FURTHER ASPECTS OF THE *TABULA CONTREBIENSIS*

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In this article we explore, in more detail than was possible for Richardson in his paper published last year,[1] some of the issues raised by the *tabula Contrebiensis*. Since this discussion is intended to complement Richardson's article, we have not dealt with matters discussed by him upon which we feel that we have nothing fresh to add. We have modified some of the points made by Richardson, and the reader will soon notice that we raise more questions and doubts than we are able to answer or settle, so that the picture which emerges from this article may appear less clear-cut than the picture drawn by Richardson. It is hoped none the less that by drawing attention to the problems which we have encountered we may at least alert other scholars who may be able to solve them.

The inscription is in the following terms: [2]

1. Senatus Contrebie[n]sis quei tum aderunt iudices sunto. Sei par[ret ag]rum quem Salluienses
2. ab Sosinestaneis emerunt rivi faciendi aquaive ducendae causa qua de re agitur Sosinestanos
3. iure suo Salluiensibus vendidisse inviteis Allavonensibus; tum sei ita parret eei iudices iudicent
4. eum agrum qua de re agitur Sosinestanos Salluiensibus iure suo vendidisse; sei non parr[e]t iudicent
5. iure suo non vendidisse.
6. Eidem quei supra scriptei sunt iudices sunto. Sei Sosinestana ceivitas esset tum qua Salluiensis
7. novissume publice depala[r]unt, qua de re agitur, sei [i]ntra eos palos Salluiensis rivom per agrum
8. publicum Sosinestanorum iure suo facere liceret aut sei per agrum preivatum Sosinestanorum
9. qua rivom fieri oporteret rivom iure suo Sallui[en]s[ibus] facere liceret dum quanti is ager aestumatu[s]
10. esset, qua rivos duceretur, Salluienses pequniam solverent, tum, sei ita [p]arret, eei iudices iudicen[t]
11. Salluiensibus rivom iure suo facere licere; sei non parret iudicent iure suo facere non licere.
12. Sei iudicarent Salluiensibus rivom facere licere, tum quos magistratus Contrebiensis quinque
13. ex senatu suo dederit eorum arbitratu pro agro preivato q[u]a rivos ducetur Salluienses
14. publice pequniam solvonto. Iudicium addeixit C. Valerius C.f. Flaccus imperator.
15. Sentent[ia]m deixerunt: quod iudicium nostrum est, qua de re agitur secundum Salluienses iudicamus. Quom ea res
16. iud[ic]ata[st mag]is[tr]atus Contrebienses heisce fuerunt: Lubbus Urdinocum Letondonis f. praetor; Lesso Siriscum
17. Lubbi f. [ma]gistratus; Babbus Bolgondiscum Ablonis f. magistratus; Segilus Annicum Lubbi f. magistratus;
18. [. . . c. 11 . . .]ulovicum Uxe[. .]i f. magistratus; Ablo Tindilicum Lubbi f. magistratus. Caussam Sallui[ensium]

→ J. S. Richardson, 'The *Tabula Contrebiensis*: Roman Law in Spain in the Early First Century B.C.', *JRS* LXXIII (1983), 33 = Richardson (1983). For a bibliography reference is made to p. 33 n. 1 of that article, to which should now be added J. L. Murga, 'La *addictio* del gobernador en los litigios provinciales', *RIDA* 30 (1983), 151 and P. Birks, 'A New Argument for a Narrow View of Litem Suam Facere', *T.v.R.* 59 (1984), forthcoming. The following works will be cited in abbreviated form: A. D'Ors, 'Las formulas procesales del "Bronce de Contrebia"', *Annuario de Historia de Derecho Español* 50 (1980), 1 = D'Ors (1980); A. Torrent, 'Consideraciones juridicas sobre el Bronce de Contrebia', *Cuadernos de trabajos de la Escuela Española de Historia y Arqueologia en Roma* 15 (1981), 95 = Torrent (1981); O. Lenel, *Das Edictum Perpetuum*[3] (1956) = Lenel, *E.P.*; M. Kaser, *Das römische Zivilprozessrecht* (1966) = Kaser, *Z.P.*

[2] The text presented here is based on the readings of Fatás and Richardson. For *apparatus criticus* see Richardson (1983), 33–4.

19. ḍeḍe[ndit . . .]assius Eihar f. Salluiensis. Caussam Allavonensium defendit Turibas Teitabas f.

20. [Allavonensis. Ac]tum [C]ontrebiae Balaiscae eidibus Maieis, L. Cornelio Cn. Octavio consulibu[s].

Translation

Let those of the senate of Contrebia who shall be present at the time be the judges. If it appears, with regard to the land which the Salluiensens purchased from the Sosinestani for the purpose of making a canal or channelling water, which matter is the subject of the action, that the Sosinestani were within their rights in selling to the Salluiensens against the wishes of the Allavonenses; then, if it so appears, let those judges adjudge that the Sosinestani were within their rights in selling to the Salluiensens that land which is the subject of this action; if it does not so appear, let them adjudge that they were not within their rights in selling.

Let those same persons who are written above be the judges. On the assumption that they were the Sosinestan *civitas*, then, in the place where the Salluiensens most recently and officially put in stakes, which matter is the subject of this action, if it would be permissible for the Salluiensens within their rights to make a canal through the public land of the Sosinestani within those stakes; or if it would be permissible for the Salluiensens within their rights to make a canal through the private land of the Sosinestani in the place where it would be proper for a canal to be made so long as the Salluiensens paid the money which is the value which would have been placed on the land where the canal might be brought; then, if it so appears, let those judges adjudge that it is permissible for the Salluiensens within their rights to make the canal; if it does not so appear, let them adjudge that it is not permissible for them to do so within their rights.

If they should adjudge that it is permissible for the Salluiensens to make the canal, then, on the arbitration of five men, whom a magistrate (*or perhaps* the magistracy) of Contrebia shall have assigned from his (*or* their) senate, let the Salluiensens pay money from public funds for the private land where the canal shall be brought. C. Valerius C. f. Flaccus, *imperator*, conferred the right of judgment.

They pronounced the opinion: ' Whereas the right of judgment is ours, in the matter which is the subject of this action we give judgment in favour of the Salluiensens.' When this adjudication was made, these were the magistrates of Contrebia: Lubbus of the Urdini, son of Letondo, praetor; Lesso of the Sirisi, son of Lubbus, magistrate; Babbus of the Bolgondisi, son of Ablo, magistrate; Segilus of the Anni, son of Lubbus, magistrate; . . . . of the . . . ulovi, son of Ux . . us, magistrate; Ablo of the Tindili, son of Lubbus, magistrate. . . . assius, son of Eihar, the Salluiensian, presented the case for the Salluiensens. Turibas, son of Teitabas, the Allavonensian, presented the case for the Allavonenses. Transacted at Contrebia Balaisca, on the Ides of May, L. Cornelius and Cn. Octavius being the consuls.

For convenience we refer to ll. 1–5 as ' the first formula ', ll. 6–11 as ' the second formula ' and ll. 12–14 (down to ' solvonto ') as ' the valuation '.

In Part I we examine the background to the dispute as it relates both to social and economic conditions in the central Ebro valley in the early first century B.C., and to Roman diplomatic activity in various areas of the Mediterranean world in the late second and early first centuries. In Part II we try to discover what was the subject-matter of the dispute between the parties as it appears in this inscription. Finally, in Part III we deal with the procedural considerations which led to the dispute being presented in the manner in which it appears here, and with the possible implications of the inscription for our understanding of the Roman formulary system as it was used in the court of the urban praetor in Rome itself. Although our investigation involves technical considerations in the fields both of Roman history and of Roman law, it must be emphasized from the outset that these two sets of considerations are not separate. The significance of this inscription depends not least on the fact that it is both a record of the activity of a Roman provincial governor at an early stage of the institutions, which made up the administration of the Roman provinces,

and a document written almost exclusively in the terms of Roman private law. The two strands, of the shaping of the Roman empire and of the development of Roman legal processes, are bound together here in a way which makes it impossible to understand the one without examining the other. The same men who, as will be seen, deployed the formulae of the praetor's court with sophistication were also responsible for the making of Roman imperial policy.

I. THE BACKGROUND TO THE DISPUTE

Two elements in the background to this document need closer scrutiny in order to understand its significance.

1. *The economic and social context*

Of the four peoples mentioned on the inscription, the Salluienses, the Sosinestani, the Allavonenses and the Contrebienses, only the first and the last can be located geographically with complete certainty (the Salluienses in the region of modern Zaragoza and the Contrebienses at Botorrita).[3] It is particularly unfortunate, from the point of view of establishing the context of the dispute contained in the *tabula Contrebiensis*, that we cannot identify the territory of the Sosinestani themselves, nor the water-source which the Salluienses were hoping to exploit by bringing a canal across the land of the Sosinestani. A certain amount of information may be gained, however, from a consideration of the conditions to be found in the area as a whole, and from the particular circumstances of at least the Salluienses and the Sosinestani, as they are revealed in the document itself.

The central section of the Ebro valley is intersected by fast-flowing rivers, descending from the Pyrenees to the north, and by a few slower-moving rivers from the mountains which form the northern edge of the central *meseta* and the southern side of the valley. However, except for the regions in the immediate vicinity of the Ebro and these tributaries, the area as a whole is one of the most arid in Spain, and it is only as a result of the extension of intensive irrigation during this century that large tracts of land north of the Ebro have been brought into cultivation.[4] In particular the area of Los Monegros, between Zaragoza and Lérida, was not only largely uninhabited during the medieval period, but was extremely difficult even to cross, and the Roman road which ran up the valley from Lérida to Zaragoza, or perhaps earlier to Gelsa, was equipped with artificial collecting pools for rain-water in order to supply travellers.[5] In such conditions it is not surprising that the management of supplies of water should be a matter of major importance to the inhabitants of the region. If the remains of the town of Contrebia at Botorrita are at all indicative of the type of settlement in which the other participants to this dispute were living, it is highly probable that they depended upon a stable pattern of agriculture, which would depend in turn upon access to adequate irrigation.[6] In the case of Contrebia itself, no doubt the fields in the immediate vicinity of the river Huerva will have received enough water at least through much of the year, but the barren state of the hills immediately to the east of Botorrita in contrast to the crop-growing areas of the valley, and particularly on the west bank of the river, indicates starkly the likely significance of a dispute over the control of water resources.

The distinction which is drawn in the document itself between the public and private land of the Sosinestani seems to indicate an agricultural pattern with some similarities to that found in Roman Italy in the third and second centuries B.C., whereby relatively small individual holdings were supplemented by the use of areas of common land.[7] Such a deduction cannot be made with complete certainty because of the nature of the clause in

[3] Richardson (1983), 35–6.

[4] R. Way and M. Simmons, *A Geography of Spain and Portugal* (1962), 24–7, 55–9, 289–95; A. Schulten, *Iberische Landeskunde* I (1955), 193–5. For a brief account of recent irrigation, see D. Nir, *The Semi-arid World* (1974), 154–8.

[5] A. Beltrán, 'El tramo de la vía romana entre Ilerda y Celsa y otros datos para el conocimiento de los Monegros', *Actas del primer congreso internacional de estudios pirenaicos* (Zaragoza, 1952), 4. 3. 189–208; cf. G. Fatás, 'Notas sobre el dique romano de Muel', *Caesaraugusta* 21/22 (1963), 174–7.

[6] On the excavation at Botorrita, see A. Beltrán and A. Tovar, *Contrebia Belaisca I* (1982), 9–33.

[7] E. Gabba and M. Pasquinucci, *Strutture agrarie e allevamento transumante nell' Italia romana (III–II sec. a.C.)* (1979), 17–29.

which the distinction appears, the style and language of which are entirely Roman and may reflect Roman legal thinking rather than Sosinestan agricultural practice.[8]

On the other hand, the circumstances of the dispute do reveal something of the nature and activity of the Salluienses. It appears from the first formula (ll. 1–5) that the dispute arose because they had purchased land from the Sosinestani for the purpose of constructing a canal (' agrum . . . *emerunt* rivi faciendi aquaive ducendae causa ', l. 2), and the use of the adverb *publice* to describe their action in staking out land and, should it be necessary, in making compensatory payments to the owners of Sosinestan *ager privatus* in the second formula (ll. 7 and 14) shows that, as the unqualified use of the word ' Salluienses ' would in any case suggest, they were here acting corporately, as a *populus*. Indeed the land in dispute will have become *publicus* for the Salluienses not only, in terms of the definitions current in Rome by the second century A.D., because it was *in publico usu* but because it was *in pecunia populi*.[9] Frontinus states that the same policy of public purchase had been employed by the *maiores* for the construction of the aqueducts of Rome.[10] This at least indicates that the Salluienses were a community with the financial and political resources necessary to secure access to supplies of water which probably lay outside their own territory, and which certainly needed to be brought through the lands of the Sosinestani in order to be of use to themselves. Although the sophistication with which the dispute is presented on the inscription is unmistakably Roman in origin, the central issue with which Valerius Flaccus was presented already showed a considerable degree of constitutional and economic complexity on the part of the communities involved.

2. *Roman international arbitration*

By 87 B.C., the date of this inscription (l. 20), the Romans were thoroughly familiar with the role of arbitrators between two disputing states, particularly in the Greek world, where they had inevitably taken over such a position from the Hellenistic kings.[11] Appeals from Greek cities during the second century are mentioned frequently in the literary sources and documented in some detail in several inscriptions. There are, however, certain differences between the adjudication made at Contrebia and those from the Greek east.

In all known cases from the Greek world in this period, the process of arbitration began with an appeal from the cities to the senate, and resulted in the passing of a senatorial decree.[12] This either stated the judgment of the senate itself on the matter, or instructed the magistrate presiding at the meeting of the senate to appoint a third party, always another city, to act as arbiter. In one case, that of a dispute between Magnesia and Priene from the mid-second century, the praetor is to find a ' free people ' acceptable to both sides, failing which he is to make an appointment himself.[13] A variant on this procedure is found in the appointment of two Romans, the Minucii, to settle a territorial dispute between two north Italian peoples in 117, but this too depended upon a *senatus consultum*.[14] On the *tabula Contrebiensis* there is no mention of any authorization of the proceedings other than that of C. Valerius Flaccus *imperator* (l. 14).

The significance of the absence of any *senatus consultum* from the record of the proceedings at Contrebia is not clear. It may be that the senate was involved at some earlier stage in the business, and that whoever put up the inscription did not feel that it was necessary to record the fact. This seems unlikely, however, as the purpose of erecting a Latin inscription in a non-Latin-speaking area suggests that at least part of the motivation was the prestige attached to a connection with Rome.[15] This, combined with the regularity with which reference is made to senatorial decrees in Greek documents and the lack of

[8] On the *ager publicus/privatus* distinction, see M. Kaser, *ZSS* 62 (1942), 1; on the interpretation of this clause, see below p. 55.

[9] *D.* 18. 1. 6 *pr.* (Pomponius 9 *ad Sabinum*, citing Celsus).

[10] Frontinus, *de aquis* 2. 128.

[11] Thus M. N. Tod, *International arbitration among the Greeks* (1913), 181–2. See the survey of the position by A. J. Marshall, ' The survival and development of international jurisdiction in the Greek world ', *ANRW* II. 13 (1980), 626–61.

[12] Thus in the epigraphic texts: Magnesia v. Priene (mid-second century: *Syll.*[3] 679); Narthacium v. Melitaea (*c.* 140 B.C.: *Syll.*[3] 674); Lacedaemonia v. Messene (*c.* 140 B.C.: *Syll.*[3] 683); Priene v. Samos (135 B.C.: *Syll.*[3] 688); Hierapytna v. Itanos (112 B.C.: *Inscr. Cret.* III. 4. 9 and 10).

[13] *Syll.*[3] 679, ll. 47–51.

[14] *FIRA* 3, no. 163, ll. 1–14.

[15] Richardson (1983), 40.

any such reference here, makes it a reasonable assumption that the senate was not involved in the Spanish case. If so, part of the explanation may lie in the fact that the Spanish communities involved in the Contrebian adjudication all lived within the geographical limits of Flaccus' *provincia*, whereas in the cases from the Greek world of the second century the cities were outside the *provincia* of any Roman magistrate or promagistrate. However, the practice of Greek cities appealing to the senate continued into the first century, when there were such Roman officials to hand.[16] It is more likely, therefore, that Greek diplomatic usage, which had accustomed them from the early second century to sending embassies to Rome for all sorts of purposes, made this the obvious way of invoking Roman arbitration.

In fact a further difference between this Spanish case and the others indicates that what took place at Contrebia was in any case not an arbitration. The Greek cases of which an epigraphic record survives, and in which the senate makes provision for the appointment of a third city to act as arbitrator, have in common with this instance the use of the forms of Roman private law to provide the framework for the resolution of the dispute.[17] The similarity to Roman practice is less striking than in the *tabula Contrebiensis*, partly because the documents are in Greek, and, more importantly, because the formulae are not set out in the full form in which they were given to the Contrebian senate. However, despite this common use of Roman law, the nature of the particular forms employed differs significantly. The wording of the relevant clauses in the Greek cases is that of the interdict *uti possidetis*, which was used in the praetor's court in Rome in disputes about possession. The praetor addressed the interdict to both parties, and directed whichever of the two did not satisfy the conditions on which the interdict protected actual enjoyment of the disputed land not to interfere with the other if he did satisfy them.[18] This would indeed be particularly appropriate for use in arbitrations, as it involves a procedure in which, as Gaius describes it, neither party is plaintiff or defendant, but the two are on an equal footing.[19] As Tod pointed out long ago, such a relationship between the two parties is an essential basis for true arbitration of the type employed by Greek states from the sixth century B.C. onwards, since it depended upon the agreement of both sides to accept the decision of a third party.[20] In any case the form of procedure adopted by Flaccus was quite different. There is no sign here of the language of an interdict, and the model (although, as will be discussed below, considerably modified) appears to be that of the more straightforward process of an *actio in rem* used to claim a *ius aquam ducendi*.[21]

This use of the *actio* procedure sets the case reported on the *tabula Contrebiensis* apart from the arbitrations of the Greek world in a more than formal sense. Whereas the latter begin in principle with an approach by both parties to the senate, there is no reason in the Spanish case to believe that there was any agreement between the two sides to refer the matter to Flaccus.[22] In an *actio* the initiative lies with the plaintiff, who summons his opponent *in ius*, and when both appear before the praetor, requests the appropriate form of action.[23] In this instance the Salluienses may be presumed to have approached Flaccus to complain about Allavonensian interference with their right to bring water across the land of the Sosinestani.[24]

[16] Thus for instance *Syll.*[3] 747 and *IG* XII (suppl.), 11. The only instance known to us of a direct appeal by Greek cities to a provincial governor is that of Cierium and Metropolis to C. Poppaeus Sabinus in the reign of Tiberius (*IG* IX. 2. 261). Sabinus referred the matter to the Thessalian league.

[17] A. J. Marshall, *ANRW* II. 13. 640–50. Arangio-Ruiz, commenting on the dispute between Magnesia and Priene (*FIRA* 3, p. 502), observed that the document ' ad Romanorum ius respicit ordinemque iudiciorum privatorum quam maxime imitatur '. In view of the terms of the tabula Contrebiensis ' quam maxime ' perhaps appears somewhat excessive. For another instance of the formulae in an unexpected context, see the Babatha archive, from Petra in the second century A.D. (*SB* X. 10288).

[18] Thus *Syll.*[3] 683, ll. 53–5; *Syll.*[3] 679, ll. 53–5; *Inscr. Cret.* III. 4. 10, ll. 56–8; J. Partsch, *Die Schriftformel im römischen Provinzialprozesse* (1905), 3–52; A. Passerini, ' Nuove e vecchie tracce dell' interdetto *uti possidetis* negli arbitrati pubblici internazionali del II secolo A.C.', *Athenaeum* N.S. 15 (1937), 25–56; A. J. Marshall, *ANRW* II. 13. 649 n. 79. On the procedure under the interdict *uti possidetis*, see J. A. C. Thomas, *Textbook of Roman Law* (1976), 115–17, 147–8; Kaser, *Z.P.* 220 n. 38 and 526.

[19] Gaius 4. 160; Kaser, *Z.P.* 327–8.

[20] M. N. Tod, op. cit. (n. 11), esp. 70–106.

[21] Lenel, *E.P.* 374. D'Ors (1980), 18 and Torrent (1981), 100 n. 10 wrongly rely on Lenel, *E.P.* 193, which deals with other servitudes.

[22] *Contra* Torrent (1980), 99–100, who asserts that there was a consensual arbitration, the judgment in which was endorsed *a posteriori* by Flaccus. This view is quite untenable.

[23] W. W. Buckland, *A Textbook of Roman Law*[3] (1963), 630–1; Kaser, *Z.P.* 162–7, 170–9.

[24] See further below p. 50.

The significance of this is considerable. Flaccus is not seen as an arbitrator or even a source of arbitration, since the form of the process is not that appropriate to an arbitration. Rather he is invoked as a source of justice by an aggrieved party, and provides, through the use of the formulae and the adjudication of the Contrebian senate, a judicial remedy. The effective superiority of the Roman power over the indigenous communities of the Ebro valley could scarcely be demonstrated more clearly, even by a man of the military capability and experience of C. Valerius Flaccus.[25]

II. THE DISPUTE

The plaintiffs are the Salluienses,[26] not the Allavonenses.[27] We say this for three reasons. The simplest is that in ll. 18–19, where the advocates are named, the Salluienses are mentioned first. Next, the second formula mentions the Salluienses but not the Allavonenses. No known form of action fails to identify the plaintiff, though some formulae do indeed omit the defendant from their *intentio*.[28] Taken alone, this argument does not mean that the Allavonenses were the defendants but it excludes their being plaintiffs. On the assumption that the Sosinestani are not parties at all, as seems to be indicated by their absence from ll. 18–19, the only parties named in the second formula are the Salluienses, who must therefore be plaintiffs. This argument is confined to the second formula, since the Allavonenses are named in the previous *intentio* (l. 3). Finally, the *intentiones* of both formulae express the Salluiensian version of the case. The Allavonensian version was negative. It is encountered, but only in the ' sei non parret ' clauses of ll. 4–5 and 11. In relation to *praeiudicia*, in which, as here, the fact that nobody was to be condemned meant that it was not completely obvious who was plaintiff and who defendant, the rule was that the plaintiff was the party whose position was represented in the *intentio*.[29] It affected the onus of proof.

Subject to one clarification, the predominance of the Salluiensian version of the case is doubly apparent in the words of the judgments which are to be given (l. 4 and ll. 10–11) if the *intentiones* are made out. The one unclarity is in l. 4. There the words ' eum agrum . . . Sosinestanos Salluiensibus iure suo vendidisse ', although undoubtedly more Salluiensian than Allavonensian, are prima facie more Sosinestan than either. They seem to indicate a Sosinestan proposition ' we had the right to sell, etc.'. However, there is a reason for this. It reflects an inelegant shift in l. 3 from buying (' Salluienses . . . emerunt ') to selling (' Sosinestanos . . . vendidisse '). This was difficult for the draftsman to avoid. If he had adhered strictly to the Salluiensian viewpoint, he would have found it almost impossible to reach the nub of their contention, that their sellers had power to sell. Every formulation which resists the change from *emere* to *vendere* becomes both more cumbersome and less clear. Hence the sudden prominence of the Sosinestan sellers does not contradict our assertion that the body of the first formula is framed from the Salluiensian point of view and that the Salluienses are therefore the plaintiffs.

As for the defendants we find it difficult to go further than to say that, if the only parties are those named in ll. 18–19, the Salluienses and the Allavonenses, then the Allavonenses are defendants throughout. The reason for caution is the difficulty of finding them some *locus standi* to contest the Salluiensian contentions in the second formula.[30]

The First Formula

For convenience we examine first a few points which specifically concern the first formula (ll. 1–5).

The case arises out of a sale of *ager* by the Sosinestani. The type of *ager* is not more closely defined in ll. 1 and 4. In particular we are not told whether it is *ager publicus* or *ager privatus*, whereas in the second formula *ager* is variously described as *publicus* or *privatus*

[25] On Flaccus in Spain, Richardson (1983), 40.
[26] Richardson (1983), 40.
[27] D'Ors (1980), 11, Torrent (1981), 98, 100.
[28] The part of the formula in which the plaintiff expresses what he claims, discussed below, pp. 63–4. And see esp., Lenel, *E.P.* 374.
[29] See above.
[30] Below, p. 52 and p. 59.

Sosinestanorum. Although there has been a tendency [31] to assume that the *ager* mentioned in this first formula is the same as the *ager* mentioned in the second, that is not said in the inscription and, as we shall see below, there are considerable difficulties in any such assumption.

The land in question has been bought by the Salluienses ' rivi faciendi aquaive ducendae causa ', to make a channel or lead water. This is the only place in the inscription where the separate matter of leading water (*aquam ducere*) is mentioned at all—indeed it is the only place where water is mentioned. The specific reference to leading water might seem superfluous since the purpose of making a channel would be to lead water across the land. The addition of ' aquaive ducendae ' could simply reflect in Latin the terms of the contract of sale between the Salluienses and Sosinestani, terms drawn up by a pernickety draftsman. But even if that is so, they probably fulfilled a useful function, viz. to make it plain that the land could be used not merely to make a channel (*rivus*), but for carrying out other operations related to the leading of water, e.g. perhaps by taking the water through a tunnel (*specus*) [32] or over an arch (*arcus*) [33] built on the land. The purchasers' freedom to use the land in the most appropriate way would be secured by employing this slightly wider formulation.

The text seems to envisage the sale by the Sosinestani to the Salluienses of a stretch of land on which a *rivus* is to be formed or water led, as opposed to a sale by the Sosinestani of a servitude *ius aquae ducendae* over their land. Torrent sees in this a reflection of an early stage in the development of Roman law, when it did not differentiate between ownership of land (*dominium*) and servitudes over land (*servitutes*), but rather thought of, say, the dominant owner of a servitude as having a right of ownership in the actual *rivus* on the servient land through which he led the water.[34] Indeed Torrent suggests that, since the notion of a servitude *aquae ducendae* as a distinct right already existed in Rome at about this time, we should see in the present text an indication that the law in the provinces had not developed to the same extent.

If correct, Torrent's argument would be far-reaching, but it is misconceived. Without expressing any view as to whether Roman jurists did indeed at some stage understand servitudes in the manner suggested, we consider that the present text provides no indication either way. In the first place, whatever the form of the procedure may be, the substantive law in the present dispute was certainly not Roman *ius civile*, though this is not to exclude the possibility that arguments from Roman law and practice might have been adduced by the parties. It is accordingly quite wrong to draw any conclusions from it about the way in which Roman jurists understood servitudes. Secondly, even in a legal system which had fully developed ideas of servitudes, those ideas might well not apply to a transaction such as the present. That transaction was between communities, not merely neighbouring owners, and many of the usual requirements of private law servitudes would be out of place, e.g. that the water should be used solely for the benefit of the particular dominant *praedium*. So the concept would not fit neatly. Thirdly, even in a system like developed Roman law, which recognized a distinct concept of servitudes, people might choose to buy up and acquire ownership of the land over which they proposed to lead water, rather than to proceed by way of servitude.[35] The fact that the Salluienses chose to acquire ownership of the land does not accordingly entitle us to draw the conclusion that no other means of achieving a similar result was available to them at least in other circumstances.

The text tells us that the Salluienses bought the land from the Sosinestani. On the other hand, it makes no mention of any form of conveyance of the land following upon that sale. It is hard to gauge the significance, if any, to be attached to that omission. It seems unlikely that the omission is simply careless, since the entire document has plainly been drafted by someone familiar with legal niceties. If we were dealing with a situation where Roman law applied to the substance of the dispute, we should be entitled to assume that, while the land had been bought, no conveyance, whether by *mancipatio* or otherwise, had

[31] D'Ors (1980), 9 and thereafter throughout the article; Torrent (1981), 98 and again thereafter throughout the article.

[32] cf. *D.* 43. 21. 1. 2 and 3 (Ulpian 70 *ad ed.*); Lenel, *E.P.* 480.

[33] cf. *D.* 39. 3. 11 *pr.* (Paul 49 *ad ed.*).

[34] Torrent (1981), 100 et seq.

[35] cf. *FIRA* 3, no. 106 *o*. See on it L. Capogrossi Colognesi, *La struttura della proprietà e la formazione dei 'iura praediorum' nell' età repubblicana* vol. 2 (1976), 279 n. 19.

taken place and so the ownership had not passed to the Salluienses, as purchasers.[36] But Roman law does not apply and we do not know whether the Sosinestani distinguished between sale and conveyance. Nor indeed do we know what kind of title, whether ownership or possession, would have been involved, nor even, again, whether the Sosinestani would have distinguished between the two. So we can do nothing more than note the fact that the conveyance is not mentioned. Since nothing in the rest of the inscription refers to any conveyancing informality, it would seem unlikely that the dispute turned on that issue.

The nature of the objection of the Allavonenses is quite uncertain and we have nothing to add to what was said on this matter by Richardson.[37] The listing of the advocates in ll. 18 to 20 indicates that the parties represented at the hearing were the Salluienses and the Allavonenses. The Sosinestani were not represented. So far as this part of the dispute is concerned, that fact presents no overwhelming difficulties from a legal point of view, since one can envisage that under the law applied in determining the case the Allavonenses, though not a party to the contract between the Salluienses and the Sosinestani, might be entitled to challenge its validity on the ground that, without their consent, the Sosinestani had no right or power to make a contract to sell the land.[38] On the other hand, the fact that the Allavonenses are the defendants and more particularly that the Sosinestani are not actively involved is perhaps, for anyone familiar with Roman and modern law, the most puzzling aspect of the second part of the inscription and one to which we have found no obvious solution.

The Second Formula

(i) *The Fiction*

It is when we turn to the second formula (ll. 6 to 11) that we encounter the most difficult problems. We look first at the clause ' Sei Sosinestana ceivitas esset '. In Richardson's article last year, it was pointed out that this clause was a fiction, a procedural device found in the Roman formulary system and known to us from Gaius' *Institutes*. We adhere to that view, which explains both the subjunctives in this formula and in particular the ' tum ' which occurs immediately before ' qua Salluiensis '.[39]

It is necessary to emphasize that a fiction of this kind establishes the hypothetical basis upon which the whole of the dispute is to be determined by the judge. So, for instance, in a case where the fiction that the plaintiff is heir to Lucius Titius applies (Gaius 4. 34), the *iudex* is to determine the whole case on the assumption that the plaintiff is heir: the judge does not consider it, for instance, first on the basis that the plaintiff is heir, then also on the basis that he is not. Likewise, where a peregrine is the defendant in an *actio furti* (Gaius 4. 37), the *iudex* is instructed to approach the matter on the same basis as he would if the defendant were a Roman citizen: the *iudex* does not also have to consider what the position would be if the plaintiff were not treated as a Roman citizen.

In the present case the fiction must be treated in the same way. The whole dispute in the second formula is to be decided on the basis of what the position would be ' sei Sosinestana ceivitas esset '. The judges must proceed and give their judgment on that assumption. They are not instructed to—and therefore must not—consider the case on the basis that this assumption does not apply, any more than the *iudex* was to consider the position as if the plaintiff were not the heir in Gaius 4. 34. Not only the parallels with the fictions which we find in Gaius make this plain, but also the very structure of the second formula does so too. The clause ' sei Sosinestana ceivitas esset ' occurs at the outset and provides the assumption for all that follows: hence the ' tum ' in l. 6 which introduces the rest of the formula. If the judges were meant at any stage to consider the position which would obtain ' si Sosinestana ceivitas non esset ', then that would have required to be said

[36] Even in the inscription cited in the preceding note, specific reference is made to the conveyance: ' comparatis et emancipatis '.

[37] Richardson (1983), 39.

[38] For *iure suo* cf. *D.* 8. 3. 29 (Paul 2 *epit. Alfeni dig.*); *D.* 7. 1. 44 (Neratius 3 *memb.*) and *D.* 43. 19. 7 (Celsus 25 *dig.*).

[39] For both cf. Gaius 4. 36. In Gaius 4. 34 the ' tum si ' following the fiction that Aulus Agerius is heir appears to be partly conjectural; the other rests on the manuscript. The subjunctives are also to be found in Gaius 4. 37.

specifically, just as the judges are specifically told what to do not only ' sei parret ', but also ' sei non parret '.

In Richardson's article the fiction was translated as ' If the rules of the Sosinestan *civitas* were to apply ' and it was explained that ' The Salluienses are thus regarded, for the purpose of this case, as having rights which strictly pertain to the Sosinestan *civitas* '.[40] In effect the fiction was being treated like the fiction of citizenship by which a peregrine plaintiff was deemed to be a Roman citizen for the purpose of bringing an action.[41] While from a legal standpoint this translation produces a satisfactory result, it must be admitted that it does some violence to the Latin, and one would have to assume something like a suppressed dative ' eis ', referring to the Salluienses, to extract this meaning from the words. While leaving that interpretation open for consideration, we look at two other possible translations.

One point, which was not noticed before, should not be overlooked. The adjective ' Sosinestana ' precedes ' ceivitas ' and would thus seem to be in an emphatic position. So an important point in the fiction is that something is to be assumed to be *Sosinestan.*

If looked at in isolation, the Latin words of the fiction would perhaps be most easily translated as ' If there were a Sosinestan *civitas* '. It has been helpfully suggested to us that they should indeed be translated in this way and that the issue at stake in the second formula is whether the Sosinestani really exist as a state. On this approach, the argument runs, the second formula carefully leaves open the question of whether there is a Sosinestan *civitas*, in which case there is *ager publicus Sosinestanorum*, while if there is no such *civitas*, the land has to be characterized as *ager privatus Sosinestanorum.* The second formula, while thus leaving open both possibilities, asks in either case whether the Salluienses were within their rights.

In our view this explanation cannot be accepted. Five points can be made against it. First, and fundamentally, for the reasons given above, the fiction lays down the hypothesis upon which the judges are to consider the whole case, and that hypothesis is ' sei Sosinestana ceivitas esset '. The formula does not leave that question open : on the contrary the judges are told precisely what assumption to make. If the words were translated as above, the judges would be told to determine the parties' rights as they would be ' if there were a Sosinestan *civitas* '. We accordingly see no room for an interpretation of the second formula which suggests that the judges are to consider both the possibility ' if there were a Sosinestan *civitas* ' and the possibility ' if there were not a Sosinestan *civitas* '. One may moreover ask : where is this second hypothesis to be found and, if it is not to be found stated in the formula, on what authority are the judges supposed to consider it ? Secondly, and this is simply a more detailed aspect of the same point, there is nothing whatever in the words of the formula which suggests that the land is to be characterized as *ager publicus* ' if there were a Sosinestan *civitas* ', but is otherwise to be characterized as *ager privatus.* If the draftsman had intended the judges to judge the case in these two completely different ways, based on mutually inconsistent hypotheses, he would have required to write a formula giving the members of the senate instructions on how to proceed in either eventuality. He has not done so, even though, as we have noted, he does elsewhere in this formula meticulously tell them what to do ' sei parret ' and ' sei non parret '. Thirdly, if translated in this manner, the clause at least envisages—and, of course, in our view it would presuppose—that no Sosinestan *civitas* may exist. Yet the references to the Sosinestani are in the same form as the references to the Salluienses and Allavonenses, both of whom, we know, formed *civitates.* Fourthly, on this translation the fiction would relate to the status of the Sosinestani. On the models found in Gaius, as well as in order to make the present formula run smoothly, one would have expected the fiction to have been placed close to the references to the Sosinestani in the formula, i.e. below in l. 8. In its present position, the fiction, translated in this way and coming next to the Salluienses, would be out of place and liable to cause confusion. Finally, we have no right to expand the scope of the fiction beyond its terms as stated in the formula. So if the fiction meant ' If there were a Sosinestan *civitas* ', then on that translation its function, and indeed its sole function, would be to create a Sosinestan *civitas* for the purposes of the litigation. The use of such a fiction would

[40] Richardson (1983), 37 et seq.

[41] Gaius 4. 37.

make sense only if, apart from the fiction, there were no Sosinestan *civitas* or at the very least its existence was doubtful. But, as we have just seen, the rest of the formula suggests that this was not the case, because in ll. 7–8 mention is made in unqualified terms of *ager publicus Sosinestanorum* and *ager publicus* implies the existence of a state which can hold that land *publice*. As was stressed, it was not part of the function of this fiction to create this *ager publicus*: its sole function was to create a Sosinestan *civitas*, not also land belonging to that *civitas*. So the *ager publicus*—and hence a Sosinestan *civitas* capable of holding that *ager publicus*—must exist apart from the fiction. It follows that a fiction ' If there were a Sosinestan *civitas* ' would have no role to play. Another way of putting this point is to say that if in reality there is no Sosinestan state, then necessarily there is no Sosinestan state land but only land of individual Sosinestani. Hence there is, on that assumption, only one category of land. The fiction of statehood could not create two categories of land. Yet the formula tells us that there are two categories. Hence the two categories must exist independently of the fiction; and the Sosinestani must therefore hold land *publice* without assistance from the fiction. For the foregoing reasons we are obliged to reject this translation of the clause.

From its position the fiction must indeed refer, as it was taken by Richardson to refer, not to the condition of the Sosinestani but to the condition of the Salluienses, who are mentioned in the immediately following *qua* clause. We propose that the fiction should be translated in this way: ' On the assumption that they (sc. the Salluienses) were the Sosinestan *civitas*, then where the Salluienses most recently and officially put in stakes . . . .' The fiction is that the Salluienses are to be treated for the purpose of deciding this dispute as if they were, and therefore had the rights and powers of, the Sosinestan *civitas*. In other words, the Salluienses are to be allowed to put a channel across Sosinestan *ager publicus* or *ager privatus* if the Sosinestan *civitas* would be allowed to do so and on the same terms.

In translating the fiction in this way, we have taken the subject of the verb ' esset ' to be the Salluienses in the next clause and have treated ' esset ' as having been attracted into the number of the noun in the predicate, ' ceivitas '. Such attractions are found where the noun in the predicate comes next to the verb or where the subject comes after the verb.[42] Here both of these conditions obtain, but in a somewhat extreme form since the subject comes in another clause. Such Latin is undoubtedly awkward, as has been pointed out to us by Latinists we have consulted,[43] but to a draftsman habituated to the inclusion of such fictional clauses as ' si civis Romanus esset ' (Gaius 4. 37) in the praetorian formulae the meaning might well have been perfectly clear.

On this translation proper force can be given to the emphatic position of ' Sosinestana '. The Salluienses are themselves a *civitas*. The point of the fiction is that for the purposes of the action they are to be treated not as the Salluiensian, but rather as the Sosinestan, *civitas*.

From the fiction which comes at the beginning of the inscription we now jump to the judgment in l. 15. It simply says that the judges find in favour of the Salluienses. As will be seen in more detail in Part III, this is in keeping with the style of judgments under the formulary system which need not contain any reasoning.[44] The laconic form of the judgment does, however, give rise to certain difficulties for a modern reader trying to understand the dispute recorded in the inscription, since it gives no indication of the basis of the Salluienses' success.

(ii) *Difficulties in interpreting the* sententia

All the scholars who have written on the inscription accept that in order to win the dispute the Salluienses required to win not only in the first formula, but in the second also, and that indeed the Salluienses won both. This is very probably correct, though the form of the judgment does not make it clear. All that we are told is that the judges decided

[42] M. Leumann, J. B. Hofmann, A. Szantyr, *Lateinische Grammatik* vol. 2 (1965, reprinted with corrections 1972), para. 234. Plural verbs are found with collective nouns. For the detail see op. cit., para. 233 1A.

[43] We are grateful for the assistance of Mr. L. D. Reynolds and Mr. D. L. Stockton in this matter.

[44] p. 72 below.

the matter in dispute (' qua de re agitur ') in favour of the Salluienses, and since ' qua de re agitur ' occurs in the first formula (ll. 2 and 4), the form of the judgment would be consistent with the judges' decision in favour of the Salluienses being based on the Salluienses succeeding in that formula alone. It is no objection to such an argument that the inscription records the formulae for the entire process, including questions which, on this view, the judges never decided, since the *sententia* would have precisely the same form irrespective of whether the Salluienses won because they succeeded in the first formula alone or because they succeeded in both. The Contrebian senate who put up the inscription would hardly have omitted one formula simply in order to indicate that they based their decision on the other, something which they did not make clear in pronouncing that decision.

It is when we consider the judges' *sententia* in relation to the second formula that the difficulties of interpretation become most acute. Although at the end of this section of the article, we suggest that in fact the draftsman did not intend the formula to be interpreted in the strict fashion which, as we shall see, gives rise to these difficulties, it is important to understand what the words actually say, if treated strictly. The main cause of the difficulties is ' aut ' in line 8, a word seen by Fatás though not by Richardson.[45] Taking that word absolutely strictly, what the formula directs the judges to do is to judge that the Salluienses have a right to make the *rivus*, if *either* of two conditions is fulfilled : (*a*) if they may make it across *ager publicus* of the Sosinestani between the stakes *or* (' aut ') (*b*) if they may make it across appropriate parts of the *ager privatus* of the Sosinestani on payment of compensation. Now no difficulty arises if the judges find both conditions (*a*) and (*b*) fulfilled. In such a case the use of the alternative ' aut ' would not preclude a decision in favour of the Salluienses.[46] But apparent difficulties of interpretation arise if one assumes that the judges may have found either (*a*) or (*b*) satisfied and the other not satisfied. In such a situation, if the words of the formula are interpreted strictly, it appears that the judges should hold that the Salluienses had the right to construct the channel, even though on one or other of the branches of the argument the judges had decided that the Salluienses had no right to make the channel. Such alternative conditions introduced by ' aut si ' are, of course, by no means unknown in the Roman formulary system, since they are one way of introducing a *replicatio*, the reply to the defence stated in an *exceptio*.[47] When such a *replicatio* is used, the form of the judgment alone will not reveal whether the plaintiff wins, because he establishes his case on the *intentio* or by virtue of the alternative condition in the *replicatio*, but that does not matter so long as the result of the action is clear, e.g. that the defendant should pay a certain sum of money. The difficulty here is that, given the alternative possible bases for a judgment in favour of the Salluienses, we are apparently left in the dark as to what the true basis was, and hence as to what precisely the outcome of the dispute was. Could the Salluienses construct their channel on public land or private land subject to compensation, or both ? It is not only we who are apparently left in the dark, but more importantly on this approach it is hard to see how the parties to the dispute would have known the precise result either, since, even if we were to assume that the judges pronounced some more formal order in terms of the formula—and this is at least doubtful given the way that their decision is recorded—that more formal order could only be in the terms prescribed by the formula, viz. ' Salluiensibus rivom iure suo facere licere '.

(iii) *Is the land the same in both formulae ?*

This apparent difficulty in interpreting the judgment is compounded by uncertainty for a modern reader as to where precisely the channel was to run, and in particular as to whether all the land mentioned in the second part, both *ager publicus* and *ager privatus*, is land which the Salluienses bought from the Sosinestani in the sale referred to in the first formula.

[45] Richardson (1983), 33–4. On the basis of an examination of the coloured photograph included in G. Fatás, *Contrebia Belaisca II* (1980), M. H. Crawford would read AVT without qualification. We have rejected a reconstruction *ast*, which by itself would have eased our difficulties, but which is never followed by a separate ' si '.

[46] cf. *D.* 43. 24. 11. 5 (Ulpian 71 *ad ed.*); *C.J.* 6. 38. 4. 1b (Justinian). For the meanings of ' aut ', including ' aut ' = ' et ', cf. Leumann, Hofmann, Szantyr, op. cit. (n. 42), vol. 2, para. 269.

[47] For examples, cf. Kaser, *Z.P.* 245 n. 63.

D'Ors [48] and Torrent [49] consider that the land in the second formula is the land bought by the Salluienses and that this land was partly *ager publicus* and partly *ager privatus*. This view is, however, by no means straightforward. Firstly, the land in the second formula is described as ' ager publicus Sosinestanorum ' and ' ager preivatus Sosinestanorum '. If, as D'Ors and Torrent assume, this second formula presupposes that the right to the land has been upheld against the Allavonenses' challenge, one might have expected that the land would have been no longer *ager publicus* or *privatus* of the Sosinestani, but *ager* belonging to the Salluienses, as purchasers. Secondly, the language of the inscription suggests that the sale was by the Sosinestani as a people rather than as individuals. For that reason, though the type of *ager* is not specified in l. 1, one might have thought it more likely that the land in question was *ager publicus* and not *ager privatus*. In particular it is somewhat surprising that the Sosinestan people should be selling off the land of private individuals. This point cannot be pressed too strongly, since, of course, there is no way of knowing how much meaning the distinction between *ager publicus* and *ager privatus* would have had for the Sosinestani and in particular how much respect would have been paid to individuals' property, even supposing the distinction to have been recognized in theory. Thirdly, if the Salluienses have successfully bought the land ' rivi faciendi aquaive ducendae causa ', it is rather strange that they are now required in the second part of the inscription to establish their right to do one of these very things, viz. to construct a channel. Fourthly, as was noted above, the Salluienses bought the land not only ' rivi faciendi ' but also ' aquaive ducendae causa '. If they now require to take additional steps to allow them to construct a channel on the land (*rivum facere*), one would expect them to have to take similar additional steps to take the water across the land (*aquam ducere*). Yet no mention is made of that aspect here. Fifthly, it is particularly difficult to understand the provision for payment of compensation for the taking of *ager privatus*. If the Salluienses have bought the land already, why are they now being asked to pay an additional price apparently to the individual owners of the land used for constructing the channel ?

For these reasons, in our opinion, one could maintain the view that the same land is referred to in both the first and second formulae only on the assumption that, despite the plain terms of the text which suggest that the Salluienses bought the land itself, in fact in substance they were really buying from the Sosinestani the rights which the Sosinestani as a people had to construct a *rivus* on *ager publicus* or *ager privatus*. So the result of the sale on this view would be that the Salluienses were not the proprietors of the land—it could, therefore, still be said to be in the ownership of the Sosinestani (' Sosinestanorum ')—but merely had the same rights as the Sosinestan *civitas* to construct a *rivus*. The point of the dispute would then be that the Allavonenses, having failed in their initial challenge to the sale in ll. 1–5, would say that, even if the Salluienses had bought the rights to construct a *rivus*, the Salluienses could still not construct it, because in fact the Sosinestan *civitas* would not have been entitled to construct it. Hence the issue for the Contrebian judges would be to decide whether in fact the rights purchased by the Salluienses were extensive enough to permit them to construct a channel over the *ager publicus* or *privatus* of the Sosinestani. The chief objection to any such approach—and in our view it is probably fatal—is that it depends on the assumption that the formula really misrepresents the nature of the sale between the Salluienses and the Sosinestani. The inscription indicates that the Salluienses bought the land, *ager*, whereas on this approach the Salluienses would not have bought the land but merely certain rights over it. It seems likely that the draftsman of this rather sophisticated document would have been able to record the nature of such a transaction rather more precisely.

We mention here, only to reject, the possible argument that when the formula says that the *rivus* was to be made ' per agrum publicum ' or ' privatum Sosinestanorum ', it refers to the strip of land bought by the Salluienses and means that it runs through the middle of tracts of *ager publicus* or *privatus* which remain in the ownership of the Sosinestani. It is sufficient to notice that the valuation (l. 13) refers to *ager privatus* ' qua rivos ducetur ', ' where the channel will be taken '. This indicates that the channel is actually to be put on the *ager privatus* for which the Salluienses are to pay.

[48] D'Ors (1980), 11.

[49] Torrent (1981), 98.

These difficulties, inherent in assuming that the land mentioned in the second part of the formula is the same as that mentioned in ll. 1–5, are avoided by Richardson's approach. He considers that the land mentioned in the second formula is different from the land mentioned in the first part.[50] The position is then that the Salluienses have bought a certain stretch of land from the Sosinestani, but now wish to lead their channel over other *ager publicus* and *ager privatus* of the Sosinestani which the Salluienses have not bought. Objections to this approach too can be envisaged. First, if the two formulae do not refer to the same piece of land, it is perhaps less easy to understand why the whole dispute appears to have been considered as a unity—e.g. there is only one mention of the fact that Valerius Flaccus ' iudicium addeixit ' and only one *res* is mentioned as having been decided. Of course this might be explicable on the basis that, even if two separate matters were involved, essentially they related to the same point, viz. the right of the Salluienses to make their channel. Secondly, the Salluienses would appear to have been somewhat naïve in not acquiring enough land to allow the necessary length of channel to be constructed: having bought a certain parcel of land, they are now having to embark on operations on other land to which they have no title. Again it is difficult to evaluate this objection, since we do not know, for instance, whether the Salluienses tried but were unable to buy more land. Thirdly, at some point before the dispute came to be formulated, the Salluienses set out a line of stakes. If these were not set out on land which the Salluienses thought that they had validly purchased, then the setting-out of the stakes on Sosinestan land is a surprisingly bold move, especially from people who were concerned enough with the niceties to enter a contract with the Sosinestani for the purchase of some of the land which they required, rather than simply seize it. This objection would have less force if, for instance, the Salluienses thought initially that they had permission to put in the stakes. It may not be without significance that, so far as we can tell, the Sosinestani did not enter the legal process to contest the Salluiensian claim to be able to construct their channel.

(iv) *Position and extent of the line of stakes*

Mention of the stakes leads us on to yet another area of uncertainty. The stakes were obviously stuck into the ground to mark a line within which the *rivus* was to be constructed. The question is whether those stakes already marked out the whole line which the *rivus* was to follow.

A significant argument for saying that they did indeed mark out the whole line can be based on the fact that in the second formula, despite the fact that questions are posed concerning both *ager privatus* and *ager publicus*, there is only one *qua de re agitur* and that comes after the clause ' qua Salluiensis novissume publice depalarunt '. The *qua de re agitur* would suggest that the issue in dispute in this second part concerns the area where the Salluienses have inserted their stakes. Hence both the *ager publicus* question and the *ager privatus* question which follow would relate to tracts of land which had already been marked off in this way by the time the dispute was presented to the Contrebian senate.

On the other hand, while the terms of the clause beginning ' sei intra eos palos ' (ll. 7–8) suggest that the stakes are on Sosinestan *ager publicus*, the corresponding absence of any reference to the stakes within the following clause beginning ' aut sei per agrum preivatum ' suggests that the stakes were not to be found on any *ager privatus* which might be in question. Yet taken as a whole, this second formula plainly contemplates that the *rivus* may require to be constructed over both *ager publicus* and *ager privatus*. The inference would be that the line of the *rivus* had not yet been fully staked out by the time when the formula was drawn up. Indeed arguably the terms of the formula go further and suggest that the line through the *ager privatus* remained to be fixed, at least in detail. The first *intentio* dealing with the *ager publicus* says that the judges are to decide whether the Salluienses can make the channel within those stakes, ' intra eos palos '. This implies that the route is determined and that all that remains to be decided is the lawfulness of making the channel along that route. On the other hand, when dealing with the *ager privatus* the only indication of the line of any channel is that it is to be ' qua rivom fieri oporteret ', ' where it would be proper for the canal to be made '. This suggests that the route across

[50] Richardson (1983), 35.

the *ager privatus* remains to be settled. This conclusion would be consistent with the approach which we argue should be taken to the provision for fixing compensation.[51]

(v) *The issues in the second formula*

At this point it may be useful to recall the two questions which the judges are being asked to determine. In determining both, by virtue of the fiction, they are to treat the Salluienses as though they were the Sosinestan *civitas*. On the basis of that fiction, the judges are to decide whether the Salluienses, if they were the Sosinestan *civitas*, would be entitled to make the channel along the line of stakes across the *ager publicus*. Next, they are to decide whether the Salluienses, if they were the Sosinestan *civitas*, would be entitled to make the channel across Sosinestan *ager privatus*, where it would be proper to make a channel, on payment of compensation for the land over which the channel was taken. The fiction means that the rights of the Salluienses are to be determined in each case by discovering the rights of the Sosinestan *civitas* in the matter. Not only is this a sophisticated approach from a legal point of view, but the fact that the Salluienses' rights should be determined on this footing, rather than, say, on the footing that they were just a collection of alien individuals, would seem to constitute already a considerable success for the Salluienses in the dispute. One would seem justified in inferring that the granting of a formula in these terms may well have been the subject of debate in front of Valerius Flaccus, akin at least to the kind of argument which would be presented to a praetor when being asked for a formula at the *in iure* stage of the formulary system.[52]

At first sight it might seem that the first question would be rather superfluous, since there could really be no proper dispute about the right of the Sosinestan *civitas*, and hence of the Salluienses, to make a channel across state land, *ager publicus*. But the position might well not be clear-cut. Roman *ager publicus*, for instance, was occupied by individuals who farmed it and carried out their various occupations on it. If the *ager publicus* of the Sosinestani was likewise occupied by various individuals who relied on it for their livelihood, it might well have been a delicate question whether the *civitas* was entitled to make a channel across any particular area occupied by such an individual.

The answer to the second question which is laid before the judges depends on whether the Sosinestan *civitas* had the power to acquire private land needed for the construction of a water channel, on condition that it paid the appropriate compensation. D'Ors [53] points out that such a provision in some respects would resemble that found in cap. 99 of the Lex Coloniae Genetivae [54] of 43 B.C. which provides that the *decuriones* may, on the application of a *duovir*, specify through which fields an aqueduct is to be taken. Just as in the present inscription it is envisaged that certain parts of the *ager privatus* may have to be avoided (' qua rivom fieri oporteret '), so in the Lex Coloniae Genetivae also the route chosen by the *decuriones* is to be followed, ' provided that the water is not taken through any building which was not erected for that purpose '. No mention is made of payment in that *lex*, though D'Ors may be right in assuming that none the less payment is envisaged, as in the present case. The express reference to payment in the present case is more reminiscent of the Roman practice mentioned by Frontinus: [55] if a possessor was *difficilior* in selling a piece of land for the passage of an aqueduct, the *maiores* would purchase all his land and sell it back to him minus the piece required for the aqueduct. But in any event what seems to be envisaged here is that the Salluienses may be able to choose an appropriate line for their *rivus* and acquire the necessary *ager privatus* against payment of compensation.

The Valuation

The compensation is to be fixed by five Contrebian magistrates (ll. 12–14). The inscription makes no mention of any decision on compensation. This has led D'Ors to

[51] See p. 59.

[52] The suggestion of Torrent that Valerius Flaccus was not involved at this stage seems quite without foundation: Torrent (1981), 100.

[53] D'Ors (1980), 14.

[54] *FIRA* I, no. 21.

[55] *de aquis* 2. 128. The comments on this passage by P. Bonfante, *Corso di diritto romano* II. 1 (1926, reprinted 1966), 286, cited by D'Ors (1980), 14 are not satisfactory.

conclude that the provision for fixing compensation was inserted merely as a routine precaution and to protect the possible rights of the individual Sosinestan proprietors, but with no intention that it should ever be operated in this process. Only in this way, he thinks, can one explain why the *sententia* makes no mention of any price being fixed for the *ager privatus*.[56]

The suggestion of D'Ors is scarcely satisfactory and it proceeds from the false premise that the absence of any mention in the *sententia* of fixing a price can be explained only in this way. On the contrary, one would certainly not have expected the *sententia* of the senate appointed to decide the dispute to make any mention of a sum to be paid for any private land. All that the senate are to do is to determine the disputes set forth in the first and second formulae—fixing compensation is for the secondary body of five magistrates chosen from the senate for that purpose. It follows that it was no part of the task of those judges whose decision the inscription records to make any determination about a level of compensation. If they had done so, they would have gone beyond the terms of their remit. They made no decision about compensation, and for that reason in recording their decision no mention is made of compensation.

The question of compensation would arise only if the Salluienses' right to make their channel was upheld. That is the eventuality in which the inscription envisages that the commission to fix compensation will be established and the Salluienses will have to pay.[57] But at the stage when the Contrebian senate give their decision on the matters remitted to them, as was seen above, it appears that the line of the *rivus* over the private land remained to be determined. It would be determined when, and only when, the Salluienses, using the powers which the senate's decision has said are theirs, declare through which fields they propose to take their water. Once they do that, the line will be fixed and so the lands affected and the proprietors affected will become known. Only when that happens can the machinery prescribed in the valuation be brought into play and the five magistrates can assess the claims for compensation which the affected proprietors will then submit to them. Since by that stage the line of the *rivus* is known, the use of the future indicative in ' qua rivos ducetur ' in l. 13 is readily explicable.[58]

As has already been noticed, the valuation envisages that steps are to be taken for assessing compensation simply if the senate ' judge that the Salluienses can make a channel '. It does not specify that the senate must have decided that the Salluienses could make the channel over *ager privatus*. That must, however, be implied. This suggests that the draftsman of the formula really envisages that a decision in favour of the Salluienses on this formula will amount to a decision in their favour on both the *ager publicus* and *ager privatus* points. In other words it suggests that the draftsman was not really envisaging that the ' aut ' in l. 8 should be given its full effect as expressing an alternative. Whether in construing the provision in this way the draftsman was following established practice, or whether his formulation was in fact rather careless in this respect, we have no way of knowing.[59] But if that was the way in which not only the draftsman, but also the Contrebian judges interpreted the formula, then their decision must mean that they found that the Salluienses could make the channel across the *ager privatus* as well as the *ager publicus* of the Sosinestani. There would, therefore, have followed the steps mentioned above, under which the representatives of the Salluienses would have publicly determined a route for the channel across the *ager privatus*; the affected proprietors would thus have been identified; the machinery for assessing compensation would have been put into effect and, presumably on payment of the sum determined by the five arbiters, the Salluienses would have made their *rivus* across the *ager privatus* and the *ager publicus* of the Sosinestani.

The Role of the Allavonenses

We have already mentioned that a most puzzling aspect of this inscription is that, to judge from the references to the representatives in ll. 18–20, the only parties who took part

[56] D'Ors (1980), 13.

[57] This is discussed in more detail below.

[58] D'Ors (1980), 11 makes the strange deduction that the tense ' ducetur ' shows that the aqueduct has already been constructed by the time of the legal proceedings.

[59] See also n. 46 above.

in the hearing before the senate are the Salluienses and the Allavonenses. Since the second formula envisages a dispute as to the right of the Salluienses to make a channel across land which is described as belonging to the Sosinestani, one would have expected the Sosinestani to have been there to argue that case. Yet there is no mention of them. In an area where, as we saw in Part I, access to water would be of the utmost importance, it is not hard to understand that the Allavonenses would have an interest to prevent any move by the Salluienses to increase their access to that precious resource. So one can well understand that the Allavonenses might try any means to thwart the Salluienses. The difficulty is thus not one of seeing what, as a practical matter, the aims of the Allavonenses might be and hence why they might wish to appear before the senate to argue against the Salluienses. The difficulty is rather to understand what the legal basis could possibly be for the Allavonenses arguing the questions raised in the second formula, since they concern rights between the Salluienses and the Sosinestani, rights which appear to be strictly no legal concern of the Allavonenses. We make only two observations. First, even if the Allavonenses appeared and argued on the second formula, it was the Salluienses who won. So the Allavonenses' position may have seemed to the senate just as untenable as it seems to us. Secondly, we may well be looking at the matter from too technical a standpoint, from the standpoint of developed law with its notions of privity of contract and *locus standi*. These notions, even in a primitive form, may not have been dreamed of by those participating in the proceedings before the lay judges of the Contrebian senate. If that was so, the judges would presumably have listened to any arguments which the Allavonenses chose to make about the rights, or lack of them, of the Salluienses, before they rejected the arguments and decided the case ' secundum Salluienses '.

III. *PARTES FORMULARUM*

We owe our knowledge of the Roman formulary system mostly to the *Institutes* of Gaius, which gives an elementary account of the system as he knew it in the second century A.D. Since by the time of Justinian the formulary system had long since passed away, the texts in the *Digest* have been altered so as to remove many of the features which related to that system. But Republican and classical Roman law was dominated by the model pleadings in the praetor's edict, and indeed the law was expounded to a large extent in the form of commentaries on the words of those formulae.

Before embarking on a discussion which might otherwise seem needlessly dry and technical, we must emphasize the importance of the precise wording of the formulae both for the development of the law as a whole and for the outcome of particular cases. Roman law did not develop as the product of abstract doctrinal debate, but in the context of litigation. In the praetor's court issues for trial were framed in formulae which controlled the lay judges when actually trying the case. It was essentially through the jurists' elucidation of the wording of these formulae that the law developed. If the particular facts of a case were novel or unusual, so that the routine forms of pleading would leave a litigant remediless, he would have to argue before the praetor for an innovation, either a new formula or a modification of an existing one. Once past *litis contestatio* (which marked the conclusion of proceedings before the praetor), the litigant's rights at the trial depended wholly on the meaning of the words in his formula. Nowadays we easily think of pleading and procedure as matters separable from the substance of the law. But under the formulary system the texts of the formulae were the foundations of substantive law, and innovation in their wording was the principal means by which that substantive law was changed.

Because of the importance of the formulae the jurists devised a technical vocabulary for analysing them. Such analysis was not primarily needed to allow litigants to compose new formulae; rather, as Zulueta reminds us, ' The formulae were constructed first and analysed later. '[60] So it would not be surprising to discover that the analysis did not always perfectly fit the actual formulae encountered in practice.

Anyone familiar with Gaius' analysis of formulae can instantly apply it to the *tabula Contrebiensis*, though unfamiliar features are also found. The fact that Gaius' analysis

[60] F. de Zulueta, *The Institutes of Gaius*, Part II (1953), 259.

can be applied in this way means that we are dealing with pleadings which are essentially Roman, even if they occur in a provincial context. Indeed we can go further. The tenses and moods, especially those associated with the fiction ' sei Sosinestana ceivitas esset ', would be bewildering if we had not learned from Gaius how to recognize an *intentio* and how an *intentio* behaves when equipped with a fiction. The remarkable fact that we can successfully interpret the *tabula Contrebiensis* using analytical vocabulary learned from Gaius, who wrote nearly two and a half centuries later, attests both the stability of formulary pleadings over a very long period and the unequivocally Roman character of this Spanish document. The dominant impression is not of the provinces but of Rome itself. The document is adapted from existing Roman practice, under the supervision of C. Valerius Flaccus who only recently had been *praetor urbanus*.[61] It is no coincidence that those who have seen a looser connection between the document and contemporary Roman litigation have also failed to recognize the *intentio ficticia* of the second formula.[62]

This document is our only record of Republican pleadings in a real case.[63] Though it would be foolish to discount the provincial context and the ' international ' subject-matter, nobody will now write on Republican litigation without taking this Contrebian evidence into account. As one would expect, both because of the early date and because documents never quite fit the abstract teaching about them, these formulae contain some intriguing structural surprises. They tell us most about the way in which instructions for the giving of judicial declarations were formulated *in iure*, and about the form in which *iudices* uttered the *sententia*.

We turn now to look more closely at the various parts of the formulae.

1. *Nominatio*

This is the part which appoints and names the judge. It must be said at once that the term is not part of Gaius' analytical vocabulary. It is a modern supplement to the Roman analysis. It is used because it is convenient.[64] Nevertheless, in view of certain difficulties which we shall encounter later,[65] it is especially important to remember that Gaius actually fails to give this sentence any name at all.

There are three *nominationes*, at l. 1, l. 6 and, less obviously, at ll. 12–13. The third contemplates an *arbitrorum datio* for the purpose of valuation. The other two do not contain surprises of tense, language or position. They are as we would have predicted. As we shall see, two formulae from Pompeii are the same in this respect.[66] And in Cicero's picture of the topsy-turvy judicial world under Verres in Sicily there is a formula which runs, ' L. Octavius iudex esto. Si paret fundum Capenatem, quo de agitur, ex iure Quiritium P. Servilii esse, neque is fundus Q. Catulo restituetur . . .'.[67] In the Lex Rubria, of 49 or 41 B.C., the two formulae for *damnum infectum* begin with ' Iudex esto ', omitting the actual name.[68] Gaius gives the same nameless outline.[69]

Nowadays we look for majorities ' of those present and voting ', the reason for the addition being our fear lest anyone should require the count to be taken of those entitled to vote though in fact absent or abstaining. The words ' quei tum aderunt ' in l. 1 (and, by implication, in l. 6) have an additional point:[70] if a named judge was absent, the consequence was that the decision was void, even if the absentee was the sole dissentient.[71] By confining the nomination to those who should be present that danger could be avoided.

[61] He was urban praetor in or before 96 B.C.: Broughton, *M.R.R.* II. 9.

[62] D'Ors (1980), 9, 19; Torrent (1981), 98, 100.

[63] Its nearest rivals are those of the Lex Rubria, n. 68 below.

[64] Buckland, op. cit. (n. 23 above), 167.

[65] Below, p. 65.

[66] Below, n. 72.

[67] *II Verr.* 2. 12. 31.

[68] Cap. 20, *FIRA* I, no. 19, col. 1, 22, 33. For the date, see F. J. Bruna, *Lex Rubria* (1972), 322–5.

[69] Gaius 4. 34, 36, 37, 47. Cf. n. 117 below. The reason for the omission of names may be no more than the extreme anxiety, exemplified by the Lex Rubria, cap. 20, col. 1, l. 45, lest names be taken to be part of the model pleading, something later obviated by the invention of Aulus Agerius and Numerius Negidius; *semble*, however, there never was a ' Julius Judicius ' *vel sim.*

[70] cf. Lex Coloniae Genetivae, caps. 96, 99, *FIRA* I, no. 21, col. 3, ll. 10–12, col. 4, l. 4.

[71] *D.* 42. 1. 37 (Marcellus 3 *dig.*); *D.* 42. 1. 39 (Celsus 3 *dig.*); *D.* 4. 8. 17. 7 (Ulpian 13 *ad ed.*); *D.* 4. 8. 18 (Pomponius 17 *epist. et var. lect.*). Cf. Kaser, *Z.P.* 284.

On the position of *nominationes* one extra word is necessary. Two formulae for *condictiones* have been published from a find at Pompeii.[72] They have *nominationes* in the same form: 'C. Blossius Celadus iudex esto'. But there has been a puzzle about the position of one of the *nominationes*, which appears to follow its formula. The danger that something serious might have been made of this oddity has now been anticipated by J. G. Wolf, who has recently shown that the two Pompeian formulae must not only be read together but also in the order opposite to that in which they were first published. With that inversion the errant *nominatio* re-assumes its place at the beginning of the second formula.[73] The Contrebian formulae now confirm the orthodoxy of that position.

There is an important question whether the judge's identity was settled at the conclusion of proceedings *in iure* (i.e. at *litis contestatio*) or subsequently.[74] The better view seems to be that there was no interval.[75] The Contrebian formulae cannot directly resolve the doubt. It is plain that they were inscribed in order to record the result of the case. Hence, even if it were true that *nominationes* were added after *litis contestatio*, they would none the less be present in this document, emanating as it does from the end of the litigation. Only a document prepared for *litis contestatio* could settle the question directly and unequivocally. The Pompeian formulae referred to above could possibly have been prepared for that purpose, but they do include the name of the judge. However, the Contrebian formulae do make an indirect contribution, and they favour the view that there was a full *nominatio* at *litis contestatio*.

There are three arguments. First, in the valuation in ll. 12–13 the appointment of the arbiters is integrated into the wording of the formula. While one can conceive of *litis contestatio* of an abstract 'iudex esto', leaving a name to be added, one cannot contemplate any subsequent appointment which would require any redrafting of the formula. For it was the function of *litis contestatio* to settle once and for all the issue to be tried. Any adjustment of the wording to admit an integrated *nominatio* might affect the substance of that issue. Secondly, Lenel was moved to accept a delayed *nominatio* partly by reason of his opinion that a delegated appointment could not have been used;[76] yet here the appointment in the valuation is exactly the kind of delegated *nominatio* which he rejected. Finally, the third and most important argument is found in l. 14 in the words 'Iudicium addeixit C. Valerius C.f. Flaccus Imperator'. This sentence is intrinsically valuable because it is our only evidence that the words 'iudicium addicere' were used in the formulary procedure. Hitherto scholars have assigned them exclusively to the *legis actiones*. It has been supposed that in the formulary system 'iudicium addicere' gave way to 'iudicium dare'.[77] In the Pompeian formulae referred to above, the equivalent phrase is in fact neither 'iudicium addicere' nor 'iudicium dare' but 'iudicare iubere': 'iudicare iussit P(ublius) Cossinus Priscus IIvir'. 'Iudicium dare' and 'iudicem dare' can be contemplated as looking towards the parties. It is they who are to receive. Both 'iudicium addicere' and 'iudicare iubere' are different in this regard. They confer jurisdiction on the judge. It is he who is to receive. The 'iudicium addicere' is what makes it possible for the *iudex* to say, as later he must say, 'quod iudicium meum est' (cf. l. 15).[78] No form of words designed to confer jurisdiction could be used without identifying the persons to be empowered. The words of l. 14 thus become cogent, albeit indirect, evidence that the *nominationes* were already present in the document at *litis contestatio*.

[72] C. Giordano, *Rend. Acc. Arch. Napoli* 46 (1971), 181; *L'Année Epigraphique* (1973), 155, 156.

[73] J. G. Wolf, 'Aus dem Neuen Pompejanischen Urkundenfund: die Kondiktionen des C. Sulpicius Cinnamus', *SDHI* 45 (1979), 141; but see W. Selb, 'Zu Anfängen des Formularverfahrens', *Festschrift W. Flume* vol. 1 (1978), 99, esp. 100 f.

[74] Subsequent nomination was supported by Kaser, *Z.P.* 215 f.; also earlier by Lenel, 'Zur Form der klassischen Litiskontestation', *ZSS* 24 (1903), 329–40. Lenel's main argument was based on *D.* 5. 1. 28. 4, which contemplates a *litis contestatio* in Rome for a trial to be held in the provinces. He derides the suggestion that there might have been a delegated nomination in that case: 'Iudex esto quem Titius propraetor dabit' (p. 338). He attaches importance to the omission of names from standard nominations (as to which see n. 69 above). For the contrary view, see M. Wlassak, *Römische Processgesetze* vol. 2 (1891), 197, n. 18; G. Pugliese, *Il processo civile romano* vol. 2 (1) (1963), 238 f. And see esp. next note.

[75] G. Jahr, *Litis Contestatio* (1960), 24 f., 84 f.; Wolf, op. cit. (n. 73 above), 155–8.

[76] Above, n. 74.

[77] G. Broggini, *Iudex Arbiterve* (1957), 11 f., 15 f. His two textual references do not, however, warrant this backdating: (i) Varro, *Ling. Lat.* 6. 61; 'Hinc illa indicit illum, indixit funus, prodixit diem, addixit iudicium'. (ii) Macrobius, *Sat.* 1. 16. 28: 'Trebatius in libro primo religionum ait, nundinis magistratum posse manumittere iudiciaque addicere.'

[78] Below, p. 72.

2. *Intentio*

The *intentio* is the plaintiff's principal pleading. Gaius says, at 4. 41, that it is ' ea pars qua actor desiderium suum concludit, velut haec pars formulae: " Si paret Numerium Negidium Aulo Agerio sestertium X milia dare oportere "; item haec: " Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere "; item haec: " Si paret hominem ex iure Quiritium Auli Agerii esse ".'

The *intentio* of the first formula runs from ' Sei parret agrum ' in l. 1 to ' inviteis Allavonensibus ' in l. 3, and it is then recapitulated in the same line by ' tum sei ita parret '. The *intentio* of the second formula runs from the fiction ' Sei Sosinestana ceivitas esset ' in l. 6 to ' pequniam solverent ' in l. 10, and it too is then recapitulated in the same line with ' tum sei ita parret '. It is a small point, but not to be missed, that this second *intentio* has no ' si parret ' until the recapitulation. In the third part of the document, the valuation, there is no *intentio* at all.

At the risk of being over-dogmatic we add a few words on the form of the *intentiones*. They are framed *in ius*, not *in factum*.[79] Although the law on which they are based is not specifically Roman, they do direct an inquiry into what may lawfully be done; they do not require the judges merely to verify a story recited by the plaintiffs. Next, they are framed *in rem*, not *in personam*.[80] So far as concerns drafting, as opposed to underlying ideas, the reason why the formulae are said to be *in rem* is that in neither case do the words of the *intentio* attack the defendant, in the sense of alleging a duty cast upon him or making an accusation against him. On the contrary, the words assert a relationship between the plaintiff Salluienses and a certain *res* (the *ager*), namely, first, that the Salluienses have rightly bought the *ager* despite the want of Allavonensian consent, and, secondly, that over that or other *ager* they now have the right to construct a waterway. In short, the words themselves are directed against the *res de qua agitur*, not against the person of the defendant.[81]

The focus of attention is the fiction in the second *intentio*. We have explored its meaning above.[82] The nearest known parallel is that of the *actio Serviana*, ' Si Aulus Agerius Lucio Titio heres esset '.[83] It is a curious coincidence that the formulae in the Lex Rubria should also have fictions.[84] It confirms that the Romans found the fiction to be a convenient and attractive means of breaking new legal ground. In this connection two technical points need to be made.

First, it can no longer be doubted that an indicative ' si paret ' can be correct after the introduction of a fiction ' si esset '. It is not necessary to have a ' si pareret '. The contrary belief has induced editors to reject the reading of the Verona manuscript of Gaius 4. 34.[85] The effect of the indicative is to affirm that the fiction must be accepted once and for all as the basis of the decision. The fiction must not infect the substance of the decision. It must not make the findings or the judgment seem somehow contingent.

Secondly, a fiction which puts one person in another's shoes, as this one does (' If X were Y '), is another way of arriving at the same extension of liability as can be achieved by a switch of names between *intentio* and *condemnatio*. Formulae which use this technique are known as Rutilian. Thus ' If X were Y, then if on that basis it appears that X owes A ten, condemn X to A for ten ' can be redrafted as ' If it appears that Y owes A ten, condemn X to A for ten '. The change of names is more startling than the fiction, which is what allows Cicero a hostile play upon it in the example given earlier.[86] But the effect is the same. This shows that our formula is Rutilian in effect, albeit not in form; and Gaius, by the order of his treatment, makes plain that he regards Rutilian formulae as a means of achieving a result which can also be achieved by using a fiction.[87]

[79] Gaius 4. 45–6.
[80] Gaius 4. 1–5; Kaser, *Z.P.* 250–6.
[81] cf. also n. 99 below.
[82] Above, p. 52.
[83] Gaius 4. 34, 35 (*Serviana*, not to be confused with the pledge-creditor's action: Lenel, *E.P.* 433, 493; Kaser, *Z.P.* 311).
[84] Above, n. 68.
[85] The emendation appears to derive from Mommsen, cf. P. Krüger, W. Studemund, *Gai Institutiones*[7] (1923), ad loc.; cf. Theophilus 4. 6. 6.
[86] Above, n. 67.
[87] Gaius 4. 34, 35. Lenel, *E.P.* 427. Rutilius was probably P. Rutilius Rufus, consul in 105 B.C.: H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*[3] (1972), 93.

The Rutilian technique is virtually ruled out in this Contrebian formula by the absence of a *condemnatio*.[88] A change of names is always a bold device. When the change happens at the *condemnatio*—' If it appears that X owes Y, condemn Z to Y '—it is surprising but explicable. The explanation is that the function of the *condemnatio* is, in any event, to transform the plaintiff's right, albeit usually only by turning it into money—' If X owes Y barley, condemn X to pay Y its value in money '. The *condemnatio* which empowers the judge not only to make this conversion but also to impose the duty of payment on a new person, Z, can be understood as an extension from the normal case. Any attempt to change the names earlier in the formula would have been intolerable. If the praetor had ordered ' If X owes Y, say that Z owes Y ' or ' If X owns, say that Z owns ', he would have been ordering the judge to lie, in the sense of pronouncing a declaration in conflict with his true finding. Even statute must be careful to avoid that species of contradiction.[89] By contrast the change of names at the *condemnatio* leaves room for a true declaration.[90] Similarly fictions never oblige the judge to declare untruth. Here, for example, the judges have to assume as the basis of their inquiry something which is not the case—that the Salluienses are the Sosinestan *civitas*—but, that assumption once made, they are to declare the truth as they find it. Obeying their instructions, they cannot be forced into a conflict between finding and utterance. It is safe to conclude that a formula requiring a declaration, rather than a condemnation, could never use the Rutilian device.

We now go on to examine the part of the formula in which the praetor, or here Flaccus, instructed the judge or judges to give a declaratory judgment. Simply for convenience, we have called that part the **iudicatio*, though we stress that the term is not Roman and that we do *not* believe that any part of the formula was ever so named by any Roman jurists. The term is simply a tool of this discussion.

3. **Iudicatio*

(i) *The form used by Flaccus to order a declaration*

Both Contrebian formulae end in the same way. Their endings begin with a recapitulatory ' tum sei ita parret ' and then require a declaration to be given in the terms of the Salluiensian claim. There then follows a symmetrical ' sei non parret ' which carries an instruction for a declaration to be given in the terms of the opponents' claim. Thus, in ll. 3–5 :

> tum sei ita parret eei iudices iudicent eum agrum qua de re agitur Sosinestanos Salluiensibus iure suo vendidisse ; sei non parret iudicent iure suo non vendidisse.

And in ll. 10–12:

> tum sei ita parret eei iudices iudicent Salluiensibus rivom iure suo facere licere ; sei non parret iudicent iure suo facere non licere.

If we sever the recapitulations, we can say that these extracts express the ' instruction ' to the judges. In classical Roman law two other species of instruction are found. The common case is the order to condemn or, alternatively, to absolve. When a formula orders only that type of decision, its main sentence, together with the whole subsidiary sentence requiring absolution, is called the *condemnatio*.[91] It is important to notice at once, because we shall return to this immediately below, that the *condemnatio* is not a single unit of syntax. It comprises the apodosis of the ' si paret ' sentence and also both the protasis and the apodosis of the ' si non paret ' sentence.

The remaining species of ' instruction ' is found in divisory actions. There the judge's task is to decide what ought to be apportioned to each party and then to assign to each his

[88] On *condemnationes*, see above.

[89] Gaius 3. 194.

[90] The development of Rutilian formulae is more easily accepted if *all* formulae originally directed declarations before proceeding to *condemnatio pecuniaria* : see below, p. 70.

[91] Gaius 4. 43.

proper part. The verb which orders this assignment is *adiudicare*. The part of the formula which gives the order is the *adiudicatio*.[92]

As for the instruction given by Flaccus, we have no other example of it or of anything like it. Moreover, there is no term in the analytical vocabulary to name it and that is why we have devised the term **iudicatio* for it.

(ii) *Opinion as to the classical order for a declaration*

So far as we know, the only classical actions for declarations were those called *praeiudicia*. Hence our question becomes, ' How was the formula for a *praeiudicium* framed ? ' However, there are many large questions about *praeiudicia* into which we cannot go. In particular, we will not address these issues : (*a*) What sense does *prae-* bear ? Does it mean ' before in time ' (i.e. ' preliminary ') or, ' before in substance ' (i.e. ' primary ' or ' chief '), or does it only intensify ' iudicare ' so as to make it mean ' judge forth ' (i.e. ' declare ') ? (*b*) Was there a fixed list of questions which could be raised in a *praeiudicium*, or a list capable of being extended from time to time in response to rational argument ? Or did the praetor regard himself as having a general jurisdiction to send questions for prae-judicial decision ? (*c*) Whatever the answer to the last question, was there a restrictive requirement that a *praeiudicium* could be allowed only for questions arising out of an existing litigation, in such a way that the *praeiudicium* must always be ancillary to that principal matter ? Or could there be independent, free-standing *praeiudicia* ? [93]

It will be seen that without answers to these questions it is not possible to say for certain whether a classical jurist would have regarded these two Contrebian formulae as giving *praeiudicia*. If the term *praeiudicium* can be translated simply as ' trial for declaration ', then both formulae clearly do qualify. On narrower definitions the matter becomes less clear. Thus the second formula does not appear to be preliminary or ancillary to any other matter. It is, on the contrary, the very issue principally at stake. Since the syntax of both formulae is essentially the same, there is no structural hint as to whether one is prae-judicial and the other not.[94]

We can now turn back to the wording. The source of difficulty is Gaius 4. 44, read against 4. 39 and 4. 41. In 4. 39 he says, ' Partes autem formularum hae sunt : demonstratio, intentio, adiudicatio, condemnatio '. In 4. 41 he explains the nature of the *intentio*.[95] He then makes the observation that not all the parts are found in every formula, and in the course of explaining that point he seems to say that *praeiudicia* have nothing but *intentio*, thus :

> Non tamen istae omnes partes simul inveniuntur, sed quaedam inveniuntur, quaedam non inveniuntur. Certe intentio aliquando sola invenitur, sicut in praeiudicialibus formulis, qualis est qua quaeritur aliquis libertus sit, vel quanta dos sit, et aliae complures. Demonstratio autem et adiudicatio et condemnatio numquam solae inveniuntur ; nihil enim omnino demonstratio sine intentione vel condemnatione valet ; item condemnatio sine demonstratione vel intentione, vel adiudicatio sine demonstratione nullas vires habet, et ob id numquam solae inveniuntur.[96]

The textual problems [97] in this passage do not affect the crucial sentence which begins ' Certe intentio aliquando sola invenitur '. It clearly says that prae-judicial formulae—and possibly even others (' sicut ')—consist only in *intentio*. This is confirmed from Theophilus' paraphrase of Justinian's *Institutes*. We must bring in that evidence at this point.

[92] Gaius 4. 44 ; cf. Lenel, *E.P.* 211.

[93] For these questions see now K. Hackl, *Praeiudicium im klassischen römischen Recht* (1976), esp. 17 f., 189 f., 293 f. See also J. Triantaphyllopoulos, ' Praeiudicium ', *Labeo* 8 (1962), 73, 220 ; ' Praeiudicium legis Cicereiae ', *Labeo* 10 (1964), 24, 171 ; H. Pissard, *Les questions préjudicielles en droit romain* (1907) ; E. I. Bekker, *Die Aktionen des römischen Privatrechts* vol. 1 (1871), 283–95.

[94] Richardson (1983), 37 went further than we now feel able to.

[95] For text, see above, p. 63.

[96] Gaius 4. 44.

[97] (*a*) sed quaedam : sed ⟨abesse potest una aliave ; item solae⟩ quaedam (Mommsen). (*b*) aliquis libertus : ⟨an quis libertus⟩ (Kübler). (*c*) vel adiudicatio sine demonstratione nullas vires habet (Kübler) : vel adiudicatio sine demonstratione vel intentione nullas vires habet (Krüger).

By Justinian's time the formulary system had long been abolished; but, just as it is true that in modern English law the abolished forms of action still rule us from their graves,[98] so habits of thought and vocabulary born of formulae endured. The *Institutes* themselves deal with *praeiudicia* very shortly. Justinian says that they belong to the category of *actiones in rem*,[99] are exemplified by the enquiries ' an aliquis liber vel libertus sit ' and ' de partu agnoscendo ', and are all praetorian except ' fere una illa . . . per quam quaeritur an aliquis liber sit '. Theophilus, however, expands Justinian's account.[100] In particular he reasserts what Gaius had said about the absence of any *condemnatio*, and in doing so he seems to be taking Gaius literally. For Theophilus not only says that a *praeiudicium* consists solely in an *intentio* and has no *condemnatio*, but he also reveals that he thinks the consequence must have been a formula which (*a*) began with the words ' If it appears . . .' but (*b*) did not go on to say ' let the judge condemn '. Twice he indicates that this is what he has in mind. He stops short of saying that in a *praeiudicium* there would be a subordinate clause beginning ' si paret ' with no main sentence—for his point is only that there is no main sentence with the main verb ' condemna '—but he does come extraordinarily close to committing himself to what Lenel called an ' in der Luft schwebende *si paret* '.[101]

On this evidence three formulations have found their supporters. First, the unattached ' si paret ' form. It is extraordinary that anyone should have thought it possible to propose a formula ' Let Titius be judge. If it appears that Seius is freedman of Aulus '. Nevertheless this is what some distinguished scholars have suggested.[102] But no time need be wasted on it. As Lenel says, a floating ' si paret ' is an impossibility.[103]

Next, Lenel's own preference. He proposed an indirect question ' an Seius libertus Auli Agerii sit '.[104] This would turn our Salluiensian contentions into something on these lines: ' An Sosinestani agrum q.d.r.a. iure suo Salluiensibus vendidissent invitis Allavonensibus ? ' and ' An Salluiensibus rivum iure suo facere liceret ? ' Lenel is rightly severe on the floating ' si paret ', but his own *an*-form, in which he is now almost universally followed,[105] is hard to understand, still harder to accept, for the question still seems to hang in the air. It is difficult to believe that Lenel intended this indirect question to depend directly on the word *iudex* in the *nominatio*, thus: ' Titius iudex esto an Aulus Agerius ingenuus sit '. Yet to escape from that (which, of course, Lenel does not ever actually set down) it would seem necessary to insert a stop after *esto* and then to add a verb to support the indirect question. Siber proposed ' quaeratur '.[106] But the insertion of any such verb then defeats the attempt to comply with Gaius' injunction to build a formula with nothing but *intentio* (or, at least, nothing but *intentio* and *nominatio*). If Gaius can tolerate ' quaeratur ', he can equally accept ' iudicet ' or ' iudicato '. And from there it is a short step to a full **iudicatio*, with a ' si paret ' instead of an indirect question.

The third possibility is indeed a **iudicatio* of the kind evidenced in the Contrebian formulae. In the sixteenth century, before the discovery of the manuscript of Gaius, Hotman took Theophilus to task for suggesting a floating ' si paret ' clause and said that anyone who wanted to make use of a protasis ' si apparet me liberum esse ' would have to add an apodosis ' tum me liberum esse pronuntiato '.[107] That suggestion comes remarkably

[98] F. W. Maitland, *The Forms of Action at Common Law* (1936, repr. 1965), 2.

[99] This may mean no more than that the wording does not allege that the defendant ought to give or do anything (i.e. that the formula was not framed ' against a person '. But this is the only place where *praeiudicia* are said to be framed *in rem* and its meaning has been much disputed. See Hackl, op. cit. (n. 93 above), 199 n. 22; Kaser, *Z.P.* 253, 267 n. 41.

[100] Theophilus, *Institutionum Graeca Paraphrasis*, ed. E. C. Ferrini (1897), 424 = J. 4. 6. 13.

[101] *E.P.* 312 f.

[102] M. A. von Bethmann-Hollweg, *Der Civilprozess des Gemeinen Rechts* vol. 2 (1865), 328, 335, 339; A. F. Rudorff, *Edicti perpetui quae reliqua sunt* (1869), 128; A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (1901), 154.

[103] loc. cit., n. 101 above. The only place in which such a ' si paret ' clause could conceivably be put would be before the nomination of the judge, in which case a *praeiudicium* would only operate as a pre-condition to the judge's own authority. To this remote possibility there are some decisive objections. *Inter alia* there would be no logical basis for the judge's own jurisdiction when, finding against the plaintiff, he destroyed his own commission. A conditional *nominatio* is therefore difficult to accept.

[104] ibid. Nobody has proposed a direct question—because of what Theophilus 4. 6. 6 says. But this possibility must be kept in play.

[105] K. Hackl, op. cit. (n. 93 above), 26, 193 f., 204 f.; Kaser, *Z.P.* 239, 266; J. Triantaphyllopoulos, op. cit. (1962; n. 93 above), 225, 238; Buckland, op. cit. (n. 23 above), 651.

[106] H. Siber, ' Praeiudicia als Beweismittel ', *Festschrift Wenger* vol. 1 (1944), 46, 69.

[107] François Hotman, *Commentarius in quatuor libros Institutionum Iuris Civilis*[2] (Basle, 1569), 377.

close to the form which we see in the Contrebian pleadings.[108] Hotman reached it because he was not distracted by Gaius 4. 44. Among modern scholars only Schulz retains anything similar, though his suggestion is perhaps closer to Siber's: 'Octavius iudex esto pronuntiatoque an Numerius Negidius libertus Auli Agerii sit'.[109] Here the 'pronuntiato' suggests the formulation proposed by Hotman, but then Schulz reverts to Lenel's indirect question.

We have noted the objections to the first two possible formulations of the prae-judicial formula. The Contrebian formulae certainly suggest a way in which the praetor might have directed the *iudex* to make a declaratory judgment. But we must consider whether there are any reasons for thinking that this may actually have been the means selected by the praetor.

We now give six points which, while not individually decisive, when taken together may point to the praetor having used this form of words.

(iii) *Six points in favour of the* *iudicatio

(*a*) Theophilus almost certainly knew more than we do about this matter, and he clearly had in mind a formula beginning 'si paret'.[110] Once we eliminate from our minds the possibility of a floating 'si paret' clause, that indicates a main sentence on the lines of the formulation in the *tabula Contrebiensis*. Lenel knew this and was clearly troubled by it. He tried to suggest that Theophilus was himself reconstructing something of which he knew nothing or, in the alternative, that the Greek εἰ φαίνεται should be translated as 'an pareat', thus pushing the 'parere' inside the indirect question: 'Whether it appears that Seius is the freedman of Aulus Agerius'.[111] Ferrini's edition of Theophilus, in its Latin translation, does exactly the same.[112] Such is the force of the doctrine that there must be nothing but *intentio*.

(*b*) Some passages seem to reflect a formula with **iudicatio*. Gaius, at 3. 123, describes the regime of the Lex Cicereia under which a creditor taking personal security had to 'praedicere et declarare' the matter in respect of which he was taking the guarantors and the number of guarantors he was taking. If he failed in this, a guarantor could get himself discharged by means of a 'praeiudicium quo quaeratur an ex lege praedictum sit'. Gaius' words—'et si iudicatum fuerit praedictum non esse liberantur'—echo the Flaccan formulation.

There are many texts of which the same can be said. It is not necessary to set them out since the point is the same in every case.[113] The strength of this kind of evidence is less than it seems at first, because it must be true that, even if Lenel's *an*-form were in fact right, some of the discussions would be conducted through 'iudicare' or 'pronuntiare' with accusative and infinitive.[114] A second difficulty arises from the *praeiudicium* 'quanta dos sit', which is evidenced only in Gaius 4. 44. It is obvious that a **iudicatio* in precisely the form 'If it appears that X is the case, declare X to be the case; if it does not appear, declare X not to be the case' cannot without adaptation be made to fit an exercise of valuation.[115]

(*c*) In a normal formula the judge is told to condemn if he finds one situation established, and to absolve if he does not. This symmetry carefully excludes, indeed one might say relentlessly excludes, the least possibility of judicial digression. Determination to keep formulae watertight is an important aspect of their success and an essential part

[108] For the combination of 'apparere' and 'pronuntiare', in place of 'parere' and 'iudicare', see *D.* 40. 12. 7. 5 (Ulpian 55 *ad ed.*).

[109] F. Schulz, *Classical Roman Law* (1951), 49.

[110] loc. cit., n. 100 above.

[111] Lenel, *E.P.* 312 n. 4. Lenel's view was affected also by his opinion that there was no 'praeiudicium an liber sit' in classical law. Cf. *E.P.* 379 f. Cf. also the discussion of Servius, *Aen.* 11. 593 by Triantaphyllopoulos, op. cit. (1962; n. 93 above), 238, which shows that Servius also contemplated a 'si paret' formulation.

[112] Cit., above n. 100. The French translation of J. C. Frégier (1847) retains the indicative: 'S'il appert que je suis libre.'

[113] e.g. *D.* 40. 12. 7. 5 (Ulpian 54 *ad ed.*); *D.* 43. 30. 1. 4 (Ulpian 71 *ad ed.*); *D.* 2. 4. 8. 1 (Ulpian 5 *ad ed.*); *D.* 25. 3. 7 (Modestinus 5 *resp.*); *D.* 37. 10. 4 (Julian 34 *dig.*); *D.* 40. 14. 6 (Marcellus 7 *dig.*); *D.* 40. 14. 5 (Papinian, 10 *Resp.*).

[114] Equally, the *an*-form found in the texts does not necessarily point, as Lenel really suggests, to the formulae being framed with *an*.

[115] cf. Hackl, op. cit. (n. 93 above), 246–57. And note for a different species of valuation which can be accommodated to the form of a **iudicatio*: Paul, *Sent.* 5. 9. 1; cf. Kaser, *Z.P.* 38 f.

of their character. It accounts for the possibility of their being placed in the hands of lay judges for decision. The form in the *tabula Contrebiensis* is true to this spirit. It spells out the options: ' If you find X, declare X to be the case; if you do not find X, declare X not to be the case '. There are logical and substantial difficulties which make this strait-jacket almost essential.[116] There is, moreover, the problem of the unreasonable or diffident judge who might prefer not to utter his judgment. The spirit of the formulae was, so far as it could be done without falling into neurosis,[117] to take precautions against aberrations in advance. The alternative commands make it clear that the judge must pronounce his judgment. An indirect question with *an* does not. It belongs in a different legal climate.

(*d*) An essential merit of the **iudicatio* is that it pre-determines the content of the declarations which are to be made. It thus not only controls the lay tribunal but also serves as a prophylaxis against obscurity. The indirect question leaves the matter too open. We have noticed the judge who will not utter. There is also the judge who talks too much. He may wrap his answer up in so many qualifications or elaborations as to leave the parties still in doubt. This is a real danger, and the *an*-form offers no protection. There is, moreover, no reason to suppose that, at any time while lay judges continued to be used, litigants or magistrates would have wanted to release the tribunal from the discipline of a prefabricated declaration. Hence there is nothing to be said for an argument which might propose an economizing development from a full **iudicatio* to Lenel's indirect question.

Admittedly, however, one of the reasons why we have found the *tabula Contrebiensis* difficult is that, despite its sophistication, it fails in the end to yield the certainty which we expect and which indeed it seems to promise. There are two sources of this frustration. First, it is inexplicably casual in its description of the land, perhaps because it takes for granted facts which could be seen. There is no technical description of the relevant *ager* such as an *agri mensor* might have provided. Secondly, there is the stubborn ' aut ' in l. 8, which creates the dilemma that if the ' aut ' is not watered down, it unfixes the line of the route [118] and thus unsettles the meaning of the judgment, while, if it is watered down,[119] it obliges us to admit that the draftsman, despite managing the fiction brilliantly, was careless with a crucial word. Either way, therefore, it seems to force us to admit that these formulae fall short of the standard of certainty which had to be achieved.

We think that this failure, always supposing that it does not emanate from a defect of our own vision, is a property of these particular pleadings. The stability of the formulary system over centuries is itself the evidence that uncertainty was not endemic. Nor can it be denied that the interest of the Contrebian document derives from the fact that, despite its own failures, it does tell of a technique already sufficiently developed to be able to frame an issue with precision, no matter how complex the factual and legal basis upon which the dispute was to be submitted for trial.

(*e*) The judge derives his authority from the magistrate from whom he receives his commission or, if he receives it from someone other than a magistrate, then from that person according to his position and power.[120] It is true that in the Contrebian case there are two modulations of this theme.[121] First, the Contrebian senate has its own dignity and authority and must not seem to depend wholly on Flaccus. That accounts for the

[116] If the judge is not convinced that the plaintiff has proved that X is the case, what should he say? Should he say ' X is not so ' or should he say ' I am not able to say that X is so '? Siber was much troubled by this, op. cit. (n. 106 above), 70; cf. *D.* 44. 2. 15. The same logical difficulty underlay counsel's argument for the next-of-kin in *Re Baden's Trusts* (No. 2) (1972) Ch. 607, 616, 625, (1973) Ch. 9, 14, 19, 20.

[117] For near-neurosis and hence for the degree of meticulousness to be expected, see Lex Rubria, loc. cit. (n. 69 above): legislation was thought necessary to take the specimen names out of the pleadings and then—even more revealing—to allow them in again, should it be that the real party or place happened to share the specimen name.

[118] Contrary to the inference from l. 13; see above, p. 59.

[119] Above, p. 55.

[120] Wlassak laid more stress on the efficacy of the agreement of the parties as the source of the judge's authority, but even he did not exclude the need for reinforcement by a magistrate manifested in the *iussum iudicandi*. See M. Wlassak, ' Die Litiskontestation in Formularprozess ', *Festschrift Windscheid* (1889), 53; ' Der Judikationsbefehl der römischen Prozesse ', *Sitzungsberichte der Akademie der Wissenschaften in Wien, Phil.-hist. Klasse* 197 (1921), Abh. 4. However, Wlassak's consensual interpretation of *litis contestatio* has now been repudiated: G. Jahr, op. cit. (n. 75 above), *passim*; Wolff, op. cit. (n. 73 above), 154.

[121] But we cannot follow Torrent (1981), 99 f. in the opinion that this is a consensual arbitration merely endorsed by Roman authority.

polite subjunctives of lines 3, 4, 10 and 11, ' iudicent ' for ' iudicanto '. Secondly, and in contrast, as between Flaccus and the parties in dispute not only is there no mincing of words in the appointments—' iudices sunto ' in ll. 1 and 6—but also, very dramatically, in l. 14 Flaccus reaches over the heads of the Contrebian senators with a direct imperative to the Salluienses, ' pequniam solvonto '. Of these two peculiarities, the first has to do with the special status of the judges. The other will be considered again below.[122]

These are again features of this particular case, and they should not distract attention from the more general point that lay judges need the backing of the magistrate. In the Contrebian document that authority is transmitted through the *nominationes*, through ' iudicium addeixit ' in l. 14, and through the verbs ' iudicent ' in ll. 3, 4, 10 and 11. Use of the *an*-form would have weakened this transmission of the authority of the magistrate. It would have withdrawn the direct support given to the actual declaration of the *iudex*. We know that this declaration was conclusive and would stand even against the emergence of contrary facts.[123] It would be very remarkable if the order for the declaration had been allowed to wither away, creating a weakness precisely at the point where we would have expected the judge's authority to be most emphasized.

(*f*) The onus of proof lay on the plaintiff. In prae-judicial actions the litigation was so ordered that, whichever party had the *intentio* framed according to his version of the case, that party was treated as plaintiff and had to bear the burden of that role.[124] It is very doubtful whether formulae in the *an*-form would make that ordering possible. Suppose, for example, the *praeiudicium* under the Lex Cicereia. With Lenel's form ' an ex lege praedictum sit ', it is impracticable to say which party has the *intentio* framed to express his version of the truth. The only other possibility is that the creditor must always be plaintiff, on the ground that the positive formulation of the question represents an affirmative statement that the statutory notice was indeed given. Again, suppose the *praeiudicium* which asks ' an ex Titio mulier praegnas sit '.[125] Again it is unclear whether it is Titius or the woman who should assume the role of plaintiff. None of these difficulties arises with the **iudicatio* in which the complementary ' si paret ' and ' si non paret ' clauses must necessarily and clearly coincide with the positions of the parties.

All these arguments tend to the conclusion that the Contrebian formulae preserve for us a form which could well have remained in use so long as the formulary system itself lasted. If so, the formula of, for example, the *praeiudicium* ' an libertus sit ' might have been on these lines : ' Si paret Numerium Negidium libertum Auli Agerii esse, iudex Numerium Negidium libertum Auli Agerii esse iudicato ; si non paret, Numerium Negidium libertum Auli Agerii non esse iudicato '.

We have set out the arguments in favour of that formulation. There remains for it a problem which we have not solved. A formula constructed on these lines still encounters the same difficulty as is met by any *praeiudicium* containing a main sentence, viz. how it is to be reconciled with Gaius' statement at 4. 44 that ' intentio . . . sola invenitur '. Once both the main sentence and the subordinate clause are present, there are only two possibilities : in Gaius' scheme either the main sentence, which we have been calling the **iudicatio*, had no name at all, or it was included in the term *intentio*. Both these encounter considerable difficulties. At this stage it remains unclear how the dilemma should be resolved.[126] However, the new evidence at least suggests that the problems of Gaius 4. 44 should not be tackled by devising formulae, such as those proposed by Bethmann-Hollweg and Lenel, without main sentences.

4. *Valuation*

We are concerned with ll. 12–14. These set up machinery to fix the compensation to be paid by the Salluienses, should they win, for the *ager privatus* over which the waterway will be taken. They also order the Salluienses to pay the sum so arrived at out of their

[122] Below, p. 71.

[123] *D.* 25. 3. 3 *pr.* (Ulpian 34 *ad ed.*) ; *D.* 2. 4. 8. 1 (Ulpian 5 *ad leg. Jul. et Pap.*) ; cf. Hackl, op. cit. (n. 93 above), 298–318.

[124] *D.* 44. 1. 12 (Ulpian 38 *ad ed.*).

[125] *D.* 25. 3. 1. 16 (Ulpian 34 *ad ed.*) ; cf. Theophilus, loc. cit. (n. 100 above).

[126] See, however, n. 133 (vi).

public purse: ' publice pequniam solvonto ' (l. 14). It is noteworthy that the order does not name the payees.

Do these lines tell us anything about the structure of formulae generally ? We think that they may. Richardson noted that they look at first sight like a *litis aestimatio* but are in fact tailored to a more specialized purpose, aimed at plaintiffs who have won rather than defendants who have lost.[127] Given the intensely Roman character of the document, the fact that the valuation has a special purpose does not mean that its formulation is not based, as the other parts are based, on a Roman model. On the contrary, the mentality of those who draft complex legal documents makes it more probable that a precedent was adjusted than that an entirely new set of words was invented.

Under the formulary system the rule was *condemnatio pecuniaria*. That is, no formula instructed the judge to order specific performance. Instead every formula with a *condemnatio* instructed him to turn the plaintiff's right into money. For example, even if the plaintiff's claim was ' I own that cow ', what he would actually get (subject to one qualification, which is not an exception) [128] would be money, for the formula would end ' quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato ; si non paret absolvito '.[129] However, under the *legis actio* procedure the principle of *condemnatio pecuniaria* had not been uniformly established.[130] At least in some cases it was then necessary, if the matter was to be turned into money, to have recourse to an ancillary *arbitrium litis aestimandae*.[131] This makes for a historical question as to how the transition to universal pecuniary condemnation was made ; or, from a different angle, how the ancillary *aestimatio* was fully integrated with the decision on the substance of the plaintiff's claim. If we once suppose that the Contrebian ' valuation ' had a Roman precedent, we may be able to suggest a possible answer.

On that assumption, what this new evidence suggests is that the conversion into money—it does not matter whether we call it *condemnatio* or *litis aestimatio*—was at one stage a discrete sentence, coming after an instruction to declare the plaintiff's right. Since an instruction for a declaration which is then followed by the instruction to turn the matter into money is arguably redundant in many or most cases, it would be a short, albeit a bold, step to elide the separate sentences. It is true that some fifty years after the praetorship of Flaccus the Lex Rubria already gives us examples of formulae in the developed pattern, with the conditional clauses directly qualifying the imperative ' condemn '.[132] The shortness of this interval is not a decisive argument against a stage during which formulae consisted in discrete sentences. This was, after all, a period of activity and change. Moreover, it should not be supposed that a development in the form of pleadings would happen suddenly or evenly. Litigants are cautious. The elimination of redundant wording might have seemed safer in one case than in another. Its good sense would have been more obvious to a legislator than to a litigant. This hypothesis suggested by the *tabula Contrebiensis*, that the *condemnatio* and *intentio* were originally discrete sentences which were later elided to produce the developed pattern of subordinate clauses qualifying the order to condemn, raises questions about the development of pleading which are too large and too important to be explored here. Other evidence may point in the same direction.[133]

[127] Richardson (1983), 38.

[128] A *clausula arbitraria*, if included, would empower the *iudex* to allow the defendant to surrender the *res q.d.a.* and thus escape condemnation: see Kaser, *Z.P.* 256–61. The possibility of a *iudicare* for the plaintiff followed by voluntary surrender of the *res* and subsequent *absolutio* brings out the contrast between the judge's findings on the *intentio* and the separate exercise of *condemnatio*, as to which see literature cited at n. 140 below.

[129] Lenel, *E.P.* 186; cf. Gaius 4. 48; Kaser, *Z.P.* 297.

[130] Gaius 4. 48; Broggini, op. cit. (n. 77 above), 65, 96; Kaser, *Z.P.* 76, 79, 90 ff. Earlier lit., G. Brini, *Della condanna nelle legis actiones* (1878).

[131] Aulus Gellius, *Noctes Atticae* 20. 1. 38, cf. 4. 4. 2, Broggini, op. cit. (n. 77 above), 143 ff. The *legis actiones* of the second generation, namely, *per iudicis arbitrive postulationem* and *per condictionem* seem always to have had an integrated *aestimatio*: Kaser, *Z.P.* 91; cf. O. Behrends, *Der Zwölftafelprozess* (1974), 132 f.; A. Magdelain, ' Aspects arbitraux de la justice civile archaique à Rome ', *RIDA* 27 (1980), 205, 212 f.

[132] See nn. 61 and 68 above.

[133] In particular, (i) the development of Rutilian formulae (cf. p. 63 above); (ii) the logical problems of the *demonstratio* (see V. Arangio-Ruiz, ' Le formule con demonstratio e la loro origine ', *Rariora* (1946), 25, 28 f.); (iii) the different forms of *praescriptio* (see Gaius 4. 130–7); (iv) the discrete *nominatio* (p. 61 above); (v) the operation of the *clausula arbitraria* (cf. n. 140 below); and finally, (vi) the fact that the terminology of formulary analysis as applied to discrete sentences, and in particular to an *intentio* of that kind, could possibly

It might be objected that the main verb in the valuation is ' solvonto ' (l. 14), in which there is no echo of a *condemnatio* whether discrete or integrated. It is possible, in answer, to wonder whether it was not once the practice for the magistrate to reach over the heads of the judges and, by a direct imperative, to keep the actual condemnation entirely to his own office.[134] But in fact there is also a less dramatic explanation of ' solvonto '. If the draftsman was indeed adapting an early form of *condemnatio*, one modification indubitably dictated by the particular needs of this case was that the Salluienses, if they won, must not be ' condemned '. The precedent had to be adjusted to work on this occasion against the winning party, the object being to perfect a right which without the valuation and payment would remain merely conditional.

5. *Sententia*

The judgment is not a *pars formulae*, but it can conveniently be considered here because the points to be made once again concern the forms of words which were used. Line 15 says ' Sententiam deixerunt: quod iudicium nostrum est, qua de re agitur secundum Salluienses iudicamus '. There follows, running on to l. 16, the introduction to the list of Contrebian magistrates, ' Quom ea res iudicatast . . .'.

' Qua de re agitur ' is a construction in which the accusative ' rem ' has been attracted into the ablative of the relative pronoun referring to it. Without the attraction the words would be ' rem de qua agitur '. The ' res ' is the object of ' iudicamus ', the same as becomes the subject of ' iudicatast ' in the next line. That we should put the comma after ' est ', not after ' agitur ',[135] is confirmed by the passage from Cicero which is about to be considered. In the clause before the comma, the word *iudicium* would, but for one difficulty, best be translated as ' jurisdiction ', since that is nowadays the correct legal term for lawful power or authority to make a decision or to take other action. The objection to ' jurisdiction ' here is that it blurs the distinction between the *iuris dictio* of the magistrate and the delegated authority of the *iudex* to hear and determine the suit. In view of this it is perhaps safer to use ' the right to give judgment ' when actually translating.[136] But in the wider discussion we shall not confine the English word ' jurisdiction ' to the magistrate.

The phrase ' sententiam dicere ' is common for ' to give judgment '.[137] The expression ' secundum (actorem, petitorem) iudicare/pronuntiare ' is also frequent.[138] ' Pronuntiare ', which we have encountered above,[139] does not appear here. There seems to be no good reason to think that it had a meaning significantly different from *iudicare* or *sententiam dicere*.[140]

There is no evidence that set words were legally obligatory in delivering judgment. But a regular form of words is probable if only because hallowed modes of expression make a judgment easier to give and to accept. The Contrebian document gives us at least

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provide a historical solution to the problems of Gaius 4. 44, p. 65 above. A paper will be published by Birks on this subject. This pattern of development would be in line with the spirit, though not the detail, of the work of Selb who has consistently argued for a less static picture of the form of the pleadings: W. Selb, *Formeln mit unbestimmter intentio iuris* (1974), esp. 47–56; cf. op. cit. (n. 73 above); also ' Die Formel der Injurienklage ', *Acta Juridica* (1978), 29.

[134] D. Liebs, ' *Damnum, damnare* und *damnas* ', *ZSS* 85 (1968), 173, 220 f.

[135] Richardson (1983), 35.

[136] ibid.

[137] *Vocabularium Jurisprudentiae Romanae* vol. 2, s.v. ' dicere ', cf. vol. 5, s.v. ' sententia ' (*D.* 2b: ' sententia iudicis '). In *tab. Cont.* the terms ' sententiam dicere ' and ' iudicare ' seem to be substantially synonymous. For shades of difference supposedly detectable, see B. Biondi, ' Appunti intorno alla sentenza nel processo civile romano ', *Studi Bonfante* vol. 4 (1930), 29, 36 f.

[138] For ' secundum (actorem, etc.) ' see esp. *D.* 40. 7. 29. 1 (Pomponius/Quintus Mucius); *D.* 6. 1. 57 (Alfenus); *D.* 5. 3. 57 (Neratius). And see also: G. 4. 166a; *D.* 2. 8. 15. 16; 5. 2. 8. 1; 5. 2. 10 *pr.*; 5. 2. 17. 1; 12. 2. 11. 3; 12. 2. 31; 12. 2. 42. 3; 12. 5. 2. 2; 12. 6. 2. 1; 20. 1. 3 *pr.*; 20. 1. 16. 5; 22. 3. 14; 24. 3. 31. 2; 26. 9. 51; 30. 50. 1; 34. 9. 16 *pr.*; 40. 7. 29. 1; 44. 2. 9. 1; 44. 4. 4. 7; 48. 1. 14. 1; 48. 14. 24; 50. 16. 158; *C.J.* 7. 43–60, *passim.*

[139] Above, p. 67.

[140] Kaser, *Z.P.* 259, 285. Beseler tried to establish a strong contrast between ' pronuntiare ' and ' iudicare ' in classical law, such that ' pronuntiare ' would always have been used to declare the rights, prior to a ' iudicare ' in money: ' Pronuntiation und Judikat ', *Beiträge zur Kritik der römischen Rechtsquellen* vol. 2 (1911); but the truth seems to be that the line is to be drawn not between ' pronuntiare ' and ' iudicare ', but between both of them and ' condemnare ': J. Vášný, ' Osservazioni generali sulla sentenza e la res judicata ', *BIDR* 47 (1940), 108; Liebs, op. cit. (n. 134 above), 216 ff., esp. 227–32; A. Magdelain, op. cit. (n. 131 above); Kaser, *Z.P.* 285 n. 22.

part of the form of Republican *sententiae*. Its evidence only comes alive when read with an unobtrusive passage in *de finibus*:

> Nam quod ait sensibus ipsis iudicare voluptatem bonum esse, dolorem malum, plus tribuit sensibus quam nobis leges permittunt, cum privatarum litium iudices sumus. nihil enim possumus iudicare nisi quod est nostri iudicii. In quo frustra iudices solent, cum sententiam pronuntiant, addere ' si quid mei iudicii est '. Si enim non fuit eorum iudicii, nihilo magis hoc non addito illud est iudicatum. Quid iudicant sensus ? Dulce amarum, leve asperum, prope longe, stare movere, quadratum rotundum.[141]

Epicurus holds that the senses themselves judge that pleasure is good, pain bad. He claims more for the senses than the law allows judges, who can only decide a matter for which they have the right of decision: ' nihil enim possumus iudicare, nisi quod est nostri iudicii '. But the judicial habit of reciting the need for such jurisdiction is an empty form, since, if in fact the judge does lack jurisdiction the nullity will not be cured merely by his not drawing express attention to the principle which makes every *ultra vires* decision void. Thus, the senses, though they omit the customary recitation, none the less render void judgments.

Our interest focuses on the fact that private *iudices* habitually preface their *sententiae* with ' si quid mei iudicii est '. There is no doubt, despite the slight verbal variation, that this is the same recitation as is recorded in the Contrebian judgment in the words ' Quod iudicium nostrum est ' in l. 15. We can be certain that we are looking at the typical form of a Republican judgment.[142] As for the verbal variation itself, it may be due only to Cicero's need in his figure of speech to emphasize the conditionality inherent in the customary recitation, that conditionality being manifest in ' si ' but less so in ' quod '.

If we may now claim to know the form, or part of the form,[143] in which Republican judgments were given, we still cannot say whether it was usual to utter as few words as the Contrebian judges seem to have done. Some judgments would have had to be longer. *Adiudicationes*, for example, had to say more, and we have examples which sufficiently show how they laid down or clarified the boundaries of the parties' property.[144] Again, any formula with a *condemnatio incerta* would require a valuation to be made and uttered, so that a simple statement of the winner's name would not answer. However, no legal reason existed why a judge should reveal the steps in his working. His handling of issues of law added nothing to the stream of authority.[145] The judgment could not be challenged except by resisting the *actio iudicati* (if you were the condemned defendant) or maintaining an action for *litem suam facere* (if you were a disappointed plaintiff). Since we know nothing of any procedure to compel the giving of reasons, we must assume that *iudices* yielded to the natural temptation to protect themselves by saying as little as possible.[146]

EPILOGUE

The *tabula Contrebiensis* is a document which requires close scrutiny if its complex meaning and significance are to be understood. At first sight the text seems to deal in a straightforward manner with an unexceptional dispute about water rights. On closer examination, however, while the outline of the dispute is clear enough, the precise configuration of the facts turns out to be elusive. Moreover the dispute itself and the manner

[141] *de finibus* 2. 12. 36. The passage is cited only for the requirement of jurisdiction by H. J. Roby, *Roman Private Law* vol. 2 (1902, repr. 1975), 392, n. 1; and by E. Costa, *Cicerone giureconsulto* vol. 2 (1927), 39; and for the cautiousness of the Roman character by A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (1901), 276. The image of giving judgment continues in the next paragraph in which, after consulting a *consilium*, reason delivers a balanced *sententia*. Cicero achieves a brilliant contrast between the babble of the senses and the calm judgment of reason, and he incorporates a number of legal allusions.

[142] cf., less vividly, Cicero, *Pro Cluentio* 164.

[143] ' Secundum Salluienses iudicamus ' may possibly have given effect to a here unrecorded declaration using ' videtur ', cf. D. Daube, *Forms of Roman Legislation* (1956), 73–7, and texts there cited, esp. Cicero, *Acad.* 2. 47. 146; Kaser, *Z.P.* 88.

[144] *Minuciorum sententia*, *FIRA* 3, no. 163 (cf. no. 164); *J. Inst.* 4. 17. 6; *D.* 10. 1. 21 (Ulp. 9 *ad ed.*); *D.* 10. 1. 3 (Gaius 7 *ad ed. prov.*).

[145] Gaius 1. 2, but note *Rhet. ad Her.* 2. 13.

[146] A panel of judges, deciding by majority, would have still more reason to declare only their conclusion, since consensus as to conclusion might well conceal a diversity of reasons. On majority decision: *D.* 42. 1. 36, 38 (Paul 17 *ad ed.*); Lex repetundarum, *FIRA* 1, no. 7, 11. 46–56.

in which it is handled in the process recorded on the inscription reveal an unexpected level of sophistication. The dispute itself concerns the political and economic relations of the various indigenous peoples of the central Ebro valley, of which little is yet known, but the character of this controversy, even before it was brought to C. Valerius Flaccus, implies a considerable economic and constitutional maturity on the part of the disputants. From the legal point of view the inscription provides the earliest example of formulary procedure, albeit not from Rome itself, and here too it is the clear signs of an already well-practised and specialized technique which are most striking—for instance, the use of a fiction and the handling of the order for a declaration. The sureness of touch exhibited in the application of the patterns and devices of the formula to a question which is not only outside the scope of Roman law but which is also not a matter of private law at all but of relations between foreign communities is remarkable evidence of the extent to which the formulary system had already taken root by the opening decades of the first century B.C.

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