones famosae in suits worth 1,000 sesterces or less, unless the litigants agree.[37] The proviso allowing matters to be heard by agreement is as follows:

> . . . de is rebus etiam, si uterque inter quos ambigetur uolet . . . . (ll. 17-18)
>
> . . . on these matters as well, if both of those between whom the dispute exists are willing . . . .

The use of ambigere here is a product of cautious drafting. So early in the litigation, when the competency of the magistrate to allow a trial has not yet been settled, the litigants are far from being legally engaged and are appropriately described as disputants.[38] A similar instance of ambigere occurs in chapter 86, which addresses the selection of judges for inclusion in the album iudicum. The duumvir is required to grant judges from among those listed on the album, but is enjoined from granting any other judge

> . . . inuito alterutro aut, si plures erunt, aliquo eorum inter quos quid ambigetur . . . . (ll. 27-8)
>
> . . . if either of those between whom a dispute exists is unwilling, or any of those, if there are more than two . . . .

Again, the statute, out of caution, regards the litigants as disputants even up to the granting of the judge.

There is little point in overstating the value of these instances of ambigere. If the lex Irnitana were assembled even in part from other sources, it would be wrong to insist on perfect consistency in the language, to conclude, for

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37 Lex Irni., ch. 84, ll. 3-18; A. Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the Lex Irnitana', ZPE 84 (1990), p. 150.

38 There is a similar usage at Frag. Atest., l. 15 (FIRA I, p. 177).

example, that a perfect chronology of events could be assembled from the relative tentativeness of certain references.[39] What these examples do show, however, is a degree of care in drafting in each instance. Ambigere describes the parties at the time they agree on the competency of the magistrate, engage in the selection of a judge, and agree on a date for intertium. The use of ambigere shows a hesitancy to attribute to the parties greater status than they have at the time they are so described. If, in two instances, the statute is hesitant to describe as formal 'litigants' persons who are only embarking on a lawsuit, then it is a fair deduction that chapter 90, in describing the parties as [qui] inter quos ambigetur, is hesitant for the same reason. At the very least, litis contestatio has not been reached at the time chapter 90 speaks.

The tentative language describing the litigants is paired with similarly tentative language describing the judge. If the two descriptions were not found together, it might be possible to ignore the apparent redundancy of iudex qui inter eos iudicare debebit, to dismiss the relative clause as an unnecessary flourish.[40] But the fact that litis contestatio has not been reached at the time chapter 90 speaks explains the second description as well as the first. There is no reason why the statute should describe an appointed judge as

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39 I am grateful to Michael Crawford for his guidance on this point. On the question whether the lex Irnitana was assembled from other sources, see especially H. Galsterer, 'La loi municipale des Romains: chimère ou réalité?', RHDFE 65 (1987), p. 203; d'Ors (1983), above note 17, pp. 23-27.

40 The debebit, if understood in the present tense, could conceivably express the obligation to serve as judge on the part of a person whose name appears on the album iudicum: Qui ita iudices lecti discriptiue erunt, ii eo anno iudices rerum priuatarum in eo municipio hac lege sunto . . . . (ch. 86, ll. 17-19); see Intertiumjagd, above note 1, p. 177. But this does nothing to explain the resulting redundancy of the language: of all references to the judge in the lex Irnitana, why must an appointed judge's obligation crop up here?

one who 'will be obliged to judge'. The strangeness of the description is all the more plain when compared with the provisions of chapters K and 92 quoted above, where an agreement for the date of trial requires the assent, simply, of the 'iudex reciperatorue' or 'iudex arbiterue'.[41] The description in chapter 90 is easily explained: the judge is one who will be, but has not yet been, appointed.[42]

b) The postponed appointment of the judge

The phrase iudex qui inter eos iudicare debebit is particularly useful in construing chapter 90, not only because it reveals the time at which the chapter speaks, but also because it suggests why a postponement to the third day might be desirable in the first place. The important point here is that the phrase qui iudicare debebit is added to iudex for a purpose. In making a special allowance for judges 'who will be obliged to judge', the text suggests that other judges will not enjoy that allowance. The context shows clearly why other judges must be excluded.

The provision on agreement allows the participants to dispense with a further hearing in iure and proceed directly to trial, after an interval of the length the participants choose.[43] To proceed to trial without the intervention

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41 Ch. K, l. 39; ch. 92, ll. 47-48. These comparisons also suggest that chapter 90 does not cautiously add the clause to make clear that it is the parties' own judge whose assent is required. Chapter 92 has no such language, and chapter K makes do with eorum.

42 I therefore disagree with the argument that, because the judge is mentioned, he must have been appointed at the time from which the text speaks. Cf. Intertiumjagd, above note 1, p. 176.

43 The days for which the participants may agree are greater in number than the days available to them without agreement, and include days on which the magistrate could not preside (i.e., days during the harvest or vintage, see ch. K, ll. 34-37, unless the matter were urgent, see above note 22 and

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of another hearing before the magistrate, the statute requires the consent of the judge, but because chapter 90 speaks from the in iure stage, the as-yet unappointed judge must be one whose appointment is assured; hence the qui iudicare debebit. Where such a judge exists, litis contestatio may take place without delay and a trial will follow after an interval of the agreed length. Otherwise, as described above, a further hearing in iure will follow an interval of three days.

If a second hearing in iure can be avoided only when a judge's appointment is certain, it is then a fair deduction that a second hearing in iure will concern itself in part with the question of appointment, and that a postponement to the third day exists, in part, for the sake of appointment. We have some confirmation of this in two of the other sources for intertium, Pompeian tablets 9 and 24.[44] Both tablets state that a party 'undertakes an intertium with' (intertium sumpsit cum) another party regarding matters in which a third person 'would be appointed as judge (iudex esse diceretur) between them'. The diceretur may be puzzling: to state that a judge 'would be appointed' is unusual, and the uncertainty expressed in the word has been a matter of some discussion. Some members of the 1987 colloquium believed it was inappropriate to state that an appointed judge was only alleged to have been

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accompanying text). This confirms that the agreement provision is indeed speaking of trial dates, and not dates for appearance before the magistrate.

44 The tablets are quoted above in Chapter Two, notes 16 and 17, and accompanying text.

appointed, and it was suggested by Crook that diceretur perhaps shows excessive caution in drafting.[45]

Part of the problem here is in deciphering sumere: the phrase intertium sumere might express the same act as intertium dare, but from the parties' point of view.[46] Or, it might refer to an agreement on the date for intertium, as in lines 31-37 of chapter 90. In either case, however, the uncertainty expressed in diceretur is appropriate under the interpretation of chapter 90 presented here. If intertium sumere is equivalent to intertium dare, then the tablet speaks from after the in iure stage, and the judge described with diceretur is one who awaits his appointment at a second hearing in iure.[47] If intertium sumere is an agreement as described in chapter 90, then the tablet

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45 Intertiumjagd, above note 1, p. 182; Crook, above note 3, p. 232. Crook mentions an unlikely circumstance in which iudicis datio could be rendered invalid: a litigant dying before a judge is appointed, as in D.49.8.2.1 (Paul, Replies, book 3).

46 Intertiumjagd, above note 1, p. 182. Wolf suggests that the sumere cum of the tablets showed that both parties obtained intertium, and that this corresponded to the dare inter eos of chapter 90. He cites several instances in the Digest where sumere is used in this way, though in each instance a partition action was under discussion. Id. See also Lamberti (1993), above note 12, p. 189.

47 From a purely practical point of view, one might expect this sort of 'suspensive selection' in any suit in which a judge is selected from the album iudicum. Admittedly, a person whose name appeared on the album was obliged to serve (Intertiumjagd, above note 1, p. 177). Nevertheless, a listed person, suitable at the time he was placed on the list, might not be suitable at the time he is selected. Death, illness, or capitis deminutio might have intervened after the compilation of the album. For this reason some have suggested that a second proceeding before the magistrate was desirable; a selected judge might offer an excuse, and another judge might be substituted. See, e.g., L. Wenger, Praetor und Formel (Sitzungsberichte der Bayerischen Akademie der Wissenschaft, 3 abh.) (München, 1926), pp. 64-66; H. F. Jolowicz & B. Nicholas, Historical Introduction to the Study of Roman Law, 3rd ed. (Cambridge, 1972), p. 201 n.3.

speaks earlier, from the in iure stage, and the judge described is one who is not yet appointed but, in the language of chapter 90, qui iudicare debebit.[48]

As an aside, perhaps the better explanation of the tablet is that intertium sumere corresponds to intertium dare.[49] As I argued in the previous chapter,[50] it seems unlikely the tablets could be describing an agreement on intertium, as outlined in lines 31-37 of chapter 90. The tablets do not mention the assent of the judge as chapter 90 requires. Also, the mention of a trial to begin perendino die appears to be a plain reference to an intertium granted by the magistrate 'for the day after tomorrow', the day to which postponements are granted in default of an agreement. The judge cited in the tablet would therefore be one who awaits his appointment at a second hearing before the magistrate.

Publishing and Announcing intertium

The task of determining what intertium means is essentially that of explaining each of the separate procedural steps in the process. In the various sources intertium is 'granted', 'received', 'published', and 'announced'. To this point I have taken up the first two of these, arguing that when intertium is granted and received, parties who await the appointment of a judge undertake to return to the magistrate for litis contestatio. The latter two procedural

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48 It is certainly possible, as Zanon has suggested, that in the Pompeian tablets we have the intertium denuntiatio that the lex Irnitana speaks of. Zanon, above note 16, p. 320 n.49. Yet under the view of intertium Zanon adopts (a bridge to the trial phase), the uncertainty in diceretur is not appropriate.

49 Cf. Rodger (1991), above note 2, pp. 81-82; F. de Martino, 'Litem suam facere', BIDR (3rd Series) 30 (1988), p. 18.

50 Above, Chapter Three, notes 28 to 29 and accompanying text.

steps, the publishing and announcing of intertium, are generally speaking the means by which proceedings are resumed.

a) Publication

The lex Irnitana requires the magistrate not only to grant intertium, but to publish it as well:[51]

> Idque proscriptum in eo loco, in quo ius dicet, maiore parte cuiusque diei per omnes dies, per quos intertium dari debebit, habeto ita ut de plano recte legi possit.
>
> And he shall have it published in the place where he administers justice for the better part of each day throughout all days on which intertium is supposed to be granted, so that it can be read properly from ground level.

Publication is apparently a serious matter, as the magistrate will be fined 1,000 sesterces for each day he fails, sciens dolo malo, to publish as the law requires.[52] But what exactly is it that the magistrate must publish? Broadly speaking the information published either will relate to individual lawsuits, or

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51 Ch. 90, ll. 29-31. The quoted portion follows d'Ors's resolution p(ossit) rather than González's p(ossint). Cf. d'Ors (1988), p. 77, with González (1986), p. 178. This portion of chapter 90 is preserved also in the Italica fragment, though the fragment gives the same unresolved abbreviation. See J. González Fernandez, 'Italica, municipium iuris Latini', in Mélanges de la Casa de Velazquez 20 (Paris, 1984), pp. 19-20. To accept the reading idque at the beginning of the sentence seems to suggest possit over possint, though González may have had in mind the publication of individual grants of intertium.

52 Ch. 90, ll. 37-40. González's text gives quiue et proscriptum ex hac lege non habuerit, and possibly the et is better read as it, as in d'Ors (1988), p. 77. But compare Intertiumjagd, p. 178, where Birks argues that et is appropriate if the statute is distinguishing the failure to grant from the failure to grant and publish.

will provide guidance for lawsuits generally.[53] The explanation most widely adopted is that the magistrate must make known that he granted intertium for a certain day in a particular lawsuit.[54]

The view that the magistrate must publish notices for individual cases is hard to reconcile with the language of chapter 90. In requiring the magistrate to publish per omnes dies, per quos intertium dari debebit, chapter 90 anticipates that certain information will be displayed over a certain span of days. If the statute is requiring publication in individual cases, then it is giving no guidance whatsoever on when, during this span of days, publication begins and ends.[55] It seems unlikely that the statute would take the trouble to state specifically, for example, that notice had to appear for the greater part of each day, and that it had to be legible from the ground, and yet omit to say on what day or days notice in an individual case was required. The omission is all the more unlikely when one considers that a fine is assessed for each day the magistrate fails to publish. If the statute were assessing a fine for the failure to display an individual notice on an undetermined day, it would be imposing a sanction for an offence it has hardly attempted to define.

From a practical standpoint also, it is hard to see why the law should bother to require publication in individual cases. The disposition in an individual case (no matter what intertium dare is taken to mean) should not

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53 Intertiumjagd, p. 177.

54 See Simshäuser (1989), above note 2, p. 632; Simshäuser (1992), above note 17, p. 196; d'Ors (1983), above note 17, p. 40; T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), p. 26.

55 See Zanon, above note 16, p. 320; Johnston, above note 1, p. 71: '. . . there can be [no] need to display such an agreement throughout all the days on which cases are heard.'

be of great interest to the citizens of the municipium generally,[56] at least not of such great interest that a magistrate should be fined severely for failing to inform every citizen. This is particularly true if information about the granting of intertium is communicated through intertium denuntiare, to which chapter 91 and 92 refer briefly.[57] The text does not say what exactly is communicated by this denuntiatio, but given that the announcement is made both to one's adversary and to the judge or arbiter, (ch. 91, tab. XA, ll. 48-49; ch. 92, ll. 46-47), no person who ought to know of the intertium can at least fail to make inquiries.

The best evidence, I believe, that the duty to publish is not concerned with individual cases is in the way chapter 90 describes the failure to grant intertium on the one hand, and the failure to publish on the other. At lines 37-39 the text makes it clear that a magistrate will have breached the law simply by failing to publish, but that his failure to grant intertium will constitute a breach only when he was obliged to grant intertium in the first place. The language cannot be due to careless drafting, as the text makes this distinction not once but twice: qui debuerit dare intertium neque dederit, quiue it proscriptum ex hac lege non habuerit (ll. 37-38); in singulos dies, quibus debuerit proscriptumue non habuerit (ll. 38-39). The implication here is that, while the duty to grant intertium is contingent on some event (the initiation of a lawsuit, at the very least), the duty to publish is absolute, not dependent on any particular matter before the magistrate.[58] This is entirely consistent with the language above, requiring publication over a span of days.[59]

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56 Johnston, above note 1, p. 71; Zanon, above note 16, p. 320.

57 Rodger (1991), above note 2, p. 83.

58 This interpretation turns somewhat on the reading of line 37: quiue it proscriptum is sometimes read quiue et proscriptum, see González (1986), p. 178. The et may be taken to indicate that a failure to publish will never

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What then is the magistrate required to publish? Even putting aside individual notices, the possibilities are not reduced very much. To date the following have been suggested: (1) a calendar of permissible days, (2) the fact that the magistrate is required to grant intertium for certain days, and (3) the date for which the magistrate is required, on the date of publication, to grant intertium.[60] The last of these has been suggested by Rodger, and seems to be the most likely of the three.

It cannot have been a simple matter for the citizens of Irni to determine which days were permitted for intertium and which were forbidden.[61] Chapters 90 and 92 describe three categories of days requiring public observance, categories which precluded intertium, respectively, for certain days generally, for certain days in the absence of an agreement, and for certain days without exception.[62] If no other guidance were available, a litigant would have needed a good deal of skill in reading the convoluted provisions of the statute to determine which days were permitted. Those provisions might

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occur alone, but only when intertium has been granted: 'he who fails to grant intertium when he should, and he who fails to publish also . . . .' This would tend to support the argument that publication was concerned with individual cases. See Intertiumjagd, p. 178 (Birks), and note 52, above. The et might also be taken to indicate, as Honoré suggests, that publication was being regulated as a separate matter: '. . . and also he who fails to publish . . . .' This would tend to support the argument that a calendar of some sort must be published. Intertiumjagd, p. 178 (Honoré).

59 Cf. Zanon, above note 16, pp. 320-21, who believes chapter 90 punishes a magistrate for 'indebito retardo' in either the datio or proscriptio.

60 A calendar: Lamberti (1993), above note 12, p. 187; Zanon, above note 16, p. 319-20. The fact of the obligation to grant: González (1986), p. 197 (translation of Crawford). The date, on day of publication: Rodger (1991), above note 2, p. 83.

61 Rodger (1991), above note 2, p. 83.

62 Ch. 90, ll. 34-37; ch. 92, ll. 28-39.

be particularly mysterious to the members of a newly chartered municipium, persons who might not be perfectly familiar with the Roman calendar.

The difficulty in determining which days were permitted for intertium would be met if, as Rodger suggests, the magistrate were required each day to publish for which day he would grant intertium. The lex Irnitana clearly takes special care to ensure that intertium be granted, and whether it does so out of wariness for a magistrate's corruption[63] or just his neglect, the protections it offers are diminished if a litigant does not know, on a particular day, for what day intertium would be given. Regardless of what intertium is taken to mean, a magistrate who can escape being solicited for intertium has effectively frustrated the statute's assurance that intertium will be granted. Neither a calendar of permissible days (which would not inform a litigant about the particular day available to him at a given time) nor publication of the fact of the magistrate's obligation to grant intertium (which in any event could be known from the lex Irnitana itself[64]) would have answered this need.

This is not to say that Rodger's explanation is correct simply because it is the most useful in the procedural scheme. Though he does not mention the fact, the words of the publication requirement in chapter 90 squarely support his explanation. A magistrate is not required to publish intertium every day, but only per omnes dies per quos dies intertium dari debebit (ch. 90, ll. 30-31). As was mentioned above,[65] these words refer to the days on which (rather than the days for which) intertium may be given. The publication requirement is therefore in effect only on the days on which the public

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63 Rodger (1991), above note 2, p. 84.

64 The lex Irnitana was to be displayed in loco celeberrimo. Ch. 95, l. 9.

65 Above, note 11.

calendar permits the magistrate to preside and utter a do. This suggests that the information to be published pertains to and is specific to the day of publication, as there is no apparent reason why information that remains the same throughout the year—such as a calendar of days permitted for intertium—should be displayed intermittently.[66]

Although Rodger has offered the most persuasive explanation of the publication requirement to date, the virtues of his explanation are less apparent under his own theory of intertium than under the theory offered here. In keeping with the idea that intertium dare means 'grant a trial', Rodger suggests that a litigant ought to know in advance for which day the trial would be scheduled, so that he could be certain, before approaching the magistrate and requesting a trial, that he would be able to attend on that day.[67] This is certainly true, but it does not explain the urgency with which the statute treats the matter of publication. A law that punishes a magistrate for each day he fails to publish certain information is probably concerned to prevent some severe consequence created by ignorance of that information. The urgency of publication is plain if one considers the predicament of a plaintiff who faces the loss of his suit through, e.g., limitations. If the limitations period is closed at litis contestatio and if litis contestatio will not take place any sooner than the third day after intertium dare, it becomes a matter of considerable importance to a plaintiff to know when he must begin proceedings before the

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66 See Intertiumjagd, above note 1, p. 177-78, where Rodger compares other publication requirements. The governor's edict was to be displayed quotidie maiore parte cuiusque diei (ch. 85, ll. 36-37). The album iudicum was to be displayed per omnes reliquos eius anni dies maiorum partem cuiusque diei (ch. 86, tab. IXC, ll. 22-23). Surely a calendar of days permitted for intertium would remain on display every day.

67 Rodger (1991), above note 2, pp. 83-84.

magistrate. Ignorance of that date may mean that his suit, which at Irni ordinarily will be worth up to 1,000 sesterces, will be lost. To impose a 1,000-sesterces fine on the magistrate for failing to provide this essential information to the plaintiff is a practical and effective way to respond to the problem.

b) Announcement

To determine how intertium denuntiare fits into the procedural scheme is difficult, because the lex Irnitana does not describe directly how the announcement takes place, but only refers to it in the course of reciting other rules. It is particularly awkward that the statute gives no indication whether the announcement was a regular feature of every suit or only became necessary under certain circumstances. This means that, at the outset, the words of the statute may be summarized only very tentatively: (1) The denuntiatio, when it took place, would be performed 'within the nearest two days' of some event (ch. 91, tab. XA, ll. 48-49; ch. 92, ll. 46-47). (2) It might be directed to the judge or to one's adversary (ch. 91, tab. XA, ll. 48-49; ch. 92, ll. 46-47). (3) It might be performed 'for the sake of judging' (iudicandi causa, ch. 92, l. 47).

There is something approaching a consensus on the meaning of 'within the nearest two days'. Most agree that a litigant would announce intertium within the two days after the magistrate grants it, that is, would announce it either on the day of the granting or on the day immediately following.[68] This interpretation is hard to improve upon for several reasons. First, the

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68 See d'Ors (1983), above note 17, pp. 42-43; Lamberti, above note 12, p. 187; Simshäuser (1989), above note 2, p. 635; Rodger (1991), above note 2, p. 90.

denuntiare appears to follow the dare in the procedural scheme.[69] The statute generally treats its subjects in the order in which they would arise in a lawsuit, and the chapters treating intertium denuntiare follow the chapter treating intertium dare.[70] This chronology is confirmed by chapter 91, which introduces intertium denuntiare. It opens with the words Quacumque de re priuata iudices arbitri in eo municipio dati subditi addictiue hac lege erunt (ch. 91, tab. XA, ll. 45-46), words that indicate a point of reference later than that of chapter 90, where the judge is not yet datus. Second, the injunction to 'grant for the third day' appears to operate literally[71] (at least so far as the calendar permits), as one Pompeian tablet recites that a trial will take place 'perendino die' after intertium is received.[72] The common view of 'the nearest two days' must therefore be correct: if the notice follows the grant and if the grant is literally 'for the third day', to understand that a litigant will give notice within two days for an event that begins on the third day is a sensible and straightforward way to read in biduo proximo.[73]

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69 Cf. Johnston, above note 1, p. 72; Intertiumjagd, p. 179 (Johnston); W. Simshäuser, [Literatur], ZSS (rom. Abt.) 107 (1990), p. 552-53.

70 See authorities cited above, Chapter Two, note 54.

71 Cf. the arguments to the contrary at Intertiumjagd, pp. 175-76.

72 TP 24 (see T. Giménez-Candela, 'La contribution des tablettes Pompeiennes au droit Romain', Puteoli 7-8 (1983-84), pp. 76-77). In this regard the alternate reading ex perendino iudicare must be pointed out. See L. Bove, Documenti processuali dalle tabulae Pompeianae di Murécine (Naples, 1979), p. 115.

73 Cf. A. Burdese, [Recensiones Librorum], SDHI 57 (1991), p. 451 (reviewing Giménez-Candela, Los llamados cuasidelitos); Zanon, above note 16, pp. 321, 324. Both Burdese and Zanon object that one could not give notice within two days of the datio if the event for which notice was given were to take place on the next day but one after the datio. As mentioned above, this objection may not take account of the peculiar Roman reckoning of days.

The denuntiatio is directed to the judge and to one's adversary. With the limited information the statute gives, it is difficult to say exactly how and to what purpose notice was given to these persons. The law presumably distinguished between, on the one hand, a notice to appear at a second hearing in iure and, on the other, a notice to appear for trial (when the parties and the person to be appointed as judge have agreed on a date for intertium). The distinction is clearest in a certain reference to intertium denuntiare in chapter 92:

> Neue quis in eos dies aduersario intertium iudici arbitro<ue> in biduo proximo iudicandi causa denuntiato, nisi si iudex arbiterue et quorum res agetur omnes tum de e(a) r(e) agi uolent, neue is dies erit quem propter uenerationem domus Aug(ustae) festum feriarum numero esse haberiue oportebit. (Ch. 92, ll. 46-50).
>
> And no one shall announce an intertium for the sake of judging for those days [i.e., days devoted to games, certain public meals, the business of the comitia, and the harvest or vintage] to an adversary or to the judge or arbiter in the nearest two days, unless the judge or arbiter and those pursuing the case all wish it to be pursued at that time, provided that day is not one which should be or should be observed as a feast day or in the category of festivals because of the worship of the imperial house.

To this point the phrase intertium denuntiare has appeared without any special qualification.[74] The significance of the quoted passage lies in the fact that, in discussing the permissible days for notice, the statute takes care to add the words iudicandi causa. The giving of notice 'for the sake of judging' is presumably the notice used when the parties and judge have agreed on a date for intertium, and whose next appearance together will be at trial. The days referred to are clearly trial days, as they are the same as those on which the parties may agree under chapter 90; these days, as already noted, include days

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[74] See ch. 91, tab. XA, ll. 48-49; tab. XB, ll. 6, 9, 11, 22.

on which the magistrate could not sit.[75] The purpose for this sort of notice was perhaps to inform the judge and the other party of the place of trial.[76]

To make provision for notice 'for the sake of judging' suggests also that notice might be accomplished 'not for the sake of judging'.[77] That is, the notice might be performed in the ordinary case, when the magistrate granted a postponement to the third day for reappearance in iure. Here, the notice might convey more than simply information. When a person has been chosen from the album iudicum to serve as judge, it is by no means certain that he will be capable of serving. The fact that a person's name is among those on the album cannot ensure that the person is not dead, ill, or absent from the city. Long before the discovery of the lex Irnitana, it was suggested that the problems inherent in this system of selection might have been alleviated if, after his selection, a judge were permitted to appear before the end of the proceedings in iure and present to the magistrate any excuses he might have.[78] Such an opportunity would at least have been greatly desirable.

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75 See above note 43.

76 Chapter 91 permits trials to take place 'in the forum or where [the parties and judge] agree, so long as it is within the limits of the municipium'. Ch. 91, tab. XB, ll. 12-14.

77 Andrew Lewis has made the similar suggestion that iudicandi causa might imply that there is more than one type of intertium. Intertiumjagd, above note 1, p. 176. Arguably, the appearance of the additional words iudicandi causa in chapter 92 is not significant. Immediately above the quoted passage, for example, the chapter forbids operam iudicandi causa dare and sententiam iudicandi causa dicere (ll. 41-42). One could argue that iudicandi causa does not identify a certain type of denuntiatio, but is added to intertium denuntiare simply to emphasize the aspect of the announcement that the statute is most concerned to regulate.

78 O. Lenel, 'Zur Form der klassischen Litiskontestation', ZSS (rom. Abt.) 24 (1903), pp. 338-39; L. Wenger, Praetor und Formel (Sitzungsberichte der Bayerischen Akademie der Wissenschaft, 3 abh.) (München, 1926), pp. 64-66; L. Wenger, Institutionen des römischen Zivilprozessrechts (München,

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Notice of his forthcoming appointment, as under the iudici intertium denuntiatio of the lex Irnitana, would have given him this opportunity.[79]

The notice before litis contestatio that is directed to one's adversary is more mysterious. What exactly is the purpose of announcing intertium in this way? As a means of conveying information it seems unnecessary. Under any view of intertium, the magistrate will have fixed a date in the calendar while both parties were present (the defendant perhaps through a vindex[80]), and both will therefore have been aware of the date. Publication, in whatever manner it took place, will have made the date clearer still. Under these circumstances there is little point in either party informing the other of what the other already knows.

The derivation of intertium denuntiare suggests to some that adversario intertium denuntiare implies 'charge with notice'. It is often suggested that in intertium denuntiare we have the successor to an earlier institution described by Gaius, comperendinum diem ut ad iudicem venirent denuntiabant (G. 4.15), and that intertium denuntiare accomplishes the notice accomplished in the earlier process by comperendinum diem denuntiare.[81] Yet the denuntiatio Gaius describes is the act which the conventional view proposes to replace with the magistrate's intertium dare, and the magistrate's intertium dare leaves little

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1925), p. 130 n.12; M. Kaser, 'Zum Formproblem der litis contestatio', ZSS (rom. Abt.) 84 (1967), p. 43

79 Cf. Simshäuser (1990), above note 69, pp. 551-52 (arguing that, as the judge was notified of intertium, we should conclude that the judge was not ordinarily present in iure). The appointment of the judge is treated in detail in the next chapter.

80 G.4.46.

81 See Simshäuser (1992), above note 17, pp. 168-69; Lamberti (1993), above note 12, pp. 190-91.

for intertium denuntiare to accomplish. We are left to speculate that, as Lamberti suggests, the denuntiatio may have served simply to remind the recipients of the trial date. Or, as Zanon suggests, perhaps the plaintiff's failure to perform the denuntiatio meant only that he would have to return to the magistrate for the granting of another intertium.[82]

A possible explanation is this: if a plaintiff performs the denuntiatio before litis contestatio, it could serve to express his willingness or unwillingness to proceed to trial. If we assume that the first phase of the lawsuit may take place over two sessions and that the plaintiff's claim will be consumed at the close of the second session,[83] a plaintiff who does not wish to proceed after the first session ought to have some means of bringing the process to a halt. If the plaintiff has obtained satisfaction from the defendant or for some other reason has decided he does not wish the matter to go to trial at that time, the denuntiatio to his adversary gives him the opportunity to terminate the proceedings before he loses the ability ever to bring the suit again.

A further suggestion that adversario intertium denuntiare might have allowed the termination of a suit before litis contestatio lies in the derivation of intertium from Gaius's comperendinus dies. This subject is taken up in much greater detail below, but a short discussion of one of Gaius's comments will be useful here. At G.4.15, in speaking about the legis actio sacramento and the

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82 Lamberti, above note 12, p. 190; Zanon, above note 16, pp. 324-25.

83 There is no question that, so far as it concerns intertium denuntiare, the consumptive force of litis contestatio at Irni will often be conclusive. This is because intertium denuntiare is treated under chapter 91 as a matter to which the rules of iudicia legitima apply. Ch. 91, tab. XB, ll. 3-4, 18-19; Simshäuser (1992), above note 17, pp. 175-76. In many instances, therefore, if a suit at Irni is repeated the defendant will not be required to make an exceptio rei iudicatae. G.4.106-107. Hence a plaintiff who does not bring the suit to a halt by denuntiatio (under the theory presented here) will face a more certain extinction of his claim.

three days' delay between the judge's appointment and trial (from which most believe intertium evolved), Gaius briefly mentions two different procedures. Under an earlier procedure, the judge was appointed 'at once', but after a lex Pinaria of unknown date, a thirty days' delay was interposed before a judge was appointed. The purpose of the delay before the judge's appointment is not known, but given the resemblance between this period of delay and the similar delay imposed (as argued here) by the lex Irnitana, Gaius's lex Pinaria may shed light on the period of delay in the later procedure.

Many have suggested that the lex Pinaria introduced an interval into the proceedings in order to allow the parties time to settle their differences before the matter was put into the hands of the judge.[84] The suggestion that the lex Pinaria was concerned with settlement arises largely by analogy to XII Tab. III, 1-2, where a debtor is given thirty days' grace before manus iniectio,[85] and the thirty days' interval of the leges Silia and Calpurnia which, in introducing two modes of the legis actio per condictionem, permitted a thirty days' interval before the receiving of a judge, apparently for the defendant to investigate the claims against him.[86] Naturally we do not know whether the period of delay created by intertium dare may be traced directly to the lex Pinaria. But at the very least, the wisdom of allowing a settlement period will have been no less

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84 Kaser, RZ, pp. 82-83; Buckland, Textbook, p. 611; P. Girard, Histoire de l'organisation judiciaire des Romains (Paris, 1901), p. 84 n.1; Wenger, Praetor und Formel, above note 78, p. 73.

85 XII Tab. III: 1. Aeris confessi rebusque iure iudicatis triginta dies iusti sunto. 2. Post deinde manus iniectio esto, in ius ducito. Gellius explains that the debtor was given the thirty days to allow him to come to terms. Gell. NA 20.1.46.

86 G.4.17b-19; de Zulueta, Institutes of Gaius II, above note 24, p. 241; Buckland, Textbook, p. 618; D. Liebs, 'The History of the Roman Condictio up to Justinian', in N. MacCormick and P. Birks, edd., The Legal Mind (Oxford, 1986), p. 165.

apparent in the later law than in the earlier law.[87] If the lex Pinaria recognized the need for an opportunity for settlement, it is perfectly possible that adversario intertium denuntiare expresses the same need in the later law.[88]

A Translation of Chapter 90

At this stage a translation of chapter 90, incorporating the suggestions above, will be useful. The translation below uses González's text, with two small modifications. In directing the duumvir to publish intertium, the statute says that the notice must be capable of being read from the ground (l. 31). Here I prefer to resolve p to possit (as for example in d'Ors (1988)) rather than possint, in keeping with the suggestion that on a given day the duumvir is publishing a single notice. Also, where González reads et proscriptum at line 37, I prefer to read it proscriptum (again, as in d'Ors (1988)), because for the reasons mentioned in notes 52 and 58, González's reading is more in keeping with the publication of notices specific to a case, or of a calendar.

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87 O. Lenel, [Literatur], ZSS (rom. Abt.) 43 (1922), pp. 571-72 (reviewing Wlassak, Judikationsbefehl).

88 It might seem that a settlement could be concluded as easily after as before litis contestatio, and that therefore to read adversario intertium denuntiare as an instrument for settlement does not provide proof of a divided proceeding in iure. Here it is worth pointing out that chapter 92 bars announcements iudicandi causa for days prohibited under the calendar, and that the announcement of a settlement after litis contestatio would come too late to avoid the prohibition. Gaius says that when a settlement is reached post acceptum iudicium, the judge is put to the choice of declaring either a condemnatio or absolutio. G.4.114. This amounts to operam iudicandi causa dare, which chapter 92, ll. 41-42, forbids. Accordingly, if the denuntiatio were used by a plaintiff to bring a suit to a close, it could have done so only before litis contestatio.

On Granting Three Days' Postponements

Whichever duumvir is administering justice in the municipium shall grant three days' postponements to any days on which trials are lawful and proper there under this law. For the better part of each day on which he is obliged to grant three days' postponements, he shall post the day to which he postpones in the place he administers justice, in a manner in which it can be read accurately from the ground. Moreover, if the persons between whom the dispute exists and the judge who will be obliged to adjudicate their dispute should agree that their three days' postponement might be granted to a certain day, and that day is not a feast day devoted to the worship of the domus Augustae nor ought to be deemed a festival day for the same reason, then he shall grant their three days' postponement to that day. Whoever is obliged to grant a three days' postponement and does not, and whoever knowingly and fraudulently fails to post it, shall be condemned to pay a fine of 1,000 sesterces to the citizens of the Flavian municipium of Irni for each day on which he was so obliged or did not post, and any citizen of the municipium who wishes and whom the law permits shall have an action, petition, and suit upon that money or concerning that money.

V

The Appointment of the Judge

The focus of this chapter is the second hearing before the magistrate, the hearing that the magistrate must entertain when the parties have not completed the proceedings in iure at their first appearance. The sources discussed in the previous chapters suggest that the second hearing is concerned in part with the appointment of the judge. Rodger's chapter 84 plan (as modified), for example, indicates that iudicis arbitri addictio follows iudici datio, and references to the judge in the lex Irnitana and two Pompeian tablets anticipate that the judge's appointment will take place at the second hearing. This chapter looks at certain aspects of appointment from a more practical point of view: how judges were selected, when they took on the burden of liability, and why a delay in their appointment might have been desirable.

Selection of the Judge under the lex Irnitana

The lex Irnitana contains a remarkable amount of information on how a judge was selected for trial. The chapters on selection, in fact, are some of the most extensive new sources on litigation that the statute provides, and not surprisingly the subject of selection has recently received a lot of attention.[1]

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1 See, for example, W. Simshäuser, 'Stadtrömisches Verfahrenrecht im Spiegel der lex Irnitana', ZSS (rom. Abt.) 109 (1992), pp. 184-95; R. Cardilli, 'Designazione e scelta del "iudex unus" alla luce della "lex Irnitana"', Rend. Acc. Lincei (Cl. scienze morale, stor. e filol.) 9:3 (1992), pp. 37ff.; A. Rodger, 'The lex Irnitana and Procedure in the Civil Courts', JRS 81 (1991), pp. 87-89; F. La Rosa, 'La "lex Irnitana" e la nomina del giudice', IURA 40 (1989), pp. 63ff.; P. Birks, 'New Light on the Roman Legal System: The Appointment of Judges', CLJ 47 (1988), pp. 36ff.; D. Johnston, 'Three Thoughts on Roman Private Law and the lex Irnitana', JRS 77 (1987), pp. 67-70; C. Lanza, 'Impedimenti del giudice', BIDR (3rd

(continued)

My aim in describing these provisions is a narrow one. My interest is not in determining from this evidence how the Romans selected their judges,[2] or even in the selection procedures per se, but in how the divided hearing in iure is reflected in the selection procedures at Irni.

Most of the rules for selection are contained in chapters 86 and 87, which address respectively the album iudicum and selection for trial. Judges are drawn both from the members of the local ordo and from the freeborn population. Candidates drawn from the ordo must not undertake another munus during the forthcoming year. Candidates drawn from the freeborn population must meet a greater number of criteria. First, they must be at least 25 years old, they must own (or be in the power of one who owns) property worth 5,000 sesterces, and they must be deemed suitable by both duumvirs. To these threshold qualifications the statute directs the duumvirs to consider the ability of the freeborn candidates to serve. A person who, in the forthcoming year, will be ill, over 65 years of age, in service as an aedile or quaestor, or absent from the municipium, is not to be a candidate. Last, they must be capable of selection as a member of the local ordo, though the pertinent property qualification is ignored for this purpose.

The duumvirs divide the names drawn from these two groups into three decuriae. The three decuriae are entered onto the album, and the album is

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Series) 29 (1987), pp. 467ff.; A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', SDHI 49 (1983), pp. 34-36.

2 La Rosa, for example, suggests that Roman practice would not have allowed the parties to select by agreement a judge who was not listed on the album, as the lex Irnitana allows. La Rosa, above note 1, pp. 68-74. See also H. Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', JRS 78 (1988), p. 83 (selection procedure at Irni was considerably simplified by contrast with that employed at Rome).

displayed beside the tribunal for the majority of each day remaining in the year.

The selection of a judge for trial is straightforward. The parties take turns rejecting, first, a decuria, and next, the name of a judge from the names on the one decuria remaining. In each case the statute indicates that the defendant (or, if there is no defendant, the party suing for less) shall have the last rejection.

This reiectio procedure does not take place in every case, however. The statute carefully provides for departures from the reiectio procedure in two circumstances. First, if there has been agreement on the person to serve as judge (whether listed or not), and that person is willing and able, the magistrate may appoint him.[3] Second, if a party has refused to engage in reiectio (and by implication has refused also to agree on a judge), the magistrate may appoint from the album the person whom the refusing party's opponent selects. When each possibility is taken into account, the array of persons who may eventually serve as judge divides into four:

1) Agreed judges, comprising

   a) listed agreed judges (see ch. 87, ll. 31-32),[4] and

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3 As Birks says, the statute 'gives the principle of consensuality overriding weight.' Birks (1988), above note 1, p. 39. There is disagreement, however, on how the words de aliquo municipe (ch. 87, l. 43, on whom the parties may agree) ought to be understood. From a reference at G.4.105 to peregrine judges, Birks suggests that the restriction to municipes in the lex Irnitana may be unintended. Id., p. 51; see also Simshäuser (1992), above note 1, p. 184 n.62 (restriction is either unintended or accidental). La Rosa argues, to the contrary, that Gaius's reference to peregrine judges is a gloss, that a judge's nationality would have followed that of the defendant, and that the lex Irnitana's restriction to municipes is therefore intended. La Rosa, above note 1, pp. 66-68.

4 Admittedly, the statute does not expressly allow the parties to agree on a listed judge; the cited portion speaks of agreement generally. But one cannot read this lanaguge to exclude listed judges: fewer qualifications are

(continued)

b) unlisted agreed judges (see ch. 86, ll. 26-28; ch. 87, ll. 43-49), and

2) Unagreed judges, comprising

a) unagreed judges selected by reiectio (see ch. 87, ll. 32-41), and

b) unagreed judges selected 'adversely', by 'optio' (that is, against a party who has refused to engage in reiectio) (see ch. 87, ll. 41-43; ch. 88, l. 6).[5]

Addicere

The chapters on selection frequently refer to iudicem addicere. The meaning of this phrase has never been very clear. Some have suggested that originally the phrase was used when a judge was chosen by agreement: 'After the plaintiff, with the agreement of the defendant, has proposed a judge (either from the list or not) and the praetor has found him fit, the praetor assigns him to the parties, probably by addicere iudicem.'[6] In the time of the formulary procedure, however, most find it difficult to distinguish iudicem

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required of an unlisted agreed judge than of a candidate on the album (see ch. 87, ll. 43-48), and a fortiori a listed judge with greater qualifications ought to be amenable to selection by agreement. Moreover, as Birks says, chapter 87's reiectio procedure is premised on the absence of agreement generally. Birks (1988), above note 1, pp. 40-41.

5 The word optio appears in chapter 88 in reference to recuperatores, but the context makes it clear that the word may be taken to describe adverse selection in the case of a unus iudex also.

6 Kaser, RZ, p. 141; see also id., p. 218; H. Lévy-Bruhl, Deux études: addicere et auctoritas (Paris, 1942), p. 15; W. Simshäuser, 'La juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), p. 623. The primary text supporting this view is D.5.1.80 (Pomponius, Sabinus, book 2): Si in iudicis nomine praenomine erratum est, Servius respondit, si ex conventione litigatorum is iudex addictus essest, eum esse iudicem, de quo litigatores sensissent. See also (metaphorically) Sen. Ep. 65.2: Te arbitrum addiximus.

addicere from iudicem dare.[7] Lévy-Bruhl, for example, tries to do so by suggesting that the datio is the act by which the praetor conferred his own power to decide the case on a judge, while the addictio was more simply the praetor's ratification of the judge's appointment. He admits that under his interpretation the two words have nearly the same meaning.[8]

The meaning of addicere, strictly speaking, is not the focus of the discussion here. My concern is more narrowly with the use of addicere within the lex Irnitana alone. Before the discovery of the lex Irnitana, no single source was complete enough to show why either iudicem dare or iudicem addicere might be favoured in a given context. The new provisions on judicial selection provide the evidence that was lacking before; in treating judges selected respectively by different methods, the lex Irnitana uses dare and addicere with obvious care. For present purposes the distinction is quite revealing, because in observing the distinction the law anticipates the existence of a second hearing in iure as a part of the procedure used at Irni.

Birks makes the first point: in the selection provisions, the text does not distinguish between dare and addicere, but between dare and dare addicere.[9] The lex Irnitana, generally speaking, distinguishes between persons who may

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7 M. Wlassak, Der Judikationsbefehl der römischen Prozesse (Wien, 1921), p. 14 n.10. The difficulty is that often the two words appear together without much context to show how, if at all, the two are intended to be distinguished. See, e.g., Frag. Atest. ll. 8, 16 (FIRA I, p. 177); lex Iulia Agraria, ch. V (FIRA I, p. 139). In one source the distinction seems to be deliberately ignored. D.5.1.46 (Paul, Questions, book 2): Iudex datus in eodem officio permanet, licet furere coeperit, quia recte ab initio iudex addictus est . . . .

8 Lévy-Bruhl, above note 6, pp. 14-15.

9 Birks, above note 1, p. 40 n.14. He suggests that dare addicere is used with reference to an agreed judge and dare alone of an imposed judge.

be granted as judges (but in the event may not serve), and those who may be both granted and appointed as judges. To see more specifically how dare and dare addicere are used, and how their use reflects the division of the in iure hearing, requires a brief review of certain selection provisions.

First, while the statute does distinguish dare and dare addicere, it is also true that every judge who eventually serves must be both datus and addictus.

> Of listed judges, both agreed and unagreed:
>
> > . . . iudicem arbitrumue quem ex hac lege oportebit dari addicique iudicare iubeto . . . . (Ch. 86, tab. IXC, ll. 25-26).
>
> Of judges unlisted and agreed, and judges selected by optio:
>
> > . . . eum inter eos in eamque rem iudicem arbitrumue dato addicito iudicare iubeto. (Ch. 87, tab. IXC, ll. 48-49).
>
> Of judges listed and unagreed, judges unlisted and agreed, and judges selected by optio:
>
> > Qui ita datus addictus iudicareue iussus erit, is iudicato litem aestumato. (Ch. 87, tab. IXC, ll. 49-51).

The implication here is that a judge, regardless of how he is selected, will be both datus and addictus before the iudicare iubere.

Second, not every judge who is datus will necessarily be addictus. This is clearest in the closing lines of chapter 86, where the distinction between dare and dare addicere is perhaps most pronounced. After describing how the album iudicum is to be assembled, the statute says:

> Deque iis iudicibus in eas res, de quibus rebus recuperatores dari non oportebit, iudicem arbitrumue quem ex hac lege oportebit dari addicique iudicare iubeto; neue quem alium iudicem neue arbitrum dato neue iudicare iubeto inuito alterutro . . . . (ch. 86, tab. IXC, ll. 23-27).
>
> And for those cases for which it is not appropriate for recuperatores to be granted, he is to order the person from among those iudices, who is appropriate under this statute, to be

> granted and assigned as iudex or arbiter and to judge; and he is not to grant anyone else as iudex or arbiter, nor order anyone (else) to judge, against the will of any one of the two . . . parties . . . . (Crawford's translation).

The text moves from dare addicere to dare in a single breath, and does so for the sake of accuracy. The first sentence speaks generally of listed judges whom the law permits to be datus addictus. In the second sentence the circumstances are more complicated; the quem alium the statute speaks of is an unlisted judge, upon whom the parties must agree (see ch. 87, tab. IXC, ll. 43-45). Hence the text is careful to say that such a person may not be granted if either party is unwilling. But agreement is not the end of the matter: an unlisted judge is also subject to much the same scrutiny as a listed judge. He cannot be a magistrate, ill, or over 65 years of age, and must be willing to serve (ch. 87, tab. IXC, ll. 44-48). In the case of an unlisted judge, therefore, agreement is necessary but not sufficient, and the text quoted above is careful to say that while an agreed, unlisted judge may be datus, it expresses no opinion on whether that person may also be addictus. The question of addictio naturally awaits further scrutiny.

The same cautious use of dare is suggested in the rubric to chapter 87, though admittedly not so clearly as in the text above. According to the rubric the chapter addresses two matters, De iudicibus reiciendis dandis, 'On rejecting and granting judges'. Most of the chapter, to line 43, discusses the first matter, describing the method by which persons on the album are rejected, and how to proceed if one of the parties refuses to reject. The chapter then takes up the second matter, the selection of an unlisted judge, described in the rubric with

dandis.[10] The case of the unlisted judge is the same matter that provokes the cautious use of dare alone in the chapter 86 text quoted above, and perhaps the same caution is apparent in the rubric here: an unlisted judge, when selected, may become datus, but he is not thereby necessarily addictus.[11]

If every serving judge must be both datus and addictus, and if some judges who are datus are not by that fact alone addictus, there is then a strong suggestion that a iudicis datio might take place at one hearing and a iudicis addictio at another. This is consistent of course with a second hearing in iure, as described in chapter 90. We can deduce that a magistrate might grant an intertium at least in part with the aim of addressing the matter of the judge's appointment. The selection provisions, admittedly, go only so far in confirming the divided proceeding in iure described in chapter 90. They do not say flatly, as chapter 90 does, that a magistrate might be obliged to entertain a second proceeding as a matter of course. The instances of dare alone in the selection provisions simply express in a given context a reluctance to assume that a granted judge will be appointed. In this respect they are like Pompeian tablets 9 and 24, discussed in the previous chapter, which are similarly silent on which class of judge 'was to be appointed' (diceretur) in the respective lawsuits addressed there.[12]

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10 One can see this sort of 'serial arrangement' in the rubric to chapter 88 on recuperatores, De reciperatoribus reiciendis sorte ducendis dandis: reiectio (including optio): ll. 4-6; sorte ductus: ll. 7-10; datio: ll. 11-12.

11 Perhaps nothing can be deduced from a further instance of dare at ch. 87, l. 31, de qua [sc. re] iudicem arbitrumue dari hac lege oportebit, which seems to have been inserted simply to distinguish the lawsuits under discussion from lawsuits in which recuperatores were to be granted.

12 One further Pompeian tablet, in fact, might support the view that only unlisted judges enjoyed the opportunity to appear at a second hearing. A tablet from 35 A.D., which Camodeca titles 'Conventio de iudice addicendo', describes an agreement between two parties that one Anthus

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Before leaving addicere, it is useful briefly to mention certain recent comments by Watson on the subject of litis contestatio and the appointment of judges. Watson says that opinion until now has incorrectly interpreted Festus's remarks on the etymology of the term litis contestatio. Festus, it will be recalled, says that the term is derived from the fact that, when other conditions for trial were fulfilled, one of the parties would declare 'testes estote'.[13] The word testes is usually understood to mean 'witnesses', but Watson suggests instead that, from before the Twelve Tables until some time thereafter, the word meant 'judges'. The words litis contestatio would therefore mean 'the call to act as judges'.[14] I mention Watson's comments principally because they emphasize the relation between litis contestatio and appointment, a relation reflected in the assurance of intertium dare that appointment be secure before litis contestatio. The comments are interesting for another reason: if the word testis is derived from a root meaning 'a third person',[15] it gives us at least a plausible further etymology for intertium.

Maior shall be appointed their judge. See TPSulp. 22 (= TP 58; = AE (1978), no. 124), in G. Camodeca, L'archivio puteolano dei Sulpicii I (Naples, 1992), pp. 95ff. (Some alternate readings at U. Manthe, [Letture], Labeo 40 (1994), pp. 371-74.) On the basis of the judge's Greek cognomen, Camodeca suspects he is a libertus, and was not listed on the album iudicum. Id., p. 104.

13 Festus, de significatu verborum, s. vv. 'contestari litem', 'contestari'.

14 A. Watson, International Law in Archaic Rome: War and Religion (Baltimore, 1993), pp. 10-19. Watson bases his argument on certain declarations of war, and more generally on the inappropriateness of declaring 'be witnesses' at this stage of a suit. I am uncertain how he would explain the plural 'judges'.

15 See id., pp. 11, 77-78 n.6.

Risk of Loss

One of the more appealing aspects of the selection provisions in the lex Irnitana is the way they take such care to ensure that a person selected as judge will enjoy a measure of security. Chapter 90 not only forces the magistrate to allow an interval, but imposes a fine on him if he does not.[16] The need for the magistrate to be compelled in this way is clear enough when one considers that a judge who fails to serve may face liability.[17] Under these circumstances a person selected as judge is entitled to be informed clearly of his impending appointment. In imposing a fine on the magistrate for failure to grant intertium, then, the lex Irnitana provides an efficient, self-enforcing system for initiating trial. The risk of loss to the plaintiff for what we would call an 'administrative failure' to accompany a case through its various stages falls first on the magistrate, and then on the judge. To appreciate exactly how this risk of loss is passed on requires a closer look at the magistrate's fine.

It is not often pointed out that chapter 90, in describing the obligation to grant intertium, mentions only the duumvir, and not the aedile (ch. 90, l. 27). There are three different explanations for the omission of the aedile here. First, it may be due to careless drafting.[18] Second, it is possible that only the duumvirs were obliged to grant intertium, and an intertium was neither

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16 Lex Irni., ch. 90, ll. 28-29, 37-41.

17 Chapter 91 states that a judge who fails to adjourn or give judgement will have made the case his own. Lex Irni., ch. 91, tab. XA, ll. 51-53; tab. XB, ll. 15-17. See also the authorities cited below, Chapter Seven, note 1.

18 González attributes it to careless drafting. González (1986), p. 201. Murga Gener implicitly takes the same position, suggesting that the actio popularis which lies against an offending duumvir (ch. 90, ll. 37-41) would also lie against an offending aedile in cases within the aedlies' competence. J. L. Murga Gener, 'La "popularidad" de las acciones en las leyes municipales de la Betica', RIDA (3e Série) 38 (1991), p. 264 n. 82.

required nor allowed in cases under the aediles' authority. Third, both classes of magistrate might have been obliged to grant intertium in every case, but it was only the duumvir who was fined for his failure to do so. The last of these explanations is the most likely, and the reason lies in the nature of the fine.

If the duumvir fails to grant intertium or to publish the days for which intertium is granted, he must pay a fine of 1,000 sesterces to the municipium for each day that he fails to grant or publish intertium.[19] The severity of the fine is often remarked on; for the sake of comparison, 1,000 sesterces is one-fifth of the property qualification of a judge, and is therefore severe enough to be taken seriously.[20] For purposes of this discussion, however, the severity of the fine is less important than the precise amount. A fine of 1,000 sesterces appears nowhere else in the surviving portion of the statute, and as severe as the fine may be, it is the lowest in amount of those that appear.[21] As I suggest above, the fine is associated with the local jurisdictional limit, which for private suits is 1,000 sesterces. The fact that the jurisdictional limit on suits before a duumvir is higher than the limit on suits before the aedile explains why only the duumvir and not the aedile is fined for failure to grant and publish intertium.

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19 Ch. 90, ll. 37-41. The fine is paid to the municipium, and an actio popularis to claim from the common funds is tried before the ordo decurionum (if the matter is worth more than 500 sesterces), or before five members of the ordo (if the matter is worth 500 sesterces or less). Ch. 69, ll. 11-15, 24-27.

20 On the severity of the fine, see Intertiumjagd, p. 178; Johnston, above note 1, p. 72; González (1986), p. 234. The property qualification for a judge is recited at ch. 86, tab. IXB, l. 52 - tab. IXC, l. 2.

21 Fines of 10,000 sesterces appear in chapters 26, 61, 74, 75, and chapter 58 of the lex Malacitana. A fine of 20,000 sesterces appears in chapter G, and a fine of 100,000 sesterces appears in chapter 96. The chapter 90 fine is indeed the lowest, ignoring for the moment the fact that it is assessed for each day the duumvir fails to grant or publish intertium.

Local jurisdiction is described in chapter 84, as follows:[22]

[tablet IX, column A]

[LXXXIV]

Rubrica. Quarum rerum et ad quantum pecuniam in eo municipio iuris dictio sit.

[Chapter 84]

Rubric. Over what matters and up to what sum there may be jurisdiction in that municipium.

[tablet IX, column B]

[1] Qui eius municipi municipes incolaeue erunt, qua de re ii inter se suo alte- [2] riusue nomine qui municeps incolaue sit priuatim intra fines eius [3] municipi agere petere persequi uolent, quae res HS (sestertium) ∞ (mille) minorisue [4] erit, neque ea res diuidua quo fraus huic legi fieret facta sit fiatue [5] aut de capite libero deue maiore pecunia quam HS (sestertiis) ∞ (mille) praeiudicium [6] futurum erit sponsioue facta futuraue erit, neque [7] ea res agetur qua in re ui factum sit quod non ex interdicto [8] decretoue iussuue eius qui iure dicundo praerit factum sit, ne- [9] que de libertate, neque pro socio aut fiduciae aut mandati qu- [10] od dolo malo factum esse dicatur, aut depositi, aut tutelae cum quo [11] qui suo nomine quid earum rerum fecisse dicatur, aut lege [12] Laetoria, aut de sponsione quae in probrum facta esse dica- [13] tur, aut de dolo malo et fraude, aut furto cum homine libero libera- [14] ue, aut cum seruo dum id ad dominum dominaue perti- [15]

Whichever municipes or incolae of that municipium wish privately within the boundaries of that municipium to bring an action against or sue or claim against each other on any matter in their own names or in that of someone else who is a municeps or incola, provided that the matter is worth 1,000 sesterces or less and has not been or is not divided in order to evade this statute, and provided that there will not be a praeiudicium concerning a free person or a larger sum than 1,000 sesterces, and provided that there has not been and will not be a sponsio, and provided that the matter at issue is not one in which there has been vis other than under the interdict, judgment or order of the person who is in charge of the administration of justice, and provided the case is not over freedom, or over partnership or fiducia or mandate, involving an accusation of wrongful intent, or depositum or tutela, brought against someone who is accused of

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22 González (1986), pp. 175-76, 195. The translation is that of Michael

(continued)

nebit, aut iniuriarum cum homine libero liberaue [16] agetur, eaue de re aliquid praeiudicium futurum sit de ca- [17] pite libero, de is rebus etiam, si uterque inter quos ambigetur [18] uolet, de ceteris quoque omnibus de quibus priuatim age- [19] tur neque in iis praeiudicium de capite libero futurum [20] erit, et omnium rerum dumtaxat de uadimonio promittendo in eum [21] locum in quo is erit qui ei prouinciae praerit futurusue esse ui- [22] debitur eo die in quem ut uadimonium promittatur postula- [23] bitur, Iluiri, qui ibi iure dicundo praeerit, iuris dictio, iudicis arbitri [24] recuperatorum, ex is qui ibi propositi erunt, iudici datio [25] addictio, item eadem condicione, de eo quod HS (sestertium) ∞ (mille) minoris- [26] ue erit, aedilis qui ibi erit iuris dictio iudicis arbitri re- [27] ciperatorum ex eodem genere iudicique datio addictioque [28] esto.

having done any of those things in his own name, or under the Lex Laetoria, or over a sponsio which is said to have been made in probrum, or over wrongful intent, or over fraus, or over theft brought against a free man or woman or brought against a slave so long as it relates to his master or mistress, or over iniuria brought against a free man or woman, and provided that there be no praeiudicium concerning a free person in this matter; the duumvir who is in charge of the administration of justice there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from those (whose names are) displayed there, and a trial; and even about these matters if each of the two parties is willing; and about all other matters about which actions are brought privately and in which there will not be a praeiudicium concerning a free person; and he is to have jurisdiction [at any rate] over the promise of a vadimonium concerning all matter for the place in which the person who governs that province will be or is expected to be on that day for which the request for the promise of the vadimonium is made. And likewise the aedile who is there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from the same group and a trial, under the same conditions, concerning anything which is worth 1,000 sesterces or less.

Crawford.

The jurisdiction of the two magistrates falls into certain tiers, which may be described in general as follows:

(1) The duumvirs may hear private actions worth 1,000 or less (ll. 3-4), but they may not hear
   (a) cases involving either a praeiudicium or sponsio concerning free status or worth more than 1,000 sesterces (ll. 5-6), or
   (b) the enumerated actiones famosae (ll. 7-16).[23]
(2) The duumvirs may, however, hear these things (de is rebus etiam, l. 17) if each of the parties agree (ll. 17-18).
(3) The duumvirs may also hear all matters that are privately sued upon (if each of the parties agree), unless they involve a praeiudicium concerning free status (ll. 18-20).
(4) In any event, the duumvirs have jurisdiction in all matters over the promise of a vadimonium before the governor (ll. 20-3).
(5) The aediles have jurisdiction 'on the same terms' (eadem condicione, l. 25) as the duumvirs in matters worth 1,000 sesterces or less (ll. 25-8).

For our purposes the primary issue is whether the jurisdictional ceiling of 1,000 sesterces applies to suits before both the aediles and the duumvirs, or before the aediles only. This, in turn, depends on whether the parties may agree to have matters worth more than 1,000 sesterces heard locally before a duumvir. The two clauses allowing the parties to agree to have certain matters

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23 The structure here is similar to that of the Fragmentum Atestinum, ll. 1-9 (FIRA I, p. 176), where a similar list of actions may be heard locally if both parties agree. A. d'Ors, 'Una nueva lista de acciones infamantes', in Sodalitas: Scritti in onore di Antonio Guarino (Naples, 1984), vol. 6, p. 2581.

heard locally, outlined above under sections (2) and (3), are not perfectly clear as to which actions are subject to agreement. González, for example, argues that the second clause allowing agreement is redundant, because the cases described there are not excluded in any instance (that is, an agreement to hear the enumerated actiones famosae is allowed in the previous clause, and cases involving a praeiudicium concerning free status are forbidden in all instances). For this reason he suggests that this clause simply gives an opportunity to repeat the prohibition on praeiudicia on free status.[24] The result is that a duumvir in no instance would hear actions worth more than 1,000 sesterces, his jurisdiction by agreement being allowed only de is rebus (l. 17), i.e., the actions described at lines 7-16.

Under this construction the aediles' jurisdiction is the same as that of the duumvirs.[25] Lines 25-28 give the aediles jurisdiction in suits worth 1,000 sesterces or less on the same conditions as would apply to the duumvirs, and chapter 19, which describes the powers of the aediles specifically, recites the same information in similar language (ch. 19, ll. 13-16). The repetition of the 1,000-sesterces limit in regard to the aediles (ch. 19, l. 15; ch. 84, ll. 25-26) would strictly speaking be unnecessary, but presumably this could be

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24 González (1986), p. 229.

25 Id., p. 201. This is how chapter 84 is often understood. Galsterer, above note 2, p. 83; L. Curchin, The Local Magistrates of Roman Spain (Toronto, 1990), p. 60; R. Talbert, 'The Decurions of Colonia Genetiva Iulia in Session', in Estudios sobre Urso, ed. J. González (Seville, 1989), p. 67 n.14. Others understand chapter 84 to permit suits greater than 1,000 sesterces before a duumvir by agreement. Simshäuser (1992), above note 1, pp. 165-66; Birks, above note 1, p. 41; La Rosa, above note 1, p. 64; W. D. Lebek, 'La Lex Lati di Domiziano (lex Irnitana): le strutture giuridiche dei capitoli 84 e 86', ZPE 97 (1993), p. 165; U. Laffi, 'Osservazioni sul testo dell' inizio del capitolo <LXIX> della Lex Irnitana, alla luce di un nuovo frammento della Lex Villonensis', ZPE 103 (1994), p. 152.

explained as the product of cautious drafting, and not as an indication that the jurisdiction of the two classes of magistrate differs.

Yet the better view on respective jurisdictional limits, as Rodger has argued, is that chapter 84 permits a duumvir, but not an aedile, to hear matters worth more than 1,000 sesterces if the parties agree. Rodger has construed chapter 84 in such a way as to give effect to several provisions that would otherwise be redundant or remain unexplained, and in so doing has vindicated an older view that different classes of magistrate may have heard suits subject to different jurisdictional limits.[26] His central point is that the second clause permitting certain suits by agreement, recited at lines 18-19, is drafted to permit not only the actions excluded immediately before that clause (the actiones famosae, ll. 7-16), but also the actions excluded at the opening of the chapter, those worth more than 1,000 sesterces (ll. 3-4). The advantage in this construction is that it gives meaning to several provisions in the lex Irnitana that would otherwise be difficult to explain. For example, the repetition, just mentioned, of the 1,000-sesterces limit with respect to the

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26 A. Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the Lex Irnitana', ZPE 84 (1990), pp. 147-61. Mommsen speculated that different tiers of jurisdiction existed, relying on the surviving portion of chapter 69 of the lex Malacitana. This chapter treats trials over common funds, and the opening speaks of claims of more than 1,000 sesterces, but less than some other (unpreserved) amount. FIRA I, pp. 218-19. Mommsen suggested that these claims might be brought before a duumvir, and claims of less than 1,000 sesterces before the aediles. T. Mommsen, 'Die Stadtrechte der latinische Gemeinden Salpensa und Malaca in der Provinz Baetica', in Juristische Schriften (Berlin, 1905), vol. 1, pp. 297 n.33, 335. See also A. d'Ors, Epigrafía jurídica de la España romana (Madrid, 1953), p. 341, who comes to the same conclusion. Spitzl pointed out (rightly, at the time) that the existence of different jurisdictional amounts was a guess, and that there was no evidence for it. T. Spitzl, Lex Municipii Malacitani (München, 1984), p. 120. As it happens Mommsen was correct about the different jurisdictional limits, though for the wrong reasons.

aediles is perfectly appropriate under this construction, as it shows that the limit imposed on aediles may not be the subject of an agreement. Also, the provision in chapter 69 which gives the local ordo the opportunity to hear claims to the funds of the municipium 'which are greater than 500 sesterces but not so great that, were it a private action, it would be denied if either party were unwilling' (ch. 69. ll. 11-13) would make no sense if Rodger's construction were not correct. And last, chapter 84's second clause permitting agreement on jurisdiction (ch. 84, ll. 18-20) would not be redundant under Rodger's construction.[27]

The result of this jurisdictional scheme is that both the duumvirs and the aediles will have jurisdiction in most actions so long as they are worth 1,000 sesterces or less, and the duumvirs will additionally have jurisdiction in matters worth more than 1,000 sesterces, so long as the parties agree. These two jurisdictional tiers go far to explain why chapter 90 imposes a fine on a duumvir of precisely 1,000 sesterces for failure to grant or publish intertium. The fine is imposed not only because the judge in fairness must be made aware of the intertium, but because the lawsuit itself may not be in the interests of the duumvir.[28] If the duumvir does have an interest in the outcome of the suit, his interest could prevail by the simple act of delaying litis contestatio and causing the plaintiff's suit to be lost by limitations, a party's death, or the loss of the subject matter. Thus at the time he grants intertium he holds a plenary power over the progress of the suit, and the temptation to abuse this power by vindicating his own interests might be great. The logic of the fine provision is in its assumption that the duumvir's interest in the suit, if any, is equal to the

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27 Rodger (1990), above note 26, pp. 149-51.

28 See above Chapter Four, note 28.

plaintiff's own, and that therefore in a suit worth up to 1,000 sesterces a duumvir will be dissuaded from delaying litis contestatio—by even one day—by a 1,000-sesterces fine.

Protection is given where it is most needed. A 1,000 sesterces fine would not prevent a duumvir from disrupting a suit in which he stood to lose more than 1,000 sesterces. Yet here the need for a fine is less acute, because in a matter worth more than 1,000 the plaintiff will have given his consent to have the case brought before the duumvir, and if he suspected a conflict of interest it was within his power to have the case heard in the provincial governor's court. In the event of a suit before the aedile, no fine is imposed at all, and accordingly no protection of this kind is given. If we assume that matters of lesser value are brought before the aediles, the lack of protection in those cases is not surprising. A fine of 1,000 sesterces is likely to be unduly severe in a case before the aedile, and might even be regarded as an excessive precaution in suits that at bottom were worth comparatively little.

In sum, the lex Irnitana takes great care to ensure that, in suits before the duumvir, the plaintiff enjoys a measure of security in the administration of justice. In this respect he is protected at each phase. If his suit reaches the trial phase and the judge is remiss, the plaintiff may have his remedy against the judge. Before that point is reached, the duumvir bears the risk of the plaintiff's loss.

It is natural to ask at this point whether the risk could have been allocated in Rome as it was in Irni. The question arises because, of all of the features of intertium described in the lex Irnitana, it is the fine provision of chapter 90 that most seems a 'provincial variant'. In the absence of a sanction for failure to grant intertium, a plaintiff might seem to have no protection against a hearing in iure delayed to his disadvantage. Without evidence of intertium specific to Rome, perhaps the best answer is this: it is the requirement that intertium be granted for the third day in default of agreement that affords a

plaintiff most of his protection against the loss of his suit through delay. The fine provision of chapter 90 simply gives an additional measure of security to a plaintiff in circumstances where conflicts of interest are likely to be especially acute.

The 'Judgeless' Formula

The question whether proceedings in iure during the formulary period were divided into two phases is by no means new with the discovery of the lex Irnitana. In particular, the idea that the appointment of the judge may have taken place at a further hearing, separately from the drafting of the formula, has been taken up many times. Until recently the debate had rested, not so much on evidence, but on theoretical arguments against the idea of a 'judgeless formula', and practical arguments in favour of it.[29] Some believe a separate appointment proceeding would have been a practical necessity at least in some cases, while others believe it was not possible to have a formula without a judge being named. Recently, the discovery of two Pompeian tablets, according to one author, has provided firm evidence that, aside from exceptional cases, a judgeless formula was not possible.

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29 The evidence most commonly cited in favour of a judgeless formula is D.5.1.28.4 (Paul, Plautius, book 17), in which Paul says that the praetor may grant an action against a provincial legate with provision at litis contestatio that the action be transferred to a province: Sed et si dies actionis exitura erit, causa cognita adversus eum iudicium praetor dare debet, ut lis contestetur ita, ut in provinciam transferatur. This is often taken as conclusive proof of a judgeless formula, as a provincial judge would only rarely have been present in Rome for litis contestatio. See M. Kaser, 'Zum Formproblem der litis contestatio', ZSS (rom. Abt.) 84 (1967), p. 42; Kaser, RZ, pp. 216-17; O. Lenel, 'Zur Form der klassischen Litiskontestation', ZSS (rom. Abt.) 24 (1903), p. 338. Cf. Wlassak (1921), above note 7, pp. 102-9, and Lenel's response, O. Lenel, [Literatur], ZSS (rom. Abt.) 43 (1922), pp. 570-72.

The practical arguments in favour of a judgeless formula follow from the sheer awkwardness of selecting and appointing a judge in a single sitting. Lenel, a proponent of the practical view, focuses on the need for the judge to be present at his appointment. He argues that it was the judge's duty to schedule the iudicium,[30] and he thinks it unlikely that the law would require a judge, suddenly surprised by his appointment in a case, to go out into the city to seek out the parties and arrange a date. He also argues that endless hearings could occur if a succession of judges appointed in their absence had excuses for not serving. As presence is essential, and since it would be impossible for all judges on the album to be present at all litis contestationes, he suggests that a second date was arranged at which the selected judge would be present. In special cases this would not be necessary, as in cases where the parties had agreed upon a judge prior to appearing before the praetor.[31]

Wenger similarly argues that the selection of a listed judge would have required a second date before the praetor. He differs from Lenel in that, in his view, a date would be fixed for the selection of listed judges in several cases at the same time. All of the candidates would be summoned before the praetor, and their presence would offer him an opportunity to consider the various excuses for not serving. In this way, Wenger argues, the process would ensure

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30 The newer view, that the magistrate and not the judge sets the date of trial, follows from the prevailing view of chapter 90 of the lex Irnitana. See Johnston, above note 1, p. 71.

31 Lenel (1903), above note 29, pp. 338-39. Mazeaud also believes the judge's presence was essential, for the same reasons cited by Lenel. J. Mazeaud, La nomination du judex unus (Paris, 1933), p. 149. He considers D.50.5.13.3 (Ulpian, Edict, book 23), where Ulpian refers to a judge 'not being heard' on certain excuses, as proof of the judge's presence in iure. Mazeaud, op. cit., p. 149 n.2.

that a given judge did not have grounds for excuse at the moment of the iudicare iubere.[32]

Kaser to some degree follows the practical arguments of Lenel and Wenger, but stops short of accepting that this sort of divided proceeding was the rule. He suggests that ordinarily the hearing in iure passed without interruption from the agreement on the formula to the appointment of the judge, but sees no valid theoretical objection to the idea of a 'judgeless formula' in exceptional circumstances. If, for example, a judge who was put forward for selection raised a valid excuse, or a judge already appointed proved to be unfit, the appointment of a new judge could be delayed without in any way disturbing the binding force of the formula. Thus in some cases the appointment of the judge might follow litis contestatio.[33]

Until recently the principal objection to the notion of a judgeless formula was Wlassak's view of litis contestatio as a contract for state-sanctioned

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32 L. Wenger, Praetor und Formel (Sitzungsberichte der Bayerischen Akademie der Wissenschaft, 3 abh.) (München, 1926), pp. 64-66; L. Wenger, Institutionen des römischen Zivilprozessrechts (München, 1925), p. 130 n.12.

33 Kaser (1967), above note 29, p. 43; see also Kaser, RZ, pp. 216-17. As Lenel succinctly remarks, 'The appointment of the judge really has nothing to do with hammering out the substance of the dispute . . . . The appointed judge can die or be excused: does that mean the litis contestatio that followed somehow becomes invalid?' Lenel (1903), above note 29, p. 338. Broggini, too, argues that the judge's appointment is an act distinct from the formula, and that when circumstances require the substitution of one judge for another who has died or become unsuitable for some reason, litis contestatio is undisturbed. Proceeding from the idea that Roman procedure originally was not divided into two phases, and that a magistrate simply delegated to a Roman citizen a potestas iudicandi that could be revoked, he concludes that 'the substitution of the judge would no more involve a prior accord between the parties than the appointment.' G. Broggini, 'A propos de mutatio iudicis et de translatio iudicii', TR 27 (1959), p. 319.

arbitration; under this view litis contestatio assumes the appointment of a judge has taken place.[34] This objection may have some support in new evidence. The discovery of two Pompeian tablets, according to Wolf, bear out the thesis that a clause declaring who shall be the judge was an intrinsic part of the formula.[35]

TP 34:

C(aius) Blossius Celadus iudex esto
[si par]ret C(aium) Marcium [Satur]ninum
[C(aio)] Sulpcio Cinnam[o] HS I)) m m m
[d]are oportere q(ua) [d(e) r(e) agi]tur
C(aius) Blossius Celadus [i]udex
[C(aium)] Marcium Satu[r]ninum [HS] m m ((I))
[C(aio)] Sulpicio Cinnam[o con]demnato
si non parret apsolvito
iudicare iussit P(ublius) Cossinius Priscus IIvir
[Actu]m Puteol[is]

Ea res agetur de sponsione
C(aius) Blossius Celadus iudex esto
si parret C(aium) Marcium Satu[rninum]

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34 Kaser (1967), above note 29, p. 41; Kaser, RZ, pp. 215-16. Wlassak defends his rejection of the judgeless formula at length in Judikationsbefehl, above note 7, pp. 102-15. See also G. Jahr, Litis Contestatio. Streitbezeugung und Prozeßbegründung im Legisaktionen- und im Formularverfahren (Cologne, 1960), p. 90: '. . . zur "Formel" [gehört] notwendig die Richterklausel.'

35 J. Wolf, 'Aus dem neuen pompejanischen Urkundenfund: Die Kondiktionen des C. Sulpicius Cinnamus', SDHI 45 (1979), pp. 155-58. The two quoted tablets are at AE (1973), nos. 155 and 156.

C(aio) Sulpicio Cinnamo HS I)) m d[are]
oportere q(ua) d(e) r(e) agitur
C(aius) Blossius Celadus iudex C(aium)
Marcium Saturninum HS I)) m
C(aio) Sulpicio Cinnamo cond[em]nato
si non parret apsolvito

Wolf points out that these two formulae are identical in all respects except as to the amount claimed. He notes that the duumvir assigned these two cases to the same judge in order to simplify matters and yet, instead of issuing a double formula in a single document, the duumvir has carefully separated the formulae. According to Wolf the separation of these formulae is significant, because it shows that the assignment of and instruction to the judge indivisibly belong together: the fact that the duumvir did not simply appoint the judge once and follow with the substantive portions of the two formulae shows that a formula cannot exist without the assignment of a judge.

Wolf is certainly right to point out that these paired tablets may be reciprocal in some way, but at the same time he perhaps deduces too much from the evidence. There may, after all, be nothing unusual in the fact that the two formulae, which theoretically might be combined in a single two-fold formula, are set forth separately. Unless the two formulae were drafted in tandem, it might not have been apparent at the time the first case was considered in iure that Caius Blossius Celadus would serve as judge in the second case. Also, the explanation for the duplication could be far simpler and more practical than the avoidance of judgeless formulae. For practical reasons, for example, perhaps the records for one case had to be segregated from those for the other. If one case became the subject of review by the local

ordo or the provincial governor's court,[36] it might have been thought sensible to maintain a separate tablet to make review more simple. Or, the draftsman may have drawn up separate formulae to anticipate the possibility that a different judge might later be substituted in one or the other case. The latter possibility, in fact, would not only explain the separate drafting, but would favour the existence of judgeless formulae.

My purpose in raising the issue of the judgeless formula is primarily to show that, to many who have considered the matter, there was a practical need to divide the appointment of the judge from the remainder of the proceedings in iure, and this need outweighed any theoretical objection to a decree which lacked the name of the judge to whom it was directed. The need to divide the proceedings might have arisen from the general difficulty in appointing a person as judge in his absence, or from the more rare instance of a trial transferred to a province after litis contestatio in Rome.[37] And in answer to those who object to a divided proceeding in spite of the practical difficulties of a single proceeding, Lenel's comment cannot be improved upon: 'Ich meine: wenn sie es unter Herrschaft der lex Pinaria [G.4.15] und wohl auch der leges Silia und Calpurnia [G.4.18, .19] angängig fanden, die Richterwahl von der Einigung über das Prozeßformular zu trennen, so werden sie eine solche Trennung auch unter der Herrschaft des Formularprozesses nicht als unmöglich angesehen haben . . . .'[38]

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36 See, for example, lex Irni., ch. 69 (hearing before the local ordo) and ch. 84 ll. 20-23 (promise of a vadimonium for appearance before the provincial governor).

37 See above note 29.

38 Lenel (1922), above note 29, pp. 571-72.

I cannot claim, however, that the lex Irnitana and the theory of intertium presented above settle the question of the judgeless formula. It is true that the lex Irnitana describes a procedural scheme in which the appointment of the judge will take place in a separate proceeding, at least in some cases. Under this scheme, however, litis contestatio will have taken place at the close of the second half of the proceedings in iure, and there is no reason to believe that any sort of provisional decree (that is, a judgeless formula) was issued at the close of the first half.[39] It appears, in fact, that the statute takes such pains to ensure a second hearing—and punishes the magistrate for his failure to conduct it—for the very reason that litis contestatio will not have been concluded at the first hearing: any delay in litis contesatio could cost the plaintiff his case.[40]

While the lex Irnitana does not prove that a judgeless formula existed, nor does it prove that a formula required the name of a judge. There is no reason to believe, for example, that the lex Irnitana somehow forbade after litis contestatio the substitution of one person for another as judge. Chapter 91, where intertium denuntiare is mentioned, is concerned in part with suits in which a judge has been substituted (subditus, ch. 91, tab. XA, l. 46), and it is certainly possible that in exceptional cases intertium was announced to a substitute judge after litis contestatio. Also, chapter 87 allows persons

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39 Lenel, Mazeaud, and Kaser have suggested that the appointment of the judge might have followed litis contestatio, Lenel and Mazeaud in ordinary cases, Kaser in exceptional cases. Lenel (1903), above note 29, p. 339; Mazeaud, above note 31, p. 150; Kaser (1967), above note 29, p. 43. Bekker says generally that it was at least possible. E. J. Bekker, 'Über Anfang und Ende des "in iure"-Verfahrens im römischen Formularprozeß: ius dicere-litem contestari', ZSS (rom. Abt.) 27 (1906), pp. 44-45. Cf. Wenger (1926), above note 32, pp. 72-73 (litis contestatio at the end of the second proceeding).

40 See above, Chapter Four, notes 17 to 28 and accompanying text.

between whom there is a 'lis controversiaue' to select a judge from the album (ch. 87, l. 30). These words were perhaps chosen carefully to include both persons seeking to select a judge before litis contestatio, and those seeking to select a substitute judge after litis contestatio.[41]

A Note on Recuperatores

In general the subject of recuperatores is not a part of this work. A brief comment on the appointment of recuperatores is nevertheless useful here, if only to emphasize that the divided appointment procedure discussed to this point applied only to trials before a unus iudex.

The fact that only the iudex arbiterue passed through his appointment in two stages is clearest in the chapters of the lex Irnitana that discuss intertium. Intertium plays no part where recuperatores are treated. Under chapter 90, the iudex alone is mentioned as one who may join in an agreement on intertium (ch. 90, l. 32), and under chapter 91 the iudex alone is mentioned as a recipient of intertium denuntiatio (ch. 91, tab. XA, l. 48). The recuperatores and intertium are found together only in chapter 92; this is unremarkable, as this chapter is concerned solely with the calendar, a matter that affects recuperatorial trials no less than ordinary ones.[42]

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41 'Usually the word "lis", in exact usage, indicates (like iudicium) only a suit that has already been constructed, not one in the process of formation.' Wlassak, Judikationsbefehl, above note 7, pp. 103-4. That a judge could offer an excuse from service either before or after trial has commenced is suggested by Ulpian, D.50.5.13.3 (Edict, book 23): Si post causam actam coeperit se excusare iudex, si quidem privilegio, quod habuit antequam susciperet iudicium, velit se excusare, nec audiendus est . . . .

42 Cf. J. M. Kelly, Studies in the Civil Judicature of the Roman Republic (Oxford, 1976), pp. 53-54 ('. . . [recuperatores] could sit on days when other court proceedings were prohibited . . . .').

Confirmation that recuperatores were not appointed in two stages is provided in chapter 88. There is no suggestion here of the care shown elsewhere in distinguishing dare and addicere. A recuperator, as already mentioned, is datus only[43], and following the dare he is put to the task of judging immediately:

> . . . tot reciperatores sorte ductos dato, quod de quaque re reciperatores dari hac lege oportebit, cogitoque eos uti cognoscant iudicent. (Ch. 88, ll. 8-10).
>
> . . . he is to grant as many recuperators drawn by lot as is appropriate under this statute in each case, and he is to force them to hear the case and give judgement.

Recuperatorial trials—whatever it was that provoked them—were commonly distinguished for their speed. The speed of the procedure is usually expressed by a time limit within which the recuperatores must give judgement,[44] though in one instance a limit is placed instead on the period preceding the

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43 Birks, above note 1, p. 40 n.14; M. Lemosse, 'Loi municipale et droit latin', IURA 41 (1990), p. 92.

44 Lex Urso., ch. 95 (FIRA I, p. 187); SC Calvisianum, ll. 134-35 (FIRA I, pp. 413-14). On speed, see generally Y. Bongert, 'Recherches sur les récupérateurs', in Varia: études de droit Romain (Publication de l'Institut de droit Romain, no. 9) (Paris, 1952), pp. 238-40; Kaser, RZ, p. 45; Kelly, above note 42, pp. 53-54. Lintott has pointed out the same feature—here, a limit of ten days to give judgement— in a Greek inscription of 101 or 100 B.C. (the so-called 'Pirate Law', composed of fragments found at Cnidos and Delphi), which he believes treats recuperatores. A. Lintott, 'Le procès devant les recuperatores d'après les données épigraphiques jusqu'au règne d'Auguste', RHDFE 68 (1990), pp. 9-10.

appointment of the recuperatores.[45] The immediacy of the order to judge expressed in the lex Irnitana perhaps expresses the same desire for speed.[46]

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[45] Lex agraria, l. 37 (FIRA I, p. 111).

[46] Or, the immediacy might have been regarded by Schmidlin as evidence consistent with his notion of the 'einheitlichkeit' of recuperatorial procedure, a procedure also characterised by 'Koerzitionsgewalt'. B. Schmidlin, Das Rekuperatorenverfahren. Eine Studie zum römischen Prozess (Fribourg, 1963), pp. 92 -109.

VI

Intertium and Comperendinus Dies

I mentioned above that many of those who have written on intertium trace the word to a certain practice mentioned in Gaius and elsewhere, generally called the comperendinatio. Although it appears in many different contexts, comperendinatio and related expressions (comperendinatus, comperendinus dies, comperendinare) often refer to some event occurring on 'the third day following'.[1] That intertium is a descendant of comperendinatio rests chiefly on the idea that the word intertium is derived from tertius. If intertium refers to an event put off for three days, then this derivation makes good sense of the delay that intertium dare creates and relies on an etymology consistent with that delay.

The derivation nevertheless does not quite work. While superficially comperendinatio and intertium might have some idea of 'delay' in common, the substance of the two practices differs a good deal. Gaius's comperendinus dies illustrates the problem: it is quite clearly an interval preceding the trial before the iudex, while intertium, as I suggested above, is an interval before litis contestatio (barring an agreement otherwise).[2] With this difference in

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1 The word is a compound form of the adjective perendinus, 'relating to the day after tomorrow'. By Roman calculation this refers to the third day from the point of reckoning. Pauly-Wissowa, RE IV (1901), s.v. 'comperendinatio' (Kipp). The words comperendinare and comperendinatus seem to be the older forms; Cicero uses these forms instead of comperendinatio. See Cic. pro Mur. 27; In Verr. I, 11, § 34; id. II, 1, 7, § 20; id. II, 1, 9, § 26; Brut. 22, 87.

2 This is the most serious difference under the view of intertium presented here. Simshäuser points out two broad differences: contrary to Gaius's scheme (1) the magistrate grants intertium, and (2) the denuntiare serves

(continued)

mind, Gaius's comperendinus dies and intertium seem to have nothing in common except (assuming intertium from tertius) the notion of 'three'.

The discussion below suggests that intertium did develop from Gaius's comperendinus dies, but developed in such a way as accounts for the differences between the two practices. The comperendinus dies is often put in the category of 'comperendinationes' generally, and though many different comperendinationes existed perhaps even into the formulary period, this particular variant was probably altered by later legislation. The altered comperendinus dies has much in common with the intertium of the lex Irnitana, and I suggest that the intervening legislation accounts for the differences between the two practices.

Comperendinus Dies

The word comperendinatio and related expressions occur in several places, but a passage in Gaius serves as the central text for the present discussion. In a badly preserved portion of book four, he describes the assigning of judges during the period of the legis actio procedure:[3]

> . . . ad iudicem accipiundum venirent. postea v(ero) reversis dabatur. ut autem (die) XXX. iudex detur, per legem Pinariam factum est; ante eam autem legem (stati)m dabatur iudex. illud ex superioribus intellegimus, si de re minoris quam M aeris agebatur, quinquagenario sacramento, non quingenario eos contendere solitos fuisse. postea tamen quam iudex datus esset,

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to inform the judge as well as the parties. W. Simshäuser, 'La Juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), p. 632. See also D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 71.

3 G.4.15. The text is that of Gai Institutiones, ed. E. Seckel & B. Kuebler (Leipzig, 1939). This text is used throughout unless otherwise noted. The translation is that of W. M. Gordon & O. F. Robinson, Institutes of Gaius (London, 1988), pp. 409-11.

> comperendinum diem, ut ad iudicem venirent, denuntiabant . . .
> .
>
> . . . they should come in order to receive a judge. Subsequently, however, he was appointed on their return. The provision that the judge should be appointed on the thirtieth day was made by the Pinarian Act; before that the judge was appointed forthwith. We learn from what is said above that, if an action was raised about property worth less than a thousand 'asses' they customarily took an oath for fifty, not five hundred. Once the judge had been appointed, they would announce that they would go before him on the third day following.

The condition of the text makes it difficult to get one's bearings. The discussion in general concerns the legis actio sacramento, but the precise context is obscured by the lacuna immediately preceding the passage. It is clear from a comment in section 16 that the lost portion dealt in part at least with the actio in personam,[4] but it is not obvious whether in the quoted portion Gaius continues on the same matter, has moved on to the actio in rem, or speaks of the legis actio sacramento in general. Regardless of where in the discussion the quoted portion falls, the three-day interval Gaius describes probably applied to the legis actio sacramento generally.[5]

No source tells us the precise purpose for this interval. Kaser suggests that, like the adjournment and recapitulation described in XII Tab. I, 6-9, it offered the parties an opportunity to come to a settlement.[6] Behrends similarly argues

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4 In describing the actio in rem, Gaius notes deinde eadem sequebantur, quae cum in persona(m) ageretur. G.4.16.

5 Kipp, loc. cit. above note 1; Kaser, RZ, p. 82; F. de Zulueta, The Institutes of Gaius (Oxford, 1953), vol. 2, p. 236. Cf. O. Behrends, 'Causae Coniectio', ZSS (rom. Abt.) 92 (1975), pp. 182-83; J. Kelly, Roman Litigation (Oxford, 1966), p. 119. The question is discussed further below, at notes 31-34 and accompanying text.

6 M. Kaser, 'Zum Ursprung des geteilten römischen Zivilprozessverfahrens', in Ausgewählten Schriften II (1976), pp. 398-99.

that it reflected a concern for the settlement of disputes, but a concern of some sacred origin. He equates comperendinatio with the iudicium addicere that a magistrate, according to Trebatius, was permitted to perform on market days; the iudicium addicere did not alter the sacred character of the market days since it had the power to make peace between the parties.[7] Lévy-Bruhl suggests that after the proceedings in iure the presence of the parties, strictly speaking, was no longer essential, so that the comperendinum diem denuntiare was simply a notification to appear on the third day, or another day if circumstances required.[8] It is possible, of course, that the interval Gaius describes merely served as a convenient way to join the two halves of the lawsuit.[9]

Gaius's comperendinus dies is widely viewed as a direct predecessor to the intertium of the lex Irnitana.[10] If one compares what is known of the two practices, trying at the same time not to anticipate any particular meaning for

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7 O. Behrends, Der Zwölftafelprozess, zur Geschichte des römischen Obligationenrechts (Göttingen, 1974), pp. 51, 61-64. Behrends relies on Macrob. Sat. 1.16.28: Trebatius in libro primo Religionum ait nundinis magistratum posse manu mittere iudiciaque addicere.

8 H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), p. 206.

9 Simshäuser (1989), above note 2, p. 631. Behrends argues strenuously that this was not the case. He argues that the comperendinatio Gaius describes took place after the iudicium was 'jurisdictionally recognized'. Thus the comperendinatio did not join the two halves of the lawsuit, but was simply an adjournment of a matter before the judge. Behrends (1974), above note 7, p. 52; Behrends (1975), above note 5, p. 183.

10 González (1986), p. 234; J. Crook, D. Johnston, P. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', ZPE 70 (1987), pp. 182-83; Johnston, above note 2, pp. 70ff.; Simshäuser (1989), above note 2, pp. 631ff. All of these authors cite the texts and present in some form the arguments set forth below. My aim in this section is simply to outline with some precision the basis of the connection between the two practices.

intertium, the attraction of this derivation is clear. Two sources provide an etymological connection. In the pro Murena Cicero remarks how regrettable it is that so many clever men speaking in the law courts are so often at a loss to decide which of alternative, equivalent expressions to use. Among the pairs of equivalent expressions that he mentions is the pair 'diem tertium' and 'perendinum'.[11] The value of the passage does not lie in the definition of perendinus (which is clear enough from numerous sources), but in informing us that the words dies tertius (whence intertium) were perhaps dignified in practice and became part of a formal vocabulary. The second source is valuable in precisely the same way. Probus gives us a helpful explanation of an abbreviation: I.D.T.S.P. in diem tertium sive perendinum.[12] The relation between this entry and Gaius's comperendinus dies is made clear by the heading Probus gives to the pertinent subsection: In legis actionibus haec:.

Aside from etymology, several comparisons point at least superficially to some substantive connection between intertium and comperendinus dies. The most noticeable similarity is the occurrence of denuntiare in both contexts. The announcement of intertium under chapters 91 and 92 of the lex Irnitana resembles the announcement of the comperendinus dies in Gaius.[13] The fact that under the lex Irnitana the announcement is to be performed in biduo proximo enhances the similarity.[14] Without delving too deeply into what in

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11 Cic. pro Mur. 27: Iam illud mihi quidem mirum videri solet, tot homines, tam ingeniosos, post tot annos etiam nunc statuere non potiusse utrum 'diem tertium' an 'perendinum', 'iudicem' an 'arbitrum', 'rem' an 'litem' dici opporteret.

12 Probus de notis juris 4.9 (FIRA II, p. 456).

13 See lex Irni., ch. 91, ll. 48-49; ch. 92, ll. 46-47.

14 See id., ch. 91, l. 49; ch. 92, l. 47.

biduo proximo might mean, at first glance it seems plausible at least that notice might be given within a two-day period if the event for which notice is given occurs on the third day. One last substantive connection between the two practices is provided by one of the Pompeian tablets quoted in a previous chapter, TP 24.[15] There, the words intertium and perendinus dies occur in the same context quite closely to one another; we learn that a litigant could undertake an intertium in matters to be judged from the perendinus dies.

Comperendinatio

The association between intertium and one instance of comperendinatio is therefore fairly strong. The present discussion, however, is more concerned with the limits of the association. The comperendinatio and its variants appear frequently over a long span of time, and there is a temptation to treat this practice as a discrete 'institution' and trace its development as one would trace, for example, the evolving meaning of sacramentum or vadimonium. The difficulty is that the various comperendinationes are not consistent with one another. Although they always carry some idea of 'delay', they appear in a great variety of different proceedings and are often used to denote 'adjournment' generally. There is a danger that in seeking to describe the development of something that resembles more an idea than an institution, one variant may be confused with another.

An illustration of the problem can be found in the fact that, in the literature on intertium, it is common to speak about the 'comperendinatio' in Gaius, though Gaius never uses that word, using instead the term comperendinus

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15 Above, Chapter Two, note 17 and accompanying text.

dies.[16] To attribute the comperendinatio to Gaius in this way reflects an assumption that intertium shares some degree of meaning with a host of different comperendinationes that may have nothing to do with the issue. Giménez-Candela, for example, in attempting to explain the evolution from comperendinatio to intertium, states: '. . . comperendinatio is documented only once in juridical sources, in a text from Gaius's Institutes [4.15].' Noting that comperendinatio does appear in several literary sources, she then argues that as intertium formally replaced comperendinatio in law, the term comperendinatio was essentially relegated to literary sources only. The argument assumes that intertium and the comperendinatio described in literary sources are the same, and it makes this connection by improperly attributing comperendinatio to Gaius.[17]

A brief description of some of the different proceedings in which the several comperendinationes appear will give a clear picture of the problem. It seems doubtful that one could trace even roughly an identifiable comperendinatio developing through these different proceedings, other than by noting that for the legal community it must have been convenient, when any one of various proceedings was interrupted, to use a familiar word to describe the interruption. Thus Gaius's text probably illustrates, not one step in the history of a single, developing institution, but simply one occurrence of a general procedural idea, and while comperendinus dies clearly sheds light on intertium, we cannot assume the other comperendinationes are as useful.

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16 See Intertiumjagd, above note 10, p. 177; Johnston, above note 2, p. 70; W. Simshäuser, ZSS (rom. Abt.) 107 (1990), p. 550; A. Rodger, 'The Lex Irnitana and Procedure in the Civil Courts', JRS 81 (1991), p. 79.

17 T. Giménez-Candela, 'Una revision de Pap. Ant. 22', in Estudios de derecho romano en honor de Alvaro d'Ors (Pamplona, 1987), vol. 1, pp. 575-76; T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), pp. 18, 25.

1. As discussed above, Gaius mentions an interval, created by a comperendinum diem denuntiare, which joined the two halves of a suit under the legis actio sacramento.[18]

2. Pliny and Tacitus express similar disdain[19] for the fact that, under the old procedure (presumably the legis actiones), litigants were able repeatedly to adjourn hearings by successive comperendinationes.[20]

3. A lex Servilia of perhaps 101 BC introduced into repetundae proceedings a compulsory adjournment called a comperendinatus.[21] The adjournment divided the proceeding into two acts, and was perhaps designed to avoid endless rehearings of the matter should a third of the jury repeatedly declare non liquet.[22]

4. During the trial of Clodius in 61 BC for sacrilege during the Bona Dea festival, Seneca mentions that, in return for a verdict favorable to Clodius, certain salacious promises were to be fulfilled before the adjournment (comperendinatio) was over.[23]

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18 Festus seems to allude to this same practice: Res conperendinata significat iudicium in tertium diem constitutum. Bruns (7) II, p. 32.

19 A. Michel, ed., Tacite dialogue des orateurs (Paris, 1962), p. 121 note.

20 Pliny Ep. 6, 2, 6; Tac. Dial. 38.

21 Cic. II in Verr. 1.9.26. The suggested dates vary. See A. H. G. Greenidge, The Legal Procedure of Cicero's Time (Oxford, 1901), p. 422 (111 BC); J. Balsdon, 'The History of the Extortion Court at Rome', in Papers of the British School at Rome 14 (London, 1938), p. 107 (104 or 101 BC); A. Jones, The Criminal Courts of the Roman Republic and Principate (Oxford, 1972), p. 53 (101 BC). In any event, comperendinatus seems to have been an older form than comperendinatio.

22 Greenidge, above note 21, p. 501-2. On the comperendinatio in repetundae proceedings generally, see Balsdon, above note 21, p. 108-12.

23 Sen. Ep. 97, 5: intra comperendinationem fides promissi mei stabit.

5. Pliny relates that at one time he went down to the Basilica Julia to listen in on a case which he would defend at the next hearing (proxima comperendinatione). The suit he refers to was before the centumviral court.[24]

6. Gellius relates that something called comperendinatio existed under the formulary procedure.[25]

The various comperendinationes are therefore used in six different proceedings. There is little to be gained by treating comperendinatio as a discrete, developing institution, since in essence the sources are telling us that 'the day after tomorrow' was simply an expression or an idea, convenient to take up as circumstances required. Sources apart from Gaius that contain one or another instance of comperendinatio may therefore be of little value in determining the meaning of intertium. Two facts bring the point home: Gaius does not use the word comperendinatio in the key text, 4.15, and no pertinent source uses the word comperendinatio remotely in the way Gaius uses comperendinus dies, to refer to the interval between the two stages in a legis actio suit.[26] It is quite possible, in fact, that the comperendinatio had little to

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24 Pliny Ep. 5.9.1.

25 Gellius does not explain it any further: Atque in dierum quidem diffissionibus comperendinationibusque et aliis quibusdam legitimis ritibus ex ipsa Iulia et ex Sabini Masurii et quorundam aliorum iurisperitorum commentariis commoniti et adminiculati sumus. Gell. NA 14.21.1. He does not seem much interested in substance here, but instead is simply relishing the length of comperendinationibusque.

26 Pseudo-Asconius is the only source that does so, and it is probably on the basis of this passage that it is common to speak of the 'comperendinatio' in Gaius. See ps-Asc. at Cic. in Verr. II, I, § 26, (Bruns (7) II, p. 71). As discussed below at notes 37-39 and the accompanying text, pseudo-Asconius is simply providing for the reader of the first Verrine information which he has read at Gaius 4.15, as is clear from the fact that he has repeated the substance of Gaius's text, including the corruptions. He therefore is clearly using a word of his own time, as the 'comperendinatio'

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do with legis actiones at all. The word appears only in authors of the formulary period.[27] Pliny and Tacitus (number two above) use it to denote adjournments under the legis actiones, presumably in the second half of a suit, but since they are both describing the procedure of an earlier age they might easily be employing a word of their own time. The same can be said of the further reference in Pliny (number five above) which speaks of the centumviral court. This court of course followed the procedure of the legis actio,[28] but we know neither whether Pliny is using a word of his own time, nor whether comperendinatio was ever a part of the legis actiones generally or simply a particular feature of centumviral court. In any event, all instances of comperendinatio are quite remote in meaning from the practice Gaius describes at 4.15, and if our aim is to determine how a process developed from comperendinus dies to intertium, it is perhaps pointless and misleading to discuss comperendinatio at all.

With the understanding that Gaius's comperendinus dies is not part of a single, evolving comperendinatio, the task of discovering the meaning of intertium is somewhat easier. In reconstructing the development of comperendinus dies, the separate development (if one exists) of comperendinatio should not confuse the issue. Johnston, for example, passes perhaps too quickly from the association between intertium and comperendinus dies to the proposition that intertium has something to do with adjournments. He cites the Gellius passage to show that something like the

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he is attempting to describe occurs neither in the text he is explaining nor in the text from which he is getting his information.

27 It first appears in Sen. Ep. 97, 5. See TLL III (1912), s.v. 'Comperendinatio'.

28 J. Kelly, Studies in the Civil Judicature of the Roman Republic (Oxford, 1976), p. 6.

comperendinatio existed under the formulary procedure, and obliquely associates intertium with this formulary comperendinatio by contrasting both with diffissiones.[29] If comperendinationes and the interval Gaius describes are for the most part unrelated practices, the Gellius passage will be of little help in explaining intertium. Moreover, we might be reluctant to associate intertium with adjournment at all, since the idea of adjournment is much closer to the formulary comperendinatio than Gaius's comperendinus dies, the latter being more an interval between two hearings than an adjournment of a hearing on specific grounds, as Johnston argues it became. In the same way Crook cites the comperendinatio of the centumviral and criminal courts, where the word refers to a trial in two parts, for the proposition that intertium perhaps served as a device to ensure the completion of trial before mors litis could intervene.[30] Like Johnston, Crook assumes the meaning of intertium can be sought from instances of comperendinatio.

Juncker's emendation

With comperendinatio put aside, it is possible roughly to reconstruct how the interval Gaius describes developed into the intertium of the lex Irnitana. Behrends, adopting an emendation proposed by Juncker,[31] has suggested an interpretation of G.4.15 for purposes unrelated to the present discussion, but his suggestions serve to explain how intertium and comperendinus dies are

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29 Johnston, above note 2, pp. 70-71, 75-76. He also comments on the resemblance of intertium to later comperendinationes at p. 73 n.55.

30 Intertiumjagd, above note 10, p. 175. Crook perhaps has in mind the interval in a repetundae proceeding, a practice which might have served to prevent endless ampliationes. See the text accompanying note 21.

31 J. Juncker, 'Haftung und Prozeßbegründung im altrömischen Rechtsgang', in Gedächtnisschrift für E. Seckel (Berlin, 1927), p. 255 n.1.

related practices and yet differ so much in substance.[32] The focus of his comments is the lex Pinaria, which according to Gaius introduced a thirty days' delay before the appointment of the judge.

At bottom Behrends' thesis is that opinion up until now has incorrectly held to the belief that the comperendinum diem denuntiare mentioned by Gaius is part of the post-Pinarian law. In other words, one would now sketch the events Gaius ascribes to the post-Pinarian law in the following order:

(1) appearance in iure;

(2) thirty days' interval;

(3) iudicis datio;

(4) notice to appear on the comperendinus dies;

(5) appearance before the iudex.

Behrends asserts that this order of events is wrong, because the thirty days' interval introduced by the lex Pinaria replaced the comperendinus dies.

As mentioned above, it is far from clear whether the text treats the legis actio sacramento in rem or in personam. Behrends argues that some of the confusion is due to an awkward insertion in the text. He maintains that the portion from Illud ex superioribus to solitos fuisse appears to be inserted from somewhere else and should be ignored.[33] He observes that this sentence has no relation to the matters mentioned on either side of it, and further that the

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32 Behrends (1975), above note 5, pp. 182-83.

33 Juncker, loc. cit., comments as follows: 'It's worth noting that the passage at G.4.15, illud ex superioribus . . . solitos, looks like a probable gloss, because it interrupts the coherence of the discussion (iudicis datio is treated before and after it) and simply repeats what was already said at 4.14.'

references to agere de re and contendere relate to actiones in rem, a matter that is only first addressed in the subsequent section.[34]

If the insertion is ignored we are then left with a statement by Gaius that before the lex Pinaria judges were granted immediately, but that nevertheless (tamen), after the judge was granted, the parties announced a three-day interval. Behrends asks us to consider the special force of tamen; he finds that in tamen, following as it does upon statim dabatur iudex, Gaius expresses surprise that a postponement should necessarily follow the appointment of the judge in all circumstances. This surprise constitutes an acknowledgement that, in some cases at least, the dispute would be capable of resolution immediately at the first appearance before the praetor. Much of Behrends' argument that the lex Pinaria replaced the comperendinus dies rests on this tamen, because it is through the link between the tamen clause and the preceding sentence that, in explaining the comperendinus dies, Gaius tells us he is continuing to speak about the pre-Pinarian law. With the removal of the insertion Illud . . . fuisse the sentence following on that insertion joins to the preceding sentence with a concessive force, and in essence we are told: 'Before the lex Pinaria a judge was granted forthwith, although after he was granted, there was a one-day interruption.' Thus the interval created by the comperendinum diem denuntiare was a feature of the law prior to the lex Pinaria, when judges were appointed immediately.

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34 The reference to agere de re is clear enough on this point. On contendere Behrends compares the character of the actio in rem, where the parties pretend to 'contest' the sacramentum, with that of the actio in personam, which the sources describe with the phrases sacramento quaerere (see Probus 4.5, in FIRA II, p. 456) and sacramento interrogare (see Festus s.v. 'sacramento', in Bruns (7) II, p. 35). Behrends does not doubt that the words of the insertion are those of Gaius, but does not mention from what source he believes the insertion was drawn. Op. cit., p. 182 n.82.

6. Intertium and Comperendinus Dies

Two additional observations, I believe, make Behrends' thesis stronger. First, Behrends has not made the best of his thesis in his interpretation of tamen. It seems less likely that in tamen Gaius is expressing surprise at the need for a further hearing than asking us to notice the contrast between the three-day interruption and the celerity with which, before the lex Pinaria, the judge was appointed. He seems to mean: 'Despite the fact that the judge was appointed on the spot (and that the case was therefore ready to proceed), the matter was nevertheless delayed for three days.' In contrasting comperendinus dies with statim, Gaius is making it quite clear that he is continuing to speak about the pre-Pinarian law, much more so than if the tamen were read simply as an expression of wonder at the necessity for a further hearing, as Behrends believes.[35]

Second, the verb tenses clearly bear out Behrends' thesis. In describing the pre- and post-Pinarian practices, Gaius states that the fact that the judge 'is given' or 'is to be given' (detur) on the thirtieth day is due to the lex Pinaria; previously the judge 'was given' (dabatur) immediately, after which the parties 'gave notice' (denuntiabant) to appear on the third day following. The detur is the reading of the Verona manuscript, although in keeping with the usual interpretation of the passage the Krueger and Studemund text shows the suggested reading of Wieding, daretur.[36] The manuscript reading supports the idea that the actions expressed in dabatur and denuntiabant should be attributed to the pre-Pinarian law.

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35 My reservations about the particular meaning Behrends ascribes to tamen in no way intrudes on Juncker's emendation; without the emendation tamen would express some sort of apology for the digression on actiones in rem.

36 Gai Institutiones, ed. P. Krueger and W. Studemund (Berlin, 1923), p. 158.

6. Intertium and Comperendinus Dies

The comments of pseudo-Asconius might appear to contradict Behrends' thesis. These comments attempt to explain a reference to comperendinatus in Cicero's first Verrine, and seem to indicate that the thirty days' delay and the comperendinus dies existed at the same time:[37]

> Comperendinatio est ab utrisque litigatoribus invicem sibi denuntiatio in perendinum diem. namque cum in rem aliquam agerent litigatores et poena se sacramenti peterent, poscebant iudicem, qui dabatur post trigesimum diem. quo dato deinde inter se comperendinum diem, ut ad iudicem venirent, denuntiabant . . . .
>
> 'Comperendinatio' occurs when both parties give one another notice for the third day. For when the parties pursued some actio in rem and engaged on penalty of a sacrament, they demanded a judge, who was given after the passage of thirty days. After the granting of the judge they gave one another notice to appear before him on the third day.

Mommsen points out that these comments so closely mimic our text of Gaius (including the insertion) that they were without doubt founded on that text.[38] Accordingly they give us no better information on the legis actio sacramento than the Gaius text itself gives, and should not be taken as evidence that the thirty days' delay and the comperendinus dies existed at the same time.[39]

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37 Ps-Asc. at Cic. In Verr. II, I, § 26, (Bruns II, p. 71). The comment is quite off the mark, since Cicero neither uses the word comperendinatio nor is referring to the kind of interval pseudo-Asconius is describing.

38 T. Mommsen, [Rezensionen], Juristische Schriften III (Berlin, 1907), p. 528. See also Giménez-Candela (1990), above note 17, pp. 15-17.

39 Behrends (1975), above note 5, p. 183 n.88.

Statim, nondum, and the date of the lex Pinaria

The condition of G.4.15 is far from perfect, and one variant reading in particular deserves a brief mention, since it bears on both the meaning and the date of the lex Pinaria. Modern editors commonly read statim in the hiatus following eam legem, in preference to an older reading, nondum.[40] The m is visible in the manuscript, and several editors believe they can read im.[41] The proposition that the thirty days' interval of the lex Pinaria replaced the three days' interval between litis contestatio and trial depends to some extent on the reading statim. Under this proposition the word tamen punctuates a contrast between the speed of the appointment and the delay in proceeding to trial before the reforms of the lex Pinaria, and the reading statim neatly supplies this contrast.

The reading has nevertheless been criticized on the ground that it would not have been possible to appoint the judge immediately. Düll argues that the praetor was charged with the duty of resolving disputes, and yet was in an awkward position to fulfill this duty because the question of who won or lost was placed in the hands of somebody else. To fulfill this duty the praetor must have taken the time to acquaint himself with the essential facts of the case, and therefore would not have been able to appoint the judge statim. He suggests the reading sensim; a judge appointed 'gradually' would be at the disposal of

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40 Statim: Gai Institutiones, ed. P. Krueger and W. Studemund (1923); Gai Institutiones, ed. E. Seckel and B. Kuebler (Leipzig, 1935); M. David, Gai Institutiones (Leiden, 1948); L. Wenger, Institutes of the Roman Law of Civil Procedure, trans. O. Fisk (New York, 1940), p. 129. Nondum: J. T. Abdy and B. Walker, The Commentaries of Gaius and the Rules of Ulpian (Cambridge, 1885); E. Weiss, 'Prozessgesetze und Richterbestellung im Legisaktionenprozesse', BIDR 49-50 (1948), p. 222; H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), pp. 202-4.

41 Krueger and Studemund (1923), and M. David (1948).

the court for a short period, during which the praetor presumably would investigate the facts.[42]

Lévy-Bruhl also questions the notion that judges could ever be given statim by the magistrate. He argues that under the legis actio procedure, as under the formulary procedure, the law sought to give effect to the parties' choice of judge. Under such a system of guided arbitration the magistrate could hardly be expected to designate a judge on the spot, since the parties would require time to express their respective choices and refusals. He prefers the reading nondum, which at first might seem to make little sense: because even after the lex Pinaria the judge was 'not yet given' but given only after thirty days, it is not clear, under Lévy-Bruhl's thesis, what innovation the law introduced. He explains that Gaius is using dare iudicem in two different ways, that the words are capable of meaning both 'designate who will be the judge' and 'give permission to have a judge', and that Gaius is saying 'before that law permission was not yet given to have a judge.' He therefore concludes that the lex Pinaria introduced not only a thirty days' delay, but the more striking innovation of the partition of lawsuits into two phases.[43]

The reading nondum has been criticized on several grounds.[44] Juncker's emendation, however, should put nondum to rest for good. The text could not, of course, be explaining that while judges were not granted before the lex

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42 R. Düll, 'Über Textkonjekturen zu Gaius Veronensis und zur Frage der Zwangenteignung in römischen Formularprozeß', ZSS (rom. Abt.) 96 (1979), pp. 290-91.

43 Lévy-Bruhl, above note 40, pp. 202-4. There are similar arguments in M. Horvat, 'Deux phases du procès romain', in Droits de l'antiquité et sociologie juridique, Mélanges H. Lévy-Bruhl (Paris, 1959), pp. 166ff., and Weiss, above note 40, pp. 217-22.

44 Kaser, RZ, p. 41 n.6; Düll, above note 42, pp. 290-91; G. Pugliese, Il processo civile romano (Rome, 1961-63), vol. 1, pp. 92-95.

Pinaria, the parties nevertheless appeared before a judge on the third day. The emendation also makes short work of Düll's sensim: if the text is stating that a judge is appointed 'gradually' but nevertheless (tamen) there ensued a further delay, the tamen is rendered meaningless. The usual reading statim is entirely consistent with the course of Gaius's discussion, and Lévy-Bruhl's and Düll's practical objections are not convincing: the practical problems they point out might have been the very problems the lex Pinaria sought to address.

The reading nondum has convinced some that the lex Pinaria was quite an early law. This is because if the law introduced the bifurcated procedure, then it is older than the Twelve Tables.[45] Lévy-Bruhl puts the date of enactment at 472 BC, following the suggestion of Huschke[46] that the lex Pinaria is the same as a certain law mentioned in Macrobius.[47] Varro, according to Macrobius, wrote of an ancient law that created an intercalary month and that was passed during the consulship of an L. Pinarius and one Furius. Lévy-Bruhl believes that this law, 'which thus stripped the pontiffs of at least part of their judicial monopoly in reforming the calendar, realized in the same domain a reform that was still more important, that of substituting for the pontiffs the competence of a lay judge.'[48] Eisele also identifies Gaius's lex Pinaria with the

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45 See M. Kaser, 'Prätor und Judex im römischen Zivilprozess', TR 32 (1964), p. 348.

46 Iurisprudentiae Anteiustinianae Quae Supersunt, ed. E. Huschke (Leipzig, 4th ed., 1879), p. 327.

47 Macrob. Sat. 1.13: sed hoc arguit Varro scribendo antiquissimam legem fuisse incisam in columna aerea a L. Pinario et Furio consulibus, cui mensis intercalaris adscribitur.

48 H. Lévy-Bruhl, 'Le sacramentum in personam', in Studi in onore di V. Arangio-Ruiz (Naples, 1953), vol. 3, p. 23.

law mentioned by Macrobius, persuaded by the similarity of the intercalary month and the thirty days' delay.[49]

The Macrobius passage is no longer considered helpful in dating the lex Pinaria. Berger, writing on the law in Macrobius, states that any connection between the two laws is doubtful, and notes that in the 6th and 7th editions of Seckel and Kuebler's edition of Gaius, Huschke's suggestion has been omitted.[50] One difficulty with the suggestion is simply a matter of names. Girard points out that a consular law as that mentioned by Macrobius would probably carry the names of both consuls, i.e., lex Pinaria Furia, and that Gaius does not mention a law by this name.[51] A greater obstacle is the fact that the association between the laws depends largely on the reading nondum and the early date this reading suggests for Gaius's lex Pinaria. If nondum is not a plausible reading, then the lex Pinaria need not antecede the Twelve Tables, and accordingly the connection which Lévy-Bruhl draws between the two laws fails: they no longer trace to the same period, and in substance seem to have nothing whatsoever to do with one another. Evidence for the date of the lex

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49 F. Eisele, Beiträge zur römischen Rechtsgeschichte (Freiburg, 1896), p. 223 n.8. Like Lévy-Bruhl, Huschke and Eisele date Macrobius's lex Pinaria to 472 B.C., which appears to follow the suggestion of Mommsen. T. Mommsen, Die römische Chronologie, 2nd ed. (Berlin, 1859), p. 11.

50 Pauly-Wissowa, RE suppl. VII (1940), p. 403, s.v. 'Lex Pinaria Furia de intercalando' (Berger).

51 P. Girard, Histoire de l'organisation judiciaire des Romains (Paris, 1901), p. 84 n.1. There may not be much to this objection, since Gaius's lex Pinaria likely carries the name of its sponsor only, not necessarily (were it a consular law) the names of both consuls. A. Watson, Law Making in the Later Roman Republic (Oxford, 1974), p. 6.

Pinaria is therefore simply lacking. It is probably not older than the Twelve Tables, but little more can be said.[52]

Survival of the lex Pinaria

Speculation that the thirty days' interval of the lex Pinaria might have survived into the formulary period has simply stalled for lack of evidence. Kaser comments that the interval seems not to have survived, noting that no source tells us whether the lex Aebutia or the leges Iuliae preserved the interval for iudicia legitima.[53] Wenger, on the other hand, believes that the weight of the evidence counts for little on the question. He comments that, not only do we know little about the history of Roman procedural law generally, but the enactment of the lex Pinaria itself—not to mention its repeal—is badly attested. He gives reasons for the survival of the law, notwithstanding our lack of evidence:[54]

> All of the reasons which historically make the Pinarian reform desirable support a hypothesis under which it is possible, as in the Pinarian law, for an interval to be inserted between the substantive contents of the procedural agenda and the choice of judge. Foremost among these reasons is the possibility of giving the parties an interval for reflection, during which the judicial machinery might be rendered unnecessary. Hence the portion of the Pinarian law still useful in the new procedural system would have survived and only would have been altered to the extent required by the new procedural practices and the new manner of litis contestatio moulded by those practices.

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52 Kaser, RZ, p. 83 n.4; A. Watson, International Law in Archaic Rome: War and Religion (Baltimore, 1993), p. 16.

53 M. Kaser, 'Zum Formproblem der litis contestatio', ZSS (rom. Abt.) 84 (1967), pp. 42-43. See also Buckland, Textbook, pp. 636-37.

54 L. Wenger, Praetor und Formel (Sitzungsberichte der Bayerischen Akademie der Wissenschaft, 3 abh.) (München, 1926), pp. 73-74.

Wenger therefore suggests that under the formulary system two hearings took place before the magistrate. At the first, the parties and the magistrate dealt with the contents of the formula. Then followed an interval of uncertain length, after which a second hearing was held for the purpose of selecting and assigning a judge (the latter taking place only if no grounds for disqualification existed), and of performing the act of litis contestatio.[55]

The question of the survival of the lex Pinaria into the formulary period remains unanswered. Perhaps the best evidence we possess on the question is a certain comment of Macrobius's, explaining the meaning of various days in the calendar: 'comperendini [sc. dies sunt] quibus vadimonium licet dicere.' (Macrob. Sat. 1.16.14). Macrobius is usually understood to have made an error here.[56] Of course there is no reason to impute an error to him if the comperendinus dies he describes is the day for which litis contestatio may be scheduled. But how these days are related to the reforms of the lex Pinaria—and specifically whether they prove that those reforms survived into the later law—is unclear.

One further item of evidence in this regard is attractive but ultimately disappointing. It will be recalled that at 4.15 Gaius alters the tenses of the verbs in describing the pre- and post-Pinarian practices. In particular, he uses the present subjunctive to describe the vitality of the lex Pinaria: ut autem (die) XXX. iudex detur, per legem Pinariam factum est. The detur at first might seem to indicate that Gaius is describing the practice of his own time, and therefore that the lex Pinaria was still in force at the time he wrote. Some editors, apparently recognizing this, have in fact read daretur in place of detur,

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55 Id., p. 72-73.

56 See, e.g., Giménez-Candela (1990), above note 17, p. 20 & n.84; Johnston, above note 2, p. 74.

as mentioned above. At bottom, however, the detur does not really tell us anything about the survival of the law, since the subordination of the detur clause could hide a future imperative as well as a present indicative. Wlassak, for example, recreates the words of the lex as follows: die XXX iudicem dato.[57] In writing of such a law later, this might easily become factum ut die XXX iudex detur. We can reproduce the ambiguity of the phrase by translating: 'the lex Pinaria enacted that judges be granted on the thirtieth day.' Whether the law was in force at the time of writing is simply not stated.[58]

Lex Pinaria and intertium

The practice under the lex Irnitana of requiring the duumvir to grant an interval of three days before the appointment of the judge may have evolved from the practice introduced by the lex Pinaria, that of delaying the appointment of the judge for thirty days after the first hearing in iure. This is not to say intertium is necessarily a feature of the lex Pinaria itself which, as just discussed, may not have survived into the formulary period. The lex Pinaria nevertheless serves as a useful bridge between the comperendinus dies of the legis actio sacramento and intertium, explaining to some extent the evolution of one to the other.

It will be recalled that intertium and Gaius's comperendinus dies are linked to one another in both etymology and substance. The comperendinus dies seems to have become dignified in practice in the phrase in tertium diem, and both the lex Irnitana and one Pompeian tablet point to some connection between intertium and 'the day after tomorrow'. Beyond this the resemblance

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57 M. Wlassak, Römische Prozessgesetze (Leipzig, 1888), vol. 2, pp. 334-35.

58 I am grateful to Dr Claude Eilers of McMaster University for this observation.

stops: the comperendinum diem denuntiare involves no further hearing short of the trial itself. Behrends' suggestion, that the interval of the lex Pinaria replaced the comperendinum diem denuntiare, explains these differences to some extent. The lex Pinaria retained the interval in the lawsuit, but inserted it in an earlier stage, before the conclusion of the hearing in iure. In so doing it created a second hearing in iure which, like the intertium of the lex Irnitana, permitted the appointment of the judge to take place before the matter passed from the hands of the magistrate.

VII

Diem Diffindere

The discussion to this point has addressed the careful manner in which the lex Irnitana ensured that a judge was properly charged to commence judging. The interruption before the appointment of the judge permitted a person to learn of his selection personally, while the hearing after the interruption permitted him to offer grounds to excuse his service. In these respects the statute shows much forethought in fixing the time at which the dispute passed into the hands of a judge. The certainty of the scheme allowed an orderly selection and, crucially, a point from which liability could attach to a judge's actions or inaction.

After a case had been entrusted to a judge in this way, inaction on his part was especially hazardous. While the bases for a judge's liability may not be easy to determine in all cases, it is likely at least that a judge who simply walked away from a suit would have made the case his own.[1] In some circumstances it was perhaps not obvious whether a judge had abandoned a suit, and this would be particularly true if a trial lasted more than a single day. In such a case a judge would be obliged to adjourn, an act which the law must have distinguished in some way from abandonment.

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1 See Egypt Exploration Society, The Antinoopolis Papyrus, ed. C. H. Roberts (London, 1950), part I, no. 22 (recto, ll. 16-19); lex Irni., ch. 91, tab. XA, ll. 51-53; tab. XB, ll. 15-17; Macrob. Sat. 3.16.15; A. d'Ors, 'Litem suam facere', SDHI 48 (1982), pp. 375-77; G. MacCormack, 'The Liability of the Judge in the Republic and Principate', in H. Temporini and W. Haase, edd., Aufstieg und Niedergang der römischen Welt (Berlin, 1982), vol. 14, pp. 5-6, 9, 18.

The discussion in the following chapters suggests that the method of adjournment of trial set forth in the lex Irnitana and elsewhere, described generally with the words diem diffindere, is in part an attempt to define the circumstances under which a judge can be said to have abandoned a case. The rules governing diem diffindere, as they pertain to the judge, seem less concerned with regulating adjournment—settling the bases for adjournment or the circumstances under which it may be taken—than with determining when a case is in iudicio and whether the judge has made himself liable by not serving.

Various Postponements

Before passing to the substance of diem diffindere, it is useful to settle certain matters of terminology. In modern works the term diem diffindere is often discussed in the company of diffissio and comperendinatio, and the three terms are not often clearly distinguished. Comperendinatio is sometimes presumed to describe an aspect of diem diffindere, and diem diffindere is often used interchangeably with diffissio.

While diem diffindere and diffissio do refer to the same practice, 'diem diffindere' is the more authentic term and should be preferred. The earliest occurrence of diffissio is in Gellius, and it is probably a word of his own invention. It appears in no legal text whatsoever, and in fact does not appear at all after Gellius until the seventh century.[2] For our purposes it is the less preferable term because, in context, it is reasonably clear that Gellius has

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2 See TLL, (1934), vol. 5, s.v. 'diffissio'.

invented it simply for purposes of style. In the relevant passage he explains his preparations for service as judge:[3]

> Atque in dierum quidem diffissionibus comperendinationibusque et aliis quibusdam legitimis ritibus ex ipsa lege Iulia et ex Sabini Masurii et quorumdam aliorum iurisperitorum commentariis commoniti et adminiculati sumus.
>
> And I was advised and helped in matters of the divisions of days and comperendinationes and some other legal formalities from the lex Iulia itself and from the commentaries of Masurius Sabinus and some other jurists.

Although modern works usually speak of diffissio alone, Gellius himself uses the words dierum diffissiones. Thus the phrase is not much altered from the more usual form diem diffindere, and in this one alteration Gellius betrays his purpose: he has used dierum diffissio in preference to diem diffindere so that two nouns, diffissio and comperendinatio, may be paired to produce dierum diffissionibus comperendinationibusque. The two nouns permit him to use -que,[4] producing a remarkable ten-syllable word and a resounding and impressive phrase. When style does not demand otherwise, he reverts to the usual form; a few sentences later he relates that, after failing to make up his mind in the case before him, 'iussi igitur diem diffindi'.[5] The lone instance of diffissio is therefore part of an effort at elegance by a literary source, and has

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3 Gell. NA 14.2.1, A. Gellii Noctes Atticae, ed. P. K. Marshall (Oxford, 1990), vol. 2.

4 It is often noted that -que usually binds two words of the same inflection, noun to noun, adjective to adjective, etc. See J. Hofmann and A. Szantyr, Lateinische Syntax und Stilistic (München, 1965), p. 473; J. Gonda, 'The History and Original Function of the Indo-European Particle KᵘE, Especially in Greek and Latin', Mnemosyne (4th series) 7 (1954), pp. 189-91.

5 Gell. NA 14.2.11.

no support in any legal source. The discussion below accordingly uses the term 'diem diffindere'.

The relationship between diem diffindere and comperendinatio is also a source of confusion. Some authors state quite boldly that the two are in essence the same thing. Buckland takes this view: '. . . postponement of the iudicium . . . was, it seems, not to the next day but to dies perendinus and there might be more than one such diffissio.'[6] This view is based largely on the Gellius passage already quoted. It is the only source where the two institutions are found together, and the only reliable evidence to hint at the existence of comperendinatio in the classical law.

Yet the Gellius passage is not proof that the two institutions are the same. The term diem diffindere, as discussed below, refers to an adjournment of a civil trial. Yet in no source does comperendinatio or any related term refer to an adjournment of a civil trial, so far as the formulary procedure is concerned.[7] If the accuracy of Festus and Macrobius can be trusted, the comperendinatio Gellius speaks of may well be the interval created by intertium dare.[8] Moreover, Gellius all but tells us outright that he is speaking of two separate practices. He is eager to emphasise the arcane nature of the material, and he does so by reciting what must have been two different

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6 Buckland, Textbook, p. 614. See also J. Thomas, Textbook of Roman Law (Amsterdam, 1976), p. 76: '. . . any adjournments which might be necessary in the course of the hearing were . . . to the next day but one.'

7 Cf. Pliny Ep. 6,2,6 and Tac Dial. 38, addressing the legis actio procedure.

8 Macrobius describes a comperendinatio similar to an intertium granted for a second hearing in iure: Comperendini [sc. dies sunt] quibus vadimonium licet dicere. (Sat. 1.16.14). Festus describes a comperendinatio similar to an intertium granted (by agreement) for the day of trial: Res conperendinata significat iudicium in tertium diem constitutum. (Bruns (7) II, p. 32).

institutions that were nevertheless confusingly alike to his lay readers. It is the very difference of the two institutions that makes his point.

Diem Diffindere in the Twelve Tables

Not a great number of sources for diem diffindere survive, and were it not for the new evidence of the lex Irnitana there would not be much to say on the subject. Modern works on Roman procedure ordinarily devote only a small amount of discussion to the subject, setting out briefly the little that can be learned from the ancient sources.[9] It is some consolation that these sources are relatively uncontradictory and straightforward, and for this reason the general outlines of the institution are known, even if the sources are disappointing on details.

The Twelve Tables is the principal source. Table II, 2 provides that if either the parties or the judge suffers from a serious illness or is required to attend a court proceeding involving a foreigner, 'the day shall be divided':[10]

> . . . morbus sonticus . . . aut status dies cum hoste . . . quid horum fuit unum iudici arbitrove reove, eo dies diffissus esto.
>
> . . . a serious illness . . . or a day set for trial with a foreigner . . . any one of which befalls a judge, arbiter, or litigant, on that account the day shall be divided.

This passage is patched together from several sources without the benefit of any clear direction on how the fragments fit together. The central portion from quid horum to diffissus esto is from Festus (F. 273), who is seeking to

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9 Kaser, RZ, pp. 84, 274; H. F. Jolowicz & B. Nicholas, Historical Introduction to the Study of Roman Law (Cambridge, 1972), pp. 185-86; Buckland, Textbook, p. 614; O. Behrends, Das Zwölftafelprozess (Göttingen, 1974), pp. 91-93.

10 XII Tab. II, 2 (Bruns (7) I, p. 20).

explain the meaning of reus.[11] The two cited grounds for 'dividing the day' are loosely appended to this central portion on the faith of other sources. The association of the first ground, morbus sonticus, with the Festus passage is well attested in Ulpian and Julian:[12]

> et ideo etiam lex duodecim tabularum, si iudex vel alteruter ex litigatoribus morbo sontico impediatur, iubet diem iudicii esse diffisum. D.2.11.2.3 (Ulpian, Provincial Edict, book 74).
>
> And so the Law of the Twelve Tables also requires the day of the hearing to be postponed if the judge or either of the litigants is prevented [from appearing] by a serious illness.

> morbus sonticus etiam invitis litigatoribus ac iudice diem differt. D.42.1.60 (Julian, Digest, book 5).
>
> Serious illness entails an adjournment, whether the parties and judge wish it or not.

The association of the second ground with the Festus passage is not so obvious. The words 'aut status dies cum hoste' are provided by Cicero; he explains that by hostis the Twelve Tables convey what would later be understood by peregrinus.[13] With the guidance of a passage in Gellius, it seems likely that

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11 Festus, de verborum significatu, ed. W. Lindsay (Leipzig, 1913), p. 336, s.v. 'Reus'. There are several variant readings. The manuscript gives eo die diffensus esto. Mommsen has suggested eo die, dies diffisus esto. T. Mommsen, 'Lex Coloniae Genetivae', in Juristische Schriften (Berlin, 1905), vol. 1, p. 232. Beseler avoids diffindere entirely, explaining diffensus as a compound of dis + *fendo, meaning 'released'. G. Beseler, 'Bindung und Lösing', ZSS (rom. Abt.) 45 (1925), p. 427. Riccobono's edition gives Cujas's suggestion, quid horum fuit vitium. FIRA I, p. 31. A discussion of the various editions may be found at F. d'Ippolito, Questioni decemvirali (Naples, 1993), pp. 94-95.

12 The translations are those of the Pennsylvania Digest.

13 Cic. Off. 1.12.37.

Cicero is quoting the provision of the Twelve Tables that treats diem diffindere. Gellius relates that in earlier times soldiers were required to take an oath to appear for service when summoned by the consul. Certain excuses for failure to appear were permitted, among them morbus sonticus and status condictusve dies cum hoste.[14] Thus from Gellius we learn that status dies cum hoste is an excuse for non-appearance that arises in the company of morbus sonticus, and on this basis XII Tab. II, 2 is a likely home for the phrase.[15]

Diem Diffindere Generally

Despite the scarcity of sources, we know generally what sort of institution diem diffindere was. First, we know from several of the sources just cited that diem diffindere, in some sense, was an adjournment of trial. The excerpts from the Twelve Tables and the Digest above speak about interruptions in proceedings. That the interruptions alluded to would arise during the trial phase is clear from Ulpian's reference to dies iudicii (D.2.11.2.3) and Festus's reference to iudex, arbiter, and reus.[16]

Second, it is hard to resist the conclusion that, so far as lawsuits were concerned, diem diffindere was relevant only to trials before an unus iudex.

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14 Gell. NA 16.4.4. The phrase appears in a similar form at Plaut. Curc. 5.

15 Whether the word condictus was found in this provision of the Twelve Tables alongside status remains open. M. Kaser, 'Ius Honorarium und Ius Civile', ZSS (rom. Abt.) 101 (1984), p. 16 n.58.

16 According to Festus, reus is a designation for either party, pertinent to the stage apud iudicem. Festus (F. 273), De verborum significatu, ed. C. Müller (Leipzig, 1880); E. Schönbauer, 'Wlassaks römische Prozeßlehre in der Kritik der Gegenwart', 1962 Anzeiger, Österreichische Akademie der Wissenschaften (phil.-hist. Klasse), p. 139. Ulpian confirms this. See D.2.11.2.3; H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), p. 139. See also the authorities cited at Kaser, RZ, p. 44 n.2.

None of the sources for diem diffindere mentions any other type of lawsuit, and nearly every source mentions a iudex or arbiter.[17] The lex Irnitana, in particular, seems to support this limitation. Generally, the latter part of the lex is careful, where necessary, to point out circumstances in which suits before iudices or recuperatores are to be distinguished from one another. For example, for judicial selection the type of judge must be distinguished (ch. 86, tab. IXC, ll. 23-25; ch. 88, tab. XA, l. 3). But where the issue is the authority to judge on certain days by agreement, they need not be distinguished (ch. 92, tab. XB, ll. 36-37, 42-44). Chapter 91, where diem diffindere appears, is devoted entirely to trials before iudices or arbitri.[18] And unlike other matters raised in chapter 91, matters which are elsewhere discussed in reference to recuperatores,[19] diem diffindere is found here and here alone. Given the care the statute takes to distinguish the two types of lawsuit, this can be no accident.[20]

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17 Festus (F. 273) (iudex arbiterve); Antinoopolis Papyrus, above note 1 (iudex); D.2.11.2.3 (Ulpian) (iudex); D.42.1.60 (Julian) (iudex); Lex Irni. ch. 91 (iudex arbiterve); Gell. NA 14.2.1 (lectus in iudices sum). The exception here is in Livy, though he describes not the adjournment of a lawsuit, but of the comitia curiata, with the phrase diem diffindere. Livy 9.38.15.

18 D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 63; González (1986), p. 234. Chapter 91 begins: Quacumque de re privata iudices arbitri in eo municipio dati subditi addictive hac lege erunt . . . .

19 Iudicare: ch. 88, tab. XA, ll. 10-12; ch. 92, tab. XB, ll. 27, 40. Litem aestimare: ch. 88, tab. XA, ll. 12-13; ch. 92, tab. XB, l. 41.

20 The other matter from chapter 91 that does not appear in the context of recuperatorial suits is intertium denuntiare. As discussed above, intertium is an institution that applies only to suits before an unus iudex. Above, Chapter Five, note 42 and accompanying text.

The phrase diem diffindere, then, generally signifies an adjourment of trial before an unus iudex. The sources quoted above suggest that, at least in some cases, this form of adjournment was justified or provoked on certain grounds. Because the general outlines of diem diffindere are largely agreed upon, these grounds have been the main subject of debate, particularly the two grounds recited in the Twelve Tables.

The phrase morbus sonticus means 'an actual illness' or 'a serious illness', that is, not one that is feigned or minor.[21] The disease need not be permanent, though a text of Venuleius (D.21.1.65.1) suggests it might be:

> Quotiens morbus sonticus nominatur, eum significari Cassius ait, qui noceat: nocere autem intellegi, qui perpetuus est, non qui tempore finiatur . . . .
>
> Cassius says that whenever a disease is declared serious, it is one which does damage; and that , in turn, means one leaving lasting effects, not one which disappears with the passage of time . . . . (translation of the Pennsylvania Digest).

Lepri argues that a requirement that the injury be permanent would be hard to square with XII Tab. II, 2 if the disease does not bring about a loss of capacity

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21 A. d'Ors, Epigrafía juridica de la España romana (Madrid, 1953), p. 223; H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), p. 140; G. Pugliese, Il processo civile romano (Rome, 1961-62), p. 402. The word 'sonticus' may be formed from *sons, perhaps an archaic present participle of sum. J. Guillen, 'El Latin de las XII Tablas', Helmantica 19 (1968), p. 102. A generous number of sources explain the meaning of sonticus. Festus (F.290) s.v. 'Sonticum': Sonticum morbum in XII significare ait Aelius Stilo certum cum iusta causa; quem nonnulli putant esse, qui noceat, quod sonte<s> significat nocentes; id. (P.111), s.v. 'Insons': Insons, extra culpam, a quo dici morbus quoque existimatur 'sonticus', qui perpetuo noceat; id. (F.344), s.v. 'Sontica': [Sontica c]ausa dicitur a morbo [sontico, propter quem, quod est g]erendum, agere [nequimus]. See also Gell. NA 20.1.27; D.50.16.113 (Javolenus). On morbus sonticus generally, see C. Lanza, 'Impedimenti del giudice', BIDR (3rd Series) 29 (1987), pp. 467-94.

to litigate or try a case (as one would expect a permanent injury to do), but simply postpones trial to another day.[22] Also, in keeping with the notion of permanent injury, it was believed at one time that morbus sonticus referred specifically to epilepsy, but as Lévy-Bruhl points out, a text of Javolenus shows that the meaning of the phrase was probably not so specific: 'Morbus sonticus' est, qui cuique rei nocet.[23]

The phrase status dies cum hoste is a little more mysterious. It is usually taken to mean 'a day fixed for trial with a peregrine'.[24] What sorts of actions the phrase includes are unclear: if the various legis actiones were closed to peregrines, then the process alluded to may be that of the foreign court,[25] although some take the phrase as proof that peregrines could appear before a Roman magistrate from the earliest times.[26]

Given the existence of such specific grounds for adjournment, it is surprising to discover that a judge was permitted to divide the day on his own initiative without, it seems, any resort to formal grounds at all. Gellius tells us

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22 M. Lepri, 'Appunti in tema di "bonorum distractio"', in Scritti in Onore di Contardo Ferrini, ed. A. Gemelli (Milan, 1947-49), vol. 2, p. 133. It does seem possible, though, for a disease to leave lasting effects and yet still allow the litigants or judge to proceed with trial.

23 D.50.16.113; Lévy-Bruhl, above note 16, pp. 140, 212. Epilepsy, the so called morbus comitialis, makes an attractive analogy to morbus sonticus, since an epileptic seizure would cause an adjournment of a public assembly. See Suet. Iul. 45 and the commentary at C. Suetoni Tranquilli Divus Iulius, ed. H. Butler and M. Cary (Oxford, 1927), p. 107.

24 Festus (F. 314): Status dies vocatur, qui iudici causa est constitutus cum peregrino. Cic. Off. 1.12.37: Hostis enim apud maiores nostros is dicebatur, quem nunc peregrinum dicimus. See generally Kaser, RZ, p. 84 & n.9

25 Kaser, 'Ius honorarium', above note 15, loc. cit.

26 F. Wieacker, Römische Rechtsgeschichte (München, 1988), p. 265.

that, in the case he was appointed to try, he was reluctant to accept the claim of an undesirable litigant, though the law seemed to favour that litigant. Gellius wished to seek the advice of Favorinus, a philosopher, on the matter, and accordingly, 'iussi . . . diem diffindi'.[27] Holford-Strevens correctly points out that Gellius's difficulty is ethical rather than legal;[28] there is no suggestion here that Gellius had any reason to adjourn other than his own uncertainty. Such uncertainty, being subject only to a judge's caprice, could not be a formal cause for dividing the day in the way, for example, a serious illness is.

Gellius's case may seem unusual: a judge who does not require the advice of a jurist and who, under other rules for adjourning, would not be permitted to adjourn even on account of an ordinary illness[29] adjourns for what appears to be almost no reason at all.[30] Frier notes the anomaly and attempts to explain it by suggesting a distinction between types of adjournment: the Twelve Tables speak of 'postponement' for cause while Gellius speaks of simple 'adjournment'.[31] Frier's interpretation requires us to accept that the diem diffindere of the Twelve Tables is not quite the same as the diem diffindere of

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27 Gell. NA 14.2.11.

28 L. Holford-Strevens, 'Towards a Chronology of Aulus Gellius', Latomus 36 (1977), p. 99. Cf. T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), p. 30, who regards Gellius's act of seeking support for the judgement as a part of Gellius's officium iudicis.

29 Gell. NA 20.1.27; D.50.16.113; Festus (F. 290), s.v. 'Sonticum'.

30 González (1986), p. 235, refers briefly to 'postponement by agreement' in the lex Irnitana. He may or may not have this passage of Gellius in mind, although neither in this passage, nor anywhere, is there evidence of any 'agreement to adjourn'.

31 B. Frier, The Rise of the Roman Jurists (Princeton, 1985), p. 210 n.55. Frier equates diem diffindere with the phrase iudicium prolatum found at Cic. Verr. II, 2, 75. Cicero uses this latter phrase to refer to the adjournment of a private trial.

the classical law. Yet this does not seem possible: the passages from Ulpian (D.2.11.2.3) and Julian (D.42.1.60), quoted above, suggest that diem diffindere for cause existed in the classical law as it did under the Twelve Tables (that is, if the reconstruction of XII. Tab. II, 2 is essentially right). Gellius, therefore, is adjourning without cause at a time when grounds for diem diffindere were very much in existence.

This anomaly of excused and unexcused adjournment is only one troublesome matter on the subject of grounds. Another troublesome matter is the problem of determining what grounds existed at what time. The common view is that originally the two grounds cited above would have supported an adjournment, but that at some unknown time, perhaps on two occasions, the grounds were extended or modified. Chapter 95 of the Urso law hints at one such occasion. Generally, this chapter appears to set down the procedure to be followed when any of the various participants fails to appear in an actio popularis. One portion treats the failure of a magistrate (acting as claimant) or a private claimant to appear, respectively, at the preliminary hearing and iudicium. The chapter offers seven excuses for their absence: morbus sonticus, vadimonium, iudicium, sacrificium, funus familiare, feriae denicales, and magistratus potestasve populi Romani. Many have suggested this list of excuses reveals that the grounds on which diem diffindere was permitted were later extended over and above those cited in the Twelve Tables.[32]

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32 D. Daube, 'Pecco Ergo Sum', in Collected Studies in Roman Law (1991), vol. 2, p. 1399 & n.30; Kaser, RZ, p. 84; P. Girard, Histoire de l'organisation judiciaire des Romains (Paris, 1901), p. 88 n.1; Johnston, 'Three Thouhts', above note 18, p. 76 n.71; H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), pp. 140-41; J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', ZPE 70 (1987), p. 174 n.4. At what time these new grounds were introduced is less certain. Six of the seven grounds mentioned in the Urso law (excluding magistratus potestasve populi Romani) are older than that law. Gellius recites similar or identical grounds while quoting an ancient soldiers' oath.

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7. Diem Diffindere

New or modified grounds may also have been introduced with the lex Iulia de iudiciis privatis. We have some evidence for this in Gellius; in the portion of the Attic Nights quoted above[33] he mentions that dierum diffissio is among the matters that he consulted in the lex Iulia. The lex may have included some enumeration of grounds, although he is not so specific on the question.[34]

Chapter 91 of the lex Irnitana also suggests, with roughly the same amount of vagueness as Gellius, that the lex Iulia may have addressed grounds for diem diffindere. Chapter 91 confirms that the lex Iulia fixed a time limit for rendering judgement.[35] Since chapter 91 twice associates the failure to give judgement with the failure to adjourn, one can speculate that the lex Iulia treated all these matters at the same time. The chapter gives further hints along the same lines: it prescribes that diem diffindere shall be performed, in part, according to leges in force at Rome, 'so that the day shall be divided and shall have been divided on the same grounds.' (ll. 12,14, 18-20). The 'same grounds', as González points out, mean those in force at Rome.[36] Finally, as

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Gell. NA 16.4.3-.4. These grounds would excuse a soldier from appearing for service. The oath dates perhaps to 190 B.C. L. Holford-Strevens, Aulus Gellius (London, 1988), p. 14. The six grounds themselves are perhaps as old as the Twelve Tables. T. Mommsen, 'Lex Coloniae Iuliae Genetivae', Ephemeris Epigraphica II (1875), p. 142 (Juristische Schriften, vol. 1, p. 232); E. Hardy, Three Spanish Charters (Oxford, 1912), p. 41 n.81; Behrends, above note 9, p. 73 n.240. On the grounds in the Urso law generally, see d'Ors, Epigrafía Juridica, above note 21, pp. 222-24.

33 Above, text accompanying note 3.

34 See J. Kelly, Roman Litigation (Oxford, 1966), p. 122; Johnston, 'Three Thoughts', above note 18, p. 63; P. Girard, 'Les leges Iuliae iudiciorum publicorum et privatorum', ZSS (rom. Abt.) 34 (1913), p. 372.

35 Chapter 91, tab. XA, ll. 53-55; G.4.104.

36 González (1986), p. 236.

Johnston notes, at line 15 the text refers to diffissum e lege, and perhaps the lex Iulia is the statute to which this phrase alludes.[37]

From the discussion to this point it is fairly clear we know very little about the grounds for diem diffindere, both the grounds recited in the Twelve Tables and the grounds accepted in the later law. To reconstruct the grounds recited in the Twelve Tables is particularly difficult: it is certainly possible, as Mommsen says, that six of the seven grounds mentioned in chapter 95 of the Urso law (excluding magistratus potestasve populi Romani) are derived from Table II, 2.[38] Yet Mommsen's suggestion illustrates well the limits of what we know. The basis for his suggestion is, in part, the observation that the two excuses cited in Table II, 2 seem to reappear in the Urso law. The excuse morbus sonticus is repeated verbatim, while the vadimonium of the Urso law has its counterpart in status dies cum hoste (a 'vadimonium factum cum hoste', as Mommsen puts it[39]). From this we could conclude that Table II, 2, in the condition we have it, gives only an abbreviated list of excuses, which happen to appear later more fully in the Urso law.

The difficulty is that the argument puts a great deal of trust in the customary reconstruction of Table II, 2. The vadimonium cited in the Urso law may indeed recall status dies cum hoste, but we cannot be entirely certain that status dies cum hoste was in fact a ground for diem diffindere recited in Table II, 2. Cicero mentions that these words were found in the Twelve Tables, but he does not say where.[40] We assume that status dies belongs alongside

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37 Johnston, above note 18, pp. 62-63.

38 Mommsen, above note 11, Juristische Schriften, vol. 1, p. 232.

39 Id.

40 Cic. Off. 1.12.37.

morbus sonticus at Table II, 2, in part because both morbus sonticus and the supposed counterpart to status dies—vadimonium—are found in chapter 95 of the Urso law. Thus the evidence of the Urso law itself helps in the reconstruction of Table II, 2.[41]

The hazard lies in taking the argument a step further and insisting that, because the statutes have two matters in common, they probably have six matters in common. This is in large part a 'bootstrap' argument, assuming a resemblance from an assumed resemblance. At bottom the resemblance is founded on the occurence of only one excuse—morbus sonticus—in both Table II, 2 and the Urso law. As a 'serious illness' would have been an appropriate excuse to many different obligations, there may be nothing remarkable at all about the recurrence of this excuse, and hence no reason to conclude that the Urso law and the Twelve Tables must have other matters in common.

It is no easier to reconstruct the grounds for diem diffindere in the later law. Given the nature of the sources, any suggestions regarding specific grounds require an enormous amount of speculation.[42] For example, though the lex Iulia certainly treated diem diffindere in some way, it need not have enumerated any specific grounds. It may merely have set down the rules affecting two related acts, adjourning and rendering judgement. Little more than this can be deduced from chapter 91 of the lex Irnitana, ll. 51-54, where the two matters are addressed.[43]

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41 Of course Table II, 2 is reconstructed also on the basis of the soldier's oath related by Gellius. See above text accompanying note 14.

42 Pugliese, above note 21, vol. 1, p. 402; F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), p. 193.

43 See Giménez-Candela, above note 28, p. 20.

Chapter 95 of the Urso law, too, is not a particularly reliable source for grounds in the later law, chiefly because it is not clear whether chapter 95 has anything to do with diem diffindere at all. Diem diffindere, it will be recalled, is a form of adjournment that appears to apply only to suits before a unus iudex. Chapter 95, however, deals only with suits before recuperatores. Even ignoring this discrepancy, chapter 95 is not a helpful source. It does not mention diem diffindere or any analogous phrase, and with respect to the two forms of absence treated there—the magistrate's and a plaintiff's—does not even raise the issue of adjournment or postponement. If a magistrate fails to appear for good cause, chapter 95 states not that an adjournment takes place, but that the selection of recuperatores does not proceed (reciperatores sortiantur reiciantur res iudicetur, ex hac lege nihilum rogatur, ll. 28-9). Moreover, the statute is here speaking about the magistrate's absence from the earlier stage of the lawsuit, before the recuperatores have been selected.[44] This is not, therefore, by any means a postponement of trial.

The other type of absence treated in chapter 95 is on a different footing from the magistrate's absence, but is no more helpful for our purposes. A plaintiff who fails to appear at the iudicium will be excused if his absence was provoked by one of the listed reasons. As the statute is here treating the second half of the lawsuit, the circumstances are closely analogous to those in which diem diffindere arises. Unfortunately, the statute discusses only the consequences of a plaintiff's absence without cause. In such a case the action is lost (actio ne esto, ll. 36-7).[45] The statute says nothing whatsoever about

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[44] D. Johnston, 'The Conduct of Trials at Urso', in Estudios sobre Urso: Coloniae Iuliae Genetivae, ed. J. González (Seville, 1989), p. 18.

[45] That is, lost so far as the plaintiff is concerned. The action treated in the statute is an actio popularis, and Johnston argues convincingly that it is

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the consequences of failing to appear for a valid cause. Perhaps an adjournment of some kind would have ensued, but whether the adjournment would take the form of diem diffindere the statute does not reveal. It therefore does not answer the very question we would like it to answer: whether the day would be divided if the claimant failed to appear for trial for a valid cause. Without an answer to this question it is difficult to conclude, as many do, that under the Urso law the list of grounds for diem diffindere had grown by the first century B.C.[46]

The evidence is therefore fairly disappointing on the matter of grounds for diem diffindere in the classical law. We cannot be certain what the grounds were nor where they were set down. The sources permit only a few firm conclusions.

First, for all the doubts about what the grounds for diem diffindere were, two or more grounds did exist in some fashion in the classical law. As just mentioned, the lex Irnitana makes use of a fiction that the day is to be divided ex isdem causis (chapter 91, l. 14) as those which prevailed at Rome. Second, the single ground for adjournment that we can be certain existed in the classical law is morbus sonticus on the part of the judge or one of the parties. According to the excerpts from Ulpian and Julian above,[47] morbus sonticus would require an adjournment, even if the parties or the judge were unwilling. Third, as Gellius reveals (NA 14.2.11), a judge appears to have had the

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only the absent claimant who may not bring the action again. See Johnston, above note 44, pp. 16-17.

46 Cf. Lévy-Bruhl, above note 18, p. 141: '. . . à ce moment [dans le temps de la loi d'Urso], la liste des excuses s'est notablement accrue.' See also Johnston, 'Three Thoughts', above note 18, p. 76 n.71.

47 Above, text accompanying note 12.

authority in some circumstances to adjourn without appealing to any specific grounds at all. As this is a peculiar feature to find alongside the other rules, I hope to give a satisfactory explanation in due course.

This chapter has sought to give a brief introduction to diem diffindere, with particular attention to the limits of what we know. The few sources for diem diffindere we possess tell us in general that it is an adjournment of trial, different from comperendinatio, and that it may take place on one of several grounds, or on a judge's own initiative. It is now necessary to take up the meaning of the phrase diem diffindere, as it may not be obvious why 'dividing the day' should describe this sort of adjournment.

VIII

Dividing the Fictional Day

I mentioned in the previous chapter that our sources for diem diffindere are detailed enough to reveal that, generally speaking, 'divide the day' means 'adjourn'. What is not clear is why the law uses this unusual phrase to denote adjournment. It is not obvious what sort of day the phrase refers to, nor why the law conceives of a day as 'divided' when a judge adjourns. The most common explanation is that the divided day is a reference to the famous rule of the Twelve Tables, the rule that a civil suit was required to be completed in one day.[1] This 'one-day rule' is the subject of this chapter and the next.

The One-Day Rule

A short description of the rule is useful. Bethmann-Hollweg describes it concisely:[2]

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1 XII Tab. I, 9: solis occasus suprema tempestas esto.

2 M. v. Bethmann-Hollweg, Der Civilprozeß des gemeines Rechts (Bonn, 1864), vol. 1, pp. 183-84. The rule has many adherents. See id., loc. cit., and vol. 2, pp. 590-91; F. Keller, Der römische Zivilprozess und die Aktionen (Leipzig, 1883), pp. 336-37; P. Girard, Histoire de l' organisation judiciaire de Romains (Paris, 1901), p. 89 n.1; A. Greenidge, The Legal Procedure of Cicero's Time (Oxford, 1901), p. 271; L. Wenger, Institutionen des römischen Zivilprozessrechts (München, 1925), pp. 72, 194; H. F. Jolowicz & B. Nicholas, Historical Introduction to the Study of Roman Law, 3rd ed. (Cambridge, 1972), p. 186; H. Hübner, 'Zur Haftung des iudex, qui litem suam fecit', IURA 5 (1954), p. 201; Kaser, RZ, pp. 37, 84; O. Behrends, Der Zwölftafelprozess, zur Geschichte des römischen Obligationenrechts (Göttingen, 1974), p. 73; G. Cervenca, Il processo privato romano: le fonti (Bologna, 1983), p. 33 n.27; B. Frier, The Rise of the Roman Jurists (Princeton, 1985), p. 209; J.-M. David, Le patronat judiciaire au dernier siècle de la république romaine (Rome, 1992), p. 7. A few writers do not accept the rule. See G. Pugliese, Il processo civile

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> [A civil] proceeding was supposed to be commenced, carried out, and completed with the giving of judgement, on one and the same day. Hence [the parties] commenced their examination during the morning and demanded that judgement be given on the same afternoon, in any event before sundown.

Thus speeches, proof, and judgement had to take place on the same day. To these events one more should be added: consultation. The one-day rule apparently governed in trials before panels of recuperatores,[3] and we can assume that members of a collegial court would have required at least some period of time to confer with one another prior to judgement. The same of course is true of a unus iudex who required consultation with a consilium.

The purpose of the rule is unknown. Kaser suggests that the rule, together with other provisions in Table I, 'are aimed at settling exactly the time and place [of trial], in order to avert a "refusal of justice", that is to say a delay, to the disadvantage of plebeian litigants seeking justice.'[4] Bethmann-Hollweg, Wenger, and Greenidge add that, aside from averting delay, the rule would ensure that all issues and evidence were put to the judge in a single sitting, allowing him to develop the truest impression of the merits of the case.[5]

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romano (Rome, 1961-62), vol. 1, p. 405; J. Carbonnier, 'Nocturne', in Mélanges Henri Lévy-Bruhl (Paris, 1959), p. 346; H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), p. 129.

3 Cicero's pro Tullio, often cited as a source for the one-day rule, was tried before a panel of recuperatores.

4 Kaser, RZ, p. 84 n.11. This suggestion depends on the view that the Twelve Tables were the product of a social struggle between the orders. An excellent and convincing argument against this view is in R. Westbrook, 'The Nature and Origins of the Twelve Tables', ZSS (rom. Abt.) 105 (1988). '[The Twelve Tables were] certainly not a reform measure called into being by particular historical events.' Id., p. 101.

5 Bethmann-Hollweg, above note 2, vol. 1, p. 184; vol. 2, p. 591; Wenger, above note 2, p. 194; Greenidge, above note 2, p. 271.

It is not known whether the rule was in force during the formulary period. Tacitus, in the Dialogus de Oratoribus, is the latest source to allude (according to some) to the rule. However, in the relevant passage the speaker is in the course of describing the trials, not of his own time, but of the late Republic. This leaves Cicero as the latest contemporary source for the rule.[6] Keller comments that there is no trace of the rule after Cicero. Bethmann-Hollweg is not so certain as this, noting that Keller gives no proof for the rule's demise. Kaser similarly leaves the matter open.[7]

Of course some lawsuits might easily demand more than one day, and for lengthier matters the rule appears to have allowed an exception. If the litigants, following an adjournment, repeated certain events from the previous session, the rule was not violated. Keller describes the exception as follows:[8]

> For the most part the rule of the Twelve Tables that the iudicium was to be completed in one day (from sunrise to sunset) was in force even to Cicero's time; so if the trial had not finished, both parties must at least have been allowed to recite their case anew, starting from the beginning on a new day, though without unnecessary repetition of the examination of witnesses and such.

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6 Tac. Dial. 19.2; Cic. pro Tull. 3.6, pro Quinct. 10. These texts are discussed below, Chapter Nine, notes 15 to 18 and accompanying text.

7 Keller, above note 2, pp. 337-38; Bethmann-Hollweg, above note 2, vol. 2, p. 591 n.29; Kaser, RZ, p. 147 n.21

8 Keller, above note 2, pp. 336-37. See also Greenidge, above note 2, p. 271.

Most writers admit that an adjournment of some kind was permitted when the proceedings had consumed the entire day.[9] To extend a suit beyond one day and allow the required repetition of events, several modes of adjournment have been suggested, including ampliatio, comperendinatio, and diem diffindere.[10]

The Fictional Day

The association of diem diffindere with the one-day rule is particularly appealing. This is in part because, from a practical point of view, it is difficult to imagine how every lawsuit could have been completed in one day, and difficult also to explain how certain trials, which we know exceeded one day, evaded the rule.[11] Adjournment by diem diffindere provides a plausible explanation: it seems plainly to take up the notion of 'one day' and, Gellius notwithstanding,[12] it is as old as the Twelve Tables and therefore as old as the one-day rule itself. Keller, accordingly, cites an instance of diem diffindere

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9 'Größere Sachen, die nicht an einem Tag erledigt werden konnten, mußten nun freilich zur Fortsetzung vertagt werden . . . .' Wenger, above note 2, p. 194. See also R. Düll, Das Zwölftafelgesetz (München, 1944), p. 77 ('erforderlichenfalls vertagt'); Kaser, RZ, p. 274; Girard, above note 2, p. 89 n.1.

10 See Keller, above note 2, p. 337 (ampliatio); Bethmann-Hollweg, above note 2, vol. 1, p. 184, vol. 2, p. 591 (ampliatio, comperendinatio, diem diffindere); Greenidge, above note 2, pp. 501-2 (ampliatio); O. Behrends, 'Ius und ius civile', in Sympotica Franz Wieacker (Göttingen, 1970), p. 45 (diem diffindere, comperendinatio); J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the Lex Irnitana: A Colloquium', ZPE 70 (1987), p. 179 (diem diffindere).

11 See the sources cited below, Chapter Nine, notes 15 to 18 and accompanying text.

12 See Gell. NA 14.2.1, where he ascribes the details of dierum diffissio to the lex Iulia.

(Gellius Attic Nights 14.2.11) for the proposition that a judge who hesitates to decide a case might evade the one-day rule by dividing the day.[13] Bethmann-Hollweg, also, explains that diem diffindere was a means of controlling the number of trial hearings, which would otherwise repeatedly take up the controversy anew each day in accordance with the one-day rule.[14] And Birks states that a trial was formally required to conclude after one day in the absence of diem diffindere; he notes in this respect that the lex Irnitana appears to take special care to ensure that the parties and the judge are present for trial on that one particular day.[15]

To spell out precisely how diem diffindere and the one-day rule fit together is not easy. Generally speaking, diem diffindere appears to create a fiction that, over a series of days, only a single court day has passed. As Behrends puts it, 'diem diffindere, literally 'to split the day' . . . allowed the creation of a fictional one-day unity . . . .'[16] Hence the dies in diem diffindere is a fictional day; in adjourning by diem diffindere the judge, we understand, is dividing the fictional day and apportioning it over several actual days.

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13 Keller, above note 2, p. 337 & n.779.

14 Bethmann-Hollweg, above note 2, vol. 2, p. 591.

15 Intertiumjagd, loc. cit. above note 10. According to Birks, the statute does so by imposing a fine on the magistrate if he fails to give intertium or publish the date of trial. Lex Irni. ch. 90, ll. 37-42.

16 O. Behrends, 'Ius und Ius Civile', in Sympotica Franz Wieacker, ed. D. Liebs (Götingen, 1968), p. 45. I have abbreviated Behrends' theory here somewhat. He argues that the lawsuit in its entirety (both phases) must take place within one fictional day, and that this is performed by splitting the first day (diem diffindere) and in its place inserting the next day but one (diem comperendinari). See id., pp. 45-46; O. Behrends, Der Zwölftafelprozess: zur Geschichte des römischen Obligationenrechts (Götingen, 1974), pp. 51, 74 n.249. Cf. T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), pp. 14-15.

The one-day rule therefore gives a reasonable explanation of what diem diffindere means. It explains why adjournment is expressed by division and what sort of day is divided when a judge adjourns. But apart from explaining what diem diffindere means, the idea of dividing a fictional day has a further, practical, advantage: it brings a good deal of certainty to the otherwise uncertain issue of a judge's liability. The certainty derives from the notion that, in a trial lasting more than one day, a judge who faithfully adjourns and reconvenes within the limits of a fictional day has kept the suit in iudicio and avoided making the case his own. In two respects in particular the one-day rule is helpful to the issue of liability.[17]

First, two sources appear to attach great importance to diem diffindere, suggesting that a failure to adjourn may bring liability on the judge, and the one-day rule serves to explain how adjournment and liability are related. The first source is a fragment from the Antinoopolis papyrus, which was mentioned briefly above.[18] The fragment has two parts, and the part relevant here appears to be an excerpt from Ulpian, ad Edictum, book 12.[19] This excerpt is discussed in far more detail below in Chapter Eleven, but in general it discusses the relief afforded a plaintiff who sues a pupil represented by a false tutor, and then loses his suit. In a subsequent suit the plaintiff may be allowed Praetorian relief, provided he was unaware the pupil lacked the proper tutorial

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17 I am grateful to Peter Birks for bringing this aspect of the one-day rule to my attention. Many of the matters I mention here were presented by Professor Birks to a colloquium on intertium on 23-24 March 1987, at St. John's College, Cambridge. The report of the colloquium is at Intertiumjagd, cited above note 10.

18 The text on the verso, containing the word intertium, was discussed above, Chapter Two, notes 21 to 24 and accompanying text.

19 See D.27.6.1.1, D.h.t.1.6; Lenel, EP, pp. 119-20.

authority. The text then modifies the hypothetical somewhat, citing Pomponius as follows:[20]

> Item Pomp(onius) scr(ibit), si falso t(utore) a(uctore) m(ale) fuerit diffis<s>us dies, ed(ictum) q(ui)d(em) cessare, et iudicem, q(ui)a neq(ue) diffidit neq(ue) s(ententi)am dixit, litem suam fe[cisse videri.
>
> Again, Pomponius writes that if the day has been wrongly divided in a case where the authority of a false tutor arises, the edict will not apply, and the judge, who has neither divided the day nor pronounced judgement, seems to have made the case his own.

The second source is chapter 91 of the lex Irnitana. As d'Ors notes, chapter 91 is striking for the fact that it reproduces the language of the papyrus just quoted—the words quia neque diffidit neque sententiam dixit—quite closely.[21] In general the chapter outlines a series of procedural matters which, to different degrees, must follow Roman practice. Among these matters is the question of a judge's liability, which is mentioned twice. In both instances the statute declares that the law of Rome relating to serving as judge and dividing the day shall govern,

> . . . si neque dies diffissum neque iudicatum fuerit, uti lis iudici arbitro damni sit . . . . (tab. XA, ll. 51-52)

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20 This is the text of V. Arangio-Ruiz, [Recensioni Critiche], IURA 2 (1951), p. 345. I have departed from Arangio-Ruiz' text only in indicating that m(ale) is a resolved abbreviation. For the alternate readings and notes accompanying the fragment's first publication, see Egypt Exploration Society, The Antinoopolis Papyrus, ed. C. H. Roberts (London, 1950), part I, no. 22.

21 A. d'Ors, 'Litem suam facere', SDHI 48 (1982), p. 377.

> . . . utique, si neque diffissum e lege neque iudicatum sit per quos dies quoque loco ex hac lege iudicari licebit oportebit, iudici arbitroue lis damni sit . . . . (tab. XB, ll. 15-17)
>
> . . . if the day has not been postponed and judgment has not taken place, so that the suit may be at the peril of the iudex or arbiter . . . .
>
> . . . and so that the case may be at the peril of the iudex or arbiter if there has been no postponement under statute and judgment has not taken place during the days and in the place which are lawful and appropriate under this statute . . . . (Crawford's translation)

These excerpts from the Antinoopolis papyrus and the lex Irnitana are remarkable, because so far as a judge's liability is concerned, dividing the day appears to be given equal importance to giving judgement. A judge who fails both to divide the day and give judgement will be liable. The importance accorded adjournment here is in contrast to Gellius's almost derisory reference to dierum diffissio as a legitimus ritus (Attic Nights 14.2.1). One naturally looks for something to explain the importance of diem diffindere, for some additional feature in the law that elevates the matter-of-fact issue of adjournment to such significance.[22] The one-day rule provides an attractive explanation. One might expect a judge to become liable by the comparatively innocent act of failing to adjourn, if an overarching rule exists requiring trials to be brought to judgement without interruption.[23]

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[22] Lamberti argues for such an additional requirement quite apart from the one-day rule. She views the phrase dies diffissos iurare in chapter 91 of the lex Irnitana as an independent undertaking by the judge to be present at the trial when it reconvenes after an adjournment. Thus a failure to divide the day would be a suitably serious matter to bring liability on the judge. F. Lamberti, 'Alcune riflessioni in tema di 'litem suam facere', Labeo 36 (1990), p. 254; F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), pp. 194-95.

[23] A proponent of the one-day rule might, however, prefer to read the two conditions for liability disjunctively—'either fail to adjourn or fail to give

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The one-day rule is helpful on the question of the judge's liability in a second respect. This concerns the iudicium imperio continens. That a judge should be liable if he fails to divide the day and give judgement (as in the sources just quoted) is a perfectly reasonable requirement so long as the judge is given an adequate period of time in which to rule. In a iudicium legitimum he will have eighteen months to do so.[24] Though this might not be adequate in every case,[25] from a judge's standpoint it is better to have a firm eighteen months than to face the uncertainty of a iudicium imperio continens. If a judge is unfortunate enough to be appointed to serve in such a trial when the appointing magistrate is nearing the end of his term of office, the judge will have undertaken to bring the suit to judgement within the short interval before the suit expires.[26] If he fails to do so, he may be liable,[27] and given the shortness of time this is hardly fair. The urgency to give judgement might be alleviated somewhat by the rule that allows him either to give judgement or divide the day; ostensibly a judge could simply declare the day divided before the magistrate's term expired. But this does not really solve the problem, first, because the judge might then use diem diffindere as a device to avoid giving judgement even when time was not short, and second, because whenever a

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judgement'—as this would establish failure to adjourn independently as a breach of the one-day rule.

24 G.4.104; see also lex Irni., ch. 91, tab. XA, l. 53 - tab. XB, l. 3, 17-18.

25 J. Kelly, Roman Litigation (Oxford, 1966), pp. 122-23.

26 G.4.105; R. W. Lee, The Elements of Roman Law (London, 1952), pp. 427-28.

27 A judge's liability for failure to give judgement is clearest in the Antinoopolis Papyrus, above note 20, recto, ll. 16-19, and the lex Irnitana, ch. 91, tab. XA, ll. 51-53; tab. XB, ll. 15-17. See also Macrob. Sat. 3.16.15; A. d'Ors, 'Litem suam facere', above note 21, pp. 375-77.

judge uses diem diffindere in this way he has at least raised a question about the propriety of the adjournment, and thus put himself in jeopardy of liability.[28]

The fictional day of the one-day rule cleverly answers the difficulties of giving judgement in a iudicium imperio continens. Under the rule, a judge who presides over a period of several days is deemed to be presiding on the same day. He therefore faces no shortage of time if the appointing magistrate is nearing the end of his term (or dies), because in dividing the day he is, so to speak, adjourning the same day over and over again. The usefulness of the one-day rule in this respect is not limited to iudicia imperio continentia, though the need for the rule is clearly greater there.

The Existence of the One-Day Rule

This chapter has discussed how certain aspects of diem diffindere are commonly understood in light of the one-day rule. The rule serves to explain both what diem diffindere means and how a judge's power to adjourn is constrained. My aim in the following chapters is to show that the one-day rule does not provide an adequate foundation for diem diffindere. The inadequacy of the prevailing view has nothing to do with the way in which the one-day rule and diem diffindere explain and support one another. In fact, they explain and support one another very well. Rather, the problem lies in the fact that the one-day rule may not have existed, that the text which is commonly

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28 Kelly solves the problem raised here by suggesting that, in the case of iudicia imperio continentia, each magistrate confirmed the iudiciorum dationes of his predecessor. He also suggests that, since the judge and parties might also be constrained by time in a iudicium legitimum, diem diffindere might have served as a device to extend the suit beyond the eighteen-month limit. Kelly, above note 25, pp. 122-31. Cf. D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 75 n.69.

understood to announce the one-day rule appears to have announced another rule entirely. Accordingly, the next chapter takes issue with the prevailing view of diem diffindere in an oblique way, addressing itself solely to the existence of the one-day rule. Because the absence of the one-day rule leaves questions about diem diffindere unanswered, the subsequent chapters then attempt to answer those questions without resort to the rule.

IX

The One-Day Rule

The view that diem diffindere is founded on the one-day rule can be the correct view, in the end, only if the one-day rule in fact existed. The evidence for the rule is of two sorts. The direct evidence is the provision of the Twelve Tables that recites the words of the supposed rule itself. There is also a body of evidence consisting of sources that support the existence of the rule by inference. These include certain authors who comment on the pressures of time in arguing before a court. The discussion below first takes up the direct evidence, the words of the supposed rule. On the basis that these words recite a different rule altogether, the discussion then attempts to explain the supporting evidence without resort to the one-day rule.

The provision of the Twelve Tables from which the rule is derived is characteristically terse, and taken alone its meaning is ambiguous: it may or may not recite the rule. Fortunately, the provision need not be understood on its own. The words are taken from a generous number of sources, and most of the sources discuss the provision in contexts that help to make its meaning clear. We can therefore learn how several ancient authors understood the very text from which the rule is derived. I suggest below that their understanding of the text is at odds with the rule, and that accordingly no such rule is found in this provision of the Twelve Tables. If the rule is not announced in the Twelve Tables, then adjournment by 'dividing the day' cannot be founded on the rule, unless the rule existed in some source unknown to us.

Sources

The evidence for the rule consists principally of XII Tab. I, 6-9, as follows:[1]

> I, 6. Rem ubi pacunt, orato. 7. Ni pacunt, in comitio aut in foro ante meridiem caussam coiciunto, tum peroranto ambo praesentes. 8. Post meridiem praesenti litem addicito. 9. Si ambo praesentes, solis occasus suprema tempestas esto.
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> I, 6. If the parties agree on the place of trial, one of them shall announce it. 7. If they do not so agree, they shall summarize their case before midday in the comitium or forum. Thereupon the parties, both being present, shall plead their cases to the finish. 8. After midday, the judgement shall go in favour of the party who is present. 9. If both parties are present, sunset shall be the latest time for the proceedings.

The greater part of the opening, from Rem ubi (6) to coiciunto (7), is from the Rhetorica ad Herenium and Priscian's Institutiones Grammaticae.[2] Gellius gives the remainder of the text, from ante meridiem (7) to suprema tempestas esto (9).[3] The convenient overlap between the three shows that the passage is

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1 The text is that of both Bruns (7) I, p. 19, and FIRA I, p. 28, with the exception of the last clause of I, 7, where tum appears for the com in the two cited editions. The emendation is the suggestion of Mommsen. See note 35 below.

2 Rhet. Her. 2.13.20, see De Ratione Dicendi ad C. Herenium, ed. F. Marx (Leipzig, 1894), pp. 226-27. Priscian purports to quote 'Cicero II ad Herennium'. Priscian, Institutiones Grammaticae 10.32, ed. M. Hertz (in Grammatici Latini, ed. H. Keil, vol. 2) (Hildesheim, 1961), pp. 523-24.

3 Gell. NA 17.2.10. See A. Gelli Noctes Atticae, ed. P. K. Marshall (Oxford, 1990): "'Sole", inquit [Quadrigarius, the republican historian], "occaso". "Sole occaso" non insuavi vetustate est, si quis aurem habeat non sordidam nec proculcatam; in duodecim autem tabulis verbum hoc ita scriptum est: "Ante meridiem causam coniciunto, tum peroranto ambo praesentes. Post meridiem praesenti litem addicito. Si ambo praesentes, sol occasus suprema tempestas esto.'" The text of Table I, 7-9, above, generally follows Marshall's text of Gellius, with the exception of caussam for Marshall's causam, and solis for sol. The word solis is given in the other sources for this portion of the text. The archaic spelling of caussam, on the other hand, though the preferred spelling of all recent editors of the Twelve Tables, is

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complete.[4] The last sentence—the sentence we are most concerned with here—is found in numerous sources: aside from Gellius, it is quoted with few variations in Varro, Festus, Censorinus, and Macrobius.[5]

The events described in the statute are much easier to identify than the persons involved. If the parties did not agree on a place for trial,[6] they would appear at a designated place before noon to present first the causae coniectio and then the peroratio. Gaius explains that the causae coniectio was a brief summary of the case presented to the judge by the parties.[7] By 'perorare' the statute apparently means 'plead their case to the finish'.[8] After midday, if one

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not found in any of the original texts. See Nonius 267, ed. W. Lindsay (Leipzig, 1903), p. 409, s.v. 'coicere'; Rhetorique à Herennius 2.20, ed. G. Achard (Paris, 1989), p. 51; and Marshall's text of Gellius, loc. cit.

4 M. Kaser, 'Prätor und Judex im römischen Zivilprozess', TR 32 (1964), p. 349.

5 Three of these authors are especially useful in determining the meaning of the last sentence, and are discussed below: Varro Ling. 6.5, 7.51; Censorinus D.N. 24; Macrob. Sat. 1.3.14. The fourth appears to be taken directly from Varro Ling. 7.51, and requires no further discussion: Festus (F. 305), s.v. 'Supp<remum>': solis <occasus diei supre>ma tempestas esto.

6 This is obviously only one interpretation of rem ubi pacunt orato. See Kaser, above note 4, pp. 349-53. H. Lévy-Bruhl, Recherches sur les actions de la loi (Paris, 1960), pp. 206-7 & n.3, makes a good defense of this interpretation.

7 G.4.15: solebant breviter ei et quasi per indicem rem exponere; quae dicebatur causae coniectio quasi causae suae in breve coactio. See also Pseudo-Asconius at Cic. In Verr. II, I, § 26 (Bruns (7) II, p. 71): Quo cum esset ventum, antequam causa ageretur, quasi per indicem rem exponere; quod ipsum dicebatur causae coniectio, quasi causae suae in breve coactio.

8 Bethmann-Hollweg, for example, renders it 'durchführen'. M. v. Bethmann-Hollweg, Der römische Civilprozeß (Bonn, 1864), vol. 2, p. 591.

of the parties had not appeared, judgement went in favour of the party who did appear.

What is not so clear is precisely which acts were performed by the magistrate and which by a judge. Possibly, at the time of enactment no judge was involved at all. The orato of section six is sometimes understood to require the magistrate to announce a settlement of the case if one should occur.[9] Moreover, the words comitium and addicito suggest that proceedings are before a magistrate and not a judge. On the other hand, if the ubi of section six is locative, then the orato is not an announcement of a settlement but a notification of the place for trial for the benefit of a judge. That the notification is for the benefit of a judge—and that the ensuing trial would therefore take place before that judge—follows from the fact that, as Kaser argues, we would not expect the parties to have the power to agree on a place for trial before a magistrate.[10]

The discussion below assumes that a judge took at least some part in the proceedings described in sections seven to nine. It may be, as Kaser and others have suggested, that when a party failed to appear before the judge, the magistrate rather than the judge gave judgement in favour of the other party

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9 This is the interpretation of A. Johnson, P. Coleman-Norton, and F. Bourne, Ancient Roman Statutes (Austin, 1961), p. 9, who translate section six 'When the parties agree on the matter the magistrate shall announce it.' See also the authorities cited in Lévy-Bruhl, above note 6, p. 206 n.3.

10 On the significance of comitium and addicito, see M. Kaser, 'Zum Ursprung des geteilten römischen Zivilprozessverfahrens', in Ausgewählten Schriften (Naples, 1976), vol. 2, pp. 399-402; Kaser, above note 4, pp. 349-353. On orato as a notification to the judge, see id., p. 350 & n.61. Alternatively, the orato may be taken as an injunction to the parties to proceed. Festus (P. 199): Orare antiqui dixerunt pro agere. If so, the singular orato is hard to account for, though some have suggested 'each party shall plead'. Ancient Roman Statutes, above note 9, p. 13 n.9.

under section eight.[11] But to deny the judge any part goes against what is perhaps the most persuasive proof on the issue: Gaius's unambiguous statement in the Institutes that the causae coniectio and peroratio took place cum ad iudicem venerant.[12]

Fortunately, section nine is much more straightforward than the sections which precede it, and this is the section that concerns us most. Section nine declares that sunset shall be 'the latest time'. The sense of the passage, for the most part, requires only an explanation of what 'the latest time' is intended to limit. Düll's translation of section nine, for example, puts 'für die Streitverhandlung' in a parenthesis.[13] With the benefit of this one parenthesis, the words are understood quite literally to declare that a lawsuit must be finished by sunset.

In the previous chapter I mentioned certain refinements in the one-day rule. The customary view is that judgement had to be announced at the conclusion of the day, and that if the case were not completed the proceedings would have to begin anew on another day.[14] These refinements are not found in the Twelve Tables, but are taken from other sources. Insofar as these

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11 See Kaser, above note 4, p. 352 & n.69.

12 G.4.15; Lévy-Bruhl, above note 6, p. 206 n.3. The Gaius passage may not be as straightforward as it seems. Broggini says very sensibly that Gaius may be committing the common error of describing historical events with contemporary terminology. G. Broggini, Iudex Arbiterve (Düsseldorf, 1957), p. 82. Kaser also notes the Gaius passage, and is bothered particularly by the fact that the comitium, where according to section seven the causae coniectio may take place, was the praetor's place of authority. Kaser, above note 4, p. 349.

13 R. Düll, Das Zwölftafelgesetz (München, 1944), p. 27.

14 Above, Chapter Eight, notes 8 to 10.

sources appear to allude to the rule, they are taken as evidence that the rule existed.

The first source usually cited in support of the rule is a passage in Cicero's pro Tullio, in which Cicero encourages his adversary not to use up the day by speaking too long:[15]

> Unum hoc abs te, L. Quincti, pervelim impetrare—quod tametsi eo volo quia mihi utile est, tamen abs te idcirco quia aequum est, postulo—ut ita tibi multum temporis ad dicendum sumas ut his aliquid ad iudicandum relinquas. Namque antea non defensionis tuae modus, sed nox tibi finem dicendi fecit; nunc, si tibi placere potest, ne idem facias, id abs te postulo. Neque hoc idcirco postulo, quod te aliquid censeam praeterire oportere aut non quam ornatissime et copiosissime dicere, verum ut semel una quaque de re dicas; quod si facies, non vereor ne dicendo dies eximatur.
>
> I would like very much to have this one favour of you, Quinctius—even though I want to gain by it something useful to me, I ask it nevertheless because coming from you it is a fair thing to ask—that you use only so much time in speaking as will leave a little time for these men to render judgement. For previously it was the night, not the closing of your defence, that brought your speech to an end. I ask you now, if you please, not to do it again. I do not ask because I propose you should omit anything or should not speak as ornately and elegantly as possible; indeed, I would rather you speak only once on each and every issue. I ask it because if you do what you did before, I am afraid your speech will use up the day.

The one-day rule is reflected in three places in this passage. First, and perhaps most conspicuously, nox . . . finem . . . fecit recalls the words solis occasus from Table I, 9. Cicero seems to be saying that Quinctius had been interrupted by the operation of the one-day rule. Second, aliquid ad iudicandum relinquas

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15 Cic. pro Tull. 3.6 (M. Tulli Ciceronis Orationes, ed. A. Clark (Oxford, 1984), vol. 6).

recalls the requirement that judgement be given before sunset. Quinctius, it appears, is warned to allow the judges enough time to render judgement, so that the trial will not have to be put over for reargument at another session. Third, si [idem] facies, non vereor ne dicendo dies eximatur suggests that Quinctius has begun speaking from the beginning, and not from where he left off at the previous hearing. This recalls the requirement that, following an adjournment, the advocates repeat their arguments.

There are similar allusions to the rule in the pro Quinctio, where Cicero's opponent complains of dilatory tactics. In this passage Cicero is speaking at a second hearing, having taken over the defence from another:[16]

> Verum quoniam tibi instat Hortensius ut eas in consilium, a me postulat ne dicendo tempus absumam, queritur priore patrono causam defendente numquam perorari potuisse, non patiar istam manere suspicionem nos rem iudicari nolle.
>
> But since Hortensius urges you retire to deliberate, asks me not to waste time in talking, and complains that the man who was defending earlier would never have finished speaking, I will not allow the inference to linger, that we do not want judgement to be rendered.

Here, the allusion to the one-day rule is, as in the pro Tullio, a reference to one advocate repeating an earlier speech, using up limited time at the expense of his opponent, and not leaving time for judgement.

The words dies eximatur in the pro Tullio are particularly appropriate to the idea of a one-day limit on trials, and these words are repeated in a passage from Tacitus, Dialogus de Oratoribus. In this passage Aper, who is defending

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16 Cic. pro Quinct. 10, 34 (M. Tulli Ciceronis Orationes, ed. A. Clark (Oxford, 1985), vol. 4, p. 13).

the style of oratory in his own day, remarks on the ponderous style of pre-Augustan oratory:[17]

> Facile perferebat prior ille populus, ut imperitus et rudis, impeditissimarum orationum spatia, atque id ipsum laudabat si dicendo quis diem eximeret.
>
> The public in those olden days, being untrained and unsophisticated, was quite well pleased with long-winded and involved orations, and would even bless the man who would fill up the day for them with his harangues.

A complaint against 'wasting the day' is perhaps proof of the one-day rule; diem eximere appears to be either an allusion to the rule or perhaps even part of a formal vocabulary of adjournment.[18]

Suprema Tempestas

Generally speaking Table I, 9 is the principal source for the one-day rule, but in fact the rule is based on only two words in that provision: the words suprema tempestas express the notion of demarcation on which the rule depends. To understand how these words express demarcation we have only to look, for example, at Düll's translation of section nine. He interprets suprema tempestas as do all proponents of the one-day rule, as 'the latest instant': 'Sind beide Teile anwesend, soll der Sonnenuntergang der letzte

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17 Tac. Dial. 19.2 (Cornelii Taciti Opera Minora, ed. M. Winterbottom and R. Oglivie (Oxford, 1975), p. 82). The translation following is that of Tacitus, Agricola, Germania, Dialogus, trans. W. Peterson and M. Winterbottom (London, 1970).

18 See Kaser, RZ, p. 274 n.24; A. Greenidge, The Legal Procedure of Cicero's Time (Oxford, 1901), p. 272.

Certain other sources are sometimes cited in support of the one-day rule, but I have omitted them from the discussion because for the most part they are simply instances of adjournment and do not tend to prove or disprove the rule. See Cic. pro Caec. 2.4, 2.6-7, 4.9; Quint. Inst. 12.9.16.

Zeitpunkt (für die Streitverhandlung) sein.'[19] Düll's translation is more precise than the original; he clarifies the meaning of the provision by translating tempestas as 'Zeitpunkt' rather than simply 'Zeit'. To give 'instant' for 'time' is a conjecture, but not an impossible one. The conjecture generally fits the course of events described in Table I: a lawsuit that begins before midday has its 'final moment' at sunset. It is also consistent with the passages in Cicero and Tacitus, the supporting evidence for the rule. If suprema tempestas means 'letzte Zeitpunkt' or 'latest instant', the meaning of those passages becomes clear; the dies eximere the authors warn of, for example, is the consuming of the one allotted day.

Yet 'latest instant' is not the only possible meaning for suprema tempestas. Proponents of the one-day rule pass over the possibility that tempestas may also mean 'time of day'[20] and therefore suprema tempestas 'the latest time of day'. That is, Düll and other proponents of the one-day rule might clarify the meaning of Zeit, not with 'Zeitpunkt', but with 'Tageszeit'. If 'latest time of day' is the correct meaning of suprema tempestas, then Table I, 9 is not limiting trials to one day's duration, but imposing the less rigorous rule that trials should not take place at night, that they must adjourn at sunset.

This is by no means a new suggestion. Pugliese says:[21]

> Perhaps in ancient times [Table I, 9] was understood in the sense that the judgement was supposed to be given before sunset, but afterwards was interpreted simply in the sense that the hearing

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19 Düll, above note 13, p. 27. See also O. Behrends, Der Zwölftafelprozess, zur Geschichte des römischen Obligationenrechts (Göttingen, 1974), p. 87 n.313 ('Endzeitpunkt').

20 Festus (P.362) is not much help on the meaning of tempestas: Tempestatem pro tempore frequenter dixerunt antiqui.

21 G. Pugliese, Il processo civile romano (Rome, 1961-62), vol. 1, p. 405.

> concluded at night, barring a new hearing on the following day; the aim of the rule accordingly came to be that of preventing proceedings from taking place at night.

Lévy-Bruhl puts it more plainly: Table I, 9, he says, prohibits the judge from presiding at night. He offers the explanation that in some primitive societies certain activities could be forbidden at night, when malevolent, supernatural forces were believed to be present.[22]

The choice of interpretation for suprema tempestas, 'latest instant' or 'latest time of day', makes an enormous difference to the meaning of Table I, 9, and not simply to the particular rule the provision announces. If suprema tempestas means 'the latest instant', then the solis occasus the provision speaks of is a specific sunset: the sunset of the day a given trial commences. If on the other hand suprema tempestas means 'the latest time of day', then the sunset spoken of is, as it were, 'sunset generally', as the provision would then forbid all trials from taking place after sunset every day.[23] Similarly, the trials alluded to under the first alternative will be the particular trials commencing on the day bounded by a specific sunset, but under the second alternative, simply 'trials generally'. The alternative meanings for Table I, 9 might therefore be described as follows:

> The latest instant for a given trial shall be the sunset of the day that trial commences.
>
> or
>
> The latest time of day for trials generally shall be sunset every day.

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22 Lévy-Bruhl, above note 6, pp. 207, 129 & n.4.

23 In practice, of course, 'every day' will include only fasti.

The difference between the two rules is in their degree of generality, and in that respect it resembles the distinction observed by Daube between two forms of Roman legislation, one expressed with a condition 'if a man murders another man . . . .' and the other with a relative 'whoever murders a man . . . .'[24] To borrow Daube's analysis: the first rule above answers the question 'when must a given trial conclude?'. The second answers the question 'when must trials generally adjourn?'.

My aim in pointing out in detail the differences between the alternative rules is to answer the suggestion that suprema tempestas conveys vaguely 'the latest time', and that the proper inquiry would ask precisely what is meant by 'the latest'. The meaning of suprema, I believe, is beside the point. The two rules given above show that, of the two meanings for tempestas, one and one only can be the right one. An instant is an idea, a way of demarcating one event from another in time. A time of day is a fact, and has nothing to do with demarcation. The difference between an idea on the one hand and a fact on the other is reflected in two vastly different rules. Table I, 9 therefore cannot express both the literal 'this is the time of day' and the abstract 'this is the point of demarcation' at the same time. It follows that suprema, whether it means 'the latter', 'the latest', or 'the very latest', has little to do with the essence of the rule. If tempestas does not express any notion of demarcation, then it makes no difference how suprema is taken, that is, what degree of intensity the superlative conveys.

Which of the two interpretations of suprema tempestas is the correct one? As it happens the answer is not difficult to find: three of the five sources for

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24 D. Daube, Forms of Roman Legislation (Oxford, 1956), p. 6. Schulz makes similar observations. F. Schulz, Principles of Roman Law (Oxford, 1936), pp. 48-53.

Table I, 9 discuss the text with at least some attention to its substance. In so doing the authors reveal quite clearly what they understand suprema tempestas to mean. In each of the passages discussed below, tempestas is understood to mean 'time of day'; there is not even the suggestion that the provision conveys the idea of an 'instant'. The aim of the discussion below therefore is to show, on the basis of these passages, that the words suprema tempestas mean 'the latest time of day' and not 'the latest instant', and that accordingly Table I, 9 does not recite the one-day rule.

Three of the five sources for the words of Table I, 9 quote and discuss the particular language of that provision. The later authors, Macrobius and Censorinus, have probably relied to some extent on the earliest author, Varro, and for this reason the three must be considered together.[25] The discussion is much the same in each source: each author sets out to analyse the divisions of the Roman day, with special attention to the words used to describe each division.

Book Six of Varro's de Lingua Latina is devoted to the vocabulary of time. After discussing the derivation of 'meridies' and 'mane' he moves on to the term 'suprema':[26]

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25 The later authors perhaps did not rely on Varro's de Lingua Latina, but on his Antiquitates Rerum Humanarum. See R. Schröter, Studien zur varronischen Etymologie, (Akademie der Wissenschaften und der Literatur, Abhandlung der geistes- und sozialwissenschaftlichen Klasse, no. 12), (Wiesbaden, 1959), p. 855; Varron, La Langue Latine, ed. P. Flobert (Paris, 1985), p. 63.

26 Varro Ling. 6.5. This text and the text cited below is that of M. Terenti Varronis de Lingua Latina quae supersunt, ed. G. Goetz and F. Schoell (Leipzig, 1910). The translations are those of Varro, On the Latin Language, trans. R. Kent (London, 1938). On the lex Plaetoria see Bruns (7) I, p. 45, and FIRA I, p. 80.

> Suprema summum diei, id ab superrimo. Hoc tempus XII tabulae dicunt occasum esse solis; sed postea lex Plaetoria id quoque tempus esse iubet supremum quo praetor in comitio supremam pronuntiavit populo.
>
> Suprema means the last part of the day; it is from superrimum. This time, the Twelve Tables say, is sunset; but afterwards the Plaetorian law declares that this time also should be 'last' at which the praetor in the Comitium has announced to the people the suprema 'end of session'.

In the subsequent book Varro discusses expressions of time in poetry, and again cites the Twelve Tables, this time to illustrate 'supremum':[27]

> Supremum ab superumo dictum: itaque duodecim tabulis dicunt: 'solis occasu diei suprema tempestas esto'.
>
> Supremum is derived from supperimum [sic], superlative of superum 'higher': therefore the Twelve Tables say: Let the last (suprema) time of day be at sunset.

Censorinus also takes up the meaning of 'suprema'. At the end of de Die Natali he sets out to explain, like Varro, the names accompanying the various divisions of the day. He begins with 'nox media' and 'de media nocte', and then cites each division in order of occurrence, usually offering an explanation of the particular term. When he comes to discuss 'suprema' he gives a lengthy explanation and, like Varro, cites the Twelve Tables and the lex Plaetoria:[28]

> . . . hinc suprema. Quamvis plurimi supremam post occasum solis esse existimant, quia est in XII tabulis scriptum sic: 'solis occassus suprema tempestas esto.' Sed postea M. Plaetorius tribunus plebiscitum tulit, in quo scriptum est: 'praetor urbanus qui nunc est quique posthac fuat, duo lictores apud se habeto isque <usque> supremam ad solem occasum ius inter cives dicito.

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27 Varro Ling. 7.51.

28 Censorinus D.N. 24, ed. N. (K.) Sallman (Leipzig, 1983).

> . . . then, the suprema. Although most [authors] believed that the suprema occurred after sunset, since it is written in the Twelve Tables that 'sunset shall be the latest time'; yet later on the tribune M. Plaetorius carried through a plebiscite, in which it was written 'the urban praetor, whether he be in office now or later, shall have two lictors with him, and shall administer justice up to the suprema at sunset.'

From the three passages it is plain that Varro and Censorinus take the word tempestas to mean 'time of day'. The suprema they set out to discuss—probably a shortened form of suprema tempestas[29]—refers to a time of day, either the final period of the day leading up to sunset (perhaps commencing from the ninth hour of the day), or sunset itself.[30] Of course for purposes of this discussion the discrepancies among the passages make little difference; what is important is that in each passage times of day are under discussion, and that suprema tempestas is offered to illustrate one time of day. If either writer understood suprema tempestas to denote something other than a time of day, the phrase would not have suited his purpose and would not have been cited. Neither writer therefore could be speaking of tempestas as an 'instant' or 'point of demarcation', as the proponents of the one-day rule understand the word. This is particularly clear in the second Varro passage, where for Table I, 9 the author gives the words diei suprema tempestas.[31]

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29 See J. Marquardt, Das Privatleben der Römer (Leipzig, 1886), p. 255; Censorinus, de Die Natali, ed. C. Rapisarda (Bologna, 1991), p. 274; Censorinus, Le Jour Natal, ed. G. Rocca-Serra (Paris, 1980), p. 70; Pauly-Wissowa, RE IV, p. 2022, s.v. 'Tageszeiten' (Sontheimer). See also Pliny HN 7, 212 (supremam pronuntiavit).

30 On the two meanings for suprema, see Flobert, Langue Latine, above note 25, loc. cit; Marquardt, Privatleben, above note 29, p. 256 n.1. Sontheimer, loc. cit. above note 29. Sontheimer puts the suprema at four to five o'clock in the afternoon. Id.

31 Of course diei could be an incorporated gloss, but this depends largely on whether one accepts Scaliger and Orsini's emendation of Festus (F. 305) (quoted above, note 5), an entry which appears to be drawn directly from

(continued)

The last author, Macrobius, does not mention the shortened form 'suprema' specifically but does, like Varro and Censorinus, take up the expression suprema tempestas. As with the other authors, it is plain he is speaking of periods of the day (a mane ad meridiem, tempus occiduum), and not points of demarcation:[32]

> Deinde a mane ad meridiem, hoc est ad medium diei: inde iam supra vocatur tempus occiduum et mox suprema tempestas, hoc est diei novissimum tempus, sicut expressum est in duodecim tabulis: solis occasus suprema tempestas esto.
>
> Then comes the period 'from morning to midday' (meridiem), that is to say to the middle of the day (medium diei); after midday comes the time called 'the day's decline', and then 'the end of the day' [for legal business]—just as in the Twelve Tables we read: 'Let sunset end proceedings.'

Macrobius's understanding of this provision of the Twelve Tables is particularly clear in the words diei novissimum tempus.

I mentioned above that Censorinus and Macrobius are probably indebted to some extent to Varro for their information on the divisions of the day. Thus the arguments I have given are open to the criticism that Varro and Varro alone reveals the meaning of suprema tempestas, and that Censorinus and

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Varro Ling. 7.51. See Festus, de Verborum Significatione, ed. A. Dacier (Amsterdam, 1699), p. 550. The Censorinus passage, in contrast, omits diei, and accordingly some translators have chosen to keep the ambiguity of suprema tempestas. See Rocca-Serra, above note 29, p. 37 ('le dernier temp') and Rapisarda, above note 29, p. 104 ('l'ultimo tempo'). One brave translation of Censorinus, however, appropriately gives der Sonnenuntergang soll der Schluß des Tages sein. Censorinus, Betrachtungen zum Tag der Geburt, trans. K. Sallman (Leipzig, 1988), p. 99. The des Tages is an inference, but an obvious one.

32 Macrob. Sat. 1.3.14 (Ambrosii Theodosii Macrobii Saturnalia, ed. J. Willis (Leipzig, 1963)). The translation is that of Macrobius, The Saturnalia, trans. P. Davies (New York, 1969), p. 38.

Macrobius contribute nothing to the issue. This criticism, I believe, detracts too much from the value of the later authors. Though their words perhaps carry less weight than Varro's, their selection of material required at least some degree of discretion. Had Varro been wrong according to their understanding of suprema tempestas, we would not expect them to use suprema tempestas to illustrate a period of the day. By adopting his illustration, they reveal that they, like Varro, understood Table I, 9 to speak of sunset as a time of day, and not a point of demarcation.

The four passages cited above are the only sources that discuss the substance of Table I, 9. They are therefore immensely valuable in understanding precisely what sort of rule Table I, 9 announces. Taken alone, the words suprema tempestas express one of two meanings, and Table I, 9 conveys a substantially different rule under each alternative. If the three authors quoted above have correctly understood the meaning of suprema tempestas, then Table I, 9 is addressing the matter of adjournment. It therefore declares the rule that trials shall adjourn at sunset, and not a rule that trials must conclude after one day.

In fairness, these three authors do not entirely settle the question of the meaning of suprema tempestas, as they express at best only their own, contemporary understanding of Table I, 9. Pugliese, quoted above, raises the possibility that Table I, 9, when enacted, recited the one-day rule, but that in time it came to be understood as a prohibition on trials at night.[33] In making this suggestion, he possibly had Varro, Censorinus, and Macrobius in mind. But in suggesting that suprema tempestas meant first one thing and then

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[33] Pugliese, above note 21 and accompanying text.

another, Pugliese puts any attempt to refute the one-day rule in an awkward position: how does one show that Table I, 9 never recited the one-day rule?

The structure of Table I, 6-9, fortunately, gives some indication that section nine always recited a rule forbidding trials at night, and consequently never recited the one-day rule. Two provisions, sections seven and eight, in effect require the addition of a rule such as one forbidding trials at night. The lack of such a rule would make the construction of those provisions difficult. In this way we have at least some proof that the interpretation of Varro, Censorinus, and Macrobius was as correct at the enactment of the Twelve Tables as in their own time.

The need for a rule such as one forbidding trials at night is most clear in the case of section eight. Section eight declares that, after midday, judgement shall go in favour of the litigant who is present. This rule, no doubt, was intended primarily to allow judgement to go against a party who failed to appear.[34] But incidentally it also permits judgement to go against a party who appears and then departs. That is, logically any party who leaves before judgement is rendered, for whatever reason, has transformed his opponent into a praesens. If the first person to step out of the ring, so to speak, loses by default, then bringing the day's session to a close will be all but impossible: neither party would be willing to leave at the end of the day. The consequence of a provision such as section eight demands a second rule to declare with certainty when a session must close.

The problem raised in section seven is similar. Most of the acts described in sections six to nine may be performed in a discrete amount of time: orato, caussam coiciunto, addicito. The injunction tum peroranto, on the other hand,

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34 See, e.g., G. Cervenca, Il processo privato romano: le fonti (Bologna, 1983), p. 10.

is open-ended, and as it states literally that the parties 'shall then argue their case to the finish', it cannot be performed in a limited amount of time. In particular Mommsen's emendation, tum for com,[35] brings out the force of the injunction: the parties must present their entire case at the conclusion of the causae coniectio. Taken alone, tum peroranto allows no interruption. Section nine is needed to explain that the peroranto must be interrupted at sunset.

Supporting Evidence

Table I, 9, of course, is not the only evidence for the one-day rule. The supporting evidence from Cicero and Tacitus does not recite the rule or refer to it directly but, according to some, several of these authors' comments are consistent with the sorts of limitations the rule imposes. If Table I, 9 truly does not recite the one-day rule, then some other explanation for these comments must be found. As discussed below, the comments are quite innocent and make perfect sense without resort to the rule.

The existence of a rule imposing a mandatory adjournment at sunset explains several of the comments. If trials were required to adjourn at sunset, the comment that has stood as the most conspicuous supporting evidence for the one-day rule is, in fact, completely unremarkable: Cicero's remark in the pro Tullio that his opponent's speech was interrupted by nightfall proves

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35 The manuscripts give cum perorant. Bergk emends to peroranto in keeping with the preceding coiciunto, and emends cum to com (by which he intends the meaning 'together'), and then to comque for continuity. T. Bergk, 'Philologische Thesen', Rheinisches Museum für Philologie, vol. 19 (Frankfurt-am-Main, 1864), p. 605. Schöll adopts these emendations, although he reads com for comque. R. Schöll, Legis Duodecim Tabularum Reliquiae (Leipzig, 1866), p. 118. Bruns and Riccobono both follow Schöll here. Mommsen's tum, I believe, is preferable because it maintains a continuity with the previous clause which com does not, and because it expresses the same order of events, causae coniectio and then peroratio, as Gaius, at Inst. 4.15, describes.

nothing more than that the previous session at which Quinctius spoke adjourned at sunset.[36] Similarly, if the duration of a day's session is limited by a mandatory adjournment, one would expect the occasional gripe that a speaker had 'used up the day', or that lengthy speeches had not left enough time for judgement to be given.[37] Such complaints could be made in any trial that adjourns before it is ripe for judgement.

As an aside, the one-day rule tends to overshadow the real force of two of these complaints. First, the rule obscures the flavour of Cicero's warning to Quinctius in the pro Tullio: his aliquid ad iudicandum relinquas. Proponents of the rule miss entirely the sarcasm of aliquid ('a little time'), as well as the phrase's double meaning: 'give them something useful to listen to.' Cicero is making a jab, not reciting a rule. Second, in inflating Tacitus's diem eximere to mean 'use up the one allotted day', proponents of the one-day rule ignore a far better explanation of the phrase offered only a few paragraphs further on.[38] There Aper praises the judges of his own day for

> not allowing the speaker to take his own time, but telling him how long he may have, and not waiting patiently for him to come to the point, but often going so far as to give him a warning, or call him back from a digression, and protest that it has no time to spare.

Surely what Aper is criticising with the words dies eximere is simply the wasting of the court's time.

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36 Cic. pro Tull. 3.6.

37 Id.; Tac. Dial. 19.2; Cic. pro Quinctio 10.

38 Tac. Dial. 19.5 (Tacitus, Agricola, Germania, Dialogus, trans. W. Peterson and M. Winterbottom (London, 1970), p. 283).

One aspect of the secondary evidence must be explained on different grounds. As mentioned above, proponents of the one-day rule often cite the pro Tullio and the pro Quinctio for the proposition that an advocate, having run afoul of the one-day rule by speaking too long, must begin his speech anew at the renewed session. The 'repetition requirement' of the one-day rule derives from these two speeches. The issue, then, is why do Cicero in the pro Quinctio and Quinctius in the pro Tullio appear to have begun speaking from the beginning, though both matters had already been heard at previous sessions? The answer is probably quite simple: some writers have suggested that both trials were adjourned by ampliatio after the judge or judges were unable to come to a decision and declared a non liquet verdict. In such a case, the advocates would be required to repeat their performance in an effort to make the matter more clear to the judges.[39] Admittedly, nothing in either speech appears to explain why the matter was previously adjourned, and the explanation that the judges were hesitant to rule is only an inference. But if this is the correct inference, the advocates' repetitions are easily explained without resort to the one-day rule.

The Attraction of the One-Day Rule

To this point I have tried to show that the meaning of solis occasus suprema tempestas esto, though ambiguous when taken alone, becomes clear when read with the texts which serve as its sources. The one-day rule, however, was never based on texts alone: several proponents of the one-day rule interpret the words of Table I, 9 as an expression of a certain principle governing the integrity of oral proceedings, a principle that seems so suitable

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39 Greenidge, above note 18, pp. 272, 531; Bethmann-Hollweg, above note 8, vol. 2, p. 591 & n.26.

to the oral legis actio procedure as to justify under that procedure a limit on the length of trial. The so-called 'principle of directness' (Grundsatz der Unmittelbarkeit)[40] was mentioned above briefly; by way of closing I wish to discuss it in more detail, as it goes far to explain why the one-day rule has endured in spite of such poor support in ancient sources.

In an oral proceeding in which a judge relies largely upon what he hears and has no recourse to written arguments, an interruption in a proceeding can be a great handicap. When the time for judgement arrives, the impressions of the case he received before the interruption will have lost their clarity, bringing the risk that his decision will not be based on the case taken as a whole.[41] In private trials at Rome, some believe this risk was avoided by limiting the length of trial to one day. Wenger explains:[42]

> [By virtue of the one-day rule] the judge could give his decision under the freshest impression of the proceedings taking place orally before him. Orality and directness in proceedings have often been united with one another. . . . [In more complicated cases] the advocates' recitals, recapitulating all of the substance of the arguments and proof, easily preserved the directness of the proceeding.

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40 The word 'directness' is an attempt to convey the notion of 'no interruption' in the word unmittelbarkeit.

41 Bethmann-Hollweg, above note 8, vol. 2, p. 591.

42 L. Wenger, Institutionen des römischen Zivilprozessrechts (München, 1925), p. 194. See also H. Hübner, 'Zur Haftung des iudex qui litem suam fecit', IURA 5 (1954), p. 201: 'Sollte nach den XII-Tafeln im Interesse der Unmittelbarkeit das Verfahren an einem Tage zu Ende geführt werden . . . .'

Bethmann-Hollweg similarly emphasizes the value of the rule to the integrity of the decision:[43]

> The aim of this extremely narrow time limit lay . . . mainly in the fact that out of a coherent and vivid development of the case, passing into the judge's understanding as, in one sitting, the hurried litigant furnishes it, the truest conviction on the part of the judge will develop . . . .

The principle that a decision should follow directly on arguments might seem particularly appropriate to civil trials under the legis actiones, where trials were based on oral declarations before lay judges.[44] Thus if the principle did prevail at Rome, one might sensibly read Table I, 9 as an expression of that principle.

But is this a Roman principle? No doubt in some respects Roman procedure reflects a concern for 'directness'. As Kaser states, 'we have observed orality and directness in proceedings at every stage of Roman procedural history, though mainly in the latter era.'[45] It requires a leap of faith, however, to accept that the one-day rule expresses this principle. To deduce a rule from a principle in this case is awkward because of the different legal traditions involved: in arguing that Table I, 9 reflects the principle of directness, Bethmann-Hollweg and Wenger cite German, rather than Roman, sources. The principle is a long-familiar feature of German civil procedure, and has governed many of the rules of the Deutsche Zivilprozessordnung from its promulgation in 1877 to this day. No doubt the principle as reflected in the

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43 Bethmann-Hollweg, above note 8, vol. 1, p. 184.

44 See Kaser, RZ, p. 9. But see the discussion below at notes 53 to 54 and accompanying text.

45 Kaser, RZ, pp. 9 & nn.34-35, 275. Kaser here does not cite Table I, 9 for some reason.

Code was drawn in part from Roman sources, but in Bethmann-Hollweg's and Wenger's analysis the tradition is reversed, and what has become a German principle is at risk of being used beyond its limited Roman pedigree. Thus in citing German proof for a Roman rule, they put a turn on the meaning of Table I, 9 not necessarily supported by Roman sources.

In general the principle of directness in German civil procedure states that a judgement must be based only on those of the parties oral recitals that come to the judge's notice directly.[46] In German law the foremost expression of the principle is the rule that judgement may be given only by the judge who is present at the relevant hearing, and not by a deputy.[47] But the principle has a temporal side as well: an interruption in a proceeding would require the parties, as in the supposed one-day rule, to repeat a recital of the issues at the subsequent hearing:[48]

> In the event of an interruption and resumption of the proceeding on another date, as in the case of a change of judge, all of the

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46 A. Engelmann, Der Deutsche Civilprozeß (Breslau, 1901), vol. 3, p. 142. The principle is the same in the modern law. L. Rosenberg and K. Schwab, Zivilprozessrecht (München, 1986), p. 474. The primary provision on oral proceedings was ZPO § 119 (1877), as cited in W. Endemann, Der Deutsche Civilprozess (Berlin, 1879). (Citations below to the 1877 ZPO are to this edition.) The provision is now § 128.

My intention in this portion of the discussion is to stay close to the provisions of the ZPO in force at the time Wenger and Bethmann-Hollweg wrote.

47 ZPO § 280 (1877); G. Hirschfeld, Der Reichscivilproceß: Eine Darstellung nach Civilproceßordnung und Gerichtverfassungsgesetz (Berlin, 1902), pp. 157-58.

48 Hirschfeld, above note 47, p. 77. '[The person presiding] must take care that the matter receives an exhaustive examination and that the proceeding is conducted to the end without interruption; if necessary he must schedule the session for the continuation of the proceeding immediately.' ZPO § 127 (1877).

> issues must, in every case, be presented anew, likewise after the subsequent presentation of evidence. . . . The person presiding must take care that his examination of the matter is exhaustive and is conducted to the end without interruption.

Thus repetition preserves the unity of the proceeding.[49]

The judge announces the judgement and brings the proceedings to a close when he is satisfied that the matter has been examined thoroughly.[50] To preserve the integrity of the judge's impressions of the case, the time of announcing judgement is carefully circumscribed, again in a similar fashion to the one-day rule:[51]

> The announcement of the judgement shall take place on the date on which the oral proceeding was concluded, or on a date determined immediately, which shall not be fixed more than one week afterwards.

The editor here explains that 'the time limit is intentionally fixed so narrowly to ensure that the judgement may feasibly be given under the still fresh impression of the oral proceeding.'[52]

By pointing out similarities between portions of the ZPO and the one-day rule, I do not mean to suggest that the rule could only be a modern invention and could never have existed in antiquity. Concern for 'uninterruptedness', in fact, shows that some limit on the length of trial is perfectly suitable to the largely oral trials under the legis actiones, and this explains the rule's appeal.

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49 A concern for unity is also reflected in ZPO § 297 (1877), where successive hearings in the case of a default judgement are treated as one for purposes of the rule accepting the plaintiff's allegations as admitted.

50 ZPO § 127 (1877).

51 ZPO § 281 (1877); Hirschfeld, above note 47, p. 158 (commenting on this provision's successor, § 310).

52 Endemann, above note 46, vol. 1, p. 449.

The rule would give, for example, the same guarantee of 'security' that Schulz has observed in the time limits inherent in iudicia legitima and iudicia quae imperio continentur.[53] To this extent the principle of directness is useful: a one-day rule or something like it should not be rejected out of hand simply because we lack the evidence for it. I believe the examples from the ZPO do show, however, how great an influence the principle of directness has had on the customary understanding of Table I, 9. Though a Roman source is unknown to us, we might accept the reasonableness of some limit on the number of permissible trial hearings. We need not, however, accept the more tenuous details that the principle of directness has produced: the one-day limit, the immediacy of the judgement, and the repetition requirement.[54]

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[53] Schulz, Principles, above note 24, at pp. 242-43; G.4.103-105.

[54] Tellegen has recently taken issue with the view in much of the older literature that judges were lay persons with no legal training. J. W. Tellegen, 'The Veracity of Cicero in his Plea on behalf of Caecina', presented to the 47th SIHDA Congress at St. Catherine's College, Oxford, 22 September 1993. In this regard he has mentioned privately that the concern for immediacy assumes less juristic ability on the part of the judge than he probably possessed. To present the judge as a mere 'Mitbürger' or 'Volksrichter', dependent entirely on the advice of a consilium, gives the picture of a person much duller in legal matters than one drawn from the upper orders probably was. For the conventional view of the judge, see, e.g., Wenger, above note 42, pp. 23, 56ff.; F. Schulz, History of Roman Legal Science (Oxford, 1946), pp. 52-53; Kaser, RZ, p. 142. Buckland and McNair remark 'the common juryman [in the modern day] is not usually a well educated or highly intelligent man, while the iudices were selected by the parties from a list consisting of men in the upper ranks of society.' W. Buckland & A. McNair, Roman Law and Common Law, 2nd ed. rev. F. Lawson (Cambridge, 1965), p. 402. The better view is also expressed in J. A. Crook, Legal Advocacy in the Roman World (London, 1995), p. 175 n.18: 'The claim . . . that unus iudex was not a lawyer needs rephrasing: say, rather, he did not have to be, and there were no career judges.'

X

The Meaning of 'Divide'

I attempted to show in the previous chapter that diem diffindere could not be a procedural device designed to avoid the one-day rule, because the one-day rule probably did not exist. Unfortunately, whatever its merits, this argument raises several new problems. The one-day rule, for all its shortcomings, provides a strong foundation for diem diffindere. First, the phrase 'diem diffindere' is an unusual choice of words to describe an adjournment, and the association of diem diffindere with the one-day rule has the virtue of explaining concisely why the idea of adjournment might be expressed in this unusual way. Second, an adjournment performed within the constraints of the one-day rule would bring a good deal of certainty to a judge's duties: he would always conduct the trial within the fiction of one day, and the lawsuit would therefore be firmly under his control and responsibility so long as he properly divided the day prior to judgement. If the one-day rule did not exist, it may not be clear what diem diffindere means nor how its abuse is avoided.

This chapter and the next accordingly seek to explain certain aspects of diem diffindere that the one-day rule would otherwise explain. As the phrase 'divide the day' perhaps makes little sense without the one-day rule, the discussion below provides a possible explanation of what the phrase means. Also, as it might seem that a judge, freed of the one-day rule, might adjourn and reconvene as he likes, the next chapter attempts to explain how the power of a judge to divide the day is circumscribed notwithstanding the absence of the fictional allotted day. These two matters introduce a discussion further on concerning the specific operation of diem diffindere and, it is hoped, answer

the argument that diem diffindere is best understood in light of the one-day rule.

Divided Days

According to the more usual understanding of diem diffindere, as already discussed, the 'division' spoken of is the division of a fictional day—the single day of the one-day rule—which is apportioned over a number of actual days. If we put aside the one-day rule, some other explanation for the division must be found. Accordingly, the first task of the discussion below is to provide a satisfactory explanation for this notion of division.

None of the direct sources for diem diffindere is particularly helpful in explaining what the phrase means.[1] A comment of pseudo-Acron, in a gloss on Horace, is the only primary source that makes even a modest attempt to discuss diem diffindere in this way. In the glossed passage (Hor. Serm. 2.1) Trebatius is asked whether he agrees to a certain point, and replies equidem nihil hinc diffindere possum. Pseudo-Acron comments: Infirmare, contradicere, et hoc Trebatius respondit; iuris verbo usus est. Praetor enim solebat dicere: hic dies diffis<s>us esto.[2] For our purposes this explanation is

1 The literary sources are not helpful at all in this respect. See Gell. NA 14.2.1, .11; Livy 9.38.15; Festus (F. 273), s.v. 'Reus'; pseudo-Acron ad Hor. Serm. 2.21, in Pseudacronis Scholia in Horatium Vetustiora, ed. O. Keller, vol. 2, (Leipzig, 1904); Varro Rust. 1.2.5. The legal sources in general offer more context, and for that reason are more helpful in describing what occurs when a judge adjourns. None of those sources, however, offers a definition of diem diffindere. See lex Irni., ch. 91, tab. XA, ll. 49-52, tab. XB, ll. 6-7, 9-10, 12, 14, 23; Egypt Exploration Society, The Antinoopolis Papyrus, ed. C. H. Roberts (London, 1950), part I, no. 22; D.2.11.2.3 (Ulpian, Provincial Edict, book 74); XII Tab. II, 2. See also D.42.1.60 (Julian, Digest, book 5) (diem differt).

2 Pseudo-Acron ad Hor. Serm. 2.21, loc. cit. above note Error! Bookmark not defined.. Pseudo-Acron is the only source to suggest that the Praetor rather than the judge divides the day. This must be an error on his part, though cf. O. Behrends, 'Ius und ius civile', in Sympotica Franz Wieacker, ed. D.

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nearly useless, since infirmare and contradicere are offered to explain not diem diffindere but diffindere alone, and the mention of the word's use in law seems gratuitous to the passage under discussion. Unless pseudo-Acron wishes us to take diffissus in the sense of infirmatus or contradictus (which seems unlikely), the passage adds nothing to what we know of diem diffindere. Unfortunately, this is the only primary source for diem diffindere that even attempts to explain what the phrase might mean.

Several other sources, however, are helpful indirectly, because while they fail to mention diem diffindere specifically, they discuss and explain certain similar expressions. The first such source is Servius, who discusses briefly a passage in the sixth book of the Aeneid. In this passage the Sibyl advises the Trojans to perform certain sacrifices and then summons them to Apollo's temple. Servius tries to explain why she is so insistent that the Trojans follow her instructions immediately:[3]

> Item lectum est deos aliquotiens <tantum> kalendis, aliquotiens tantum idibus vaticinari; nonnumquam diei vel prima <vel media> vel postrema parte, unde est in iure fissus dies, id est non totus religiosus. Quem nunc ostendit dicens non oportere Aenean religiosam diei partem perdere, id est oraculis congruam.
>
> Similarly we learn that the gods would prophesy at several different times only on the Kalends and Ides, sometimes at the beginning or end of the day, whence under the law the 'divided day', which is a day not entirely devoted to religious matters. This is what she now brings to his attention, telling Aeneas that

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Liebs (Göttingen, 1968), p. 46 n.201, who argues that the one-day rule encompassed both phases of a civil lawsuit, and that therefore the Praetor as well as the judge divided the day.

3 Serv. ad Aen. 6.37, in Servii Grammatici qui feruntur in Vergilii Carmina Commentarii, ed. G. Thilo and H. Hagen (Leipzig, 1923). The addition of vel media may be wrong.

> he should not lose the observant portion of the day, that is to say, the portion suitable for oracles.

The passage mentions the fissus dies, an expression remarkably similar to diffissus dies.[4] The meaning of fissus is quite clear: the day is 'divided' in the sense that it is devoted to the gods only at certain times, but is otherwise a work day.[5] In other words, the day is simply divided chronologically.

Unfortunately, we possess no further sources for fissi dies against which to compare diffissi dies. The fissi dies, however, are usually taken to describe a broad category of days in the calendar, days that are regarded as 'divided' in some fashion. One calendar day falling under the rubric of fissi dies is particularly relevant here: the intercisus dies.[6] This was a day of which fixed portions were treated either as fas or nefas. Macrobius states:[7]

> Numa ut in menses annum, ita in dies mensem quemque distribuit, diesque omnes aut festos aut profestos aut intercisos

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4 For the form dies diffissus specifically, see XII Tab. II, 2; D.2.11.2.3 (Ulpian).

5 Pauly-Wissowa, RE vol. 6 (1909), s.v. 'Fissi dies' (Wissowa).

6 For the proposition that the fissus dies is a class of calendar days under which other divided days fall, see Pauly-Wissowa, loc. cit. above note 5; id., suppl. vol. 10, p. 1172, s.v. 'Intercisus dies' (Eisenhut); G. Wissowa, Religion und Kultus der Römer, 2nd ed. (München, 1912), p. 435; Varron, La Langue Latine VI, ed. P. Flobert (Paris, 1985), pp. 107-8. The other types of fissi dies are those designated Quando rex comitiavit fas and Quando stercus delatum fas. See Varro Ling. 6.31-32; A. Michels, The Calendar of the Roman Republic (Princeton, 1977), pp. 29-30. Like the intercisi dies, these fall on certain days of the year, though there is some controversy about the particular days they signify. See Flobert, loc. cit.; Pauly-Wissowa, loc. cit. above note 5. Possibly, fissi dies and intercisi dies are the same, while the other two types of days fall outside of the definition of fissi dies. See Ovide, Les Fastes, ed. R. Schilling (Paris, 1992), p. xvii.

7 Macrob. Sat. 1.16.2 - .3. The translation following is that of Macrobius, The Saturnalia, trans. P. Davies (New York, 1969), p. 105.

> vocavit. Festis dis dicati sunt, profesti hominibus ob administrandum rem privatam publicamque concessi, intercisi deorum hominumque communes sunt. . . . Intercisi in se non in alia dividuntur: illorum enim dierum quibusdam horis fas est, quibusdam fas non est ius dicere. Non cum hostia caeditur fari nefas est, inter caesa et porrecta fari licet, rursus, cum adoletur non licet.
>
> Numa, having divided the year into months, went on to divide each month into days, all of which were known as 'festivals' or 'working days' or 'half-festivals'. The festivals are days dedicated to the gods; on the working days men may transact their private and public business; and the half-festivals are days shared between gods and men. . . . The half-festivals are not divided into other classes, but each is subdivided in such a way that at certain hours of the day judgment may be pronounced in a court of law and at certain other hours it may not; for when the victim is being slain no legal business may be done, but in the interval between the slaying of the victim and the placing of the offering on the altar such business may be done, although it is again forbidden when the offering is being burned.

Varro explains the meaning of 'intercisus dies':[8]

> Intercisi dies sunt per quos mane et vesperi est nefas, medio tempore inter hostiam caesam et exta porrecta fas; a quo, quod fas tum intercedit aut eo intercisum nefas, intercisi.
>
> The intercisi dies 'divided days' are those on which legal business is wrong in the morning and in the evening, but right in the time between the slaying of the sacrificial victim and the offering of the vital organs; whence they are intercisi because the fas 'right' intercedit 'comes in between' at that time, or because the nefas 'wrong' is intercisum 'cut into' by the fas.

An intercisus dies is therefore a day which is nefas at its beginning and end and is otherwise fas. Conceptually, it is divided either by being 'interrupted' or 'cut up' (Varro seems to offer intercedit to explain the figure, not the

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8 Varro Ling. 6.31. The translation following is that of Varro, On the Latin Language, trans. R. Kent (London, 1938).

etymology). There were apparently eight such days in the Julian calendar, and three additional days in the pre-Julian calendar.[9]

Chronological Division

If a day is diffissus in the same way it might be fissus or intercisus, then it is divided chronologically, devoted to court business only during a portion of the day. Of course at bottom a diffissus dies is quite different from the other two: it is not a fixed day in the calendar, but a day created by the act of a judge. Yet the three expressions use the same metaphor;[10] in this respect the resemblance of fissi dies to diffissi dies is particularly strong. The issue is whether there is anything more to this resemblance than the similarity of the metaphor, and accordingly whether a judge who adjourned by diem diffindere was regarded as having divided the day chronologically.

No evidence answers the question with certainty, but certain sources at least suggest that a diffissus dies is divided in the way the two calendar days

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9 On the number of days see Flobert, above note 6, at p. 107; S. Eitrem, 'A Purificatory Rite and Some Allied Rites de Passage', Sym. Osl. 25 (1947), p. 46. An intercisus dies was noted on the calendar with an EN, for endotercisus, see Flobert, loc. cit., or endotercisus nefas, see P. Brind'Amour, Le Calendrier Romain: Recherches Chronologique (Ottawa, 1983), p. 230, or perhaps endoitio nefas, see J. Rüpke, 'Dies Endotercisi?', ZPE 86 (1991), p. 213. On endotercisus for intercisus, see especially M. Hermans, 'Endotercisus', Mus. Helv. 21 (1964), pp. 173ff., and Rüpke, loc. cit. The sacral calendar from Praeneste provides an example for one day, together with a partially mutilated description of intercisi dies. Fasti Praenestini, CIL 1^2, 1, p. 231 (10 January). Hermans cites the other instances at Mus. Helv. 21, p. 173 n.1. Ovid happens to mention intercisi dies, though without designating them as such: Qui iam fastus erit mane nefastus erat; / Nam simul exta deo data sunt, licet omnia fari / verbaque honoratus libera praetor habet. Ov. Fast. 1.50-52.

10 Beseler points out the resemblance but then rejects it, reading *diffendere instead of diffindere in several texts. G. Beseler, 'Bindung und Lösung', ZSS (rom. Abt.) 45 (1925), p. 427-28.

are divided. One such source is Livy, who describes an adjournment of the curiate assembly in the early fourth century. The assembly was then engaged in ratifying the election of a master of the horse:[11]

> Papirius C. Iunium Bubulcum magistrum equitum dixit. Atque ei legem curiatam de imperio ferenti triste omen diem diffidit.
>
> Papirius named Gaius Junius Bubulcus as master of the horse. But while he was bringing a law regarding Bubulcus's authority before the curiate assembly, an evil omen divided the day.

At the outset the passage in interesting because, though the phrase diem diffidit here clearly means 'adjourned', the context has nothing whatsoever to do with trials. This adjournment, in any event, is not founded on the division of a fictional day. The fissus and intercisus dies provide a much sounder analogy. Though the assembly has adjourned because of an evil omen and not because public business has come up against a period of nefas, the division nevertheless appears to be chronological; the assembly does not continue beyond the instant at which the day is divided.[12]

The intercisi dies in particular provide an attractive analogy to diffissi dies. I mentioned in the previous chapter that Table I, 9 of the Twelve Tables probably announced a rule requiring civil trials to adjourn at sunset, a time of

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11 Livy 9.38.15.

12 This appears to be how Ernout and Meillet read this passage. For diem diffindere (de omine) they give 'séparer en deux'. A. Ernout and A. Meillet, Dictionnaire Étymologique de la Langue Latine (Paris, 1959), p. 235, s.v. 'Findo'.

I should mention one further instance of diem diffindere outside the context of trials. The phrase is again used to indicate the chronological division of a day, but as it appears in a purely literary context, it is of little use to the argument above. Varro Rust. 1.2.5: Ego hic, ubi nox et dies modice redit et abit, tamen aestivo die, si non diffinderem <eum> insiticio somno meridie, vivere non possum.

day designated by the Twelve Tables and by certain authors either as suprema tempestas or simply suprema.[13] If this rule did indeed exist, then a judge who adjourns at sunset will have divided the day at precisely the same instant as, on an intercisus dies, the day passes from a period of fas to nefas.

To appreciate the resemblance and its limits more closely requires a second look at some of the sources discussed in the previous chapter. The suprema at which a judge might have adjourned took place either at sunset or during the period leading up to sunset.[14] In either event the suprema marks the end of the daylight hours, and is followed by vespera.[15] It is at vespera that, according to Varro, the vital organs were offered on intercisi dies, and hence on those days the period of fas will have ended at suprema, that is, at the same instant at which judges were required to adjourn under the Twelve Tables. From this one can speculate that when a judge adjourned by diem diffindere at suprema, he divided the day in the manner of an intercisus dies.

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13 Above, Chapter Nine, notes 19 to 35 and accompanying text.

14 Macrobius vaguely describes the suprema tempestas as diei novissimum tempus, and quotes XII Tab. I, 9. Macrob. Sat. 1.3.14. Censorinus is more specific, stating that some believed the suprema took place at sunset, but that after the lex Plaetoria the suprema occupied the period of time up to sunset. Censorinus D.N. 24. Varro gives the same information as Censorinus though less precisely. Varro Ling. 6.5. (As I mentioned above, though Censorinus drew much of his information from Varro, it is believed he drew from a somewhat more extensive work of Varro's. See authorities cited above, Chapter Nine, note 25.) Sontheimer suggests that after the lex Plaetoria the suprema would be announced by a herald at roughly the ninth hour of the day, and that the suprema would therefore occupy the evening until sunset. Pauly-Wissowa, RE (2nd Series, 1932) vol. 4, p. 2022, s.v. 'Tageszeiten'.

15 Macrob. Sat. 1.3.15; Censorinus D.N. 24. Cf. Varro Ling. 6.6, where vesper follows either suprema or crepusculum.

The analogy is not perfect, however, largely because it is not clear what sort of day the phrase diem diffindere purports to describe. A calendar day such as the intercisus dies is based on the astronomical day, the dies civilis, reckoned from midnight to midnight.[16] In contrast, the rule of the Twelve Tables requiring a trial to adjourn at sunset accords with the Roman working day, the day calculated from sunrise to sunset.[17] The Roman working day, in fact, makes the rule of adjournment almost self-evident: a trial could be expected to adjourn when the working day is finished.[18] The difficulty is that in the face of these different notions of 'day' the analogy of the intercisus dies falls short. If the intercisus dies refers to the division of the civil day, and diffissus dies to the division of the working day, then the first will represent a divided day, while the second will represent a day divided from the night. To insist on the analogy and yet resolve the discrepancy would require a rather bold conclusion: that a trial was deemed adjourned at sunset without diem diffindere, and that a judge divided the day only if he wished to adjourn before sunset. Without any evidence to this effect it seems unnecessary to press the analogy of the intercisus dies this far.

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16 Gell. NA 3.2.7 - .8, .16; Censorinus D.N. 23; D.2.12.8 (Paul, Sabinus, book 13); E. Bickerman, Chronology of the Ancient World (London, 1980), p. 14. See generally TLL (1909), vol. 3, p. 1214, line 60, s.v. 'Civilis'.

17 Censorinus puts the distinction nicely: Naturaliter dies est tempus ab exoriente sole ad solis occasum, cuius contrarium tempus est nox ab occasu solis ad exortum. Civiliter autem dies vocatur tempus, quod fit uno caeli circumactu, quo dies verus et nox continetur, ut cum dicimus aliquem dies triginta tantum vixisse. Censorinus D.N. 23. See also Bickerman, above note 16, p. 13.

18 This is the observation of J. W. Tellegen, from the 47th SIHDA congress in Oxford, 22 September 1993.

My aim in this chapter has been to show that a reasonable explanation for the meaning of diem diffindere exists apart from the explanation provided by the one-day rule. My argument has taken the form of suggesting an analogy between diem diffindere and two calendar days. The argument stops short of showing precisely how the divided trial day and the divided calendar days are related, because so far as I can discover the sources do not show any path of development. Comparatively few sources mention these divided days at all, and sources that so much as hint at some association between the days are too vague to be helpful. For example, in the Curculio Plautus happens to insert some legal boilerplate into a flowery declamation for comic effect: si status condictus cum hoste intercedit dies.[19] Is it possible that Varro, in explaining the concept of intercisi dies (De Lingua Latina 6.31) with the words fas intercedit, is alluding to the same boilerplate? There is more frustrating evidence of this sort: Michels, investigating whether the comitia curiata met on particular days in the calendar, discovered only one meeting that could be firmly dated, a meeting which happened to fall on an intercisus dies.[20] As the comitia curiata was described by Livy as having adjourned by diem diffindere, it would be desirable to know more about how this assembly and the intercisi dies were related. Might the assembly, for example, have favoured both meetings on intercisi dies and adjournment by diem diffindere? None of this sort of evidence is particularly satisfactory, and accordingly the argument here

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19 Plaut. Curc. 5, in Plauti Comoediae, ed. G. Goetz and F. Schoell (Leipzig, 1910), vol. 3, p. 46.

20 The meeting fell on ante diem IX Kal. Sept., 69 B.C., as related at Macrob. Sat. 3.13.11. Michels, above note 6, at pp. 46-47. This day, the 22nd day in the month of Sextilis, is marked as an intercisus dies in the Fasti Antiates Maiores, see A. Degrassi, Inscriptiones Latinae Liberae Rei Publicae (Florence, 1957), vol. 1, p. 35.

is more modest: the divided calendar days provide a plausible analogy to the divided trial day, and the one-day rule is not needed to explain the meaning of diem diffindere, since a likely explanation exists elsewhere.

XI

Adjournment and the Antinoopolis Papyrus

One appealing aspect of the one-day rule is the way it explains the limits of a judge's responsibilities. A judge allowed one fictional day in which to serve, we understand, would remain within his responsibilities and avoid liability so long as (in a case which required it) he properly adjourned by dividing the allotted day. The security of a fictional day would be particularly welcome to a judge appointed in a iudicium imperio continens near the end of the magistrate's term of office.[1] And apart from the matter of liability, the practice of dividing the day would gain a good deal of certainty from the one-day rule, because with the power to adjourn a judge seems to possess also the power to avoid giving judgement, and the one-day rule would protect against an abuse of this kind.

Yet civil trials are not necessarily open to uncertainties and abuses if the one-day rule is not available to provide protection. Recently published sources for adjournment by diem diffindere show that, generally speaking, diem diffindere carries its own safeguards. The lex Irnitana and a fragment from the Antinoopolis papyrus show a close relation between adjournment and liability and, under threat of liability, a judge who adjourns by dividing the day appears to do more than simply close the proceedings and depart: he must reconvene. Under these circumstances the protections of the one-day rule are unnecessary.

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1 See above, Chapter Eight, notes 24 to 28 and accompanying text.

Lawsuits with False Tutors

This chapter is concerned primarily with the Antinoopolis papyrus. A certain portion of the papyrus was discussed above, but a second introduction will be useful here. The leaf of a parchment codex, dating from the fourth century A.D., was discovered in the winter of 1913-14 in Sheikh Abâda. The fragment was first published in 1950.[2] The recto text, which mentions diem diffindere, contains several unusual abbreviations and requires a fair amount of reconstruction. The text reads as follows:[3]

.. ( ) pup(ill.) si .e.. o[. . .] obsta-
bit exc(eptio), aut restitutoriu(m)
iud(icium) dabitur. Q(uod)si sciens eu(m)
pup(illum) esse lit(igaverit) s(ine) t(utore)
a(uctore) repel<l>etur iure
pr(aeto)rio. § Item Pomp(onius) scr(ibit), si fal-
so t(utore) a(uctore) m(ale)[4] fuerit diffis<s>us
dies, ed(ictum) q(ui)d(em) cessare, et iudi-
cem, q(ui)a neq(ue) diffidit neq(ue)
s(ententi)am dixit, litem suam fe-
[cisse videri

2 Egypt Exploration Society, The Antinoopolis Papyrus, ed. C. H. Roberts (London, 1950), part I, no. 22 (accompanied by the commentary of de Zulueta).

3 This is the text of V. Arangio-Ruiz, [Recensioni Critiche], IURA 2 (1951), p. 345, which for the most part follows the reconstruction of Roberts, above note 2. I have departed from Arangio-Ruiz' text only in indicating that m(ale) is a resolved abbreviation.

4 For an alternative reading to male see the discussion below at notes 24 to 29 and the accompanying text.

> . . . a pupil if . . . an exceptio will hinder, or a restitutory action will be given. But one who shall have litigated with a pupil knowing that that pupil is without the authority of a tutor will be defeated under praetorian law. Again, Pomponius writes that if the day has been wrongly divided in a case where the authority of a false tutor arises, the edict will not apply, and the judge, who has neither divided the day nor pronounced judgement, seems to have made the case his own.

In general, the papyrus fragment discusses the limits of the protection afforded a plaintiff who has sued a pupil, and it does so with three illustrations. The first illustration is mutilated, and concludes with the words iudicium dabitur. The second illustration, from quodsi to praetorio, appears to narrow the relief mentioned in the first illustration. The third illustration, beginning with Item Pomponius scribit, alters the facts significantly by introducing the matter of adjournment.

The first to comment on the fragment after its publication was de Zulueta, who suggested that it was part of Book 12 of Ulpian's ad Edictum, and that it appeared to treat in part the edict quod eo tutore.[5] Our knowledge of this edict is incomplete. Part of it is preserved in Ulpian's commentary at D.27.6, which carries the rubric Quod falso tutore auctore gestum esse dicatur. Unfortunately, the words of the edict are not certain, and much of the commentary attributed to Ulpian is probably interpolated. Generally, as we have it the edict appears to state that that which is transacted on the authority of one who falsely puts himself forward as a tutor is not valid, but that if the other transacting party was unaware the tutor was false, the praetor will give restitutio in integrum.[6] Lenel provisionally reconstructs the words of the edict

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5 Antinoopolis Papyrus, above note 2, p. 48 (de Zulueta). Cf. F. de Martino, 'Litem suam facere', BIDR (3rd Series) 30 (1988), p. 14, who doubts that the fragment is classical.

6 D.27.6.1.1, D.h.t.1.6 (Ulpian, ad Edictum, book 12); Lenel, EP, pp. 119-20.

as follows: Quod eo auctore, qui tutor non fuerit, . . . si id actor ignoravit, dabo in integrum restitutionem.

The difficulty here is that this clause of the edict probably allowed relief, not where affairs were transacted with a false tutor, but only where a plaintiff had brought suit against a pupil represented by a false tutor and consequently lost his action. References in the title to affairs transacted with a false tutor appear to have been added by the compilers.[7] As Karlowa explains, the interpolations take account of the fact that, in Justinian's time, a plaintiff who had innocently accepted the authority of a false tutor no longer needed relief from the consumptive force of litis contestatio. References to trials undertaken with false tutors have been largely omitted from D.27.6; Lenel suggests that the edict perhaps may have read something like Quod eo auctore, qui tutor non fuerit, iudicium acceptum erit, si id actor ignoravit, in integram restituam.[8]

It is this edict that the Antinoopolis papyrus appears to address. De Zulueta suggests that the first two illustrations in the text do not treat the case of the false tutor directly, but rather the analogous case of a suit against a pupil who lacks the authority of a tutor, by a plaintiff who believed the pupil was of age. According to de Zulueta, the plaintiff, having lost his right to sue, might be made whole by restitutio in integrum. If he later became a defendant, he

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7 In addition to the rubric, references to gerere are at D.27.6.1.3 and D.h.t.1.5. On the authenticity of these references, see Lenel, EP, loc. cit. above note 6; S. Solazzi, 'Quod falso tutore auctore gestum esse dicatur', in Scritti di Diritto Romano (Naples, 1957), vol. 2, p. 595; O. Karlowa, Römische Rechtsgeschichte (Leipzig, 1901), vol. 2, pp. 1098-99.

8 Karlowa, loc. cit. above note 7; Lenel, EP, p. 120 n.1. Lenel suggests in integrum restituam in preference to dabo in integrum restitutionem to match the style of other clauses in this title.

would have the benefit of an exceptio rei iudicatae. A plaintiff who knows that his opponent is not of age will not benefit from either form of relief.[9]

The exceptio causes some difficulty. De Zulueta says 'It is not easy to conceive of circumstances in which the original plaintiff would need an exceptio', and several writers have taken up the question. Seidl reconstructs the opening of the passage as follows:[10]

> Ei, qui rem in litem deducit cum falso tutore pupilli, si denuo agit, obstabit exceptio, aut restitutorium iudicium dabitur.
>
> One who has carried a matter to trial with the false tutor of a pupil and sues again will be hindered by an exceptio, or will receive a restitutory action.

Seidl suggests that the exceptio rei iudicatae is for the benefit of the pupil and not the plaintiff: the pupil will successfully plead the exceptio when the plaintiff knew that the pupil lacked the authority of a tutor, a contingency taken up expressly in the next sentence. If the exceptio is proven in these circumstances, the plaintiff will be denied restitutio in integrum.[11]

Seidl's explanation is not completely satisfactory because, as Giménez-Candela points out, the structure of the fragment appears to pose a contrast between the first illustration, where the exceptio and restitutio are cited, and the second illustration, introduced by quodsi.[12] The text clearly seems to treat the insciens plaintiff in the first illustration and the sciens plaintiff in the

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9 Antinoopolis Papyrus, above note 2, p. 48 (de Zulueta).

10 E. Seidl, 'Juristische Papyruskunde', SDHI 18 (1952), p. 344.

11 Id., p. 343-44.

12 T. Giménez-Candela, 'Una Revision de Pap. Ant. 22', in Estudios de derecho romano en honor de Alvaro d'Ors (Pamplona, 1987), vol. 1, p. 569.

second. If this is so, the obstabit exceptio of the first illustration refers to the insciens plaintiff, and not to the sciens plaintiff as Seidl believes.

Giménez-Candela's suggestion itself, however, faces much the same problem. She argues that the first two illustrations present, not one hypothesis with an alternative solution, but rather two distinct hypotheses: if the pupil is condemned and later faces an actio iudicati, he will have the benefit of an exceptio (perhaps a special exceptio under this edict). If the pupil is absolved, the plaintiff is permitted to repeat the action, with the fiction that the prior judgement has been rescinded (restitutorium iudicium dabitur). Thus according to Giménez-Candela, of the two forms of relief mentioned in the first illustration, one is for the benefit of the pupil and the other for the benefit of the plaintiff.[13] Yet this suggestion, like Seidl's, ignores the contrast expressed by quodsi in line 3: it is the plaintiff who, under the exception to the rule, loses praetorian remedies on account of his knowledge, and a posteriori it is the plaintiff who benefits from the those remedies, provided he has no such knowledge.

Arangio-Ruiz offers by far the best explanation of the exceptio. He states that the first illustration in the passage describes the case of a plaintiff who brings a second action against the pupil, having brought the first action in the honest belief that the pupil was of age. He explains the troublesome exceptio by suggesting that the text originally read non obstabit exceptio or contained some equivalent negative expression to make clear that a plaintiff would not face an exceptio rei iudicatae in these circumstances. Thus in a subsequent

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13 Id., pp. 567-69.

suit the plaintiff either receives restitutio or is permitted to evade an exceptio that he brought the same suit earlier.[14]

False Tutor or No Tutor?

The scope of the discussion in the first two illustrations is still cloudy. The edict itself appears to have treated suits against pupils eo auctore, qui tutor non fuerit (D.27.6.1.1), that is, false tutors. Does the papyrus fragment also speak about lawsuits taken against pupils with false tutors, or more generally against pupils who lack the authority of a tutor? The second illustration refers broadly to a pupil sine tutore auctore, and for this reason most assume, following de Zulueta, that aside from the last illustration (which mentions false tutors expressly) the fragment treats the more general case of a pupil lacking the authority of a tutor. Arangio-Ruiz and Seidl both say that the fragment takes up a rule analogous to the rule of the edict—a rule to govern when the plaintiff was in error about the age of the pupil—and, similarly, Giménez-Candela says that the discussion encompasses both the presence of a false tutor and an error about the age of the defendant.[15]

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14 Arangio-Ruiz, above note 3, p. 345. It is also possible that the exceptio spoken of is the exceptio tutoria, allowed, perhaps, in cases in which the authority of the tutor is in doubt. See Kaser, RZ, p. 160; Lenel, EP, pp. 502 n.10, 503. According to Lenel the exceptio tutoria would have taken the form 'Si Aulus Agerius Lucii Titii tutor est . . . .' Whether the papyrus has this exceptio in mind is not clear, first, because evidence for the exceptio is late (see C.5.45.2, Diocletian) and second, because as mentioned above the edict quod eo tutore appears to assume that the plaintiff has already pursued an action beyond litis contestatio: the exceptio tutoria, presumably, would arise in the first suit against the pupil.

15 Arangio-Ruiz, above note 3, p. 345; Seidl, above note 10, p. 343-4; Giménez-Candela, above note 12, p. 566-68. Seidl's assertion that the fragment takes up the analogous case is confusing since, as quoted above, he reconstructs the opening of the fragment with the words qui rem in litem deducit cum falso tutore pupilli.

That the fragment takes up an analogous rule is certainly possible. The rule discussed in the first illustration may be too poorly preserved to say one way or the other, but since the proviso recited in the second illustration takes up the more general case of the pupil sine tutore auctore, perhaps the first part of the fragment treats the more general case as well.

Yet it is also possible that none of the fragment has anything to do with a rule analogous to the edict on false tutors, but that the fragment discusses only the edict itself. Possibly, the first section of the fragment, describing relief under certain facts, is indeed speaking of suits with false tutors, while the proviso, denying relief to a sciens plaintiff, is intentionally drawn more broadly with the words sine tutore auctore. The proviso might be more broadly drawn than the rest to take account of the problem that arises when a pupil is represented by a genuine tutor, but the authority of the tutor is in doubt. Ulpian, in commenting on the edict quod eo auctore, introduces this very problem with the warning verbis edicti multa desunt.[16] He says that the words of the edict fall short in the case of a genuine tutor who cannot give authority because, for example, he is a lunatic or was appointed in another province.[17] We might speculate that if a plaintiff loses his action in such a case, the praetor would not later deny him restitutio (or permit him to evade an exceptio rei iudicatae), so long as the plaintiff was sufficiently ignorant of

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16 D.27.6.1.2. Giménez-Candela says that these words are an allusion to the fact that the edict, as we have it, is only partly preserved. Giménez-Candela, above note 12, p. 567 & n.46. It seems more likely Ulpian is commenting on the fact that the words do not convey the full import of the edict.

17 D.27.6.1.2: Quid enim si fuit tutor, is tamen fuit qui auctoritatem accommodare non potuit? The essence of the criticism here is that the words qui . . . fuerit in the edict might be understood to exclude genuine tutors whose authority in a given lawsuit is ineffective.

the tutor's status. But here the praetor would demand a higher degree of ignorance on the plaintiff's part. To allow relief in these circumstances, it would be inadequate to require that the plaintiff be 'unaware the tutor was false' if, for example, he knew that the tutor (though genuine) was a lunatic. With such knowledge the plaintiff would properly be denied relief as one who, in the words of the papyrus, sciens eum pupillum esse litigaverit sine tutore auctore.[18]

If these are the circumstances the papyrus fragment assumes, then the fragment is telling us something about the edict we did not know before: when a plaintiff loses in a suit against a pupil represented by a false tutor, to secure relief in a second suit, the plaintiff must not only have been unaware the tutor was false, but unaware that the authority of an otherwise proper tutor was ineffective. This interpretation, however, probably does not require any revision to Lenel's amended reconstruction of the words of the edict. Lenel, it will be recalled, suggested that in its original condition the edict recited something like Quod eo auctore, qui tutor non fuerit, iudicium acceptum erit, si id actor ignoravit, in integram restituam. If the words qui tutor non fuerit are understood to include both false tutors and tutors whose authority is ineffective, then the commentary in the papyrus is being cautious, though accurate, in speaking of knowledge that a pupil is 'without authority'.

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18 Much the same analysis applies if one assumes the edict was not limited to suits with false tutors, but extended to affairs transacted with false tutors. Again, the plaintiff might be held to a 'higher standard of ignorance'. If, for example, the false tutor was not present at the transaction to which he lent his authority, but attempted to give his authority afterwards by letter as is prohibited (see J. Inst. 1.21.2), it should not avail a plaintiff to be unaware the tutor was false if he knew of the lateness of the letter. The authority would have no validity even if the tutor were genuine.

Adjourning in a Case with a False Tutor

The fact that the fragment to this point appears to discuss directly the edict quod eo tutore gives continuity to the fragment as a whole: the final sentence, following on the first two illustrations of the edict, expressly mentions the case of the false tutor. This portion declares that if a judge improperly divides the day in a case in which the authority of a false tutor arises, he will have made the case his own. The circumstances are similar to those described earlier in the fragment: a plaintiff will seek relief from the praetor in a second action, his claim now consumed in the litis contestatio of the first action. In this case, however, the plaintiff will not have even so much as a judgement absolving his opponent (neque sententiam dixit), and his recourse will not be against that opponent under the edict quod eo tutore, but against the judge.[19]

The last portion of the fragment is interesting for many reasons, but particularly so with respect to diem diffindere, as it provides an example of adjournment in the context of a particular dispute. One task here is to determine whether the presence of the false tutor is in any way related to the adjournment. We are told the adjournment is 'improper' (male) in some way, and as de Martino remarks, this use of male is not a model of clarity.[20] Does the presence of the false tutor somehow render the adjournment improper, or is the adjournment improper for some other, unstated reason? De Zulueta and Arangio-Ruiz believe the false tutor was not relevant, de Zulueta because the judge's knowledge of the situation is not stated, and Arangio-Ruiz because male seems to suggest a feigned illness on the part of a litigant.[21] Cremades

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19 Antinoopolis Papyrus, above note 2, p. 49 (De Zulueta); Giménez-Candela, above note 12, p. 572-73; Arangio-Ruiz, above note 3, p. 346.

20 De Martino, above note 5, p. 14.

21 Antinoopolis Papyrus, above note 2, p. 49 (De Zulueta); Arangio-Ruiz, above note 3, p. 346.

and Paricio similarly believe that male refers to an administrative failure in performing the adjournment, and not to an adjournment somehow provoked by the false tutor.[22] Some take the other view. D'Ors assumes that the adjournment is in some way invalid on account of the presence of the false tutor, and Seidl and Hübner speculate that it was a judge's duty to assume risks of this sort.[23]

Much of the ambiguity here is due to the way the fragment as a whole is usually interpreted. If one reads the first two sections of the fragment to refer (incorrectly, as I believe) not to a rule about false tutors but to an analogous rule about the lack of a tutor, the introduction of the false tutor in the third section takes on special significance. It then becomes necessary to account for the introduction of the false tutor there, to explain why the false tutor illustrates a point that the lack of a tutor would not. To some, the false tutor provides a basis for 'improper adjournment'. On the other hand, the mention of the false tutor in the third section takes on no special significance if all three sections are speaking about lawsuits with false tutors.

At the heart of the problem, however, is the resolution m(ale). The fragment appears to contain an m with a diagonal line through it. In the fragment's first publication Roberts noted that, though he could find no instance among legal writers for m = male, he did find m for malo or mali

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22 I. Cremades and J. Paricio, 'La responsabilidad del juez en el derecho romano clasico', AHDE 54 (1984), p. 182.

23 A. d'Ors, 'Litem suam facere', SDHI 48 (1982), p. 374; Seidl, above note 10, p. 343; H. Hübner, 'Zur Haftung des iudex qui litem suam fecit', IURA 5 (1954), p. 204. See generally Giménez-Candela, above note 12, pp. 569-70.

when it appeared with dolo or doli.[24] On this analogy he suggested m(ale), and nearly every subsequent treatment of the fragment has followed his suggestion.

Giménez-Candela, however, argues convincingly in favour of a different reading: m(inus). She admits to finding no other source that shows this abbreviation, though in this respect her reading is no worse than m = male. The advantage in this reading, she argues, is one of consistency: in a subsequent clause the fragment declares, not that the judge divided the day improperly, but that he failed to divide the day at all (neque diffidit). For this reason it is more likely that the condition above is expressed in the same way, si . . . minus fuerit diffissus dies, 'if the day has not been divided'. To support her argument further she cites twenty-eight instances in which Ulpian uses the expression si minus for si non.[25]

The reading si minus does seem preferable to si male, though some of the reasons Giménez-Candela offers for this reading need a closer look. First, perfect consistency between the condition si falso tutore auctore etc. and the subsequent neque diffidit is not really necessary. If an improper adjournment amounts to no adjournment under the law, then Pomponius might well say that a judge who has adjourned improperly 'has not adjourned'. Second, the twenty-eight instances for si minus in Ulpian that Giménez-Candela cites may not be helpful.[26] In each of the cited cases Ulpian places si minus against

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24 Antinoopolis Papyrus, above note 2, p. 51 n.51 (Roberts). See W. Studemund, Gaii Institutionum Comentarii Quatuor (Leipzig, 1874), p. 263.

25 Giménez-Candela, above note 12, pp. 570-3. Her arguments on the construction of the papyrus may also be found at T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990), pp. 41-45.

26 Id., p. 372 n.74. All of these examples are drawn from Vocabularium Iurisprudentiae Romanae (Berlin, 1983), vol. III/2, col. 1918. It is worth

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another conditional clause, to convey 'if so, then . . . if not, then . . . .' Typical is D.21.1.4.3 (Ulpian, Curule Aediles' Edict, book 1), which speaks of a seller's liability for defects in a slave: Animi autem vitium ita demum praestabit venditor, si promisit, si minus, non. The text of the papyrus does not appear to be using si minus in this way, as there is no apposite conditional clause. If it were in fact using si minus in this way, moreover, it would be Pomponius's usage, not Ulpian's: we would assume that only part of Pomponius' statement is given by Ulpian, that in its original form it began with the affirmative 'if a day shall be divided in a suit with a false tutor', and that Ulpian has excerpted only the negative hypothetical introduced by si minus.

The expression si minus is not, however, limited to introducing the negative half of a proposition. It appears twice in Ulpian with the straightforward meaning 'if not' and, as in our papyrus, appears separately from si:[27]

> D.27.8.1.5 (Ulpian, Edict, book 36): Si curatores fuerunt minus idonei dati, dicendum est teneri magistratus oportere, si ex suggestu eorum vel nominibus ab eis acceptis praeses dederit.
>
> If curators were appointed who were unsuitable, then the magistrates ought to be liable if the governor made the appointment at their suggestion or from their list of nominations.

> D.17.1.10.12 (Ulpian, Edict, book 31): Generaliter Iulianus ait, si fideiussor ex sua persona omiserit exceptionem, qua reus uti non potuit, si quidem minus honestam, habere eum mandati actionem.

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noting that we cannot be certain the papyrus is the work of Ulpian. See Seidl, above note 10, p. 343.

27 The translations are those of the Pennsylvania Digest. The phrase si minus idoneus, for some reason, is particularly common. See D.6.1.16.1 (Paul, Edict, book 21); D.19.2.13.1 (Ulpian, Edict, book 32); D.47.9.9 (Gaius, XII Tables, book 4).

> Julian holds that as a general rule, if a verbal guarantor fails [to plead] a defense which was personal to him and which the principal debtor could not have used, [then] if the defense was not an honorable one, he will have the action on mandate.

Of course it is arguable here whether minus modifies the adjective or the verb, but this is true also of the papyrus. In general the phrases si curatores fuerunt minus idonei dati and si quidem minus honestam [exceptionem omiserit] are sufficiently similar to si falso tutore auctore minus fuerit diffissus dies to support Giménez-Candela's suggestion, si minus for si m.

Apart from matters of syntax, we know enough of the substance of the discussion in the papyrus to prefer si minus to si male. Each of the three sections sets out to illustrate what recourse a plaintiff has after losing a suit with a person lacking tutorial authority.[28] In the first section he has relief under the edict, and in the second he has no relief. The aim of the third section is to show that he has an additional avenue of relief. There, to illustrate the plaintiff's recourse against the judge, only a limited number of facts are relevant: (1) the plaintiff's claim was consumed in litis contestatio, (2) the judge has not adjourned, and (3) the judge has not given judgement.[29] We are told plainly with the words neque diffidit that the judge has not adjourned. That he tried to adjourn and failed is simply beside the point, and in fact this detail does nothing but raise needless questions about what exactly the judge did wrong to incur liability.

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28 If Arangio-Ruiz has correctly explained the various illustrations, then the fragment does not anywhere treat an aggrieved pupil seeking relief (either in a second action of the same kind or in an actio iudicati). Arangio-Ruiz, above note 3, p. 345.

29 We know without question, not only from this fragment but from the lex Irnitana, that a judge who does not adjourn and does not give judgement will be liable. See above, Chapter Eight, notes 20 to 23 and accompanying text.

In short, Giménez-Candela's suggested resolution m(inus) is not perfectly proven, but is much to be preferred to Roberts' tentative m(ale). The improved reading puts aside the question whether a judge's duty to adjourn is somehow associated with a duty to flush out false tutors. The judge, for a reason we are not told, has not adjourned when he ought to have adjourned. The plaintiff, all other things begin equal, might have his relief either under the edict against his opponent or against the judge. This text explains that his relief is against the judge.

Adjourning and Reconvening

The discussion to this point has sought to set out exactly what the papyrus is describing. From here certain aspects of diem diffindere are more plain. I mentioned in a previous chapter that the language of the third illustration, together with the almost identical language in the lex Irnitana,[30] is remarkable, because so far as a judge's liability is concerned, dividing the day appears to be given equal importance to giving judgement. That is, a judge must fail to perform both of these acts in order to incur liability. I mentioned also that there is a temptation to explain the unusual importance of adjournment in those sources by inferring some overarching rule, such as the one-day rule, that forbids or discourages interruptions in some way. Yet if a failure to adjourn seems to carry graver consequences than expected, it is perhaps better to ask whether a judge who 'divides the day' is undertaking something more extensive than we have been led to understand, and accordingly whether a failure to divide the day is a more serious offence than it seems. We know that in English the word 'adjourn' often means more than 'close the proceeding'. In modern parliamentary practice, for example,

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30 Lex Irni., ch. 91, tab. XA, ll. 51-52; tab. XB, ll. 15-17.

'adjourn' assumes an adjournment to a fixed day; if the body does not intend to reconvene, it must often say so, with the words sine die.[31] So, if the importance of adjournment seems exaggerated in the Antinoopolis papyrus and the lex Irnitana, the explanation may lie in the misunderstanding that diem diffindere means 'close the proceeding' and nothing more.

Adjournment is not somehow as significant as giving judgement simply because the liability of a judge turns on a failure to perform both of these acts. The two are found together because 'failure to give judgement' is a difficult offence to assess unless the law fixes an instant in time at which judgement must be given.[32] As trials vary in length and the time for judgement varies accordingly, it is no surprise that adjournment plays a part in fixing this instant. I suggest that adjournment can be useful in this respect only if, as part of the act of adjournment, the judge is also obliged to reconvene. Clearly, in a suit not yet decided, a judge will have failed to give judgement if, after an adjournment, he has not reconvened the trial at an appointed time. Thus if 'divide the day' means not simply 'adjourn' but 'adjourn and reconvene at an appointed time', the two conditions for liability in the Antinoopolis papyrus

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31 D. Walker, The Oxford Companion to Law (Oxford, 1980), s.v. 'Adjournment'. In the United States House of Representatives, for example, 'adjournment' means adjournment to the day fixed for the next meeting. Only if a day is not fixed will adjournment mean the dissolution of the assembly. See J. Tilson, A Manual of Parliamentary Procedure § 104 (n.p., 1949).

32 Johnston recognizes this fact in commenting on chapter 91 of the lex Irnitana. He speculates that the iudicare iubere fixed a time limit, shorter than that fixed by mors litis, within which judgement was to be given. He finds support for this in the rule that a judge who neither adjourns nor gives judgement may be liable: 'This appears to suggest that the judge could be failing in his duty if he did not pronounce judgement by a certain point which was earlier than mors litis . . . .' D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), p. 75 n. 69.

and the lex Irnitana are perfectly appropriate: a judge's failure to give judgement would not be assessed until the time for reconvening has passed. A failure to divide the day, therefore, is mentioned in the two sources not because it is somehow an important act to perform, but because it serves as a predicate to liability for failure to give judgement.

The third illustration in the Antinoopolis papyrus shows quite concisely that to take diem diffindere to mean 'adjourn'—and not 'adjourn and reconvene'—is to misunderstand the phrase. As it happens Giménez-Candela's si minus is quite useful in pointing up the correct meaning of diem diffindere. The illustration states that the edict ceases to apply when the judge does not divide the day, and because the judge has not divided the day nor given judgement, he has made the case his own. The hypothetical does not say 'if' a judge fails to give judgement, but 'because': it assumes that a judge who fails to divide the day does not give judgement. That a failure to divide the day would imply a failure to give judgement is precisely what we would expect if diem diffindere meant 'adjourn and reconvene'.[33]

The requirement to reconvene is most clear in the lex Irnitana and the Antinoopolis papyrus, where it provides a basis for assessing liability, but a text of Julian also happens to hint at this aspect of diem diffindere, though indirectly. Here diem differe is substituted for diem diffindere; speaking of a case in which a judge delivers judgement notwithstanding a party's illness, he says: morbus sonticus etiam invitis litigatoribus ac iudice diem differt (D.42.1.60, Julian, Digest, book 5). The substitution of diem differre for diem

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33 De Martino rightly remarks on the awkwardness of quia here, noting that it suddenly 'introduces a new element, the failure to give judgement'. He chooses, however, to use this as evidence that the fragment is not classical, rather than to question the meaning of diem diffindere. De Martino, above note 5, pp. 16-17.

diffindere is revealing. If Julian regarded 'putting off the day' as equivalent to 'dividing the day', then diem diffindere probably included the requirement to reconvene that the word differre assumes.

Adjourning without the Fictional Day

This chapter has sought to put aside any remaining concerns that, without the one-day rule, diem diffindere becomes an uncertain and ill-defined method of adjournment. A number of sources make it clear that a judge who divides the day does not meet his responsibilities simply by declaring the end of a day's proceedings with the correct form of words. The act of ordering a day divided comprises not only the conclusion of a hearing, but the reconvening of the trial on another date. Moreover, a judge who announces when he will reconvene but does not appear on that day risks liability: when he fails to reconvene he becomes one who, in the words of the Antinoopolis papyrus and the lex Irnitana, 'has neither divided the day nor given judgement'. Thus if diem diffindere takes on the larger meaning 'adjourn and reconvene', the certainty provided by the one-day rule's 'fictional day'—something that in any event probably did not exist—is not needed.

This broader meaning for diem diffindere does not, however, offer every advantage of the one-day rule. It is a fair objection that a judge who fails to bring a iudicium imperio continens to judgement before the end of the appointing magistrate's term of office is open to liability in a way that adjournment within the limits of a fictional day would not permit. Under the one-day rule, it will be recalled, a judge would enjoy the fiction that such a iudicium takes place on the first day it convened, even if in fact it continues beyond the magistrate's term.[34] Yet under the broader meaning for diem

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[34] See above, Chapter Eight, notes 24 to 28 and accompanying text.

diffindere suggested here, a judge who adjourns but does not reconvene the trial before the magistrate's imperium ends presumably will be liable on the same basis as any judge who does not reconvene after adjourning: he has 'neither divided the day nor given judgement' within the meaning of the Antinoopolis papyrus and the lex Irnitana.

To a judge appointed near the end of a magistrate's term, this is an intolerable burden. It is hard to imagine how a system could threaten a judge with liability while allowing him only a short span of time in which to give judgement. This does not mean that the broader meaning for diem diffindere suggested here should be abandoned, but that adjournment in the context of iudicia imperio continentia needs a second look. The solution to the problem may lie in the scope of a judge's liability in this sort of trial. Possibly, the rule imposing liability on the judge for failure to divide the day and failure to give judgement—the liability rule at the root of the problem—did not govern in iudicia imperio continentia at all, but only in iudicia legitima. If this is so, then a judge's failure to reconvene in a iudicium imperio continens would not (by virtue of this rule, at any rate) be a basis for liability.

Certainly the strongest indication that this liability rule governed only in iudicia legitima is in chapter 91 of the lex Irnitana.[35] This chapter, it will be recalled, employs the fiction that, as to certain matters such as adjournment and judgement, a lawsuit is to be conducted as if it were a iudicium legitimum. The draftsman of this chapter, however, was not entirely satisfied to leave the citizens of Irni to consult other sources of law to determine what a iudicium

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35 For a discussion of the structure of chapter 91, and in particular of the fiction of the iudicium legitimum employed there, see above, Chapter Two, notes 3 to 14 and accompanying text.

legitimum demanded.[36] Instead, in two unwieldy digressions, he describes specifically how the fiction affects adjournment and judgement. It is in the course of these digressions on the requirements of iudicia legitima that the liability rule appears.[37] The phrases si neque dies diffissus neque iudicatum fuerit (tab. XA, ll. 51-2) and si neque diffissum e lege neque iudicatum sit (tab. XB, l. 15), together with the eighteen-month limit of the lex Iulia, are recited in the statute to show what the rules of iudicia legitima demand. It is a fair deduction, then, that the liability rule is a particular feature of iudicia legitima.

In the other source for the liability rule, the Antinoopolis papyrus, the text does not say whether the lawsuit treated there is a iudicium legitimum or a iudicium imperio continens. We do not have enough of Pomponius' comments to know even whether the distinction is important. This much, however, is clear: the guardianship at issue in the lawsuit under discussion there is either a tutela impuberum or a tutela mulierum. An impubes as plaintiff or defendant required the authority of a tutor regardless of the type of suit he appeared in, but a woman sui juris required the authority of a tutor only in iudicia legitima.[38] If Pomponius, therefore, is speaking of a case in which a woman appears with a false tutor, we may be sure the liability rule he recites arises in a iudicium legitimum.

The broader meaning ('adjourn and reconvene') for diem diffindere suggested above, therefore, would not have put a judge in the impossible

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36 Cf. W. Simshäuser, 'La juridiction municipale à la lumière de la lex Irnitana', RHDFE 67 (1989), pp. 640-41; Johnston, above note 32, p. 65.

37 The first mention of the rule falls within the digression at tab. XA, ll. 51 - tab. XB, l. 3, and the second within the digression at tab. XB, ll. 14-18.

38 Ulpian, Reg. Lib. Sing. (FIRA II, p. 276) 11.24, .27; G.1.185. See also Kaser, RZ, p. 150; Buckland, Textbook, pp. 167, 688.

position of incurring liability simply because he could not reconvene and give judgement before the appointing magistrate left office: a plaintiff in a iudicium imperio continens would not have relief against the judge under the liability rule recited in the sources just discussed. Where the plaintiff might obtain relief is another matter. Gaius holds out some hope for the plaintiff in his comment (G.4.106) that a iudicium imperio continens does not preclude another action on the same matter, and Jones, taking this up, suggests that a plaintiff in these circumstances might be permitted to pursue an appeal, perhaps to a magistrate with greater potestas.[39] Also Kelly, who finds the hardships generally of a iudicium imperio continens unbelievable, suggests that it may have become a matter of routine for an incoming magistrate to renew the iudiciorum dationes of his predecessor, either singly or all at once.[40]

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39 A. H. M. Jones, 'Imperial and Senatorial Jurisdiction in the Early Principate', in Studies in Roman Government and Law (Oxford, 1960), pp. 81-83. Some doubts expressed in J.A. Crook, Law and Life of Rome (London, 1967), p. 83.

40 J. Kelly, Roman Litigation (Oxford, 1966), pp. 126-30. Kelly's suggestion turns partly on a comment of Gaius: ideo autem imperio contineri iudicia dicuntur, quia tamdiu valent, quamdiu is, qui ea praecepit, imperium habebit. Kelly notes that Gaius uses iudicium praecipere where one would expect iudicium dare, and that praecipere suggests both granting and renewing.

XII

The Judge's Burden

I have left to the end the lex Irnitana's principal contribution to the subject of adjournment. This is because the lex Irnitana provides evidence of a different kind from other sources. Where other sources describe what sort of institution diem diffindere was, the lex Irnitana suggests how diem diffindere might have operated in practice. With the new evidence the picture we get of diem diffindere, though incomplete, is clear enough to show that a judge was more closely restricted by rules than a plain 'power to adjourn' would suggest. Moreover, the close restriction of the judge, taken together with the deliberate way he is appointed, suggest that the extent of his liability has much to do with the extent of the burden he undertakes.

The discussion of diem diffindere began with the suggestion that, in some respects, the rules are concerned not so much with adjournment as with abandonment. That is, they seem to take great care to determine when a judge has failed to perform what is required of him. I suggest below that to a large extent the rules for dividing the day are designed to ensure that a suit, once put into a judge's hands, remains under his supervision until judgement. Generally, they keep the judge to the business of judging by describing his mandate in such a way that he will know clearly whether he has crossed the line and incurred liability. The rules, moreover, provide the means for their own enforcement: with the lex Irnitana we have evidence that a judge's failure properly to divide the day will become, in modern terminology, a 'matter of record', a feature that allows his liability to be proven more readily. In diem diffindere, therefore, the law of procedure does not simply help the judge to set the trial schedule, but defines when a suit is or is not 'before the judge'.

Adjournment in Practice

Before the discovery of the lex Irnitana, we did not possess any source that properly described how adjournment operated in practice. The new evidence provides enough additional information to reveal the circumstances under which a judge would adjourn and the form of words the adjournment would take. The new evidence is found entirely within chapter 91. At first this material might seem not to promise much. This chapter, it will be recalled, mentions a series of procedural subjects largely with references to the practice at Rome, but with little elaboration. Fortunately this is much more useful evidence than it seems because, though chapter 91 is sometimes evasive on substance, it is remarkably thorough in cataloguing the subjects it evades. On adjournment it is particularly thorough, giving a generous number of references to diem diffindere. The references, moreover, are unusual, because in most instances in which adjournment is mentioned, it is given in a striking double form, as in the rubric: Quo iure . . . dies diffindatur diffissusue sit . . . .

The body of the chapter refers to diem diffindere three times in this double form. In the latter two instances the references are abbreviated, but the first time the pair appears it is given in fuller form. There the text states that in private suits in the city of Irni the law of Rome shall prevail,

> de ea re . . . diem diffindendi dies diffissos iurandi antequam iudicent . . . . (tab. XA, ll. 48-50).

Then follows the same pair in two abbreviated forms. The law of Rome prevails,

> uti . . . ex quacumque lege rogatione quocumque plebis scito iudicia privata in urbe Roma fient, . . . diem diffindi, diem diffissum esse . . . oporteret . . . . (tab. XB, ll. 3-8).

And again the law of Rome prevails,

> utique ex isdem causis dies diffindatur diffissus sit . . . . (tab. XB, l. 14).

The paired phrases have been explained in several ways. D'Ors suggests that the statute perhaps alludes to the 'double moment' at which an excuse for adjournment is pleaded. By 'double moment' d'Ors appears to mean that a cause for adjournment is first raised (perhaps by either a party or the judge) and then ratified, as it were, by an oath of the judge.[1] González suggests that 'diem diffindere' refers to postponement by agreement, while 'dies diffissos iurare' refers to 'the invocation of one of the reasons which actually entitled a party to a postponement'.[2] Lamberti suggests that the oath is related to the matter of the judge's liability: at the time the adjournment is announced the judge swears that he will be present at the next hearing, and in this way the

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1 A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', SDHI 49 (1983), p. 45. In several places d'Ors adopts quite different readings from the text of González. At ll. 49-50 he reads diem diffindi, diem diffusum iurare, and at ll. 6-7, diem diffindi, diem difussum esse. A. d'Ors, 'Litem Suam Facere', SDHI 48 (1982), pp. 374-75. Similarly, at XII Tab. II, 2, he reads eo diffusus esto. A. d'Ors, Epigrafía jurídica de la España romana (Madrid, 1953), p. 224.

2 González (1986), p. 235. This cannot be correct, as the statute speaks of ex isdem causis dies diffindatur (ch. 91, tab. XB, l. 14), and accordingly 'diem diffindere' must take account of grounds in some way. D'Ors, like González, assumes that iurari refers to the act of swearing that a ground for adjournment exists. He translates iurare ante quam iudicent (as he reads l. 50) as 'jurar (la causa del aplazamiento antes de que (aquellos) juzguen'. D'Ors (1988), p. 78. Zanon takes the same position. G. Zanon, 'De intertium dando', SDHI 58 (1992), pp. 317-18 n.38.

oath serves as a predicate to his liability, should he fail to appear as he has sworn.[3]

Each of these suggestions tries to some extent to take account of the fact that, in each of the paired phrases, the first phrase is in the present tense and the second is in the perfect. To d'Ors and Lamberti a judge will confirm that a day 'was divided' earlier. To González postponement by agreement takes place in the present, while postponement on a certain ground recognizes that the postponement, being assured, has ipso iure been effected. Of the three, d'Ors' explanation takes better account of the two tenses of diffindere. The principal distinction conveyed by the two tenses is the time at which the day is viewed as having been divided, and d'Ors' suggestion that a judge later ratifies a division that took place earlier closely observes this distinction.[4] Yet d'Ors has probably not made the best use of the paired phrases, because in none of the other sources for diem diffindere is there a suggestion that adjourning is a two-step procedure, that a judge first adjourns and then ratifies the adjournment. It is also arguable that a two-step procedure would not be described with the disjunctive dies diffindatur diffissusue sit in the rubric to chapter 91.[5]

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3 F. Lamberti, 'Alcune riflessioni in tema di 'litem suam facere', Labeo 36 (1990), p. 254; F. Lamberti, Tabulae Irnitanae: municipalità e 'ius Romanorum' (Naples, 1993), pp. 194-95.

4 That the judge is the one who swears is apparent from ll. 49-50: dies diffis[sos] iurandi antequam iudicent.

5 We have at least some confirmation in Cicero that iurare refers to the act of swearing that a ground for adjournment exists. Cicero twice refers to morbum iurare, and though neither reference has anything to do with trials, he seems to intend some legal allusion. Both references appear in letters to Atticus. In the earlier letter (dated shortly before 17 July 65), Cicero speculates that his friend Aquilius would not seek the consulship that year: Nam Aquilium non arbitramur, qui et negavit et iuravit morbum et illud suum regnum iudicale opposuit. (Cic. Att. I, 1, 1). Shackleton-Bailey says 'Facetious intent ought to be obvious in iuravit morbum, a legalistic phrase . . ., which of course cannot be meant literally here.' D. R.

(continued)

I mentioned earlier that the rules for diem diffindere appear to allow adjournment sometimes with and sometimes without a formal ground. I suggested that a judge need not give a supporting ground when he announces an adjournment at the conclusion of a hearing because, having announced the adjournment 'on the record', he is easily held accountable later should he not reconvene at the appointed time. So far as his liability for his own absence is concerned, the propriety of an adjournment is in question only when a suit is adjourned or postponed unexpectedly. It is only when, for an unforeseen reason, the judge fails to appear at the appointed time that an excuse becomes important.[6]

The alternative of 'dividing or swearing' described in chapter 91, I suggest, corresponds perfectly to a scheme of anticipated and unanticipated adjournment. When the adjournment is anticipated and the judge adjourns at the close of a hearing, a prospective statement is demanded, perhaps something like iubeo diem diffindi[7] (or, where a ground exists, iubeo stato die cum hoste diem diffindi). When the adjournment is unanticipated—that is, when a judge or a litigant is absent at the time appointed for convening or reconvening—then the adjournment, if excused, must be announced

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Shackleton-Bailey, ed., Cicero's Letters to Atticus, (Cambridge, 1965), vol. 1, p. 291. In the second letter, of 7 March 45, written when he was mourning the death of Tullia, he explains his reluctance to attend a banquet of the college of augurs. He assumes that others will be willing to vouch for his absence, but: Si erit durius, veniam et ipse perpetuum morbum iurabo. Cum enim mihi carendum sit conviviis, malo id lege videri facere quam dolore. (Cic. Att. XII, 13, 2).

6 A litigant's absence, of course, may call for a different rule. We might expect a litigant to be obliged to offer an excuse for adjournment in any circumstance he requires it, whether he anticipates it or not.

7 See Gell. NA 14.2.11.

retrospectively: iuro diem diffissum esse. Accordingly, I suggest that the phrase 'diem diffindere' in chapter 91 is best explained as treating the case of 'prospective adjournment', and the phrase 'dies diffissos iurari' as treating 'retrospective adjournment'.

The suggestion that iurari refers to putting adjournment on the record retrospectively is supported principally by the rules for excused and unexcused absences discussed earlier. But there is other support as well. At lines 48-50 of chapter 91, where the diffindere/iurari expression is set out in full, the text does not simply say dies diffissos iurandi, but dies diffissos iurandi antequam iudicent. The words antequam iudicent indicate that the oath takes place at the reconvened hearing. There would be little point in a rule that insisted that, at the hearing being adjourned, a judge then engaged in putting the matter off to another day must give the oath 'before he gives judgement'. Also, requiring a judge to give the oath before the suit is concluded is tantamount to requiring him to affirm the propriety of the adjournment during the trial before witnesses.[8] This is precisely what we would expect of a system of rules which anticipates that a judge may later be called to account for his own or a litigant's unexpected absence.

Yet one of the stronger indications that diem diffissum iurari is an act of retrospective adjournment is not in any texts as such, but is suggested by common sense. A trial is vulnerable to unforeseen disruptions. It is fortunate that we possess firm evidence that a 'serious illness' was a ground for adjournment in the classical law, because illness illustrates the point well. At the conclusion of the phase in iure or of a trial hearing, no judge or litigant

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8 D'Ors (1988) adopts the reading diem diffisum iurare ante quam iudicent litem aestument which, if correct, would not so clearly imply that the judge is to put the cause for adjournment on the record.

could know that at the time for convening or reconvening he will suffer from a serious illness and be prevented from attending. Unless a participant were struck down by a serious illness in the middle of the trial, an adjournment on account of illness would never be 'prospective'.[9] As a serious illness does not simply permit but requires an adjournment,[10] a mechanism for determining retrospectively a reason for the absence and the seriousness of the illness is essential. This mechanism appears to be furnished by diem diffissum iurari.

This is not to say that all excused absences are scrutinized after the absence has occurred. It is on just this point I believe González's suggestion falls short. González, it will be recalled, suggests that in chapter 91 diem diffindere refers to a postponement by agreement, while dies diffissos iurare refers to a postponement to which a party is entitled on a certain ground. The difficulty here is that not every ground for adjournment is like morbus sonticus; some grounds, such as status dies cum hoste and funus familiare,[11] might well be known about in advance. If, as I have suggested, the oath is given not at the adjourned hearing but at the reconvened hearing, then according to González a judge will in some cases be obliged to swear after the fact that the day was divided, though he knew in advance the adjournment would be necessary. It is not clear why a judge, forewarned in this way, must 'swear the day was divided before he gives judgement' rather than simply 'order the day divided'.

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9 Those who hold that adjournment can only be prospective would find attractive the theory that morbus sonticus and morbus comitialis, i.e., epilepsy, are the same. See above, Chapter Seven, note 23 and accompanying text.

10 D.42.1.60 (Julian, Digest, book 5).

11 Lex Urso., ch. 95, ll. 24, 33.

Moreover, in proposing a scheme of adjournment by either agreement or entitlement, González is introducing a further, precarious distinction into the matter, a distinction between consensual and nonconsensual adjournment. One difficulty here is that, as mentioned above, no source speaks of adjournments by agreement. But the greater difficulty is that González has restricted 'prospective' adjournments (adjournments in the present tense) to adjournments that are consensual. Yet it is perfectly possible that a prospective adjournment could be nonconsensual. If we can trust that the Urso law recites grounds for diem diffindere, then feriae denicales (a purificatory rite for the family of the dead) would be an instance of a prospective and foreseeable, yet nonconsensual adjournment.[12] On this example 'diem diffindere' (in the language of chapter 91) cannot be confined to 'adjournments by agreement'.

Summary of Adjournment

It will be useful here to summarize the conclusions on adjournment to this point.

In general, diem diffindere refers to the adjournment of the trial phase in a suit before the unus iudex. It appears as early as the Twelve Tables, and existed in a substantially similar form in the classical law. Both the earlier and later sources speak about adjournment being provoked by certain events or grounds.[13]

Our knowledge of the grounds allowed for adjournment, both at the time of the Twelve Tables and later, is greatly limited. Table II, 2 appears to have allowed two excuses: morbus sonticus and status dies cum hoste. We know

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12 Lex Urso., ch. 95, ll. 24, 33-34.

13 Above, Chapter Seven, notes 10 to 26 and accompanying text.

also that grounds of some sort existed in the classical law—and that there was more than one—but the only ground we can name with confidence is morbus sonticus. Two classical sources state unambiguously that, in the event the judge or litigants become seriously ill, the day must be divided.[14] Oddly, despite the fact that grounds for adjournment existed in the classical law, we have evidence that during this same period a judge was permitted to adjourn on his own authority without appealing to any grounds at all.[15]

It is common to explain diem diffindere as a corollary to the supposed rule of the Twelve Tables that a civil trial could not last beyond one day. Proponents of this view explain 'dividing the day' as an act of fictionally dividing the one permitted day and apportioning it over several actual days. In this way the one-day rule would not only explain what the phrase 'divide the day' means, but would ensure that, to maintain the fictional day, a judge was obliged to reconvene the trial, and could not avoid his duty to give judgement simply by declaring an open-ended postponement.[16]

The one-day rule, however, probably did not exist.[17] This does not mean that diem diffindere is left without any conceptual foundation, because aspects of diem diffindere that the one-day rule would explain can be explained in other ways. The notion of 'division' may be understood by analogy to certain days in the calendar, days which are themselves described as 'divided'. These days are divided chronologically, devoted at certain times of day to certain affairs, and a day divided by adjournment may similarly be understood to be a

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[14] Above, Chapter Seven, note 12 and accompanying text.

[15] XREFAbove, Chapter Seven, notes 27 to 31 and accompanying text.

[16] Above, Chapter Eight.

[17] Above, Chapter Nine.

day devoted to the business of adjudication until that business is interrupted.[18] Also, there is no reason to believe that, absent the one-day rule, a judge with the power to adjourn holds therewith the power to avoid giving judgement. A judge who adjourns by diem diffindere must also reconvene, and therefore does not require the impetus to reconvene provided by the one-day rule.[19]

The lex Irnitana does not perhaps add a great deal to what was known of diem diffindere, but is nevertheless useful in indicating how the rules operated in practice. We can infer from the lex Irnitana that an adjournment the participants foresaw was accomplished by the judge simply 'dividing the day', while an adjournment the participants did not foresee was accomplished retrospectively by the judge 'swearing that the day was divided'. Prospective adjournments may or may not have been based on specific grounds; retrospective adjournments probably were.

To go beyond the brief guidelines the lex Irnitana gives us, we must rely on conjecture.[20] Specifically, there is a gap in our knowledge of how a judge is challenged for failure to observe the rules. The lex Irnitana and the Antinoopolis papyrus state that a judge's failure to observe the rules may result in his liability, but to decipher the steps leading to his liability requires some speculation.

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18 Above, Chapter Ten.

19 Above, Chapter Eleven.

20 Johnston rightly points out that chapter 91 presumes the reader will have a copy of the lex Iulia de iudiciis privatis to hand, and in particular that the words diffissum e lege at line 15 indicate that, to understand adjournment, further material is needed. D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', JRS 77 (1987), pp. 62-63.

If a trial, unexpectedly, is not convened or reconvened because the judge or a litigant is absent, neither can be liable on that fact alone,[21] as it may happen that the absence is a permitted one. In this event there will be no alternative but for the judge and parties to exchange notices to appear later at a certain place and time. If the judge and parties do reconvene, the judge will have an opportunity to declare on oath what ground existed for his own or a litigant's earlier absence. If they do not reconvene, the case presents a special problem. The bare rule is that a judge who does not reconvene will be liable, but if no firm date were fixed for reconvening, it would be difficult to declare at any given instant that a judge has not reconvened. The problem was perhaps met by a plaintiff's suit against the judge. If a judge, in a suit claiming he had made the case his own, were permitted to raise by exceptio the cause for his absence, the resolution of that exceptio would determine whether he had 'failed to reconvene' as the law requires.

Naturally if no such suit is brought and the judge does not reconvene, the issue might be unresolved forever, except that, as the lex Irnitana confirms, lawsuits pass away with the passage of time. Chapter 91 states plainly that res in iudicio non sit if it is not adjudicated within the time constraints set forth in the lex Iulia and certain senatusconsulta.[22] This time limit neatly closes what is a largely self-enforcing, efficient system of rules for ensuring judgement.

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21 Possibly, Table I, 8 of the Twelve Tables could be read so severely: Post meridiem praesenti litem addicito. The issue is difficult, however, because of course the Twelve Tables not only allowed but required the iudicium to be postponed in the event of serious illness. D.2.11.2.3 (Ulpian); XII Tab. II, 2.

22 Ch. 91, tab. XA, l. 53 - tab. XB, l. 3; tab. XB, ll. 17-18.

Other Aspects of Adjournment

Taken together the rules just summarized raise the suspicion that dividing the day is not concerned solely with defining 'allowable adjournment'. Why must the requirement to reconvene necessarily be part of the act of adjournment? Why is adjournment not simply permitted but required in the case of morbus sonticus? Why does the law bother to fix grounds for adjournment when a judge may simply adjourn sua sponte? In these respects diem diffindere is not, as we would expect of a plain 'power to adjourn', an instrument the judge takes in hand to direct the course of the trial. Instead, in setting out narrow rules that the judge must negotiate at his peril, diem diffindere resembles far more a restraint than a power.

A comparison with modern law is useful here. It may be obvious, but is still worth pointing out, that if a judge today were not able to continue to serve because of a serious illness (as in Table II, 2) or the competing demands of another office (as in chapter 95 of the Urso law), his absence would probably fall within the ambit of something other than 'the law of adjournment'. His absence is likely to create a jurisdictional issue. In England and Wales, if a High Court judge dies, or it is impossible or inconvenient for him to serve in a particular case, jurisdiction is given to another judge.[23] The same is true in the United States of America: there, the rules of civil procedure provide that a second judge will be substituted in a particular case if the first judge is 'unable to proceed', and further cases may be withheld from that judge if he suffers from a physical or mental disability.[24] Ontario provides an example from the

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[23] R.S.C. O.4, r.7(2) (1993).

[24] See, respectively, Rule 63, Federal Rules of Civil Procedure, and United States Code, tit. 28, § 372(c)(6)(B)(iv). The broad language 'unable to proceed' is intended to include death, any disability, or anything else

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opposite angle: there, the law affirmatively gives a special grant of jurisdiction in a particular case to a judge for a period of ninety days after he resigns, retires, or is appointed to another court.[25]

If the judge's absence does not create a jurisdictional issue, it might, as in Roman law, raise the question of a party's loss. One of the better analogies in modern law to diem diffindere is in a statute that regulates not adjournment, but reimbursement. In a civil proceeding in England and Wales, if a party incurs additional costs because the presiding judge has died or become incapacitated, that party may seek reimbursement from the Lord Chancellor.[26] In its essentials the relief allowed here is very much like the praetorian relief allowed against a judge who has not appeared at trial and not given judgement, insofar as it favours a party who has borne the loss of a judge's absence.

There is nothing surprising or unusual about the way the modern law treats a judge's absence. If a judge is indisposed, the law naturally attends to the many consequences. The point here is not that, on analogy with modern law, the rules for dividing the day must be based, for example, on issues of jurisdiction. Rather, examples from the modern law ought to raise the suspicion that 'adjournment' is only the more superficial aspect of diem diffindere. It would be surprising if the issue of a judge's absence were somehow divorced from the more fundamental problems the absence creates.

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whatsoever. D. Siegel, 'The Recent (Dec. 1, 1991) Changes in the Federal Rules of Civil Procedure', Federal Rules Decisions 142 (1992), p. 377.

25 Courts of Justice Act, S.O. 1984, c. 11, s. 133(2). The Act's predecessor is cited in R. Megarry, A Second Miscellany at Law (London, 1973), p. 54 n.10. Megarry writes at length, pp. 53-58, about the difficulties that arise when a judge dies before a trial or appeal is completed.

26 Section 53, Administration of Justice Act 1985 (30 October 1985).

Subordination

To argue that diem diffindere is largely about defining the conceptual limits of the trial rather than settling the trial schedule is hazardous, because the argument may turn on whether one takes the view of the judge or a litigant. To a judge the argument may seem obvious. He may give close attention to these trial limits because he wishes to avoid making the case his own. To a plaintiff the circumstances may appear different. He may be eager to obtain a remedy as soon as possible, and not concerned whether he takes his remedy against the defendant or the judge. Nevertheless, in many respects the rules for dividing the day conspicuously take pains to define the extent of a judge's responsibility over a lawsuit, to draw the lines a judge must not cross, and in these respects the rules appear to address the limits of the trial to the exclusion of other matters.

The first indication that diem diffindere is more concerned with limits than scheduling is in the very language in which diem diffindere usually appears. Not many sources survive, but in nearly all of those that do, the judge is not the one who performs the act of dividing. It is often an event that divides the day:[27]

XII Tab. II, 2: . . . morbus sonticus . . . aut status dies cum hoste . . . eo [iudici arbitroue reoue] dies diffissus esto.

Livy 9.38.15: ei legem curiatam de imperio ferenti triste omen diem diffidit.

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27 Johnston notes that diem diffindere is something that occurs 'automatically', 'a necessary adjournment forced upon the parties and judge by external circumstance'. Gellius Noctes Atticae 14.2.11 is an important exception to this notion of diem diffindere, but in general the sources quoted here, where events are shown to cause adjournment, bear out Johnston's remarks. Johnston, above note 20, p. 76 & n.71.

And similarly, with diem differre:

D.42.1.60: morbus sonticus . . . diem differt.

Here, it is neither the judge nor an event that divides the day, but a statute:

D.2.11.2.3: lex duodecim tabularum . . . iubet diem iudicii esse diffisum.

Some sources declare elliptically that a day is divided, without explaining who or what has divided it:

Ant. Pap. I.22: si falso tutore auctore minus fuerit diffissus dies

lex Irni., ch. 91, ll. 51-2: si neque dies diffissus . . . fuerit

Id., ll. 15: si neque diffissum e lege . . . sit

In only a few sources does the judge appear as the 'agent' of diem diffindere, but what is interesting is that even here the judge effects adjournment only indirectly:

lex Irni., ch. 91, ll. 49-50: dies diffissos iurandi

Gell. NA 14.2.11: iussi . . . diem diffindi

In only one source is the judge the subject of diffindere. It is arguable here that Pomponius has offered [iudex] diffidit as a shorthand, having just given the expression more fully a few words earlier:[28]

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28 Another exception is from a source outside the law and is probably irrelevant. Varro says: Ego hic, ubi nox et dies modice redit et abit, tamen aestivo die, si non diffinderem [eum] insiticio somno meridie, vivere non

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> Ant. Pap. I.22: Pomponius scribit . . . si . . . minus fuerit diffissus dies, edictum quidem cessare, et iudicem, quia neque diffidit neque sententiam dixit, litem suam fecisse.

The point here is that the language for dividing the day, at least in the few sources we have, does not depict the judge as a figure with unimpeded powers over the trial schedule. Instead of taking a direct hand in adjourning a trial, in most instances the judge is subordinated to the event that provokes the adjournment. To all appearances the judge orders or swears that a day is a 'divided day', while something else—perhaps a permissible ground for adjournment—is the direct instrument of the division. This is what we would expect of an institution that follows the analogy of the fissi and intercisi dies:[29] an event such as a serious illness chronologically divides the day into parts by bringing business to a close, and the judge simply recognizes the division the event has created. Thus the rules for dividing the day, in assigning the primary impetus to the event rather than to the judge, suggest a greater concern with defining in law the true beginning and end of a trial than with providing the judge a tool of administration.

The 'subordination' of the judge is expressed not only in the language of the rules, but in their substance. A clear example is in the rule, discussed in the previous chapter, that 'dividing the day' includes the act of reconvening, and that a judge must reconvene or face liability. A system of adjournment that sought only to guide the trial schedule by determining what sort of absences were excused would not burden the judge in this way. Rather, the rule aims to define the limits of the trial by obliging the judge to build a bridge

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possum. Varro, Rust. 1.2.5. The text is that of J. Heurgon, ed., Varron économie rurale, (Paris, 1978), p. 13, and is much reconstructed.

29 Above, Chapter Ten.

to the next hearing, thus preventing diem diffindere from becoming an open-ended suspension or postponement, and ensuring that the trial will be a continuous and discrete event up to judgement.

Yet the clearest example that the judge's power is subordinated in the interest of fixing the trial limits is in the two peculiarly contradictory rules already mentioned. In some instances, it will be remembered, a trial may be adjourned by the occurrence of some event, while in other instances the judge appears to be free to divide the day on his own authority. It is natural to ask why the law bothers to insist on a range of excuses if adjournment can occur, as it were, on the judge's own unsupported motion.

The answer lies in the fact that the rules are attentive to the issue of a judge's liability, and they fix the trial limits with an eye to the proof required to show a judge's transgression. When a trial must last more than one day and the judge adjourns at the conclusion of the day, he undertakes to adjourn and reconvene before all who are present at the trial, and he is therefore easily accountable later for the propriety of the adjournment. In the event he does not reconvene, the adjournment will have been 'on the record', and therefore witnesses will be available, if necessary, in a subsequent action against the judge to testify that he undertook to reconvene on a certain date and did not. From this point of view, to insist that a judge provide a reason for the adjournment (particularly if he adjourns as he is required to do at the end of the day) is simply unnecessary. On the other hand, a reason for absence will be greatly desirable if a judge, for an unforeseen reason, does not appear at the time appointed for reconvening, because the propriety of the interruption would not be a matter of record. The same is true of a litigant who fails to appear for an unforeseen reason. In such a case the judge or litigant may or may not be able to offer a permissible reason for his absence. As the absence may be due, for example, to either a permissible illness or impermissible

neglect, the rules for diem diffindere must settle the question, declaring what reasons will justify the absence.

It is in these ostensibly contradictory rules that diem diffindere appears most clearly as a device to fix the limits of the trial. In allowing adjournment to take place without a formal ground when the judge openly adjourns and reconvenes on the record, the rules betray the fact that they are concerned less with assigning an excuse to every adjournment than with ascertaining and proving when a judge has acted within his mandate. In this respect the rules do not treat the narrow issue of excused and unexcused adjournment, but the broader issue of accountable absence.

Liability

The rules under which a civil lawsuit passed into the hands of the judge and from there to judgement were remarkably simple and efficient. The delay preceding the judge's appointment (where needed) assured that the judge was suitable and able to serve. The second hearing in iure assured that the judge undertook the suit from an easily discernible point in time. The rules for diem diffindere assured that the judge, by following simple guidelines, could effect an adjournment without worry that he had made the case his own.

All of these rules, of course, are associated to some extent with the question of litem suam facere. One need not read the lex Irnitana in the way I have suggested to see that liability bears some relation to intertium and diem diffindere. For example, in her excellent book Los llamados cuasidelitos,[30] Giménez-Candela concludes that a diffissio is an adjournment for cause through which a judge, on petition, may depart from the trial date (intertium) fixed by the magistrate. The diffissio, under this argument, is therefore a

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30 T. Giménez-Candela, Los llamados cuasidelitos (Madrid, 1990).

device that keeps the judge within his officium, and he will incur liability if he fails to perform the diffissio.[31]

The scope of the judge's liability is not strictly a part of this work but, by way of closing, a brief look at one issue will be useful. The issue here is the so-called 'narrow view' of litem suam facere put forward by, among others, d'Ors, Birks, and MacCormick.[32] The essence of this view is that at least a substantial number of acts which might have brought liability onto the judge fell within what we might call 'patent errors' or 'errors on the face of the record'. These would include failing to appear, departing from the terms of the formula, and perhaps managing the trial badly.[33] These have in common the fact that they are 'intrinsic' to the trial and capable of proof without resort to matters outside of the events at trial.

The conclusions presented in this work are perhaps well suited to rules that would impose liability for errors such as this. What those rules would require is a trial phase that may be unambiguously understood as such. It would be difficult, for example, to hold with Mazeaud and others that a judge's appointment might follow litis contestatio, or to conclude that a judge might adjourn without undertaking to reconvene. A trial takes place where litis

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31 Id., pp. 12-45.

32 D'Ors (1982), above note 1, pp. 368-94; P. Birks, 'A New Argument for a Narrow View of litem suam facere', TR 52 (1984), pp. 373-87; D. N. MacCormick, 'Iudex Qui Litem Suam Fecit', Acta Juridica (1977), pp. 149-65.

33 See G.4.52; Macrob. Sat. 3.16.15; Birks, above note 32, pp. 382-83; MacCormick, above note 32, pp. 152-55. See also G. MacCormack, 'The Liability of the Judge in the Republic and Principate, in H. Temporini and W. Haase, edd., Aufstieg und Niedergang der römischen Welt (Berlin, 1982), vol. 14, p. 20 (recourse against the judge was permitted for his failure to carry out 'the fundamental procedural requirements of his office').

contestatio may be performed without the uncertainty of an unfit judge, and where thereafter a judge is firmly either present or absent.

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