THE LEX IRNITANA AND PROCEDURE IN THE CIVIL COURTS*

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The procedural rules of civil courts stimulate interest among few except the lawyers who practise in them. The procedures of the courts of the Roman world may therefore not seem an enticing topic. But procedure lies at the heart of any legal system and the Roman legal system is no exception. So when the discovery of the Lex Irnitana brought us fresh material about the jurisdiction and procedure of the local magistrates and courts at Irni, it added greatly to our understanding of one of the central institutions of the first-century Roman world.[1] But the information is not always easy to interpret. The purpose of this article is first to try to solve an apparent mystery in Chapter 90 of the Lex and then to use the new material to fill out our picture of procedure in this period. In this way it is hoped to contribute to a fuller understanding of the Lex Irnitana as a whole.

I. THE PROBLEM OF CHAPTER 90

Chapter 90 is one of a series of provisions concerning the handling of civil actions. Although the material in these chapters is for the most part new, its general import is readily understandable since it deals with procedures which were already known from other sources on Roman law. The apparent exception is Chapter 90 with the rubric 'De in tertium dando'. This has seemed to introduce a whole new institution, *intertium*,[2] which was previously unknown, although some scholars now think that traces of it are to be found in at least one wax tablet from Pompeii.[3]

Professor Simshäuser is the latest scholar to present an account of civil procedure as modified to incorporate *intertium*.[4] A brief summary of his version may be useful. He argues that *intertium* serves as a bridge between the first stage of procedure before the magistrate (*in iure*) and the second stage before the *iudex* or arbiter (*apud iudicem*). The basic meaning of *intertium* is 'the earliest starting date for proceedings before the *iudex*' ('frühster erster Verhandlungstermin vor dem *iudex*') and so by granting *intertium* in a case the magistrate fixed the earliest starting date for proceedings *apud iudicem*. This could be as soon as the third day. The magistrate was required to publish the fact that he had granted *intertium* in a particular case and the party who had been granted the *intertium* had to notify his opponent and the judge so that they would know when the case was to begin.

While this sketch is basically along the right lines, it requires considerable modification.[5] Above all it suffers from a fundamental weakness, the translation of 'in tertium'. This weakness, which Simshäuser's version shares with many others, leads him to misinterpret what the Lex is actually saying about the transition between the two stages in civil proceedings.

Chapter 90 begins by providing that the magistrate is to grant *in tertium* for all the days which are lawful for actions in terms of the Lex (lines 27–9). The prevailing view is that the words *in tertium* in these lines and elsewhere are to be treated as an indeclinable noun.[6] There is less agreement on precisely what this strange noun means. Differing from Simshäuser,

* My interest in this topic stems from the stimulating colloquium organized by Professor John Crook in St John's College, Cambridge on 23–4 March 1987. My views have changed much since then, but that discussion helped to highlight for me the problems of interpreting the Lex Irnitana. I am grateful to Professor Peter Stein and Professor Peter Birks for comments on an earlier draft of this paper.

[1] References in this article are to the text in J. González, 'The Lex Irnitana: a New Copy of the Flavian Municipal Law', *JRS* 76 (1986), 147–243, including an Appendix containing an excellent translation by Michael Crawford, hereinafter González (1986). A full discussion of the literature is to be found in W. Simshäuser, *ZSS* 107 (1990), 543–61, hereinafter Simshäuser (1990). Since then L. A. Curchin, *The Local Magistrates of Roman Spain* (1990) has appeared. The following works are cited by the abbreviation noted only: J. A. Crook, D. E. L. Johnston, P. G. Stein, 'Intertiumjagd and the Lex Irnitana: a Colloquium', *ZPE* 70 (1987), 173–84 cited as *ZPE* (1987); D. Johnston, 'Three Thoughts on Roman Private Law and the Lex Irnitana', *JRS* 77 (1987), 62–77 cited as Johnston (1987); M. Kaser, *Das römische Zivilprozessrecht* (1966) cited as *Prozessrecht*.

[2] Simshäuser (1990), 549 ff.

[3] *ZPE* (1987), 181 ff.

[4] Simshäuser (1990), 550 ff.

[5] Part x below contains an outline of the system as envisaged in this article.

[6] González (1986), 234; Johnston (1987), 70 ff.; *ZPE* (1987), *passim*; Simshäuser (1990), 549.

Professor González and Professor Crawford believe that it means 'notice for the third day' so that, for instance, the rubric is to be translated 'Concerning the granting of notice for the third day',[7] while the opening provision (lines 27–9) is understood to provide that the magistrate is to grant notice for the third day for all the lawful days.[8]

Whichever translation is adopted, this basic approach is open to objection.

First, it treats the words *in tertium* as though they were a single indeclinable noun even though they appear as two distinct words in the text of the Lex. Moreover it should be noted that in the Tabula Pompeiana 24 where *in tertium* also occurs, it appears as two separate words.[9] There would be little need to stress these facts but for the practice which has developed of routinely printing and talking about '*intertium*' in articles on this topic.[10]

Secondly, the translation 'notice for the third day' runs into insuperable difficulties when we reach lines 33–4 and 36–7 of Chapter 90. Here the text provides that if the parties agree 'in aliquem diem uti in tertium inter eos detur', then, if the day is lawful, 'in eum diem in tertium inter eos dato'. The problematical word is *inter* where it occurs in each of these clauses. Since *in tertium dare* is translated as 'to grant notice for the third day', Crawford, for instance, has to write: 'if it is agreed . . . that notice *for them* for the third day should be granted for a certain day . . . he is to grant notice for the third day *for them* for that day'.[11] But *inter eos* cannot mean 'for them': it must mean 'between them' or 'among them'. Yet it is impossible to make any sense of a provision which refers to an agreement between the parties and the judge that the magistrate should grant notice 'between them' for the third day — which is presumably why the other translation was chosen by Crawford. Instead of blurring the translation of *inter* in this way, we should rather accept that, just as in lines 31–2, *inter eos* means 'between them'. This then leads to the conclusion that the phrase *in tertium dare* does not refer to granting notice.

A similar difficulty occurs with these lines if Simshäuser's translation[12] is adopted. You cannot have a starting date 'between' parties. It is therefore inappropriate to envisage an agreement that 'the earliest starting date for proceedings should be granted *between them* for a particular day' or that the magistrate should grant it 'between them' for that day. Again we are driven to the conclusion that this translation is unsatisfactory.

Consideration of these problems indicates that what is required is a translation of *in tertium* which does not treat the words as an indeclinable noun and which permits *inter eos* to be given its normal meaning.

II. TRANSLATING *IN TERTIUM*

The first step is to treat *in tertium* as a phrase comprising two words and meaning 'for the third day'. An ellipse of *diem* in this phrase presents no insuperable problems and indeed there is agreement that, at least originally, the phrase would have had this meaning.[13] The important point is that *in tertium* is not to be regarded as the object of the verb *dare* in Chapter 90 but rather as a phrase describing the time for which the magistrate 'grants'. So, for instance, the rubric is not 'Concerning the granting of notice for the third day', but may be translated for the moment as 'Concerning granting for the third day'. A similar adjustment requires to be made in lines 28–9, 30–1, 33–4, 36–7 and again in line 37. So, to take the last example, the law prescribes a fine for the magistrate 'who is obliged to grant for the third day and does not grant'.

If it is correct to treat *in tertium* in this way in Chapter 90, then it is also correct to use the same approach in Chapter 91. So again — and contrary to the view of Simshäuser and others[14] — we must not translate *in tertium* as though it were the object of the verb *denuntiare*. Rather *denuntiare* is an intransitive verb and has its usual meaning of 'to serve a summons or, other official notice in connection with legal proceedings'.[15] Similarly, in line 48 *in tertium* is simply a phrase which shows that the notice is given 'for the third day'. The matter to which the notice

[7] González (1986), 197.
[8] González (1986), loc. cit.
[9] See below Part v.
[10] See the works cited in n. 6.
[11] González (1986), 197 (emphasis added).
[12] Simshäuser (1990), 552.
[13] See for instance *ZPE* (1987), 175; Simshäuser (1990), 549 ff.
[14] Simshäuser (1990), 552 ff. and, for example, González (1986), 197–8 and 234–5.
[15] *TLL* VI, 556 lines 3–62 deal with various kinds of legal notices. Cf. *OLD*, s.v. *denuntio* 5; *VIR* II, 172 lines 39 ff.

relates is defined, again with the normal construction,[16] by the phrase *de ea re* in line 48. So in lines 48 and 49 the Lex provides that the same law is to prevail as at Rome in respect of a party serving a legal notice on his opponent and the judge or arbiter for the third day. The nature of that notice will be explored below.[17]

According to its rubric, Chapter 92 deals in part with the days 'in quos in tertium ne detur'. Crawford translates 'for what days notice for the third day may not be granted',[18] but again we should depart from this and say simply 'for what days a grant may not be made for the third day'. The equivalent approach should be taken in lines 28 and 29 of this chapter.

If we leave Chapter 91 on one side and concentrate on Chapters 90 and 92, then the problem is to decide what is meant by saying that the magistrate 'grants' for the third day. The matter can be put in another way. Scholars have concentrated on asking what is meant by *in tertium* and have not paid sufficient attention to what the verb *dare* means in these passages. In short, the real question is: what is it that the magistrate 'grants' for the third day?

The answer to that question is to be found in the first place by standing back and establishing the context within which Chapter 90 occurs. This involves looking in more detail at the sequence of chapters on procedure which opens with Chapter 84.

III. THE ORDER OF THE PROCEDURAL CHAPTERS

The provisions on civil procedure are set out in Chapters 84 to 93. Although they may appear at first sight to occur in no particular order, in fact they are arranged in a logical sequence which is worth exploring.[19]

Chapter 84 gives the basic rules on the jurisdiction of the local duumviri and aediles. Since this is the fundamental provision, not surprisingly it comes first. As has been explained elsewhere,[20] the basic structure of the chapter is to define the matters in respect of which the duumviri and aediles have jurisdiction: 'de . . . x . . . iuris dictio' (lines 23 and 26). It should be noted that the magistrates are not merely to exercise *iuris dictio* in these matters, but, to be precise, they are to have 'iuris dictio, iudicis arbitri reciperatorum, ex his qui ibi propositi erunt, iudici datio addictio' (lines 23–5; 26–8). One can identify the following elements: *iuris dictio*, *iudicis arbitri datio addictio*, *reciperatorum datio*, and *iudici datio*.

If we now run through the chapters which follow, we shall see that they deal in more detail with these elements and that they do so in the order in which they occur at the end of Chapter 84.

The first attribute of the magistrates is *iuris dictio* (Chapter 84, lines 23 and 26). In Chapter 85 the Lex provides that the magistrates are to display the edicts and other legal provisions which the provincial governor has published and which are relevant to the *iuris dictio* of the magistrates (Chapter 85, lines 30–7). The magistrates are then to apply these provisions when deciding legal issues: 'ad ea interdicta . . . ius dicatur' (lines 37–40). Chapter 85 may therefore be seen as containing directions relevant to the *iuris dictio* function of the magistrates.

Next in Chapter 84 comes *iudicis arbitri datio* and *addictio* which are to be done 'ex his qui ibi propositi erunt' (Chapter 84, lines 23–4 and 26–7). When we turn to Chapter 86 we find that it deals first with the selection of the panel of *iudices* (Chapter 86, lines 43–17) and then with the publication of their names ('praenomina nomina . . . proposita habeto') (lines 19–23). It then provides that in appropriate cases[21] *iudices* and arbiters are to be granted and assigned (*dari addicique*) from the judges whose names have been published in this way (lines 23–6). Thus Chapter 86 gives fuller information on what is involved in the matter of *iudicis arbitri datio* and *addictio*.

Chapter 87 is properly a more detailed regulation of the mechanism of *iudicis arbitri datio addictio*. In particular it explains how the particular judge for a case is chosen (lines 30–48) and then eventually appointed (lines 48–9). In this way it spells out what is involved in the

[16] *OLD*, loc. cit.
[17] In Part VIII, text accompanying n. 57.
[18] González (1986), 198.
[19] Simshäuser (1990), 544 ff. and 555 ff. It will be apparent that my analysis differs somewhat from his.
[20] A. Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the Lex Irnitana', *ZPE* 84 (1990), 147–61, esp. at 147–51.
[21] See below Part IX.

phrase 'quem ex hac lege oportebit dari addicique' in lines 25–6 of Chapter 86.[22] So Chapter 87 prescribes the actual procedure which the magistrate is to follow in carrying out the function of *iudicis arbitri datio* and hence *addictio* which is laid upon him in Chapter 84.

After appointment of *iudices* and *arbitri*, in lines 24–5 and 26–7 Chapter 84 mentions appointment of *reciperatores*. Similarly, after dealing with the appointment of *iudices* and *arbitri* in Chapters 86 and 87, in Chapter 88 the Lex turns to the appointment of *reciperatores*. Here the only verb used is *dare* and so the process must simply be one of *reciperatorum datio* rather than of *reciperatorum datio addictio*. The method of selection is a modified version of that applying to *iudices* and *arbitri* in Chapter 87. But for present purposes the important point to notice is that the same order is maintained in the sequence of chapters as in the provisions of Chapter 84.

Chapter 89 is the final provision relating to the appointment of *iudices*, *arbitri*, and *reciperatores*. It provides that the duumviri are to grant single judges or arbiters in cases of 1000 sesterces or less, unless the case is one where it is proper for *reciperatores* to be appointed (lines 16–21). It then says that in these exceptional cases the magistrates are to appoint the number of *reciperatores* which would be proper under Roman practice (lines 22–5). This chapter contains matter which is relevant both to *iudicis arbitri datio* and to *reciperatorum datio* in Chapter 84.

At this point it is convenient to summarize the parallels which have been identified:

Chapter 84	
iuris dictio	Chapter 85
iudicis arbitri datio addictio	Chapters 86 and 87
reciperatorum datio	Chapter 88
iudicis arbitri reciperatorum datio addictio	Chapter 89

It is worth noticing also that, when listing the various responsibilities of the magistrates, Chapter 84 uses the noun forms whereas the rubrics of the subsequent chapters use various corresponding verb forms. Again the parallels can be listed:

Chapter 84	
iuris dictio	ius dicant (Chapter 85)
iudicis datio	de iudicibus . . . dandis (Chapter 87)
reciperatorum datio	de reciperatoribus . . . dandis (Chapter 88)
iudicis arbitri reciperatorum datio	singuli iudices arbitrive . . . reciperatores dentur et quod dentur (Chapter 89)

Up to this point we have examined all but the last of the magistrates' responsibilities as listed in Chapter 84. This last responsibility is *iudici datio*, the granting of a *iudicium* (lines 24 and 27). To judge by what has been seen so far, it would be proper to anticipate both that the Lex would now contain some provision explaining aspects of *iudici datio* and that the rubric of the relevant provision would contain a verb form which would be related to the noun form, *iudici datio*.

It is my submission that the sequence of parallels continues in precisely the same way in Chapter 90. That is to say, Chapter 90 contains provisions relating to the last element in Chapter 84, *iudici datio*, and the rubric of Chapter 90 has a verb form *dando* which corresponds to the noun *datio* in Chapter 84. The structure of the Lex therefore indicates the answer to the question posed at the end of the previous section: what the magistrate grants for the third day is 'the *iudicium*'. The key to this approach is that the verb *dare* is being used in an absolute or 'pregnant' sense to signify 'to grant a *iudicium*'. We should therefore translate the rubric of Chapter 90 as 'Concerning the grant of a *iudicium* for the third day'. Before looking at this argument more deeply we must see whether, so interpreted, Chapter 90 fits not only into the pattern of the chapters which precede it, but also into the sequence of those which follow.

[22] There is a slip in the translation in González (1986), 196 which reads as if the construction were 'dari addicique iudicare iubeto'.

On the approach which I am suggesting, Chapter 90 marks the end of the chapters which deal with the magistrate's role: with *reciperatorum datio* (Chapter 88) or *iudici datio* his work is done and the *in iure* stage is over.[23] Chapters 91 and 92 then turn to the proceedings which take place now that the *in iure* stage is complete. Chapter 91 is concerned exclusively with the *apud iudicem* stage before a single judge or arbiter,[24] whereas Chapter 92 (lines 27–46) is applicable to recuperatorial proceedings also.

Chapter 91 in particular deals with the matter of a party summoning his opponent and the *iudex* to the hearing of the *iudicium* which has been granted by the magistrate, with adjournments, and with the effects of failure to observe the proper time limits. These matters will be looked at in more detail below.[25]

Chapter 92 is very important since it specifies the days on which the hearing *apud iudicem* (and before the *reciperatores*) may take place. It also specifies the days for which the magistrate may grant an action *in tertium*. At first sight this might seem to undermine the argument that Chapters 84 to 90 deal with the magistrate's duties *in iure* whereas from Chapter 91 the Lex is concerned with proceedings *apud iudicem* and with the hearing by the *reciperatores*. But in fact that argument is not affected. The reason why granting *in tertium* recurs at this point in Chapter 92 is that in Chapter 90 (lines 27–30) the magistrate is instructed that he must grant *in tertium* for the days 'per quos ... ex hac lege ibi iudicia fieri licebit oportebit'. That is to say, the days for which the magistrate may grant *in tertium* are defined by reference to the days on which an action may be heard by the judge or arbiter. Accordingly, when we come to Chapter 92 its primary function is to define the days on which cases may not be heard (and hence by inference those on which they may) and these same days are then necessarily the days for which the magistrate cannot grant *in tertium*. Thus the magistrate comes in again at this point precisely because the chapter is dealing with the *apud iudicem* stage and the days on which it can and cannot take place.

Finally it should be noted that, having expounded matters relating first to proceedings *in iure* (Chapters 84–90) and then to proceedings *apud iudicem* (Chapters 91 and 92) or before the *reciperatores* (Chapter 92), in Chapter 93 the Lex quite logically completes the picture with a provision which relates to civil proceedings as a whole.[26] It tells us that the law to be applied when *municipes* are litigating is to be Roman law — unless the Lex provides otherwise.

IV. ARGUMENTS FOR THE PROPOSED INTERPRETATION OF *IN TERTIUM*

The position of Chapter 90 accordingly indicates that it deals with *iudici datio*. What the chapter shows is that when the magistrate granted a *iudicium*, he usually granted it for the third day on which judicial proceedings could properly be held (lines 27–9). By 'the third day' was meant the day after the following day. In granting the *iudicium* for that day the magistrate was ordering that the hearing of the action was to take place then. If the parties and the judge agreed, then the magistrate was entitled to grant the *iudicium* for some other day (lines 31–7). In that event the hearing before the *iudex* or arbiter would have to take place then. For the procedure in the courts at Irni, but undoubtedly for formulary procedure at Rome also, Chapter 90 therefore fills a major gap in our knowledge. Until now scholars could merely speculate that the proceedings *apud iudicem* started on the third day after the end of the *in iure* proceedings.[27] Now we know that these speculations were correct.

It is time to turn in more detail to the interpretation of the phrase 'in tertium dare', 'to grant a *iudicium* for the third day'. I have not discovered any text which can be cited as a precise parallel for the ellipse of *iudicium* in this phrase. None the less it is submitted that the suggested ellipse would conform to what we know of Latin usage in this regard.[28]

[23] At the colloquium in Cambridge I shared the common view that Chapter 90 was not concerned with the *in iure* stage: *ZPE* (1987), 176.

[24] González (1986), 234. See below Part VIII, text accompanying n. 51.

[25] In Part VIII, text accompanying n. 57.

[26] Simshäuser (1990), 554 ff.

[27] Th. Kipp, *Comperendinatio*, *RE* IV, 789 lines 28 ff. J. M. Kelly, *Roman Litigation* (1966), 119–20 thought it very unlikely that this was ever a general rule.

[28] See for instance Kühner-Stegmann, *Ausführliche Grammatik*[3] II, 594 ff.; E. Löfstedt, *Syntactica* II, 243–4; B. J. Hofmann, *Lateinische Umgangssprache*[2], paras 155 ff.

For an ellipse to occur, the reader or listener must be able to supply the necessary word without difficulty. If the missing element — and hence the meaning — is difficult to discover, then an ellipse will not develop. Because members of groups who share a common interest, be they tradesmen, gamblers or doctors, will also tend to have a common pool of knowledge and of references, the technical languages of such groups contain many examples of ellipses. These ellipses may in particular constitute a convenient form of shorthand to refer to matters which recur in the activities of the groups.

In the case of 'in tertium dare' these elements are present. The phrase would be used among jurists, pleaders, magistrates and judges concerned with court proceedings. The step of granting a *iudicium* for the third day would occur over and over again. So it would not be surprising if there was an ellipse in the phraseology referring to this process. And indeed we know that there was an ellipse of the word *diem* in part of the phrase, *in tertium*. Furthermore we know that *iudicium dare* was the technical expression for granting a *iudicium*[29] and so we are contemplating the ellipse of the noun from an expression which refers to this commonplace activity. It is indeed plain that the technical use of the verbs *do*, *dico*, *addico* with reference to the judicial activities of the praetor was widely recognized.[30] What we have to consider is the reaction of someone who read that a magistrate 'in tertium dedit' or who, perhaps,[31] heard a magistrate saying 'in tertium do'. In fact the general context of the magistrate's actings at the end of proceedings before him would tend to indicate what he was granting. The use of the words *in tertium* would put the matter beyond doubt: the magistrate must be granting the thing which a magistrate in such proceedings granted 'for the third day'. This could only be a *iudicium*. It is not difficult to see how an ellipse of *iudicium* would develop in these circumstances.

It should not be forgotten that ellipses of a noun after the verb *dare* occurred in other legal contexts.[32] Most obviously we find the ellipse of *actionem* as, for instance, in '. . . Mela putat dandam mihi iniuriarum adversus te . . .'[33] where the general context and *adversus te* leave no room for doubt about the word to be supplied. The verb *dare* may also be used absolutely of the decision of a tribunal. So Pliny speaks of a *quaestio* which decided in favour of the accused: 'quae secundum reos dedit'.[34] Again the context leaves no doubt about the sense in which the verb is being used.

For these reasons the novelty in our sources of the ellipse found in 'in tertium dare' is no obstacle to accepting the interpretation which is proposed. We now examine other factors which confirm that this interpretation is correct.

In the first place it is proper to notice that the proposed approach has one general advantage over the explanations suggested by other commentators. From various sources, we have a fair understanding of the main stages of legal proceedings under the formulary system. But nowhere in these other accounts do we hear of a distinct stage called *intertium*. Indeed it is precisely because such a concept is alien to the picture derived from the other sources that scholars have been hunting for a role for this supposed new institution. On the approach adopted here, that problem disappears since Chapter 90 relates to *iudici datio*, the well-recognized culmination of many proceedings before the magistrate under the formulary system. It should also be noticed that, if Chapter 90 does not in fact deal with *iudici datio*, then it alone of all the functions of the magistrate mentioned at the end of Chapter 84 would not be more fully explained in the Lex.

Next, this interpretation means that one can link the use of 'in tertium dare' to the matter of *comperendinatio* in the old *legis actio* system. In his *Institutes* IV.15 Gaius tells us that under that system, after the judge was appointed, the parties 'gave notice that they would appear before him on the third day', 'comperendinum diem, ut ad iudicem venirent, denuntiabant'. We know from Cicero and elsewhere that *dies perendinus* was synonymous with *dies tertius*.[35] On the present approach, one can see a fairly smooth historical development. Under the *legis*

[29] *TLL* V 1, 1678 lines 8 ff. The *VIR* lists 120 examples: II, 305, lines 38–306, line 4 and see III 1, 1365, lines 26 ff.

[30] See the references in *Prozessrecht*, 28 n. 33.

[31] See Part VI.

[32] See, for instance, W. Kalb, *Das Juristenlatein*[2] (1888), 46 ff.; C. de Meo, *Lingue tecniche del latino* (1983), 108.

[33] *Digest* XLVII.10.17.2, Ulpian 57 *ad edictum*. Cf. *VIR* II, 301 lines 33–41. In some of the texts listed there a part of *actio* lurks nearby or may well have done so in the original. Only in *Digest* XXI.2.74.1, Hermogenian 2 *iuris epitomarum* is it not absolutely clear that the missing noun is *actio*.

[34] *Ep.* VII.6.9. See *TLL* V 1, 1678 lines 31 ff.

[35] Cicero, *pro Murena* 12.27. See *Prozessrecht*, 83 n. 4.

actio system the judge begins hearing the case on the third day after his appointment. Under the formulary system he begins on the third day after *iudici datio* which would in practice be the third day after *iudicis datio* also.

Thirdly, Chapter 90 does not apply to cases where *reciperatores* are appointed. If the Chapter deals with *iudici datio*, then, as will be seen in Part IX,[36] this is consistent with what we know of recuperatorial procedure.

Fourthly, the opening provision of Chapter 90 (lines 27–9) at the very least presupposes a close connection between granting for the third day and *iudicia* since any grant must be to a day on which it is lawful and proper for *iudicia* to take place. If the magistrate is in fact granting a *iudicium*, then this is the best possible reason for that close connection: the magistrate must not grant a *iudicium* to start on a day when *iudicia* cannot take place. This is confirmed by the terms of Chapter 92 which deals with the days on which *res ne iudicentur* and the days on which *in tertium ne detur* (rubric). The forbidden days are the same and indeed both matters are dealt with together. So the magistrate must not grant a *iudicium* for a day on which the judge cannot judge — on which indeed the magistrate must stop him if he does.

Fifthly, scholars have noted that a failure to *dare in tertium* attracts a large fine for every day that the failure persists (Chapter 90, lines 37–41). This suggests that the failure is a matter of great importance.[37] The failure to grant an action in an appropriate case would strike at the very heart of the legal procedure, and so it would be understandable if the Lex imposed this severe penalty for the breach.

Sixthly, this interpretation allows us to explain the use of *inter* in line 33 of Chapter 90, which, as was seen above, has given rise to difficulties of translation on the approach adopted hitherto. The text envisages the case where the parties and judge agree 'in aliquem diem uti in tertium inter eos detur', 'that the *iudicium* between them may be granted for the third day for a particular day'. A similar use of *inter* to describe the relationship of a *iudicium* and the parties to it is found in Chapter K: 'nisi inter omnes quos inter it iudicium erit et iudicem reciperatoresve eorum convenisset' (lines 38–9).

There is no doubt that, whatever approach one adopts, lines 31–7 of Chapter 90 present no little challenge to the translator since they envisage that something which is to be granted 'for the third day' — whether that be a notice or a *iudicium* — may be granted 'for another day'. None the less, while the formulation is difficult, the basic idea seems reasonably clear: if the parties and the judge agree, another day can be substituted for the third day. On the approach which is being proposed, the passage means that, if the parties and the judge agree, then the magistrate can grant the *iudicium* for some day other than the third day. The only restriction is that the day chosen must not be a festal day or a holiday in honour of the imperial house. (Since this part of the chapter presupposes agreement, it does not list the other exceptional days mentioned in Chapter 92, lines 30–5, on which a case may not be heard without agreement, but may be heard with the agreement of all concerned.) At this point it may be useful to examine a text upon which this part of Chapter 90 throws some light.

V. TABULA POMPEIANA 24

The text is as follows:

C. Sulpicius Cinnamus in ter-
tium sumpsit cum Q Laberio
Philippo quibus de rebus
inter se et eum Q Laber[ius]
Cerdo Maior iudex esse
diceretur . . . . . ex die
perendino iudicare.[38]

[36] Text preceding and accompanying n. 70.

[37] *ZPE* (1987), 177–9.

[38] F. Sbordone, 'Nuovo contributo alle tavolette cerate pompeiane', *Rendiconti dell'accademia di archaeologia lettere e belle arti di Napoli*, N.S. 46 (1971), 175–6; *AE* 1973, No. 145; L. Bove, *Documenti processuali dalle Tabulae Pompeianae di Murecine* (1979), 114–17.

The translation which I have proposed for the phrase *in tertium* in the Lex Irnitana proceeds on the basis that it means simply 'for the third day' and that it is not a noun. Proponents of the contrary view cite this wax tablet from Pompeii. It is said that here *intertium* is a noun which is the object of the verb *sumpsit*, the phrase meaning something like 'took an *intertium*' or 'accepted a notice for the third day'.[39] A major difficulty with this theory is that on the tablet also the phrase appears as two words. But, even if that difficulty can be overcome and the preferred translation is applied, its proponents concede that 'the construction in the tablet is unclear'.[40] Indeed no coherent interpretation of the tablet on this basis has been offered so far.

While problems will remain and no full discussion of the text is possible here, some progress with the interpretation of this text can perhaps be made if one again starts from the premise that *in tertium* is not a noun but a phrase meaning 'for the third day'. The text falls to be considered in the light of lines 31–7 of Chapter 90 which envisage that the parties to a dispute may agree with each other and the *iudex* that the *iudicium* should be granted 'in aliquem diem . . . in tertium' and, if that happens, then the magistrate is to grant it 'in eum diem in tertium'. What we have in the tablet from Pompeii is part of such an agreement in the form of an agreement by one of the parties with the other as to the day on which their case is to proceed.

On this basis it is submitted that the text should be translated along the following lines:

> C. Sulpicius Cinnamus agreed with Q. Laberius Philippus for the third day, that Q. Laberius Cerdo Maior would hold a hearing on the day after next in respect of those matters as to which he would be appointed to be the judge between himself and him (i.e. Q. Laberius).

The translation is not literal. In particular I have adopted part of the conjecture of Crawford[41] who suggested that 'eum d(e) e(is) r(ebus)' should be inserted in the lacuna after 'diceretur'. Since 'eum' is used in the fourth line to refer to Q. Laberius Philippus it would be awkward to use it at this point to refer to the judge. But 'quibus de rebus' in the third line does lead one to anticipate, in a legal document, a corresponding 'd(e) e(is) r(ebus)'. So that part of his conjecture should be accepted. While 'iudicare' lacks a subject in its own clause, it seems possible to supply it from the relative clause and I have translated accordingly.

I have translated 'esse diceretur' as 'would be appointed to be'. The agreement therefore dates from a time before the actual appointment of the judge. The use of *dicere* of the appointment of various officials is standard,[42] though admittedly not with an infinitive. Its use here, perhaps in a rather non-technical way, to describe the appointment of a *iudex* is readily understandable. In adopting this translation I am following what appears to be the view of those who dealt with the text before the discovery of the Lex Irnitana.[43] For my own part I can derive no sensible meaning from the translation 'was said to be' which has been suggested both before and since that discovery.[44]

In translating 'sumpsit cum' as 'agreed with' or 'undertook to'[45] I have again reverted to the interpretation which was usual until the discovery of the Lex Irnitana.[46] Before that there was perhaps some difficulty in seeing what the purpose of the agreement had been. But lines 31–7 of Chapter 90 suggest that it was an agreement *in tertium* between the parties to the action as to the day on which it should be heard. In itself this agreement would not be effective, but if Q. Laberius Cerdo also agreed to hear the case on that day, then under a provision similar to that found in Chapter 90, C. Sulpicius Cinnamus could ask the magistrate to grant the *iudicium* for the day after the next for the third day.

At first sight any such agreement might seem superfluous since in any event the magistrate would, in default of agreement to the contrary, grant the *iudicium* for the third day — the *perendinus dies*. But such an objection presupposes that this agreement was reached on

[39] cf. *ZPE* (1987), 181–2; Johnston (1987), 71.
[40] *ZPE* (1987), 181–2.
[41] *ZPE* (1987), 182.
[42] *TLL* v 1, 982, lines 16–32; *OLD* s.v. *dico* 10c. No example of *iudicem dicere* is listed in the *Thesaurus* or in *VIR* III 1, 1348.
[43] Sbordone, op. cit. (n. 38), 176; Bove, op. cit. (n. 38), 115.
[44] J. Crook, 'Working Notes on Some of the New Pompeii Tablets', *ZPE* 29 (1978), 229, 232; *ZPE* (1987), 182.
[45] The usage would seem to be some kind of development of that found in *OLD* s.v. *sumo* 15.
[46] Sbordone, op. cit. (n. 38); Bove, op. cit. (n. 38), 115 and 117.

the same day as *iudici datio* would take place. We do not know that and indeed the fact that the *iudex* had yet to be appointed might suggest an earlier date for the agreement. Suppose that, in fact, *iudici datio* was to take place on the following day. On that assumption, in default of any agreement, the *iudicium* would take place on the third day, counted from the following day. So the effect of this agreement, if confirmed by the judge, would be that the magistrate could grant the *iudicium* for the day after *iudici datio* rather than for the third day. We must assume that this slightly earlier date for the hearing would have suited the parties better.

The position can be summarized in this way. The tablet envisages a situation where C. Sulpicius Cinnamus and Q. Laberius Philippus are parties to an action. At the time when they enter this agreement they know that Q. Laberius Cerdo is to be the *iudex* but he has not yet been appointed. The document records C. Sulpicius Cinnamus' agreement with his opponent that the case should be heard on the day after next. Provided that Q. Laberius Cerdo consented, this agreement would have permitted the magistrate to grant the *iudicium* to be heard on that day instead of on the third day from *iudici datio*.[47]

VI. THE FORM OF *IUDICI DATIO*

The preceding discussion assumes that, unless there was agreement to the contrary, the magistrate was bound to grant the *iudicium* to start on the third day. In other words it assumes that *in tertium* still retains its full force as a reference to the third lawful day. This has been the subject of considerable discussion[48] and even those who think that the phrase does refer to the third day envisage that it means the third suitable day, the third *dies utilis*. I see no reason why this should be so. As Simshäuser points out, the whole tenor of the provisions on the selection of judges in Chapter 86 indicates that the system worked on the basis that a person who was put on the list of judges was expected to be available to carry out the duty if called upon to do so. Since the judges were drawn from a section of society in which people enjoyed great leisure, it was not unrealistic to assume that they could serve when required even at short notice. For their part the parties to an action would know the system and so could hardly complain if they had to proceed to a hearing on the third day if this was what the rules prescribed. In these circumstances there may well have been no real difficulty in operating on the principle that as a rule a case should start on the third day after *iudici datio*, unless there was agreement to hold it on another day.

In addition it is difficult to see why the Lex should continue to use the phrase *in tertium* if in fact a different period was usually meant. Undoubtedly by the time of the Lex it was possible for the parties to select a different period and when they did so the Lex uses the curious formulation 'in eum diem in tertium dato' (lines 36–7) to describe the magistrate's duty, but this presumably reflects the historical development.

A possible development would be this. Originally the only order which could be pronounced by the magistrate at the end of the *in iure* proceedings was the grant of a *iudicium* for the third day, *in tertium*. Hence the magistrate's action in granting a *iudicium* came to be referred to simply as *in tertium dare*. We do not have any direct evidence of what the magistrate would actually say when making *iudici datio* in this way,[49] but the fact that the process is referred to as *in tertium dare* prompts the suggestion that, in reply to the litigant's request for a *iudicium*, the magistrate simply said 'in tertium do'. At some later time it became possible for an order to be pronounced for a day other than the third day. None the less the usual order, and indeed the only possible order unless there were agreement of the parties and the *iudex*, remained a grant for the third day. It would therefore be perfectly natural for the procedure of *iudici datio* to continue to be thought of as *in tertium dare*. Hence in the exceptional cases where there had been agreement, the usual terminology was adapted and the magistrate was said 'in aliquem diem in tertium dare.' This in turn would suggest that a

[47] It should be noted that Crook has very plausibly conjectured that *in tertium* should be read in Tabula Pompeiana 9 which would then have an exactly parallel structure to that of Tabula Pompeiana 24 as far as *diceretur*, at which point the text breaks off, *ZPE* 29 (1978), 231–2. See also Camodeca, *AE* 1986, No. 187.

[48] *ZPE* (1987), 175–6 and 180; Simshäuser (1990), 552.

[49] *Prozessrecht*, 217 n. 14.

magistrate who was asked to grant a *iudicium*, say, for 24 September would have granted it by pronouncing: 'in ante diem octavum Kalendas Octobres in tertium do', although the simpler 'in ante diem octavum Kalendas Octobres do' is also possible.

VII. PUBLICATION

These conclusions about the form of the magistrate's order are necessarily speculative. Still, they should be borne in mind when we turn to examine the provision on publication contained in Chapter 90 (lines 29–31). Immediately after the magistrate is instructed to grant *in tertium* for all lawful days, the Lex provides that he is to have 'id' published, where he sits, for the greater part of each day 'per omnes dies, per quos in tertium dari debebit'.

There has been much debate about what the Lex is saying should be published. Hitherto the principal candidates have been either a calendar of days on which actions could take place (and hence for which a *iudicium* might be granted) or notice that *intertium* had been granted in a particular case.[50] The main difficulty about envisaging the provision as dealing with a calendar is that it is hard to see how a magistrate could 'sciens dolo malo' (line 38) fail to publish a list of days on which actions could be held during the year. Moreover, since the magistrate is instructed in Chapter 92 as to the days for which he may and may not grant a *iudicium* for the third day, one would have expected to find any direction for him to publish a calendar of those days in Chapter 92 rather than at this point. Accordingly the alternative theory was advanced that what is envisaged is publication of a notice that *iudicium* had been granted in a particular case. That suggestion could be revised in the light of the thesis advanced in this article: the magistrate was to publish a notice saying that a *iudicium* had been granted *in tertium* in a given case.

On reflection, however, I doubt whether, even with this revision, the explanation can be correct. First, there remains the difficulty — noticed when the idea was originally advanced — of seeing precisely why the grant of a *iudicium* should be published in this way when Chapter 91 introduces a system of *denuntiatio* to the persons having an interest to be informed, the opposing party and the *iudex*. Secondly, the provision does not seem to differentiate — as it should, if this explanation were correct — between cases where the magistrate granted a *iudicium* and those where he did not. Thirdly, the provision occurs only once in Chapter 90, immediately after the opening measure on granting for a third day. It is not found after the passage providing for the case where the parties and judge agreed on another day. So in such cases the fact that a *iudicium* had been granted for a particular day would not be published. It might be suggested that publication would not be needed in such cases since the opponent and judge would know when the case was due to come on. But there is nothing to suggest that the provisions on *denuntiatio* to an opponent and the judge in Chapter 91 did not apply where the date had been agreed. If, then, the system of notification in Chapter 91 applied to such cases, it is hard to see why any system of publication should not have applied also. This suggests that the proposed interpretation of the publication measure is incorrect. What we must look for is an interpretation which is consistent with the provision occurring after the first sentence only.

A fresh interpretation may be considered. Each day the magistrate has to publish that on that day he is required to grant actions for a particular date. In this way he declares what the *dies tertius* will be in cases in which he grants a *iudicium* on that day. So, for instance, if he is sitting on 1 February and 3 February is not one of the days excepted by Chapter 92, then he must publish a notice that he will grant actions for 3 February. The following day, other things being equal, he will publish a notice saying that he will grant actions for 4 February. Obviously if 4 February is, say, to be a day for public games (cf. Chapter 92, lines 30–2), then he will announce that actions are to be granted for 5 February.

The purpose of this provision would be to ensure that a party applying for a *iudicium* would know for which day it would be granted. This is a matter which it might otherwise be difficult for a private individual to ascertain for himself, involving, as Chapter 92 shows that it would, a knowledge of feast days, holidays and the dates on which business was postponed because of the harvest or vintage. Yet it could be very important to a party not to make a

[50] *ZPE* (1987), 177–8; Simshäuser 550.

mistake over the date on which the action was to be heard. If, for instance, he was granted an action for a day on which he could not attend, then he might find that he lost the case due to his failure to appear on the appointed day.

But the need for the magistrate to give notice that he would grant *iudicia* for a particular date would be even more pressing if, as suggested above, when making the grant the magistrate merely said 'in tertium do'. In that situation his actual words would not indicate which day was meant by the phrase 'in tertium'. So the system of publishing the day for which the magistrate would grant actions would mean that a party could discover the relevant date by looking at what was written up.

In any such system one can also see that a corrupt magistrate might deliberately fail to announce for which day he was to grant *iudicia*. After all, there would presumably not be an enormous number of actions before the magistrate's court on any day. So one of the parties, knowing that his opponent was likely to apply for a *iudicium* that day, might bribe the magistrate not to announce for which day he would grant *iudicia*. That would tend to cause the opponent considerable difficulties — either because he could not ascertain in advance for which date the *iudicium* would be given or because, even after it was granted, he still could not be sure which day the magistrate had specified when he said 'in tertium do'. Since such tactics would tend to frustrate the administration of justice almost as much as a simple refusal to grant a *iudicium*, it is not surprising to find that both matters are treated together and that they attract the same large fine.

If the publication provision is interpreted in this way, then we can also see why it occurs only once in Chapter 90. It is a general provision which tells the magistrate what he must do whenever he sits. It has nothing to do with his decision to grant or refuse a *iudicium* in any individual case. In these circumstances the instruction to the magistrate need only be stated once.

VIII. CHAPTER 91

The provisions of Chapter 91 require to be examined in a little more detail. This chapter is immensely long and its structure is somewhat daunting, but three general points about it should be noted straight away.

First, as has been observed already,[51] Chapter 91 applies only to proceedings before a single judge or arbiter. It does not apply at all to proceedings before a bench of *reciperatores*: they are instructed to proceed to *cognoscere* and *iudicare* (Chapter 88, line 10) and, just as that does not involve the procedure of *iudici datio* for the third day in Chapter 90, so equally it does not involve the kind of procedural matters which are covered by Chapter 91.

Secondly, as Simshäuser has observed,[52] the rules which are to be applied by virtue of Chapter 91 are those which apply to a *iudicium legitimum* at Rome. The draftsman is very precise on this point. In this chapter only, when he applies Roman law, he takes care to refer to what would be done 'in urbe Roma':[53] lines 4, 6 and 21. (It would seem that after line 18 the missing portion should be restored as 'eam rem in urbe Roma praetor populi Romani inter'.) This is to be contrasted with *Romae*[54] which is found in the application of more general aspects of practice at Rome: Chapter K, lines 36 and 41; Chapter 64, lines 28 and 40; Chapter 71, line 4 and Chapter 89, lines 20, 22 and 25.

Lastly, when the text provides on certain points 'is iudicibus arbitrisve et is quos inter ii iudices arbitrive dati subditi addictive hac lege erunt . . . siremps lex ius causaque esto' as if in a *iudicium legitimum* in Rome (lines 46–8 and 3), then this simply means that on these points the whole legal position affecting the litigants and the judge or arbiter is to be the same as in such an action at Rome. So for instance when the text speaks of 'denuntiandi . . . lex ius causaque' (lines 49 and 3), which is to apply to the judges, arbiters, and parties, this does not imply that the judges or arbiters had a right to make a *denuntiatio*, but simply that the law which was to be binding on them in the matter of *denuntiatio* was to be the same as would apply to a judge

[51] Part III above. See González (1986), 234.
[52] Simshäuser (1990), 553–4.
[53] cf. Gaius, *Institutes* IV. 104.
[54] cf. *Digest* L.16.2, Paul I *ad edictum*.

or arbiter in a *iudicium legitimum* in Rome.[55] By contrast only a judge or arbiter, and not one of the parties, could make *litis aestimatio*, but the text speaks of 'litem aestumandi . . . lex ius causaque' (lines 50–1 and 3), meaning that the judges, arbiters and parties are all bound by the same rules on *litis aestimatio* as in a *iudicium legitimum* at Rome.

Chapter 91 is divided into two parts: lines 45–10 and 10 to the end. Since both parts refer to similar matters, for instance, adjournments, and since both parts contain an elaborate *siremps* clause, one's initial reaction is to feel that there is a measure of duplication. In fact, however, this is not so and both parts of the chapter must be read cumulatively and in conjunction with other chapters in order to see what the Lex is laying down on the topics which it covers. That is to say, different aspects of the law on all the matters in the rubric are to be found in each part of the chapter.

The first part says that the law on *iudicia legitima* as applied in the city of Rome is to apply in respect of three items: a category of actions, certain judges, arbiters, and litigants and certain time-limits. The second part applies the same law to the days for which and the place in which *denuntiatio* is permitted and to the place in which *diffissio* and judging may take place. When one adds the two parts together one discovers to which kinds of actions, to which judges, arbiters and litigants, to which time-limits, to which lawful days, and to which geographical locations the rules of the special Roman procedure are to apply unless the Lex provides otherwise.

The first point covered is the category of actions to which the provisions of Chapter 91 are to apply. They are to apply to actions on private matters for which judges or arbiters are granted in terms of the Lex: 'quacumque de re privata iudices arbitri in eo municipio dati subditi addictive hac lege erunt . . . de ea re . . . eam rem . . . de ea re' (lines 45–6, 48, 3 and 5). To discover which actions are meant the reader would require to refer to Chapters 84, 86 (lines 23–6)[56] and 89.

Once one has discovered to which actions the Roman rules are to apply, one also knows to which judges, arbiters and litigants they apply: they apply to those involved in the actions to which the rules apply: 'is iudicibus arbitrisve et is, quos inter ii iudices arbitrive dati subditi addictive hac lege erunt . . . siremps lex etc.' (lines 46–7 and 3), where 'is iudicibus arbitrisve' refers back to the *iudices* and arbiters in line 45.

The law is to apply to *denuntiatio*, *diffissio*, judging, and *litis aestimatio* on the days and where the Lex permits and authorizes: 'per quos dies et ubi ex hac lege licebit oportebit' (line 51). For the permitted days, as will be seen in a little more detail below, the reader must refer to Chapter 92, while the place is dealt with in the second part of Chapter 91. Finally the rules on *mors litis* will take effect if the action is not disposed of within the time laid down by Chapter 12 of the Lex Iulia and the senatusconsulta relating to it (lines 53–3).

When we come to the second part of the chapter we find that all the points which have been covered in the first part are then built into the second part by reference back. The judges, arbiters, and litigants to whom the second part is to apply are defined as 'iis omnibus' (line 10) which picks up what was said in lines 46–7 and 3. The subject-matter of the relevant actions is likewise simply 'de ea re' (lines 10 and 19), referring back to 'quacumque de re . . . de ea re', etc. (lines 45–6 and 48, etc.). For the days on which *diffissio* and judging can take place reference is still made to Chapter 92 (lines 15–16), but the time-limit for disposing of an action is now expressed by citing the reference in the first part to the Lex Irnitana and senatusconsulta (lines 17–18).

Three new elements, however, are introduced into this second part. The first is that *denuntiatio* must be *in tertium* for a permitted day: 'in eos dies in quos ex hac lege licebit' (lines 10–11). This is a reference to lines 46–50 of Chapter 92 which absolutely forbid *denuntiatio* for holidays in honour of the imperial house and forbid it for certain other days unless the judge and parties agree — adopting the rules laid down for the hearing of cases and hence for granting *iudicia* for the third day (Chapter 92, lines 27–39). The second new point also relates to *denuntiatio*, but this time concerns the place where it may take place — a matter which was left open for later determination in the first part (line 51). *Denuntiatio* may take place either within the *municipium* or within a mile from it, or where 'they' (sc. the parties and the judge) agree (lines 11–12). The third new matter also refers to a place, this time the place where

[55] See the discussion in *ZPE* (1987), 180.

[56] See Part IX below.

diffissio and judging may take place — in the forum of the *municipium* or where 'they' (sc. again the parties and the judge) agree, provided only that it is within the boundaries of the *municipium* (lines 12–14). The rules on the place for *diffissio* and judging are then taken up in 'quoque loco ex hac lege iudicari licebit oportebit' (line 16).

If we now put the provisions of both parts on *denuntiatio* together, and apply the ordinary translation of *denuntiare* mentioned above,[57] then we can see that a party is to summon his opponent, the judge or the arbiter *in tertium* and is to do so within a period of two days, *in biduo proximo*. The procedure can take place in the *municipium* or within a mile, or elsewhere by agreement. This is evidently[58] the method by which the plaintiff will give his opponent and the judge or arbiter formal notice that they are to attend the hearing of the *iudicium* on a certain date, being the third lawful day — or another day agreed on by all concerned — as appointed by the magistrate under the provisions of Chapter 90.

The plaintiff must take this step *in biduo proximo*. There has been considerable discussion as to whether this phrase means 'within the next two days' or 'within the previous two days'.[59] Though the matter does not admit of a definite answer, the former translation seems preferable. From a general point of view, a provision which insists that persons be summoned only within two days prior to the hearing seems odd: usually one would think that the longer the period of notice the better for those who have to comply. Moreover, if the hearing of a *iudicium* is to take place on the third day, i.e. with only one day intervening after *iudici datio*, then it seems probable that the plaintiff was required to notify the judge and his opponent without delay. A rule that he should give the necessary notice within two days from *iudici datio* would be consistent with this approach. Lastly, if *in biduo proximo* refers to the next two days after *iudici datio*, and *in tertium* refers to the third day after *iudici datio*, then both time phrases are calculated from the same starting-point. This seems preferable to a translation which would involve one period starting from *iudici datio* and the other starting and moving backwards from the *tertius dies*.

A few remarks on *diffissio* may be useful. In lines 12–13 of Chapter 91 it is not just judging but also the process of *diffissio* (*diem diffindendi*) which is to take place in the forum of the *municipium* or, by agreement, elsewhere within the boundaries of the *municipium*. Similarly in lines 15–16 what is contemplated is that *diffissio* as well as judging may not have taken place in the permitted place. This emerges from lines 8–10 and 21–3 which envisage that the Lex will permit *denuntiatio*, judging, and *diffissio* to occur on different days and in different places from those stipulated by the law applying at Rome. The provision of the Lex specifying where *diffissio* may occur locally is in lines 12–13.

So far as the days for *diffissio* are concerned, lines 49–51 simply speak of *diffissio* on the days permitted under the Lex. These days are not enumerated separately in Chapter 92 or elsewhere. It follows that the reader must be expected to deduce them from some other days which are specified in Chapter 92. That chapter, as we have seen,[60] deals with the days on which judicial hearings can and cannot take place. One is therefore justified in inferring that *diffissio* could take place only on the same days. It is for this reason that the reader of Chapter 91, knowing the days for hearings, can work out when *diffissio* is permitted by the Lex. We can therefore say that a judge could grant the form of adjournment known as *diffissio* only on the day appointed for the hearing and not, for example, on the day before.

In lines 49–50 the Lex speaks of the legal position in relation to 'diem diffindendi, dies diffissos iurandi antequam iudicent'. On this González comments that '"diem diffindere" no doubt refers to postponement by agreement, "dies diffissos iurare" to the invocation of one of the reasons which actually entitled a party to a postponement'.[61] That does not seem a likely explanation if only because the texts on the topic give grounds for *diffissio* and do not suggest that at this period it could also be granted just because the parties agreed to have a postponement.[62] A different explanation can be offered. If a judge failed to judge on the appointed day, the *dies tertius*, then, unless the *dies* was *diffissus*, the case was at his peril (Chapter 91, lines 51–3). So, if a judge who had granted an adjournment by way of *diffissio*, was going to give judgement later than the *dies tertius*, he had to do something to indicate that his judgement was not overdue. What he did was to swear an oath that the *dies* for the hearing

[57] In Part II, text accompanying n. 15.
[58] So in substance Simshäuser (1990), 552–3.
[59] *ZPE* (1987), 179–80; Simshäuser (1990), 553.
[60] Part III.
[61] González (1986), 235.
[62] *Prozessrecht*, 83 ff. and 274.

of that case had been *diffissus*: *diem diffissum iurare*. Whether he had to state the ground for the adjournment is not clear. It appears that the *dies* which is *diffissus* is the 'appointed day'[63] for the hearing, the *dies tertius*, the theory behind the system of *diffissio* being that the day appointed for the hearing is 'split' and the adjourned part of the hearing takes place on the second portion of the appointed day.

IX. *RECIPERATORES*

Since those mysterious figures, the *reciperatores*, have flitted into the discussion from time to time, it may be appropriate to devote some lines to them.

Appointment of *reciperatores* is part of the powers given to both the duumviri and the aediles in Chapter 84 (lines 24 and 26–7). (This provision, so far as the aediles are concerned, is the operative one to which a general grant in Chapter 19 (lines 13–16) refers. Doubtless a parallel provision appeared in the equivalent chapter on the duumviri, but that chapter is missing.) When we turn to Chapter 89 which deals in more detail with certain aspects of the granting of judges or *reciperatores*, there is no mention of aediles. González suggests that they have been omitted by mistake.[64] This seems unlikely, if only because the point would be important and an omission would soon be spotted and rectified. More probably the aediles are covered by the words *eadem condicione* in line 25 of Chapter 84. In other words, the rules in Chapter 89 are expressed in terms relating to the duumviri, but apply to the aediles also because their right to grant judges or *reciperatores* is given on the same basis as that of the duumviri. (What is less clear is why certain chapters refer to the presiding magistrate generally and others to the duumvir or duumviri. The differences may indicate that the chapters derive from different revisions of the law.)

The holy grail in any discussion of *reciperatores* is the distinction between the cases which they heard and the cases which were heard by a single judge.[65] Chapter 89 has some material on this point but, because it refers to the (unknown) practice at Rome, it has been regarded as tantalizing but disappointing. It is thought, however, that the evidence in the Lex can be pressed to take us a few steps further in the quest for this elusive distinction.

In discussing the point scholars have concentrated on Chapter 89 and have paid less attention to another passage which actually constitutes the setting in which Chapter 89 stands. Chapter 86 deals with the selection of those who are to serve as *iudices* and with the publication of their names. In lines 23–6 the Lex then says that the magistrate is to order one of them, appointed under the Lex, to judge 'in eas res de quibus rebus reciperatores dari non oportebit', 'for those cases for which it is not appropriate for recuperators to be granted'.

There is no equivalent clause elsewhere, say, in Chapter 88 or 89. This is the definitive statement of the basic rule for deciding whether a single judge or *reciperatores* should be granted. The magistrate is to appoint a single judge in those cases where, having regard to the law on the matter, it is not proper that *reciperatores* should be granted.[66] The way in which the rule is stated must be carefully noted.[67] It presupposes that *reciperatores* are the proper form of tribunal unless the law provides that it is not proper that they should be appointed. It is only in those cases where, exceptionally, it would not be proper for *reciperatores* to be granted, that the magistrate is to appoint a single judge. The formulation proceeds on the basis that a case must fall into one category or the other; it is either a case for *reciperatores* or a case for a single judge.

It must also be stressed that the phrase is simply *dari non oportebit* and not, for instance, *dari ex hac lege non oportebit*. In other words the magistrate will not find the answer to the question simply by consulting the terms of the Lex Irnitana: he must look to the law in general to find the appropriate rule. Moreover, having regard to Chapter 93, the law which he requires to consider is the Roman law. So we must infer that in Roman law too the fundamental rule was that *reciperatores* could be granted in all cases except those in which, according to the law, it was improper for them to be appointed. In cases where it was improper for *reciperatores* to be

[63] *OLD* s.v. *dies* 7.
[64] González (1986), 233.
[65] See generally J. M. Kelly, *Studies in the Civil Judicature of the Roman Republic* (1976), chs 2 and 5 with the literature cited there.
[66] For this use of *oportebit* see D. Daube, *Forms of Roman Legislation* (1956), 8 ff.
[67] See González (1986), 232.

granted, a single judge was to be appointed. The matter can be seen as involving two interrelated questions for a magistrate. The magistrate required to discover when it was *not* proper to appoint *reciperatores*. He also required to discover when he *was* entitled to appoint a single judge. By finding the answer to the first question he also found the answer to the second. But the answer to the first question might be found in a specific provision which answered the second question by saying that a judge should be appointed in certain cases. This is what we find in Chapter 89.

Lines 15–21 provide that in cases of 1,000 sesterces or less the duumviri are to grant a single judge, provided that certain exceptions do not apply, notably that 'it is not a matter in which, if the action were at Rome, whatever the sum involved, it would be proper for *reciperatores* to be granted (*reciperatores dari oporteret*)'. If it is such a case where it would be proper for *reciperatores* to be granted whatever the sum involved, then the duumviri are to grant the number of *reciperatores* which would be granted in such a case in Rome (lines 22–5).

Professor Birks[68] has suggested that Chapter 89 may indicate that 'in order to qualify for recuperators at Rome cases not only had to arise from particular causes of action but also had to be above a certain value.' The form of this conclusion suggests that one had to find reasons why the appointment of *reciperatores* would be proper. In the light of the passage from Chapter 86 this can be seen to put the emphasis wrongly: *reciperatores* would be competent unless the law provided that it would not be proper to appoint them. I suggest that Birks' generalized conclusion might be reformulated somewhat along the following lines: 'In cases of a specified value or less the general rule was that a single judge was to be appointed. In certain special cases within that range, notably those in which according to Roman practice it was always proper to appoint *reciperatores* irrespective of the sum at issue, the magistrate could not appoint a single judge. In cases with a value over the specified amount *reciperatores* would be appointed since there was no provision which said that it would not be proper for them to be appointed.'

The first thing to notice about Chapter 89 is that its scope is strictly limited. It applies only to actions involving sums of 1,000 sesterces or less. Such actions were the only actions in which the magistrates and courts at Irni had jurisdiction as of right, but over that amount they had jurisdiction if the parties agreed (Chapter 84, lines 18–20).[69] Nothing which is said in Chapter 89 has any bearing on cases of over 1,000 sesterces. Yet such cases may very well have been quite common since often the parties would prefer to litigate locally rather than to involve themselves in procedures before the governor or elsewhere. Now if Chapter 89 were the only operative provision, a magistrate faced with a suit for over 1,000 sesterces would have been at a loss to decide whether to appoint a single judge or *reciperatores*. In fact what he would do, by reason of Chapter 86, would be to look to the general law on the matter to see whether it would be improper to grant *reciperatores* in the particular case.

According to lines 15–21 of Chapter 89 in cases of 1,000 sesterces or less, a single judge or arbiter is to be appointed. But there are exceptions even within this range. They are cases in which, according to the practice at Rome, whatever the sum in issue (i.e. however small), it is proper for *reciperatores* to be granted. This can only be because these particular kinds of cases were regarded as meriting or being suitable for recuperatorial proceedings even though the sum in issue was small. One recalls the not dissimilar idea in Chapter 84 that even though the magistrates had jurisdiction in actions of 1,000 sesterces or less, certain specific kinds of action within that limit were excluded (Chapter 84, lines 6–17) and were to be dealt with elsewhere. For the exceptional cases in Chapter 89 the duumviri are to appoint the number of *reciperatores* which it would be proper to appoint for an equivalent case at Rome — indicating that different numbers would be appointed for different kinds of case.

But, as Birks argues,[70] the form of these rules suggests that recuperatorial procedure was usually associated with cases of a certain value or over and that below that level single judges would hear the cases. At Irni we should infer that the relevant level was 1,000 sesterces. There is no reason to suppose that the particular limit of 1,000 sesterces would have applied at Rome, but there is reason to argue that some upper limit for judges and arbiters would have applied there also. It is suggested therefore that there was a rule in Roman law that it was not proper for

[68] P. Birks, 'New Light on the Roman Legal System: the Appointment of Judges', *CLJ* (1988), 47, 36–60, 59–60.

[69] Rodger, *ZPE* 84 (1990), 148 f.

[70] Birks, op.cit. (n. 68), 60.

reciperatores to be granted for ordinary cases for sums of a certain amount or less. This was probably expressed in the form that in cases of that amount or less a single judge should be appointed. In certain cases *reciperatores* had always to be granted even though the sum at issue was only the specified amount or less. Fortunately or unfortunately, the Lex Irnitana does not resolve the disputes among Romanists by spelling out which these special cases were.

Once the magistrate has decided that he should grant *reciperatores*, Chapter 88 tells him what he is to do. In particular it specifies that the magistrate is to appoint them and then 'cogitoque eos uti cognoscant iudicent' (line 10). That is the key provision explaining what happens when *reciperatores* are appointed at the end of the *in iure* proceedings.

Chapter 90 by contrast tells us what happens at the end of the *in iure* proceedings where a single judge or arbiter is to be appointed. That chapter does not apply to the appointment of *reciperatores* and so the procedure of *iudici datio* for the third day does not apply to such cases. That is not to say that *reciperatores* were not furnished with a *iudicium* but simply that this particular procedure was not used. This conclusion is borne out by other texts which, in referring to *reciperatores*, tend to concentrate on the grant of the *reciperatores* rather than on the grant of a *iudicium*.[71]

It is also noticeable that, whereas under Chapter 90 proceedings before a single judge or arbiter are to begin on the third day, or some other agreed day, there is no similar reference to a day for starting in Chapter 88. This may suggest that *reciperatores* were instructed to begin work straightaway. Indeed we find various passages in lay authors which stress that recuperatorial proceedings were set in motion very quickly.[72] If their appointment operated forthwith, then it would seem likely that at least the seven *iudices* who were liable to be appointed as *reciperatores* would require to be present before the magistrate. In that connection it is noteworthy that under recuperatorial procedure there is no notice provision equivalent to that in Chapter 91 (lines 48–9 and 11–12) for single judges or arbiters. In fact none of the other procedural rules involving adjournments, the place for hearings, and time-limits set out in Chapter 91 applies to *reciperatores*. The contrast between the detailed régime for single judges under the Lex and the lack of procedural guidance for *reciperatores* is reflected in line 51 of Chapter 87 and lines 12–13 of Chapter 88. The former speaks of 'quodque is hac lege iudicaverit aestumaverit', whereas the passage on *reciperatores* mentions simply 'quodque ii iudicaverint litem aestumaverint'. The lack of detail in the Lex suggests that the special procedure of the *reciperatores* was flexible and also that — rather as under Chapter 95 of the Lex Ursonensis[73] — the magistrate may have been able to force *reciperatores* to proceed and to conclude their cases, whereas he had no such control over single judges or arbiters who had therefore to be threatened with various sanctions if they delayed unduly.

X. SUMMARY OF CIVIL PROCEDURE UNDER THE LEX IRNITANA

If in proceedings *in iure* the magistrate was minded to grant a *iudicium*, he had to consider whether the case was one to be heard by a single judge or *reciperatores*. He would decide on the basis of a Roman law principle that a single judge should be appointed if the case was one in which it would not be proper to grant *reciperatores* (Chapter 86, lines 23–5). Usually he would appoint a single judge in cases of 1,000 sesterces or less, *reciperatores* in cases involving larger sums. There were, however, exceptional cases in which *reciperatores* had always to be appointed (Chapter 89).

If *reciperatores* were appointed, they were directed forthwith to hear the case (Chapter 88, line 10). If a single judge was to hear the case, the magistrate would appoint him (Chapter 86, lines 23–6; Chapter 87, lines 48–9), but in addition the magistrate would grant a *iudicium* usually for the third lawful day (Chapter 90, lines 27–9; Chapter 92, lines 27–39). This meant that proceedings before the judge were to start on that day. Each day that he sat, the magistrate

[71] cf. B. Schmidlin, *Das Rekuperatorenverfahren* (1963), 117–19.

[72] See, for example, Pliny, *Ep.* III.20.9 and the other texts mentioned in L. Wenger, *Reciperatio*, *RE* 2te Reihe I 1, 427 lines 22 ff. and 431 lines 48 ff. and Schmidlin, op. cit. (n. 71), 130 ff.

[73] *FIRA* I², 187.

had to publish the date for which he was to grant *iudicia* (Chapter 90, lines 29–31). If, on the other hand, the parties and the prospective judge agreed, then the *iudicium* could be granted for any day, provided only that it was not a holiday in honour of the imperial house (Chapter 90, lines 31–7; cf. Tabula Pompeiana 24).

Once the magistrate had granted the *iudicium* for the third day or any agreed day, the plaintiff had two days (i.e. the same day and the following day) in which to summon his opponent and the judge to appear at the hearing on the appointed day (Chapter 91, especially lines 48–9 and lines 10–11). This could be done in the *municipium* or within a radius of a mile, or elsewhere by agreement of the parties and the judge (Chapter 91, lines 10–12). Unless the hearing was formally adjourned by *diffissio*, it had to take place on the day appointed by the magistrate (Chapter 91, lines 14–17). If it had been adjourned, then, before giving judgement, the judge had to swear an oath that the *dies* had been *diffissus* (Chapter 91, lines 49–50). In any event the proceedings had to be completed within the time prescribed by Chapter 12 of the Lex Iulia de iudiciis privatis and relevant senatusconsulta (Chapter 91, lines 53–3 and 17–18).

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