THREE THOUGHTS ON ROMAN PRIVATE LAW AND THE LEX IRNITANA*

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New discoveries are customarily hailed as events of the greatest importance; whether they always are is a matter more for the judgement of posterity than of the discoverer. But the Lex Irnitana is exceptional. Discovered in Spain in 1981, it has now been published for the first time with translation and commentary.[1] It is the most complete copy yet discovered of the Flavian municipal law already known in more fragmentary form from Salpensa and Malaca. For Roman legal historians the detailed provisions on civil jurisdiction in the tenth and last tablet are of the greatest interest. They fall into three main areas: the first deals with the competence of local jurisdiction and the display of the relevant edictal remedies (chapters 84 and 85); next follow four chapters concerned with the selection of a pool of judges for each year and provisions on how to select them or *recuperatores* in any given case; finally the law regulates adjournments requested or required and the days on which cases may be heard or for which they may be adjourned. The law is notably well structured, an advantage for us since unexpected omissions may be regarded as significant rather than due to related material being scattered through many tablets, some not extant.

There is a good deal of private law in the Tabula Irnitana. This paper is far from being a comprehensive study and deals only with three topics which mirror the three main areas just outlined. First (in connection with the limits on local competence) come some general remarks on the Lex Irnitana in relation to other private-law sources at Irni; second (in connection with the appointment of judges) the new information which the law provides on the activity of *recuperatores*; and third (in connection with adjournments) an attempt to reconstruct the hitherto almost unknown institution of *intertium*.

I. THE LEX IRNITANA AND OTHER SOURCES OF LAW FOR IRNI

What is the relation of the Lex Irnitana to other sources of law? How much of what they needed to know about legal practice would the citizens of Irni be able to gather from inspecting their municipal law? There are three features to consider here: first, matters where our law refers for further information or detail to another statute, such as the Lex Iulia de iudiciis privatis, or where although there is no explicit reference, the detail lacking in our law must evidently be supplied from some such source; second, matters which are regulated both by this law and another statute, again most likely to be the Lex Iulia de iudiciis privatis; third, matters in which our law refers to the provincial edict.

To begin with the cases in which the Lex Irnitana has to be supplemented by another law. (i) A clear case is that of *diffissio*, which is dealt with in chapter 91. It is a type of adjournment when one of the litigants or the judge has failed to appear in court but has a reason justifying his absence. What reasons might justify it? The Lex Irnitana provides none. But they must have been listed somewhere, since it was not good enough to allege just any reason. Indeed, that there were statutory grounds for

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→ J. González, 'The Lex Irnitana: a new copy of the Flavian municipal law', *JRS* 76 (1986), 147–243, hereafter González (1986). The following works are also cited by author and date or by the abbreviation noted only: M. A. von Bethmann-Hollweg, *Der römische Civilprocess*. II. Formulae (1865); A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', *SDHI* 49 (1983), 18–50; M. Kaser, *Das römische Zivilprozessrecht* (1966) cited as *RZ*; O. Lenel, *Das Edictum perpetuum*[3] (1927) cited as *EP*; G. Pugliese, *Il processo civile romano*. II. i: *Il processo formulare* (1963); B. Schmidlin, *Das Rekuperatorenverfahren* (1963); M. Wlassak, *Der Judikationsbefehl der römischen Prozesse* (1921) cited as *JB*.

diffissio is indicated by the words 'diffisum e lege' at l. 15 of chapter 91. (It is worth stressing that it does not say 'diffisum ex hac lege'.) A text of Gellius suggests that the grounds for allowing *diffissio* were enumerated in the Lex Iulia de iudiciis privatis.[2] Here then is one case in which the provisions of the Lex Irnitana are insufficiently detailed: to find out whether he had a ground for *diffissio* a citizen of Irni would need to supplement his information by turning to another statute. (ii) It is similar with the *intertium* of chapter 91. The rubric of the chapter promises to describe by what right (*quo iure*) it may be served. And it does in fact provide for this—but only by providing that the *ius* is to be the same as at Rome. It is the same passage of Gellius which indicates that this matter too would probably have been regulated in the Lex Iulia de iudiciis privatis. (iii) A third example drawn from chapter 91, in which, in the context of the statutory limit on actions, there is an explicit reference to the Lex Iulia de iudiciis privatis, does no more than confirm the suspicion that not all the provisions of the Lex Irnitana could be understood without having a copy of the Lex Iulia to hand.

There are also more general connections with the practice at Rome. These are found in two forms. First in the shape of references: in chapter K, for instance, in which it is stated that issues which are heard or for which *vadimonia* are made at Rome even when business is postponed ('rebus prolatis') may also be heard at Irni; or in chapter 93 where the provision is made that any matter not covered by this law is to be dealt with by the citizens of Irni just as the Romans deal with it under *ius civile*. Quite distinct from these formally, but producing the same effect, are cases of a second type, in which there is a fiction that the matter is taking place at Rome.[3] There are several of these,[4] but it will be enough here to deal with two, both of which also feature later in this paper. The first is in chapter 89, which regulates the cases in which *recuperatores* are to be appointed and the number of them to be appointed. It provides that both these questions are to be resolved on the basis of what would be done 'si Romae ageretur'. The second example brings us back again (not for the last time) to chapter 91. In dealing with the various rights to serve *intertium*, obtain adjournment and so on, the chapter says that all these rights are to be available for all the days and places that they would be if the praetor had ordered the case to be heard at Rome between Roman citizens. For two reasons this is a particularly interesting example. The first is that these powers are made available for the days and places authorized by Roman practice, but the law goes on to specify 'except for other days and places ... allowed by this law' (ll. 8–10: 'praeter quam quod per alios dies et alio loco hac lege denuntiari rem iudicari diem diffindi oportebit'). So this is a conscious assimilation of the Roman practice with necessary modifications, and a valuable insight into the draftsman's conception of this law. The second notable feature of the example is that it is especially extensive, laying down that matters are to be treated just as if it were the praetor who had ordered the case to be heard, as if it were taking place at Rome, and as if the parties were Roman citizens. In fact this comes very close to fitting Gaius' definition of a *iudicium legitimum*, for which he lists three prerequisites:[5] that the action takes place in Rome or within a mile of it; that the parties are Roman citizens; and that the case is heard before a single judge. Only this third requirement is omitted here, but since the whole of chapter 91 (in strong contrast to most of the jurisdictional chapters) deals only with the instances of *iudex* and *arbiter* and entirely neglects *recuperatores*, this third requirement is tacitly satisfied. If that is so, then we have a perfect fiction of a *iudicium legitimum*. A more powerful assimilation to Roman practice would not be possible.

So far we have seen that for some matters the citizens of Irni depended on sources of legal information outside their own municipal law. No doubt that is not particularly

[2] Aulus Gellius, *Noctes Atticae* 14. 2. 1; cf. d'Ors (1983), 45.

[3] On fictions see particularly P. Birks, 'Fictions ancient and modern' in *The legal mind: essays for Tony Honoré*, edd. N. MacCormick and P. Birks (1986), 83–101.

[4] See also chapters 64 (on pledges) and 71 (on summoning witnesses).

[5] G. 4. 104.

surprising. The interest lies principally in the manner in, and the economy with which, this was regulated: the involvement of Roman practice is constant, whether by express or implied references or by fictions. It is time now to move on to the second of the three features mentioned: matters which are regulated both in this law and in another statute. Since we have now seen the economy with which at least some of the law is drafted, the main question which arises here is whether the municipal law would only regulate the same question as another statute did if it was derogating from the rules already laid down in that statute.

Here are three examples. (i) The first is from the Edictum Venafranum.[6] In it reference is made to the *reiectio* of *recuperatores* provided for by the Lex Iulia de iudiciis privatis. (*Reiectio* was selection of a panel of *recuperatores* from the list by allowing the parties to reject names in alternation.) Chapter 88 of the Lex Irnitana deals with the same matter. In fact it deals with it somewhat more fully, mentioning selection by lot (*sortitio*) as well as *reiectio*; but it seems unlikely that *sortitio* would not have featured in the Lex Iulia, and otherwise so far as the two texts allow a comparison the rules for appointing *recuperatores* appear to be the same.

(ii) A text of Ulpian purports to cite some words from the Lex Iulia iudiciorum.[7] The context is consent by litigants to the jurisdiction of a magistrate in a case for which he is not in fact competent. (This context incidentally makes plain that it is the law on *iudicia privata* which is in question, since consent does not have a role to play in criminal process.) It is accepted, Ulpian says, that it is enough that the litigants alone should be in agreement, and the magistrate's consent is not needed. He quotes the words 'quominus inter privatos conveniat', unfortunately ruthlessly excised from their original context. But their general drift is clear enough. Chapter 84 of the Lex Irnitana states the same principle that parties may consent to a magistrate having jurisdiction over a case beyond his competence. Precisely the same point, although there is no sign of the wording that Ulpian quotes.

(iii) Another text of Ulpian is generally taken to refer to the Lex Iulia de iudiciis privatis,[8] although it states only that it is *lege cautum* that cases should not be heard during holidays except by the agreement of the litigants. This too fits with the provisions found in chapters K and 92 of the Lex Irnitana.

These are the only three cases which seem to show clearly (although in the case of the last, not very clearly) that there was an overlap between the Lex Irnitana and the Lex Iulia de iudiciis privatis. In none of the cases is there any sign that the Lex Irnitana orders the matter differently. So the hypothesis that it provides a parallel treatment of a topic solely when wanting to depart from Roman practice may be discarded.

The third feature to consider is the relation of this law to the provincial edict. The most important case of this is (i) in chapter 85. The rubric states that the magistrates at Irni are to display the *album* of the provincial governor and exercise their jurisdiction in accordance with it. The chapter itself is a little more explicit. For one thing, it gives a long list of the edictal elements which are to be displayed (the principle of their selection is not clear); and for another, at the end of this list it adds the qualification 'those of them which pertain to the jurisdiction of the magistrate at Irni' (ll. 33–5 'quae eorum ad iuris dictionem eius magistratus qui ⟨in⟩ municipio Flavio Irnitano i(ure) d(icundo) p(raerit) pertinebunt'). So the only display is to be of things in the edict relevant to Irnitan exigencies.

Who is to decide what is relevant and on what criteria? This is another mysterious lacuna in the law. Determining which actions need not be displayed is more difficult than it may seem for, although there is a list in chapter 84 of those that lie outside local jurisdiction, some of them do so only when infaming, in other words apparently only when *dolus* is shown. There is in any case a good deal to be said for displaying even

[6] *FIRA* I. 67 at ll. 68–9.
[7] Ulp., *lib.* 3 *ed.*, *D.* 5. 1. 2. 1.
[8] Ulp. *lib.* 77 *ed.*, *D.* 2. 12. 6.

actions which the local magistrate cannot grant himself, but which can be heard on remission to another and higher authority. The list to be displayed, however, must have excluded matters found in the edict but beyond the competence of local magistrates. No doubt *restitutio in integrum* would be among these, although it is not possible to discuss here the powers excluded from local jurisdiction.[9] In addition the *vadimonium Romam faciendum*, a promise to appear before a court in Rome, must have been excluded.

(ii) Which brings us to a second point: chapter 84 provides, towards the end, that in the case of actions excluded from local jurisdiction, the magistrates are to have competence to extract a *vadimonium* (a promise with security) for appearance in the place in which they anticipate that the provincial governor will be residing. This is an interesting link in the chain: for the edictal commentaries show that the governor's edict contained provision in the case of matters beyond his competence for a *vadimonium* to be made for appearance in Rome.[10] So it looks as if a matter which had to be remitted from Irni to Rome would first of all have to be remitted under one *vadimonium* to the provincial governor, and then under another to Rome. In this instance then the Lex Irnitana acts as a set of rules supplementary to the provisions of the edict.

(iii) Other references to the edict are few. Only chapter 70, which deals with the appointment of the municipal agent (*actor*), stipulates that he must be a person whom the provincial edict allows to be an *actor* or *cognitor*.[11] It is well known that the urban edict contained details on this.[12]

These three features of the relationship between the Lex Irnitana and other sources of law allow various general conclusions. Most obviously, that the Lex Irnitana was not the only document on display in Irni. Not only was there a list of the *iudices* (its display is required under chapter 86),[13] but there was also a display not of the whole provincial edict but of the parts of it relevant to municipal jurisdiction. Apart from this, there must have been some means of obtaining information on procedure at Rome. In practice this amounts to making the text (or relevant parts of the text) of the Lex Iulia de iudiciis privatis accessible. There is no need to suppose that the text of that statute was actually displayed—for if that were the case it might as well have been incorporated in the municipal law. But the jurisdictional authorities must at any rate have had access to it.[14]

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

[9] On *restitutio* see W. Simshäuser, *Iuridici und Munizipalgerichtsbarkeit in Italien* (1973), 222 ff. and in general on the powers of municipal magistrates, 186–232. See also U. Laffi, 'La lex Rubria de Gallia Cisalpina', *Athenaeum* 64 (1986), 5–44 at 26 ff.

[10] Lenel, *EP*, 55 ff. gives, as title 1 paragraph 6 of the edict, *de vadimonio Romam faciendo*, which features in book two of Ulpian's and Paul's commentaries and book one of Gaius'. See also the Lex Rubria XXI. 22 (*FIRA* I. 19) and Fragmentum Atestinum 17 (*FIRA* I. 20).

[11] On *cognitores*, Lenel, *EP*, 86 ff.

[12] One oddity concerning the governor's involvement is worth noting here: Paul, *lib.* 1 *ed.*, *D.* 2. 12. 4 provides that the governor is to determine the periods during which business is to be postponed, according to local custom. Chapter K of the Lex Irnitana provides, however, that this is to be decided by the decurions. The texts relate to very different periods. At what point the change may have been made is unclear.

[13] A further display may have been of the forensic calendar. Chapters K, 91 and 92 give much prominence to its details. Yet there do not appear to be any early examples of calendars intended for public use. N. Ehrhardt, *Istanbuler Mitteilungen* 34 (1984), 371–404, discusses a Severan example which includes details of both imperial festivals and celebrations provided by local philanthropy. Earlier than this there seem only to be private calendars on papyrus (pp. 398–9), but even they date only from the second century onwards.

[14] Chapter 91 not only mentions chapter 12 of the Lex Iulia de iudiciis privatis but also refers to *senatusconsulta* pertaining to it. It assumes, therefore, the availability of a relatively extensive collection of legal materials. Yet Pliny's letters indicate that the existence of a systematic collection of such materials may be ruled out for Bithynia: so to suppose much for Spain may be too optimistic.

important matters are displayed in detail, but the availability of certain rights need only be mentioned and its details supplied on demand.

In concluding these general remarks it is worth considering a well-known passage of Gaius.[15] Rounding off his discussion of *legis actiones* in book four, he notes that they came gradually into disfavour. And so 'per legem Aebutiam et duas Iulias' they were abolished and it was brought about that litigation was carried out *per formulas*. What were these two Leges Iuliae? The first is accepted to have been the Lex Iulia de iudiciis privatis. But the second? It was generally supposed to have been the Lex Iulia de iudiciis publicis, although the irrelevance of formulae in *iudicia publica* was recognized. The difficulty led Wlassak to propose a third Lex Iulia, making two dealing with *iudicia privata*.[16] In his view the first of these applied only to Rome, while the second extended the formulary system to *municipia* and *coloniae*. The weakness of his theory has always been that there is no evidence of this extra Lex Iulia; and so his view has met with little enthusiasm.[17] But recently it has been revived in a new form:[18] there was another Lex Iulia but it was not a Lex iudiciaria. Instead it was a Lex municipalis, no less than (an earlier version of) the municipal law we are now discussing.

The Lex Irnitana relates closely to Roman practice, making constant references to it for rulings or further information: it is heavily dependent on another statute, the Lex Iulia de iudiciis privatis. This dependence and the many references to Rome allow us to rule out the possibility of there having been a specific jurisdictional law for the *municipia* of the provinces. Had there been, then it would have been natural to refer to that rather than to the specifically Roman enactment. Consequently, the municipal law embodied in the Tabula Irnitana must be the law which introduced formulary procedure to *municipia*, as chapter 85 indicates.

This law is nonetheless a measure of the second order, for it is often concerned merely with introducing the provisions of another law, many of which are derived from the Lex Iulia de iudiciis privatis. It innovates in the sense that it extends the compass of an earlier measure. For this reason among others it is hard to suppose that in speaking of 'duae Iuliae', Gaius could have had this law in mind as the second one. Several other reasons support this conclusion: first, that Gaius is notoriously uninterested in extra-Roman practice. It does not seem likely that he would have departed from his normal concerns to mention a municipal law as one of the three statutes responsible for abrogation of the *legis actiones* and introduction of the formulary procedure, especially since a number of the provisions in the Lex Irnitana are no more than instructions to implement rules already established elsewhere. Second, it is hard to see how anybody could be expected to understand under 'duae Iuliae' two measures as diverse as the Lex Iulia de iudiciis privatis and a Lex municipalis. The strength of the revised form of Wlassak's hypothesis is that it need invent no extra Lex Iulia, but that is partially compensated for by its weakness in having to bundle together a Lex municipalis and a Lex iudiciaria, and so imputing to Gaius uncharacteristic obscurity.

To conclude. Since there was no general Lex iudiciaria for the provincial *municipia*, the Lex municipalis must be the law which introduced the formulary procedure to them. It did this to a considerable extent by enacting that procedures already introduced at Rome should be followed in the provinces. Nonetheless, it is not likely that this law is one of Gaius' two Leges Iuliae. Much more probable is that he meant the law on *iudicia publica* as well: the two laws on private and public *iudicia* are

[15] G. 4. 30.

[16] Wlassak, *JB*, 274 ff. defending his earlier claims in *Römische Prozessgesetze* I (1888), 190 ff.

[17] P. Girard, *SZ* 34 (1913), 295–372 at 339 ff.; Pugliese (1963), 65 ff.

[18] D'Ors (1983), 22; *AHDE* 53 (1983), 8; González (1986), 150.

found together often enough;[19] and since Wlassak's day Kunkel[20] has supplied reason to think that in early criminal process a *legis actio per sacramentum* was used and that it remained at least theoretically in force until the time of Augustus. So there may yet be a role for the Lex Iulia de iudiciis publicis in abolishing the *legis actiones*.

II. *RECUPERATORES*

At first sight the material in the Lex Irnitana on *recuperatores* is exceptionally disappointing, so to single them out for treatment may cause surprise. But first appearances are misleading, and in fact the Lex Irnitana seems likely to cause us to revise several of the accepted ideas about *recuperatores*. What is known of them so far? In brief, that they constituted a court of several members, usually three or five; that they had jurisdiction over various civil (and criminal) matters; and that their involvement in a case had connotations of urgency.

To begin with the prima-facie disappointment. It is chapter 89 which promises much but delivers little. The rubric announces that it treats of 'those matters for which a single *iudex* or *arbiter* is to be given, and those for which *recuperatores* are to be given'. The chapter, however, provides only that if the case were being heard at Rome and *recuperatores* would be given in it, then they are also to be given at Irni. The number of *recuperatores* to be given is to be determined in the same way. The fiction 'si Romae ageretur' and the reference to Rome are of great interest. But it is most unfortunate that we do not have any evidence for how or on what basis the competence of *iudices vis-à-vis recuperatores* was defined at Rome. It is ironic with this new evidence to come so near and yet remain so far from a solution.

The standard beliefs about *recuperatores* have changed little in the last twenty years, since the work of Schmidlin and its canonization by acceptance into Kaser's account in his *Zivilprozessrecht*.[21] Schmidlin's views, although regarded with more circumspection by Pugliese,[22] are nonetheless widely cited as the correct line on *recuperatores*. His main points are these:

In general Schmidlin argues that the literary and epigraphic evidence presents a picture of a unitary recuperatorial procedure which varied little either geographically or in the course of time.[23] He also maintains that there is no need to adopt either the old trichotomy of recuperatorial process (Rome-*municipia*-provinces) or Wlassak's more recently suggested dichotomy (public and private):[24] in his view the unity he demonstrates renders such divisions superfluous.

In particular Schmidlin asserts that the competence of *recuperatores* is essentially in cases of greater than normal public interest:[25] *causae liberales*, where somebody's liberty is at stake; fines payable to a public body; offences prejudicial to public order or safety; (physical) *iniuria*. He goes on to present features of recuperatorial process which can be justified on the basis of this enhanced public interest. There are three of these which demonstrate urgency:

(1) *recuperatores* can sit on days outside the normal forensic calendar, the *rerum actus*;[26]

(2) a time limit is or can be imposed within which they must deliver their judgement;[27]

[19] Girard, *SZ* 34 (1913), 339 ff. refers to FV 197–8 which cites both laws, and notes the practice of citing disparate measures together, for instance the Lex Iulia et Papia.

[20] W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (1962), 120.

[21] Schmidlin (1963); Kaser, *RZ*, 142 ff. A more recent study by A. Lintott on epigraphic evidence and *recuperatores* should soon appear in the Colloques de l'Institut de droit romain (Paris). I am most grateful to Dr Lintott for allowing me to make use of it.

[22] Pugliese (1963), 206–15.

[23] Schmidlin (1963), 92 ff.; but see n. 31 below.

[24] Schmidlin (1963), 97; Wlassak, *Römische Prozessgesetze* II (1891), 324 ff.; *JB* 261 ff.

[25] Schmidlin (1963), 45 ff. and *passim*; cf. Kaser, *RZ*, 144 ff.

[26] Schmidlin (1963), 132. This widely-accepted view seems to have been challenged only by O. Behrends, *Die römische Geschworenenverfassung* (1970), 92 n. 5.

[27] Schmidlin (1963), 130.

(3) they can publicly summon a restricted number of witnesses, usually ten.[28]

It is worth considering these three points and the provisions of the Lex Irnitana. First, the *rerum actus*. The crucial[29] dispensation of *recuperatores* from abiding by the usual calendar is not found at Irni. There are several points in the law at which the civic calendar is discussed, notably chapters K (on *res prolatae*) and 92 (on the days on which cases are not to be heard and for which *intertium* is not to be given). Both of these expressly apply the same rules to *recuperatores* as to *iudices*. There are two categories of days excluded from the forensic calendar: (*a*) those which are *festi* or *feriarum numero* for reasons relating to the imperial house; (*b*) those on which business is postponed (*res prolatae*) or there are games, banquets or *comitia*. On days in the second category, a case can after all be heard so long as *iudex*, *arbiter* or *recuperatores* and the litigants are agreed on this. The first category, however, is rigidly excluded, and the exclusion applies as much to *recuperatores* as anyone else.

Second, time limits. At Irni there is no sign of a time limit within which *recuperatores* much reach their judgement.

Third, witnesses. Similarly there is no reference at Irni to the public summons of a set number of witnesses in recuperatorial procedure. But one chapter of the law does contain such detail: chapter 71, whose rubric reads 'acturis de pecunia communi testibus denuntiandi ut ius sit', and in which the plaintiff *municipum nomine* is given the right to summons ten citizens or *incolae* of Irni. This however is a special procedure. For one thing, the composition of the court which assesses such actions (it is described in chapter 69) is a quorum of the decurions and *conscripti* in actions involving more than HS 500 but nonetheless within the jurisdictional limit of Irni; or a panel of five drawn from them for cases involving less than HS 500. Both of these are quite different from the composition of recuperatorial panels whose selection is outlined in chapter 88. Further, a reference is made at the end of chapter 71 to *iudicia publica*: no witness is to be summoned before the court who could not be summoned before a *iudicium publicum* in Rome.[30] These two differences are sufficient to point a contrast between this and ordinary recuperatorial procedure, for which no such right of public summons is mentioned.

Our new evidence then departs significantly from the standard account drawn up by Schmidlin. In the face of it we cannot maintain with him both (i) that recuperatorial procedure was 'einheitlich'[31] and (ii) that striking among its features were freedom from the *rerum actus*, the existence of a time limit, and the right to summons publicly a set number of witnesses. This divergence is no minor matter, to be explained away as idiosyncratic behaviour peculiar to a (hitherto) unknown town in Spain. Not only does the link between this law and the laws of Salpensa and Malaca indicate generally that this is a law which applied widely,[32] but the three specific references in chapter 89 to the practice at Rome make it a strong possibility that what we are dealing with are features of Roman recuperatorial procedure too. As for timing, while this is a Flavian text, the words 'proxime lata' in chapter 91 referring to the Lex Iulia de iudiciis privatis of 17 B.C. indicate that some—and no doubt much—of our law is Augustan. So the divergences the Lex Irnitana presents from the received picture are evidence of a different style of recuperatorial procedure which was not only geographically wide-ranging but also of an early period.

How are these differences to be accounted for? The explanation becomes apparent on looking through the references provided in the footnotes of Schmidlin or Kaser: the literary ones are practically all from Cicero, and the epigraphic from Republican inscriptions. In other words, the accepted picture of recuperatorial procedure is a Republican picture. Is it possible that the procedure may have changed

[28] Ibid., 126 ff.

[29] So F. Eisele, *Beiträge zur römischen Rechtsgeschichte* (1896), 44 ff.

[30] Cf. Quintilian, *Institutio oratoria* 5. 7. 9.

[31] Schmidlin's exaggeration of this feature was already noted by Kaser, *RZ*, 145 n. 70.

[32] D'Ors, *AHDE* 53 (1983), 6 ff.; González (1986), 148 etc.

considerably under the principate? It will not take long to review the meagre non-Republican evidence usually produced. But none of it allows a firm conclusion as to the terms applying to *recuperatores* in civil process: (i) One of Probus' abbreviations concerns a limit on the number of witnesses who may be summoned under recuperatorial procedure. Yet the scheme of his work is by no means clear and the key argument that this abbreviation is drawn from the praetor's edict is not strong.[33] (ii) The SC Calvisianum of 4 B.C.[34] This is a case of *pecunia capta* by officials, and evidently a special procedure. It is worth noting the reference it contains to the Lex Iulia iudiciaria, but the reference is to the law on *iudicia publica*, as is shown by the provision that nobody is to be compelled to give evidence in this court who would not be compelled to do so in a *iudicium publicum* in Rome.[35] The similarity to chapter 71 of the Lex Irnitana is remarkable, and that makes its differences from ordinary procedure all the more clear. (iii) The Lex Iulia of which the Edictum Venafranum speaks, however, is plainly that *de iudiciis privatis* and it provides for the summons of a set number (ten) of witnesses.[36] But the Lex Iulia is referred to for its rules on *reiectio*. Whether any other provisions of that law are to apply is not clear; equally uncertain is what action is involved. Since this edict is dealing with an aqueduct it can hardly be supposed to be a private civil case.

So the standard picture of recuperatorial process makes use of no evidence for *recuperatores* in private cases under the empire. What evidence there is is either flimsy or likely to relate to special procedures. The exception to this is the Lex Irnitana. We return to the question: is it possible that the procedure may have changed considerably under the principate? In principle it is, for in the meantime the great Augustan jurisdictional laws, the Leges Iuliae de iudiciis privatis et publicis, had been promulgated.

Yet for two reasons there is no need to suppose that these laws introduced drastic change. First, in private recuperatorial process there has never been any good evidence that a right of public summons of a restricted number of witnesses existed or that a time limit could be imposed.[37] These are attested only in processes at public law.

Second, our law contains detailed provisions on the calendar. But the principal points on which it insists are only two: nothing is to be done on days of holiday or festival on account of the *domus Augusta*; otherwise private process can be regulated as the litigants wish. Plainly holidays on account of the *domus Augusta* were not celebrated under the Republic. That began under the empire, although at what precise point is unclear. Apparently the earliest inscription to use the expression dates only from A.D. 55.[38] But in the East at any rate the imperial cult seems to have been at its strongest in Augustus' day;[39] and it is in that period too that most of the additional imperial holidays are introduced,[40] so it seems likely that rules relating to festive days of the *domus Augusta* would be a matter of particular concern under the early Empire. This, combined with the *laissez-faire* approach of the law towards process before private judges, amounts to a new regulation, or perhaps rather deregulation, of the forensic calendar. Since only a few imperial days are excluded, but their exclusion is absolute, actions before *iudices* can be held on precisely the same days as those before *recuperatores* and on no others.

All the same, certain differences between judges and *recuperatores* will have remained. It looks as if there was a set list of cases in which *recuperatores* were

[33] Probus 5. 8 (*FIRA* II. p. 457): Q.E.R.E.T.P.I.R.D. T.Q.P.D.D.D.P.F. i.e. 'quanti ea res erit tantae pecuniae iudicium recuperatorium dabo testibusque publice dumtaxat decem denuntiandi potestatem faciam'; cf. Pugliese (1963), 207 n. 124.

[34] *FIRA* I. 68 v.

[35] Ibid. at l. 117.

[36] *FIRA* I. 67 at ll. 66 ff.

[37] Kaser, *RZ*, 145 with n. 73; B. W. Frier, *The Rise of the Roman Jurists* (1985), 202.

[38] *CIL* III. 7380; the sources are in *TLL*, s.v. *augustus*, p. 1391, ll. 5 ff.; s.v. *domus*, p. 1983, ll. 70 ff.; E. de Ruggiero, *Dizionario epigraphico di antichità romane* II (1922), 2061–2.

[39] S. R. F. Price, *Rituals and Power* (1984), 57–62.

[40] Of the 29 holidays listed by *CIL* I². p. 299, 25 are dateable: 5 to Caesar, 4 to Tiberius, 1 to Gaius but 15 to Augustus.

competent.[41] Some post-Augustan texts still suggest that process before them was quicker.[42] There was still a different method for selecting them. *Intertium* was not available in recuperatorial process, as chapters 90 and 91 of this law show.[43] But the Lex Irnitana demonstrates that the uniformity of recuperatorial process has been seriously exaggerated. In particular, the assertion that it changed little through time is shown by this evidence, which is only marginally later than that on which theories have been built, to be false. And the eagerness to do away with the perfectly plausible distinction between private and public procedures is shown to have been excessive and mistaken.

III. *INTERTIUM*

Perhaps the most puzzling of the various legal institutions mentioned in the Lex Irnitana is *intertium*,[44] which is the topic of chapter 90 and also features in chapters 91 and 92. (In addition it is restored in chapter K.[45]) It is scarcely known from other sources. The Lex Irnitana gives many details, but the precise workings of *intertium* remain obscure. This is no more than a first attempt to piece together what the Romans did with *intertium* and when.

The most obvious hypothesis to begin with is that *intertium* plays the role in the formulary system that was played by *comperendinatio* in the *legis actio* procedure.[46] According to Gaius, after the judge had been appointed in that procedure, that is at the end of proceedings before the magistrate, the litigants 'comperendinum diem ... denuntiabant',[47] in other words served on each other notice of intention to begin proceedings before the judge on the next day but one. Various texts show that the expression *dies tertius* might be used instead of *dies perendinus*, and this creates an irresistible temptation to make some sort of connection between *intertium* and *comperendinatio*. In some unsympathetic remarks on jurists in the *pro Murena*, Cicero notes that they cannot even make up their minds whether to say 'diem tertium' or 'perendinum', and both options are also mentioned by Probus.[48] Cicero may well not be speaking of formulary procedure, and Probus is probably concerned with *legis*

[41] It is not possible to discuss this here. But it is interesting that some of the cases which are traditionally thought to have been reserved for *recuperatores* are actually excluded under chapter 84 of the law from local jurisdiction: *causae liberales*; *iniuria*.

[42] Pliny, *ep.* 3. 20. 9; G. 4. 185.

[43] *Recuperatores* feature in neither of the chapters concerned with *intertium*; in addition, although they do appear in chapter 92, they are not mentioned when the matter of *intertium* is raised at ll. 46–8.

[44] In chapters 90–2 of the law *intertium* appears to be an indeclinable substantive, and is treated as such in this paper.

[45] The text deals with days when business is postponed (*res prolatae*) and what acts the magistrates are not to allow to take place during those periods. Chapter K, ll. 40–4 as printed by González (1986), 161–2 reads: 'inque eos dies vadimonia fieri nisi de iis rebus de qui/bus Romae messis v[indem]iaeve causa rebus prolatis ius di/ci solet ne sinunt[o; ite]m de ⟨interti⟩is nisi in eos dies qui prox|sumi futuri erunt pos[t e]os dies qui tum rerum prolatarum | erunt fieri n[e s]inu[nt]o'. Where *intertiis* is printed, the bronze actually has *decretis*, with the letters *eter* added above the *reti* of *decretis*. But the restoration there of *intertiis* is unconvincing: not only is it found in conjunction with a redundant *de*, but it is in conflict with the apparent indeclinability of *intertium* elsewhere; it is also remote from the letters on the bronze and inconsistent with another chapter of the law: for chapter 92 provides that *intertium* is normally not to be made for various days (including those of *res prolatae*) but may be if the parties and judge agree. Yet chapter K—if the restoration were correct—would provide that *intertium* could not be made for days during which business was postponed but only for the days immediately following them. The bronze indicates that originally *decretis* was written and then amended, apparently to *de ceteris*. What then are the *cetera*? The preceding sentence prohibits *vadimonia* for days of postponed business except for certain special cases: *de iis rebus* they are allowed. It then continues: *de ceteris* they may be made only for the days immediately following. So the 'others' referred to are the normal cases for which the special dispensation of a *vadimonium* (which of course implies a hearing before the magistrate) for a day during *res prolatae* would not be allowed. There are of course two types of *vadimonium*: (*a*) the 'Dilationsvadimonium', which could only arise before *res prolatae*: the law states that, unless it is an exceptional case, the magistrate is not to fix a *vadimonium* for days during which business is postponed. So if *res prolatae* intervene during process *in iure* a long gap must be accepted in most cases. (*b*) The 'Ladungsvadimonium' (on which see J. G. Wolf in *Satura R. Feenstra* (1985), 59–69) could be fixed by the parties alone and could therefore be made even during *res prolatae*. It too, however, could not take effect in a normal case until afterwards.

[46] Cf. d'Ors (1983), 40. On *comperendinatio* see O. Karlowa, *Der römische Civilprocess zur Zeit der Legisactionen* (1872), 360 ff.; Th. Kipp, *RE*, s.v. IV. 788–91.

[47] G. 4. 15.

[48] Cicero, *pro Murena* 27; Probus 4. 9 (*FIRA* II. p. 456): I.D.T.S.P. i.e. 'in diem tertium sive perendinum'.

actiones. The first suggestion that there may be something like *comperendinatio* in the formulary procedure comes from Gellius, who speaks of his preparations for the role of *iudex*, reading up *diffissiones* and *comperendinationes* and other 'legitimi ritus ex ipsa lege Iulia'.[49] Gellius is obviously speaking of the formulary procedure. If we suppose that the words *intertium* and *comperendinatio* describe the same feature, but for different procedural systems, this amounts to supposing that in the formulary procedure, at the end of proceedings *in iure*, the parties agreed to appear before the appointed *iudex in tertium*, on the next day but one. In other words, they arrange an adjournment for one day between the stage before the magistrate and that before the judge.

With this background it is time to look at the Lex Irnitana. Chapter 90 provides: (i) that the IIvir is to grant *intertium* for all days on which *iudicia* take place; (ii) that it is to be displayed at the place in which he exercises jurisdiction; (iii) that on agreement of the litigants and their *iudex* he is to grant it for any day which is not a feast day or a festival for reasons connected with the imperial house; and (iv) that failure to grant *intertium* or display it gives rise to an *actio popularis* for HS 1000 per day that the offence lasts.

This raises several points. Notably that *intertium* here is not really very much like *comperendinatio*. Why does the magistrate need to be involved in making an arrangement to appear before the *iudex*? And what is it that he has to grant? (Gaius makes it clear that *comperendinatio* was something the litigants sorted out themselves.) The provision on payment of a fine for each day that *intertium* is not granted also fits badly. For it can only and has only to be granted on one day. Yet it is 'granting' *intertium* with which chapter 90 is wholly concerned, and the same conception is found in one of the Pompeian tablets,[50] which speaks of *intertium* as something which has to be taken (the verb is *sumere*). This conception, however, is alien to *comperendinatio*. And further differences will soon emerge.

What is to be displayed? There seem to be three options. It might be (*a*) notice granted in an individual case or (*b*) the fact of granting *intertium* itself or (*c*) a list of the days for which it can be granted. The first of these is unlikely, since there is no reason why the public at large should need to know of a private agreement between two litigants, nor can there be any need to display such an agreement throughout all the days on which cases are heard. If the particular option can be ruled out, the two general ones remain. The law provides only that the magistrate is to grant *intertium* for all the days on which *iudicia* take place and that that is to be displayed ('idque proscriptum ... habeto'). If *intertium* were granted only on specific grounds, it would make sense to display its availability together with information as to those grounds. On the other hand, if it could be granted only for certain days, it would make sense to list them.[51]

Chapter 91 allows litigants and the judge or arbiter in any private suit the same right as is allowed at Rome of 'denuntiandi intertium' on the adversary, judge or arbiter 'in biduo proximo' for all days and places permitted under the law. Again several problems arise. Since the Lex Irnitana employs a reference to Rome in the form of the fiction 'if the case were between Roman citizens and were being heard at Rome on the praetor's instructions', there is a lamentable shortage of detail on *intertium*. For instance, no grounds for declaring *intertium* are listed. But this does not mean that no particular grounds were required. In the case of *diffissio*, it is plain that the grounds for justified absence from court were restricted, but they are nonetheless not mentioned in this law.

[49] Aulus Gellius, *Noctes atticae* 14. 2. 1.

[50] *Tab. Pomp.* 24 (in *AE* 1973, no. 145) with discussions by J. A. Crook, *ZPE* 29 (1978), 231–2 (but see n. 74 below); L. Bove, *Documenti processuali dalle Tabulae Pompeianae di Murecine* (1979), 114 ff.

[51] This might be supported by Macrobius, *Saturnalia* 1. 16. 3 and 13–14 which refer to *comperendini dies* as a category of *profesti*, that is non-festive days. But for difficulties in Macrobius' definition of them see the text below at n. 62.

What is the meaning of 'in biduo proximo'? Evidently, 'within the nearest two days'. *Proximus* is as usual ambiguous, but here it is only comprehensible in the sense of 'preceding'.[52] The expression makes two appearances. Chapter 91 allows you, for all days permitted by this law, 'denuntiare intertium' ('to give notice of *intertium*') within the preceding two days. Chapter 92 debars you from *denuntiatio* within the preceding two days for days which are holidays.[53] The qualification 'in biduo proximo' is at once significant and curious. First, it is significant because the grant of *intertium* by the magistrate (in chapter 90) is mentioned without qualification; but the giving of notice (*denuntiatio*) of it is twice said to be required within the preceding two days. This suggests a means of combining the stages of grant and notice, chapters 90 and 91. Second, it is curious because it does not really establish a limit on the latest point at which notice of *intertium* may be given but on the earliest. There seems to be only one possible explanation for this. But for that and further detail it is best to wait a few pages.

Chapter 91 purports to grant the litigants (and perhaps also the judge) the same power as at Rome of giving, within the two preceding days, notice of *intertium*. I say 'perhaps also the judge' because chapter 91 must be treated with some caution. For it makes that provision in a long list of powers which it says are to be available both to litigants and judge just as they are at Rome. One of these powers, however, is *iudicare* (l. 50), and it will not require much argument to convince that the litigants did not have this power. We cannot, then, safely assume in the case of *intertium* that both litigants and judge would have had the power of giving notice of it which is attributed to them. In fact the chapter speaks of giving notice to the adversary and judge, and this is to look at the matter very much from the point of view of the litigants. It may be, then, that only they could give notice of *intertium*.

So far the provisions of chapter 90 and those of chapter 91 have been dealt with separately. But they cannot be considered only in isolation. It has been suggested that there are two forms of *intertium*: one granted (the verb is *dare*) by the magistrate; the other served (the verb is *denuntiare*) by the parties or the *iudex*.[54] Do two forms really exist, or are they two parts of just one process?

Several points are in favour of their being two elements in a compound procedure. It is perhaps unlikely that the same word would be used for two procedures of such different character, one an official grant and the other a private declaration. But more importantly, chapter 90 shows that the price to be paid by the magistrate for improper failure to grant *intertium* is very high, HS 1000 per day. This makes two things clear: firstly, that much importance was attached to obtaining *intertium*; secondly, that obtaining one form of it depended entirely on the readiness of the magistrate to grant it. This makes the idea of a second form of *intertium* brought about purely by a declaration of one of the litigants or the judge rather unlikely. Finally, as we have just seen, the *denuntiatio* was not constitutive of *intertium* but merely notice of it which had to be given within the preceding two days. Since there is no such qualification in the law about the *datio* of *intertium*, it appears that this took place on the day the *intertium* began. So the two elements do fit into a single process: a party has to give notice within two days of seeking the grant of *intertium* from the magistrate. What consequences failure to give notice may have brought with it are not stated, but it might reasonably have led to refusal by the magistrate to grant *intertium*.

It remains to examine the process more closely, treating *denuntiare* and *dare* as part of one process of obtaining *intertium*. Primacy is accorded in the Lex Irnitana to the grant by the magistrate. This is not surprising since it is that that brings it into force. Yet it is in fact the *denuntiare* that comes first. But when does this procedure of

[52] Contrast d'Ors (1983), 42 who takes 'in biduo proximo' to mean 'para el dia siguiente' which seems impossible. For *in* emphasizing in temporal expressions 'die Zeit, innerhalb welcher etwas geschieht', see R. Kühner and C. Stegmann, *Ausführliche Grammatik der lateinischen Sprache*[5] (1976) II. i. 358 etc.

[53] It makes of course no sense to associate the notice within the two preceding days with the 'third day' concealed in *intertium*: for you cannot call it the third day with respect to the notice unless (counting inclusively) the notice was given on the first of the two preceding days.

[54] González (1986), 234 (commentary on chapter 90 l. 26).

intertium take place? In Roman civil process a clear distinction has of course to be made between the two parts of any action, between the activity of the magistrate (*ius dicere*) and that of the *iudex* (*iudicare*). This can be illustrated by an example from the Lex Irnitana, chapter K: when business is postponed ('rebus prolatis') the magistrate is not to exercise his jurisdiction, and consequently the chapter excludes *vadimonia* for those days, apart from in a few exceptional (but unnamed) cases where jurisdiction would be permitted at Rome even during this period. *Vadimonia*, of course, relate to *ius dicere*, the part of the legal process before the magistrate. Yet there is no objection to the second part of an action, which is *apud iudicem*, taking place during those days, so long as both litigants and their *iudex* are agreeable to this: *iudicare* is essentially a private matter. Judges may be prepared to sit on any day, but the jurisdictional magistrate will adhere strictly to the official calendar and depart from it only exceptionally.

The distinction between the exercise of jurisdiction by a magistrate and the hearing of cases by a judge is also found in chapter 92. It deals only with the latter. The rubric makes plain that *intertium* and *iudicare* fall under the same regime. If *intertium* were, like *vadimonium*, a procedure connected with process before a magistrate, this could not be so. So *intertium* must relate to the second stage of process, *apud iudicem*. This is confirmed by chapters 90 and 91, which make it clear not only that the *iudex* has already been appointed, but also that *intertium* is an arrangement to which the parties and their judge come.[55]

It is time to draw these threads together: there is only one type of *intertium*, for which an intending party must give notice and which is granted by a magistrate (an oddity to which I shall return). It is a procedure which relates to process not before the magistrate, but before the judge. Etymology suggests a link with *comperendinatio* but significant differences have already emerged. What sort of process then was *intertium*? Chapter 92 speaks of declaring 'intertium iudicandi causa', in order to get a case heard. And one of the Pompeian tablets states that two litigants have taken an *intertium*, and that the judge is to hear the case from the third day on, 'iudicare ex perendino die'.[56] Both these sources are in accord in regarding *intertium* as something obtained in connection with the hearing of the case by the judge. But chapter 92 of the Lex Irnitana emphasizes the positive side, that *intertium* is an arrangement for hearing the case, while the Pompeian tablet stresses (as it were) the negative, that it is a suspensive arrangement, for hearing the case only from the third day. These are distinct conceptions but amount in practice to very much the same thing: the adjournment in the tablet after all provides not just for an interval but for the time for recommencement.

All this suggests that *intertium* was an arrangement to adjourn proceedings once they were already before the *iudex*. A party had to give notice of his intention to seek an adjournment (his adversary might want to oppose it). This must be done within two days of seeking the magistrate's grant of an adjournment. Now it is worth returning to the question why this amounts to a limit on the earliest rather than the latest moment for giving notice. The most obvious explanation is that the *denuntiatio* brought proceedings to a standstill and so could not be allowed to take place long before an approach to the magistrate was made.[57] A ruling had to be obtained quickly on the question whether there was a ground for adjournment.

[55] This is a further significant difference from *comperendinatio*, which precedes process before the judge. *Comperendinatio* came, however, to have a broader meaning (cf. n. 70), and it is possible that it also came to describe adjournments *apud iudicem* (Karlowa, op. cit. (n. 46), 364).

[56] *Tab. Pomp.* 24. Bove, loc. cit. (n. 50). In his review of Bove, however, U. Manthe, *Gnomon* 53 (1981), 153, says *ex* should not be read. For present purposes, this makes little difference: without *ex*, the tablet arranges for the case to be heard 'on' rather than 'from' the third day.

[57] In other words a *denuntiatio* effects a temporary stay in proceedings until the magistrate has determined whether a longer adjournment is justified. This explanation also deals with a further difficulty: for if *intertium* is an adjournment for obtaining such things as new evidence (see n. 63), then it is hard to see why process should continue after a *denuntiatio*, in the absence of a piece of evidence thought by one of the parties to be essential. But if *denuntiatio* itself leads to a brief break in proceedings no such problem arises.

Suspending the hearing of a case and arranging the point at which it is to begin again are features of *vadimonium* too, but between that and *intertium* there are also crucial differences.[58] One precedes and the other succeeds *litis contestatio*. Here it may be helpful to sketch in some procedural background. Before *litis contestatio* at the end of proceedings *in iure*, there was no obligation between the parties to an action, and so if process *in iure* lasted more than a day they had to provide a guarantee (*vadimonium*) to return on the next day agreed.[59] Yet *litis contestatio* transformed the nature of the legal relationship between the parties, and after it there was no need for them to guarantee their appearance before the judge. Already the XII tables had provided that if by midday only one party had appeared, the issue was to be adjudged to him.[60] Failure to appear brought with it its own consequences of loss of suit, which might only be avoided by demonstrating an acceptable ground for absence. The same applied under the formulary procedure, so it too had no need to require from the parties guarantees that they would appear before the judge.[61]

To return to *intertium*. Since it was an arrangement made for the stage of process *apud iudicem*, it need contain only an agreement to appear on the day set but need not be supported by stipulation of a penalty for failure to do so. Apart from the lack of a requirement for a penal stipulation, *intertium* does bear a resemblance to *vadimonium*, since it is an arrangement for the time and place of a hearing. It may be this which tempts Macrobius into his curious definition of *comperendini dies* as those 'quibus vadimonium licet dicere',[62] for it is plain that whether we are speaking of *intertium*, an arrangement to suspend the process before the judge, or *comperendinatio*, an adjournment preceding the process before the judge, *litis contestatio* and the need for *vadimonia* must already have passed.

Three more points remain: first, the grounds on which *intertium* might be granted; second, the period for which it might last; and third, the reason for the involvement of the magistrate.

No doubt *intertium* was made available on a set range of grounds. What these were is not stated by our law, which simply refers the reader to the practice at Rome. The resources of time and speculation required to deal with this fully rule out a comprehensive discussion here. But two obvious possibilities are adjournments in order to obtain witnesses or to obtain necessary documents. There is evidence in the *Digest* of adjournments for these purposes (*dilationes*), but it appears to relate to *cognitio* rather than to formulary procedure.[63] A rescript of Marcus Aurelius provides that not more than one *dilatio* is to be allowed except *causa cognita*.[64] It does not seem implausible that adjournments of this sort might have been available under formulary procedure, likewise *causa cognita*. Yet the texts on *dilatio* speak in terms of months, and it has to be conceded that adjournments reaching beyond the third day would be required for purposes of this sort.

Which brings us to the second point: *intertium* was an arrangement to adjourn proceedings *apud iudicem* and to re-commence on a set day. Was this day inevitably the third day?[65] Although the somewhat nebulous links with *comperendinatio* and the

[58] Overlooked by d'Ors (1983), 44. See n. 74 below.

[59] G. 4. 184.

[60] XII tables 1. 8.

[61] The details under the formulary procedure are obscure: W. W. Buckland, *A textbook of Roman Law* (3rd ed. by Peter Stein, 1963), 638. Contrast Kaser, *RZ*, 288 (whose view is that in the text) with Bethmann-Hollweg, II. 603 ff. (in whose view the case was heard even if the defendant failed to appear; the defendant was not automatically condemned; but his chances were slim if he was not present to counter arguments presented by the plaintiff). Some sort of hearing must have taken place, as Buckland notes, since the amount of the *condemnatio* had to be determined. If the plaintiff was absent the case was lost, since the burden of proof lay on him.

[62] Macrobius, *Saturnalia* 1. 16. 14.

[63] Ulp., *lib.* 1 *de off. cos.*, *D.* 2. 12. 7 and *D.* 50. 16. 99. 2; Paul, *lib.* 5 *sent.*, *D.* 2. 12. 10; Call., *lib.* 1 *cogn.*, *D.* 5. 1. 36 *pr.*; Pap., *lib.* 3 *resp.*, *D.* 5. 1. 45 *pr.*; *Cf* 3. 11. 1 (A.D. 294); Bethmann-Hollweg, II. 177.

[64] Ulp., *D.* 2. 12. 7.

[65] The question is discussed for *comperendinatio* by P. Girard, *Histoire de l'organisation judiciaire des romains* I (1901), 87 n. 2 (in favour of understanding it as a minimum interval) and C. Bertolini, *Appunti didattici di diritto romano (seconda serie): Il processo civile* I (1913), 119 n. 2 (against).

presumed etymology of *intertium* suggest this, the Lex Irnitana gives no particular reason to think so. Chapter 92 provides that the magistrate is not to grant, and that one cannot oneself give notice of a request for, adjournment to a day which is a holiday. But it is not evident that the adjournment must be restricted to two days after it has been obtained, and it would be easier to explain the purpose of, and the importance attached to, *intertium* if it could be more extensive. An adjournment *in tertium* is after all, given the Roman system of inclusive counting, the minimum period which could count as an adjournment: any less would be no adjournment at all. So it may be reasonable to suppose that there was an original, literal, minimalist conception of *intertium* as an adjournment until the third day, that is a gap of only one day in proceedings; and that the same word later came to be used to describe longer adjournments too. But in the absence of further sources it is impossible to be sure either way.[66]

Third, the involvement of the magistrate. Intention to seek an adjournment had to be communicated in advance to one's opponent and to the judge. But the granting of the adjournment was a matter for the magistrate, presumably after some scrutiny of the grounds put forward. But why is the magistrate involved? It is this which is the most curious feature, since *intertium* is plainly associated with the second of the two parts of Roman civil procedure, the part *apud iudicem*, in which the magistrate does not participate.[67] (In the *comperendinatio* of the *legis actio* procedure, Gaius does not suggest that anybody other than the litigants was involved.) Yet chapter 90 explicitly attests the involvement of the magistrate. The ambivalence of the position is plain in that chapter where, although it is the magistrate who grants *intertium*, the choice of days is dependent on the consent of litigants and judge.

Intervention by the magistrate in a process already before the judge is a quite new feature of the Lex Irnitana. No more than a hypothesis to account for it can be offered here: that *intertium* was regarded as a modification of the magistrate's decree to the judge to hear the case, his *iudicare iubere*. That decree would, or at least could, contain instructions as to the time and place for the hearing.[68] Plainly these details would be affected by *intertium*, so it may have seemed appropriate to return to the magistrate for him to grant the requested alteration if suitable ground for it was demonstrated.[69]

What arrangements the formulary procedure made for adjournments of any sort are unclear. But—to return to Gellius once more—it seems that the formulary system

[66] *Tab. Pomp.* 24 speaks both of *intertium* and *ex die perendino iudicare*. But it is unclear whether this is (*a*) tautology, the second term adding nothing, since *intertium* means 'an adjournment to the third day', or (*b*) precision, specifying the day for the hearing to begin, since *intertium* denotes only 'adjournment'.

[67] Evidence for the involvement of the magistrate in other circumstances once process has begun before the judge is scant, although Ulp., *lib.* 14 *ed.*, *D.* 5. 3. 5 *pr.* does show that the magistrate might intervene even after *litis contestatio* and *cognoscere causam* to make sure that assets of an inheritance were not depleted; cf. Bethmann-Hollweg, II. 107.

[68] Ulp., *lib.* 51 *Sab.*, *D.* 2. 1. 13. 1 and *D.* 5. 1. 59; Wlassak, *JB*, 59 ff., 84 ff.; Bethmann-Hollweg, II. 108.

[69] If the *iudicare iubere* included the time and place for the judge to hear the case, and *intertium* modified these, the following considerations arise: (i) What sort of reference to time was made? It seems unlikely that the *iudicare iubere*, which was issued *in iure* when the judge need not be present, could have set a precise time for a hearing. It is more likely that it imposed a time limit within which judgement was to be given. (ii) This is consistent with chapter 91 of the law, which seems to indicate the existence of a time limit earlier than that for *mors litis* (which for *iudicia legitima* was 18 months: G. 4. 104): it provides (ll. 51 ff.) that if there has been neither *diffissio* nor judgement, the case is to be at the peril of the judge; and that if the time limit has been exceeded, the matter is to cease to be before the court (*in iudicio*). This appears to suggest that the judge could be failing in his duty if he did not pronounce judgement by a certain point which was earlier than *mors litis*; and it should be stressed that the law does not suggest that its provisions apply only to a restricted range of cases. The conclusion that there was an earlier limit is unavoidable, unless it is the case that *diffissio* could prolong the *tempus legitimum* beyond its normal limit. This seems unlikely (contra, J. M. Kelly, *Roman Litigation* (1966), 122). (iii) If this is right, the Lex Irnitana provides further evidence of the *iudex ad tempus datus* in formulary process. Hitherto most evidence has been explicable as relating to *cognitio*: Ulp., *lib.* 3 *ed.*, *D.* 5. 1. 2. 2 and *lib.* 1 *de off. cos.*, *D.* 5. 1. 32. An exception is Ulp., *lib* 51 *Sab.*, *D.* 2. 1. 13. 1 which there is no reason to believe to relate to *cognitio*: although it is concerned with restrictions on the days for which the magistrate can exercise his *iudicare iubere*, implicit in the whole discussion is that he can set a day—or at least a limit: Wlassak *JB*, 71–2. (iv) It may be, then, that we should suppose that even in formulary process the magistrate normally imposed a limit. But this will require further research.

knew something of both *diffissiones* and *comperendinationes*.[70] To distinguish between these is not difficult: a *diffissio* occurs automatically if a party fails to appear and yet has a good reason for not being non-suited;[71] the hearing is put off for another day, and the matter can be resolved among the litigants and their judge. But the sort of adjournment which *intertium* seems to describe is an arrangement for which notice can and must be given, not just a product of circumstance.[72]

This explanation of the power to decree *intertium* as a prerogative of the magistrate can also account for other provisions of chapter 91. For at ll. 51 ff. the law provides that the case is to be at the peril of the judge if there has not been *diffissio* and he has not given judgement.[73] No mention is made of *intertium*, yet this would be expected if it were something over which the judge had any control. But once it is seen for what it is, a decree of the magistrate and in effect a modification of his initial *iudicare iubere*, this becomes comprehensible.

Still the point can hardly be over-emphasized that the involvement of the magistrate at this stage is most odd. Chapter 90 shows that he was obliged to grant *intertium* for any day on which cases could be heard, or any day at all which was agreed to by the parties and judge, so long as it was not a festive day of the imperial house. All the magistrate can have done is check that suitable grounds for adjournment were shown. He had no choice in the timing, nor an option to refuse—unless prepared to pay a substantial fine. The severity of the fine is also understandable if an adjournment of this kind could only be brought about by a magistrate's decree. Failing to grant an adjournment to which one of the parties could show an entitlement could only be regarded as a serious matter, since it could prejudice critically the case of one of the litigants. Furthermore, the prejudice caused to his case in this way could be exacerbated day by day, so it is not inappropriate that the penal liability of the magistrate should increase day by day.

To sum up:[74] *intertium* was an adjournment of a case once it was already before the judge. In this it differs from *comperendinatio*. If a party wished to obtain it, he must

[70] *Comperendinatio* gradually took on a more general meaning of 'adjournment' or 'postponement': Th. Kipp, *RE*, s.v. IV. 789, 45 ff.; *TLL* s.v. 2.

[71] Grounds for *diffissio* appear already in XII tables 2. 2 but are restricted to two: *morbus sonticus* and *status dies cum hoste*; cf. Ulp., *lib.* 74 *ed.*, *D.* 2. 11. 2. 3. The list was evidently extended, as indicated by the Lex Ursonensis 95 (*FIRA* I. 21), on which see A. d'Ors, *Epigrafía jurídica de la España romana* (1953), 223–4. It is worth noting here again that the Lex Irnitana need not elaborate these grounds since it is able instead to rely on the enumeration in the Lex Iulia de iudiciis privatis promulgated in the meantime. The conception of *diffissio* as a necessary adjournment forced upon the parties and judge by external circumstance is clearest in Jul., *lib.* 5 *dig.*, *D.* 42. 1. 60.

[72] *Intertium* is not dependent on agreement of the parties, which appears to be required only for adjournment to days which are actually holidays; but contrast González (1986), 234 on chapter 90 l. 26.

[73] This amounts to the *iudex qui litem suam facit*: see A. d'Ors, *SDHI* 48 (1982), 368–94; P. Birks, *TR* 52 (1984), 373–87.

[74] At this point it is worth referring to other theories on *intertium*, of which so far only two have been published: (*a*) J. A. Crook, *ZPE* 29 (1978), 229–39 at 231–2, which of course pre-dates the discovery of the Lex Irnitana. Our new evidence forces us to reject the theory put forward, which connects *intertium* with *entritos* (found in the Gloss) and with the *intertiare* of the Frankish legal sources, and therefore suggests that *intertium sumere* is to be translated 'sequestrate'. (*b*) A. d'Ors (1983), 40–4 deals specifically with the Lex Irnitana. His interpretation conflicts at many points with that offered here, and is as follows: (i) *intertium* is the same as *comperendinatio*; (ii) on the first day a decree of *intertium* is obtained, on the next (i.e. 'in biduo proximo', see n. 52 above) a *denuntiatio* is made, and on the third day the case is heard. No reasoning is given for this reconstruction, for instance why the decree should precede the *denuntiatio*; (iii) the law is dealing with provincial practice: there was no *denuntiatio* at Rome: a curious conclusion since the law establishes for Irni the same right of *denuntiatio* as exists at Rome; (iv) the law introduces the system of *intertium* and *denuntiatio* in place of the *in ius vocatio* and *vadimonium* of ordinary procedure. But since *intertium* relates to the stage of process beyond *litis contestatio* this is untenable. (*c*) A further unpublished version suggested to me is that *intertium* is connected in some way with bringing on the case (like the later *denuntiatio*). This seems to face two difficulties: first, that it is not clear how the parties and judge can have an opportunity to agree (as the text says they do) to *intertium*, since until the end of proceedings *in iure* the judge is not appointed, let alone present; second, that there is no reason in this case why the magistrate's liability should increase day by day. If the magistrate must grant an *intertium* so that the case can be heard, the only prejudice that can arise to a case is that, if it is not a perpetual action, the right to bring it may lapse because of the magistrate's delay. But this is not exacerbated day by day once that limit has been passed. In any case, a *restitutio in integrum* was provided precisely for the event that a plaintiff's claim had expired before he had been able to make it good for reasons attributable to the magistrate (*per magistratus*): Ulp., *lib.* 12 *ed.*, *D.* 4. 6. 1. 1; *D.* 4. 6. 26. 4–7; C.F. v. Savigny, *System des heutigen römischen Rechts* VII (1848), 182. For further discussion of the problems of *intertium*, see now the discussion by J. A. Crook, D. E. L. Johnston, P. G. Stein, forthcoming in *ZPE*.

give notice to his opponent and to the judge within the two days preceding his approach to the magistrate. Proceedings stopped. The magistrate would then consider whether a case for granting it was made out. Only the magistrate could grant it, since it was conceived as a modification to his original instructions to the judge. Grounds for adjourning might have included the need to procure essential testimony, and this makes it likely that more than one day's intermission would have been possible. The magistrate was to display the grounds for adjourning and grant it in accordance with these. That he did so was assured in time-honoured fashion: by a stiff fine.

CONCLUSIONS

There is no need to repeat the specific conclusions reached on each of the topics discussed. But it is worth taking those three topics in reverse order and drawing from each the broadest of possible conclusions on private law in the Lex Irnitana. First (the case of *intertium*), the law introduces a legal institution which was almost unknown before; second (*recuperatores*), it refines our knowledge of the details and evolution of Roman civil procedure; third (its relation to other sources of law), the Lex Irnitana demonstrates the existence of a close relation between municipal practice and the practice of civil law at Rome. The first two offer scope for much further research, and the third assures us of the relevance of our conclusions to the practice of law in Rome itself. If the importance of the Lex Irnitana for the history of Roman private law and civil procedure is now clear, many problems still remain. Their importance demands investigation with the speed formerly associated with *recuperatores* and with the minimum of adjournments.

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