# POSTPONED BUSINESS AT IRNI*

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## I. INTRODUCTION

The Lex Irnitana is arguably the most important addition to the material for the study of Roman Law since the discovery of the text of Gaius' *Institutes* by Niebuhr in 1816. In terms of information about the working of the Roman legal system its importance far outstrips, for example, that of the new fragments of Gaius found in the 1920s and 1930s.[1] In particular it gives us much fresh information on a topic about which we are really very badly informed, viz. the law of civil procedure during the classical period of Roman Law, say, during the first two centuries A.D.[2] While one can debate whether the procedures at Irni were in all respects the same as at Rome, no-one who has studied the inscription can be in any doubt that in its essentials the Lex envisages that the institutions of Irni will use a system which is Roman in nature. So what we have is evidence which can be used to help reconstruct the procedure under the formulary system in the first century A.D.

The discussion of any question of procedure will invariably involve some rather technical legal matters. Despite these technicalities a grasp of procedure is essential to any real understanding of how the Roman legal system worked because, just as in any modern system, procedure determined the way in which cases were actually fought, advantages were gained or lost, and issues were presented and decided.[3] Even today a lawyer who does not have a good grasp of procedure may lose a trick or even the entire case. That would certainly have applied under the formulary system. Although substantial textbooks are available, not only laymen but even lawyers who are not involved in the daily work of the courts have great difficulty in understanding how modern rules of procedure actually work in practice. Unfortunately it will inevitably be much more difficult for us to understand Roman procedure about which we have so much less — indeed so very little — detailed information. It is, however, worth making an effort to try to understand what went on — and not simply for those with a specialist interest in Roman Law. The procedure of modern civil courts can seem a particularly uninteresting subject not merely because it is technical but more particularly because it does not really affect the lives of most members of the public. The reason is that the system is in the hands of professional judges and lawyers; lay people are not likely to become involved unless they happen to be a party or a witness. By contrast, at least for well-to-do Romans and politicians, civil procedure was by no means so remote a topic. Rising politicians might do a spell as a praetor — which brought them to the very heart of the legal system where they would need to operate the rules. In addition, since the judges under the formulary system were private citizens, those having the necessary property qualification might find their names on the list of potential judges who could be called upon to give a decision on the facts of a case. So the way in which the system actually worked would have had an impact on the individuals whose lives and doings are

* This is a revised version of a lecture delivered at a meeting organised by the Society for the Promotion of Roman Studies in London on 10 January 1995. The following works are cited by abbreviation alone: J. González, 'The Lex Irnitana: a new copy of the Flavian municipal law', *JRS* 76 (1986), 147–243, cited as González (1986); W. Simshäuser, *ZSS* 107 (1990), 543–61, book review, hereinafter Simshäuser (1990); A. Rodger, 'The Lex Irnitana and procedure in the civil courts', *JRS* 81 (1991), 74–90, cited as Rodger (1991); F. Lamberti, *Tabulae Irnitanae* (1993) cited as Lamberti (1993); M. Kaser, *Das römische Zivilprozessrecht* (1966) cited as *Prozessrecht*.

[1] The discovery of the fragments of Gaius was important, however, for the severe check which it administered to some of the wilder excesses of the interpolationists. See, for example, H. L. W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (1981), 16 ff.

[2] For one among many discussions see Rodger (1991), *passim*, with a summary at 89–90.

[3] cf. J. A. Crook, *Legal Advocacy in the Roman World* (1995), 176. Ch. 5 as a whole gives a stream of insights into how cases would actually have been handled in court.

most frequently recorded in our sources. The Lex Irnitana should help us to understand better how the system would have affected those people.

Until the discovery of Gaius' *Institutes* in 1816 we knew virtually nothing about procedure in classical Roman Law. The *Digest* dates from the sixth century and therefore from a time when the formulary system had long been dead. It had been superseded by the *cognitio* system which had been in use in certain spheres alongside the formulary system even during the classical period. The fact that the *Digest* was compiled at a time when the formulary system was no longer in use means that the texts in the *Digest* are not designed to refer to the institutions of the formulary system and indeed have been altered to remove references which would have been inappropriate for the procedure used by the courts in the time of Justinian. The result is that one cannot learn about the formulary system simply by reading the *Digest* uncritically. For that reason, perhaps the most important aspect of the discovery of Gaius' *Institutes* was that Book IV contained a great deal about the formulary system — things which had been completely unknown until then. This new information formed the basis of much of the new work which was done on Roman Law in the nineteenth century. But, of course, Gaius was writing for law students[4] and this meant that he could not go into detail on all the various topics which he covered. While he gives us a good deal of information, his account is essentially one for students and much of the detail must have been left out.

The Lex Irnitana is important precisely because it adds materially to the information which Gaius gives. Yet it is difficult to interpret. This is because it is largely allusive: it is written by people who know what various institutions mean and who expect those who will have to operate the statute to know also. For instance — and perhaps most obviously — there is Chapter 90 with the rubric *de in tertium dando*. The legislator obviously thought that a lawyer who read that rubric and similar words elsewhere in the statute would have no difficulty in knowing what matter was being discussed and that all he needed to do was to give the particular rules which were to be applied to it. Yet, as we know, over the last few years there have been all kinds of discussion as to the very nature of the matter described in the words *de in tertium dando*. Essentially we have been in the dark because Gaius does not mention the matter in his discussion of the formulary system. But that does not mean that it was in any way obscure. Rather, it serves to remind us that the elementary account in Gaius must have omitted reference to many things, even though they were part of the everyday business of the courts.

The purpose of this paper is to explain the meaning of ll. 42–4 of Chapter K of the Lex Irnitana. Chapter K gives us fresh information about two topics, the postponement of legal business (*res prolatae*) and vadimonium, about which we previously knew something[5] but which we should now be better able to understand. As a background to the discussion which follows, it is necessary to bear in mind the basic nature of the formulary system.[6] Its unique characteristic was that it was divided into two separate stages before different bodies. The first (*in iure*) took place before the praetor or other magistrate. The plaintiff would summon the defendant to a hearing before the praetor (*in ius vocatio*). At that hearing it would be his job to decide whether the plaintiff had the kind of claim for which the law provided a remedy and, if so, which kind of remedy might be appropriate. He would also consider the availability of defences for the defendant. A hearing could take some considerable time and might need to be continued to another day. When that occurred, the attendance of the defendant at the adjourned hearing was secured by requiring him to make vadimonium, promising to turn up at a particular place at a particular time and, in the event of his failing to appear, to pay a sum of money. If at the end of the hearing the praetor decided that the law provided no remedy in the situation, then he would simply refuse to grant an action (*actionem*

[4] On the nature of the *Institutes* see, for example, F. Schulz, *Roman Legal Science* (corrected edn, 1953), 159 ff.; *Geschichte der römischen Rechtswissenschaft* (1961), 191 ff.

[5] On *res prolatate* and vadimonium see *Prozessrecht*, 146 and 167 ff. respectively.

[6] This account is necessarily only an elementary outline which does not do justice to the many controversial points. For the detail see *Prozessrecht*, Part Two.

*denegare*). He might, on the other hand, decide that, although he could not grant the plaintiff the particular remedy which he sought, he could grant a different action.[7] In any event if after argument the praetor decided that the plaintiff would be entitled to some remedy, if the facts really were as he stated, then he would grant an action in terms of a particular formula. At about this point there was *litis contestatio*,[8] which meant roughly speaking that the issue was fixed and any obligation on which the action had been brought was now transformed into an obligation defined by the terms of the formula.[9] The new obligation was transmissible, for example, against the heir of the wrongdoer in an action based on delict.[10] A judge (*iudex* or *arbiter*) or judges (*reciperatores*)[11] would be selected from the list of potential judges (all laymen)[12] and a second distinct phase of the procedure would begin (*apud iudicem*) in which it would be the judge's job to listen to the evidence and to decide if the plaintiff had proved his case or the defendant had made out any relevant defence. Having made up his mind, as directed by the formula, the judge would then find in favour either of the plaintiff or of the defendant.

Even that brief account points to the fact that the magistrate was involved at the initial stage of an action, whereas the *iudex* or *arbiter* came in at the second stage. Even though the judge at this second stage was concerned largely with determining the relevant facts, the work involved would often have been demanding and difficult. It also appears that someone who was on the list had to be ready to take a case at any time — this can be inferred not least from the provisions of Chapter 86 (ll. 4–10) of the Lex Irnitana which allow people to be excused from having their name put on the list if, for instance, illness would prevent them from serving, if they were due to be away on official business, or if they were going to be away from the area for some good reason. The implication must be that, if no such excuse could be advanced, a person's name might be put on the list and, if chosen to serve, he would have to do so. The somewhat peremptory nature of the duty[13] would have made it all the more important to identify the times when the judges would not require to be available to sit. The Lex Irnitana contains rather elaborate provisions on the point.

## II. CHAPTER 92

The main provisions are contained in Chapter 92:

R(ubrica). Quibus diebus res ne iudicentur et in quos in tertium ne detur.
Ne quis <qui> in eo municipio i(ure) d(icundo) p(raerit) is diebus iudicem arbitrum recipera-
tores rem priuatam iudicare sinito, neue in eos dies in terti-
um dato, quos dies propter uenerationem domus Augustae festos
feriarumue numero esse haberique oportet oportebit, quibusque di-
ebus ex decurionum conscriptorumue decreto spectacula in eo
municipio edentur, epulum aud uesceratio municipibus aut ce-
na decurionibus conscriptisue municipum inpensa dabitur, qui-
busque diebus comitia in eo muncipio erunt <qu>ique dies h(ac) l(ege) con-
stituti erunt per quos messis et uindemiae causa res prolatae
sint, nisi si iudex arbiterue aut reciperatores et quorum res

[7] *Prozessrecht*, 177.
[8] Few topics in Roman Law have aroused fiercer controversy. For a summary of the various views see *Prozessrecht*, 215.
[9] cf. W. W. Buckland, *A Textbook of Roman Law* (3rd edn, ed. P. Stein, 1963), 695 ff.
[10] ibid., 700.
[11] Different rules applied when *reciperatores* were involved. Cf., for example, Rodger (1991), 87–9. For the purpose of this article, it is sufficient to refer to single judge procedure.
[12] cf. chs 86–8.
[13] cf. Simshäuser (1990), 552; Rodger (1991), 82.

agetur omnes dum d(e) e(a) r(e) agi uolent, neque is dies erit quem propter uenerationem domus Augustae festum feriarumue numero esse haberiue oportebit. Neue quis iudex neue arbiter neue reciperator per eos dies, quibus s(upra) s(criptum) est, rem priuatam iudicato neue litem aestumato neue per eos dies operam iudicandi causa dato neue sententiam iudicandi causa dicito, nisi si iudex arbiterue aut reciperatores et quorum res agetur omnes dum d(e) e(a) r(e) agi uolent, neque is dies erit quem propter uenerationem domus Augustae festum feriarumue numero esse haberique oportebit. Neue quis in eos dies aduersario in tertium iudici arbitro <ue> in biduo proximo iudicandi causa denuntiato, nisi si iudex arbiterue et quorum res agetur omnes tum d(e) e(a) r(e) agi uolent, neue is dies erit quem propter uenerationem domus A(ugustae) festum feriarumue numero esse haberiue oportebit. Quod aduersus ea factum erit id ratum ne esto.

Professor Crawford translates[14]:

> Rubric. On what days matters may not be judged and for what days notice for the third day may not be granted.
> Whoever is in charge of the administration of justice in that municipium is not to allow a iudex or arbiter or recuperatores to judge a private matter on those days nor is he to grant notice for the third day for those days which it is or will be appropriate to have or regard as feast-days or in the category of festivals because of the worship of the Imperial house, and on the days on which games are given in that muncipium by decree of the decuriones or conscripti or a meal or distribution of meat is given to the municipes or a dinner to the decuriones or conscripti at the expense of the municipes, and on the days on which there are assemblies in that muncipium, and on the days which are fixed under this statute as the days on which business is postponed because of harvest or vintage; except if the iudex or arbiter or recuperatores and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. No iudex or arbiter or recuperator is to judge a private matter on those days which have been laid down above or value a case or devote attention for the sake of judging or express an opinion for the sake of judging, except if the iudex or arbiter or recuperatores and those whose matter is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. And no one is to serve notice for the third day for those days to an adversary or a iudex or arbiter within the previous two days for the sake of judging, except if the iudex or arbiter and those whose case is being heard all wish it to be heard then and it is not a day which it is appropriate to have or regard as a feast-day or in the category of festivals because of the worship of the Imperial house. Whatever is done contrary to these rules, is not to be legal or valid.

The provisions are made to apply to three groups of people, first to the magistrates, then to those chosen as judges, and finally to the parties to a case.[15] The important thing to notice is that the aim of the cumulative provisions is to free the judges and the parties from any need to be available to play their role in litigation on the dates mentioned. The provisions are not designed to free the magistrates. In other words even though some of the provisions are directed at the magistrate, they are really concerned with arrangements for the second (*apud iudicem*) stage, rather than for the first (*in iure*) stage of a litigation. The overall effect of the provisions is that no-one can be forced to take part in the second stage of a litigation on any feast or holiday in honour of the imperial house (ll. 29–30), nor on any day when games are to be held or a feast or distribution of food or a dinner is to take place at public expense (ll. 30–3), nor on any day when the local assembly is to be held (ll. 33–4), nor on the days during which business has been postponed under the statute on account of the harvest or vintage (ll. 34–6). The statute brings this about by first ordaining the magistrates not to allow the judges to judge on those days and not to grant *in tertium* for those days (ll. 26–39). That binds the magistrates. Then the judges are ordained not to do any judicial work on those days

[14] González (1986), 198.
[15] cf. W. Simshäuser, 'Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana', *ZSS* 109 (1992), 163, 199–200.

(ll. 39–46) and finally the plaintiff is told not to give notice *iudicandi causa* for those days (ll. 46–50). The result is that judges and parties can steer clear of these periods if they want to.[16]

But if the judge and parties are all agreed that the second stage of some particular proceedings should take place during such periods, then that is permissible (ll. 36–7, 42–4, 47–9), except on days set aside as a feast or holiday in honour of the imperial house (ll. 37–9, 44–6 and 49–50). For example, suppose my name is on a list of potential judges and the parties come along and say that they would like me to act and hear the case on a day which happens to be the date of some local public games. If I have agreed to go with some friends to the games and therefore do not wish to sit as a judge, then I can refuse to act on the day chosen by the parties, since the provisions of Chapter 92 say that judicial proceedings are not to take place on the day of public games unless the parties and the judge all agree. On the other hand, if I have no intention of going to the games and have no pressing engagement for that day, then I may agree to sit and hear the case even though the games are taking place. By contrast, if the parties wanted the hearing to take place on a day (whether or not it also fell within the vintage break, for example)[17] which was a feast day in honour of the imperial house, then, even if I wished to sit and everyone else were agreeable, I could not sit as a judge on that day since the provisions of Chapter 92 contain an absolute ban on judicial proceedings on such a feast day.

## III. *RES PROLATAE*

Among the periods referred to in Chapter 92 is the period when business is postponed under the statute on account of the harvest or vintage (ll. 34–6). By virtue of Chapter 92, while no-one could be forced to take part in the second stage of a litigation during the harvest or vintage period, a hearing could take place then if the parties and the judge were all agreed that it should and the particular day was not a feast or holiday in honour of the imperial house (ll. 34–9, 39–46 and 46–50). Chapter 92 does not itself contain the provisions on postponement of business. They are to be found in Chapter K:

Perque eos
dies duumuiri decuriones conscriptosue ne cogunto, comitia
ne habento, ius ne dicunto nisi si de is rebus, de quibus Romae
messis uindemiaeue causa rebus prolatis ius dici solet; res iu-
dicari per eos dies, nisi inter omnes, quos inter it iudicium er-
it, et iudicem reciperatoresue eorum conueniet, ne sinun-
to; inque eos dies uadimonia fieri nisi de iis rebus de qui-
bus Romae messis uindemiaeue causa rebus prolatis ius di-
ci solet, ne sinunto; item de ceteris, nisi in eos dies qui prox-
sumi futuri erunt post eos dies qui tum rerum prolatarum
erunt, fieri ne sinunto; neue quis iudex reciperatorue ali-
ter per eos dies causas cognoscito iudicato.

Crawford translates:[18]

> And during that period, the duumviri are not to summon the decuriones or conscripti, they are not to hold an assembly, they are not to administer justice except concerning those matters concerning which it is customary to administer justice at Rome when business has been postponed for the harvest or the vintage; they are not to allow matters to be judged

[16] Cicero sets his dialogue *de oratore* during the games of 91 B.C. when he makes his characters assemble at L. Crassus' villa at Tusculum: 1.7.24. Cf. J. P. V. D. Balsdon, *Life and Leisure in Ancient Rome* (1969), 212.

[17] This is clear from the cumulative form of the provision in which the words 'neque is dies erit . . . ' (ll. 37–9) qualify all the descriptions of days which precede it.

[18] González (1986), 187. In l. 42 he is translating the text with the emendation *de intertiis*. See Part VI below.

during that period, unless it is agreed between everyone who will be a party to that trial and their iudex or recuperatores; and they are not to allow vadimonia to be entered into for appearance in that period except concerning those matters concerning which it is customary to administer justice at Rome when business has been postponed for the harvest or the vintage; likewise concerning [notices for the third day], they are not to allow them to take place, except for those days which follow immediately after that period which is the period of postponed business; nor is any iudex or recuperator to hear or judge cases on any other basis during that period.

Even before the discovery of the Lex Irnitana, it was, of course, known that judicial proceedings had been affected by the harvest and the vintage, but the relevant text of Ulpian referred to an *oratio* of Marcus Aurelius.[19] Chapters K and 92 of the Lex Irnitana now show — not unexpectedly — that even before his time a similar rule applied. The idea behind it was that during these periods when the cereal or wine harvests were being gathered, landowners would be free to return to their estates, to attend to the harvest and to take part in any celebrations.[20] At Irni this freedom was ensured by defining the relevant period and then declaring that during it business was postponed (*res* were *prolatae*) (Ch. K, ll. 25–34). So, as we saw, under Chapter 92 during such a period no-one could be forced to take part in the second stage of a litigation, whether as a judge or as a litigant.

Chapter K gives us some detail as to how the system worked at Irni. At the start of their period of office, the *duumviri* were to ask the assembly to decide the days during which business was to be postponed during their period of office (ll. 25–8). Business was then to be postponed during the days fixed by the assembly, provided that they did not fix more than two such breaks and provided that neither of the breaks was for more than thirty days in any one year (ll. 28–32). The magistrates were then to issue an edict proclaiming that business was to be postponed during the days laid down by the assembly (ll. 32–4). The statute tells the magistrates that they are not to summon the *decuriones* or *conscripti* and that they are not to hold the assembly during the harvest or vintage periods (ll. 34–6). Finally in l. 36 the statute turns to judicial business and once more, as with Chapter 92, it is important to keep its structure in mind. From l. 36 down to l. 44 it is concerned with laying down provisions which tell the magistrates what they are to do and not to do. Only in ll. 44 and 45 does it lay down a provision which binds others, viz. those acting as judges or *reciperatores*. But there is a significant difference between Chapter 92 and Chapter K.

Chapter 92 is not concerned with what the magistrate could or could not do during the harvest or vintage. It is concerned with measures binding on the magistrates and others, which are designed to ensure that judges and parties would not need to engage in litigation during that period. Nothing is said about the magistrates' activities during that period. That is because Chapter 92 is aimed at regulating the second stage in legal proceedings, the hearing before the judge or *reciperatores*.[21]

Chapter K has a different range and, having dealt with other matters of public business, in l. 36 the statute instructs the magistrates 'ius ne dicunto'. This provision is aimed at the first part of legal proceedings and tells the magistrates that, when business has been postponed, they should not deal with such proceedings, except in connection with those matters which it is customary to deal with at Rome when business is postponed on account of the harvest or vintage (ll. 34–7). It is noteworthy that this is the only place in the statute where it lays down a ban on the magistrates dealing with a case at any time of the year. Any bars which existed — for example, in connection with *dies nefasti* — must have been derived from another statute or from the general law.

[19] *Dig.* II.12.1, Ulpian 4 *de omnibus tribunalibus*. For suggestions of interpolation see *Index Interpolationum*, ad loc.

[20] Balsdon, op. cit. (n. 16), 210 ff., gives a good idea of the importance of periods free from legal business such as the vintage for men of affairs who wanted to get out of Rome.

[21] Rodger (1991), 78.

## IV. JUDICIAL BUSINESS DURING THE HARVEST OR VINTAGE

The provision in ll. 34–7 is otherwise instructive. First, it shows that, whatever changes may have been introduced into the system at various times, postponement of legal business on account of the harvest or vintage was indeed the practice at Rome at the time when the statute was drafted. One can deduce that from the present tense 'solet', as opposed to, say, 'solebat' which might have been used if the practice had previously existed at Rome, but had been discontinued.[22] Secondly, the form 'ius dici solet' indicates that the types of business which were permitted during such periods at Rome were not laid down in statute, but were a matter of practice and of practice which was sufficiently well recognized for it to be possible for the draftsman to legislate for Irni by reference to that practice. In the *Digest* we are told that certain exceptions to the bar on proceedings were allowed by the wording of Marcus Aurelius' *oratio* if the expiry of a time-limit would destroy the plaintiff's action or whenever the matter was urgent.[23] In another text Ulpian gives examples of proceedings which would be extinguished by the death of the defendant and which the plaintiff would therefore have an interest in getting into court.[24] One such example ('damni iniuriae') is a delictal action based on the Lex Aquilia dealing with loss caused by damage to property. We cannot be sure whether the practice observed in the period of the Lex Irnitana would have covered precisely the same actions, but it seems likely that Marcus Aurelius adopted broadly the kind of approach which had previously been applied. Urgency of some kind would seem to have been the likely justification for dealing with cases during a period which was otherwise to be kept free from judicial business. So in ll. 36–7 of Chapter K the magistrates were probably being told in effect that during the harvest or vintage periods they could sit only in the first stage of cases which were in some respect urgent.

In ll. 37–40 we come to a different point. The statute is not dealing specifically with hearings before the magistrate during the period when business is postponed. Rather, it is telling the magistrates that they are not to permit the second stage of judicial proceedings to be held, unless by agreement of all concerned, during the period of postponement. Contrary to what Professor González says,[25] this provision applies both to the urgent cases envisaged in l. 36 and to ordinary cases. Whatever the nature of the case, the second stage can be heard only by agreement. This is confirmed by what is said at the very end of *Dig.* II.12.1.2, Ulpian 4 *de omnibus tribunalibus* — to the effect that if either party objects to proceeding after the stage of *litis contestatio* then the hearing must be postponed.[26] The reason is obvious. Once the first stage of the procedure is over and *litis contestatio* has taken place, the matter is no longer urgent: any time-limit for raising proceedings has been complied with[27] and the obligation which might have been unenforceable after the death of the defendant has been transformed by *litis contestatio* into an obligation which transmits against the heir.[28] The direction to the magistrates in ll. 37–40 therefore mirrors the equivalent portion of the direction in the opening part of Chapter 92 which does not distinguish between urgent and non-urgent cases, but simply provides that the magistrates are not to allow judges to act, except where they and the parties agree, during the period of the harvest or vintage (ll. 27–37). In the same way, the direction to the judges and *reciperatores* in ll. 44–5 of Chapter K, that they are not to proceed 'aliter', i.e. except by agreement, corresponds to what we find in ll. 46–50 of Chapter 92.

[22] A. Pernice, 'Parerga', *ZSS* 14 (1894), 158 n. 5 thought that the reference to the undesirability of summoning people from their agricultural tasks in *Dig.* II.12.1 pr., Ulpian 4 *de omnibus tribunalibus* was somehow inappropriate for Rome as a great city.

[23] *Dig.* II.12.1.2. The suggested interpolations (*Index Interpolationum*, ad loc.) do not affect the sense.

[24] *Dig.* II.12.3, Ulpian 2 *ad edictum*. For the interpolation of 'tempore vel' see O. Lenel, 'Textkritische Miszellen', *ZSS* 39 (1918), 119–71, at 126 = *Gesammelte Schriften* Vol. 4 (eds O. Behrends and F. D'Ippolito, 1992), 131–83, at 138.

[25] González (1986), 213.

[26] M. Wlassak, *Zum römischen Provinzialprozeß* (1919), 62ff., argues that the passage originally referred to procedure not before the praetor but before Italian *iuridici*.

[27] Buckland, op. cit. (n. 9), 700.

[28] ibid. Cf. *Dig.* XLIV.7.59, Callistratus 1 *edicti monitorii*.

## V. VADIMONIUM

In l. 40 of Chapter K we are back with further directions to the magistrates in connection with the first stage of a litigation. The directions concern the matter of vadimonium. As we saw earlier, the basic purpose of the first stage presided over by a magistrate was to decide whether the plaintiff was entitled to a legal remedy or the defendant to a particular defence. The magistrate might have to hear extensive legal argument, or indeed there might be a number of cases to dispose of. If the magistrate could not finish the business on a particular day, then the defendant could be required to give a promise to turn up again at a certain time and place, failing which to pay a sum of money related to the value of the suit. That promise was known as vadimonium.[29] This use of vadimonium was ancient and had applied in the old *legis actio* procedure.[30] It lies, for example, behind the story[31] of Scipio who was besieging a well-defended town in Spain and while doing so was sitting to hear legal disputes involving his soldiers. When one of them asked for which day and place vadimonium should be made, Scipio pointed to the citadel of the besieged town and said 'the day after tomorrow in that place'. And, we are told, he did indeed hold legal hearings in the citadel on that day.

Against that background the provision in ll. 40–2, down to 'ne sinunto', is not too difficult to understand. It tells the magistrate that he is not to allow the defendant in any litigation before him to give a promise to turn up for the continuation of the hearing for any of the days during which business is postponed, unless the case is one of the special ones. That seems sensible. After all, the magistrate has just been told (ll. 36–7) that he is not to sit to hear ordinary cases during the harvest or vintage period. This provision backs that up by ensuring that in these ordinary cases he cannot sit in a continued hearing either during that period. This means that litigants can be free to attend to the harvest or vintage, even though the first stage of the litigation in which they are involved has not been completed. A simple example can be given. Let us suppose that the period for the vintage has been fixed as 15 October to 31 October. On 14 October my case is being argued before the magistrate, but the hearing is not completed and vadimonium has to be made. Lines 40–2 tell the magistrate that he cannot allow vadimonium to be made for any date between 15 October and 31 October, unless the case is one of the special ones. If it is not special, the defendant cannot be required to undertake to turn up for a continued hearing until after the vintage period. If the case is special, then, just as the initial hearing can take place during that period, so also a defendant can be required to undertake to turn up for a continued hearing during that period. Therefore a defendant in one of these special cases cannot insist on escaping to his estates for the vintage, but must be prepared to remain in town to attend at a particular place for a continued hearing in his case which will be held in front of the magistrate. This might seem rather a nuisance, but such a rule would be necessary to prevent a defendant from using delaying tactics to defeat a plaintiff's claim. For instance, suppose a plaintiff, whose claim would be extinguished if *litis contestatio* had not occurred by 25 October, summoned the defendant to a hearing on 14 October. If the defendant could spin out the initial hearing so that it was not completed on that day, then the plaintiff would automatically lose his claim if he could not insist on the hearing being continued to a date before 25 October during the vintage holiday. In such cases therefore the defendant could be required to undertake to turn up on a date during the vintage holiday.

[29] *Prozessrecht*, 167–70.
[30] *Prozessrecht*, 167 ff.
[31] Aulus Gellius, *Noct. Att.* VI.1.7–10; Valerius Maximus, *Facta et Dicta Memorabilia* III.7.1a.

## VI. CHAPTER K, ll. 42–4

In ll. 42–4 we come to a further point and one which has caused considerable difficulties. In the González edition the text of l. 42 has been emended to read 'item de intertiis'.[32] But in fact the engraver originally engraved 'DECRETIS' which he subsequently corrected to 'DE CETERIS'.[33] The emendation to 'de intertiis' was made, it is said, because 'neither DECRETIS nor DE CETERIS makes any kind of legal sense'.[34] For my part, leaving any other considerations on one side, I can make no legal sense of the text with the proposed emendation. Obviously 'DECRETIS' is equally impossible, but the engraver's correction should surely not be lightly rejected, and other editors have printed the text with 'de ceteris'.[35]

In order to assess the meaning of 'de ceteris' it is necessary to ascertain its context and in particular the word which precedes it. González could not see the whole word and so the reading 'item' relied in part on conjecture, while D'Ors found a lacuna which he filled with the conjecture 'neue'.[36] But Lamberti was able to read 'item'.[37] Given this latest reading of the bronze after it had been cleaned, we should proceed on the basis that the phrase in l. 42 is indeed 'item de ceteris'.

The next thing is to fix upon the translation based on that reading. The basic structure of the Latin text (ll. 40–4) which requires to be considered is:

> inque[38] eos dies vadimonia fieri nisi de iis rebus . . . ne
> sinunto; item de ceteris, nisi in eos dies qui proxsumi
> futuri erunt . . . fieri ne sinunto.

Lamberti, who does not explain what she thinks the passage means, translates 'item de ceteris . . . fieri ne sinunto' as 'analogamente per que che riguarda altre attività, non permettano che abbiano luogo . . . .'[39] This is not acceptable, if only because the provision becomes entirely meaningless since it does not tell us what 'other activities' are not to take place until the holiday period is over. The same kind of criticism applies to the French translation of Le Roux: 'ne permettent pas qu'on examine [les autres affaires]'.[40]

Both the Italian and French translations proceed on the wholly unacceptable basis that the clause beginning 'item de ceteris' has nothing to do with the immediately preceding discussion of vadimonium. A different approach is required. We must look at the provisions of ll. 40–4, in which the words 'item de ceteris' occur, as a whole and we have to respect the grammatical structure of those provisions. When we do this, then the overall thrust of the provision is perfectly clear. Whereas in ll. 40–2 the magistrates are told not to allow vadimonia to be made for the days of harvest and vintage except in respect of certain (special) matters ('nisi de iis rebus . . . '), in ll. 42–4 they are being told that likewise ('item') in respect of other matters ('de ceteris') they are not to allow them (i.e. vadimonia) to be made except for the days after the holiday period. In other words the natural translation of the Latin of the inscription is to take 'fieri ne sinunto' in l. 44 as referring back to 'vadimonia fieri . . . ne sinunto' in ll. 40–2. Any other translation is forced and unacceptable.

If we adopt and adapt Crawford's translation,[41] then we might translate ll. 40–4 somewhat as follows:

> . . . and they are not to allow vadimonia to be entered into for appearance in that period except concerning those matters concerning which it is customary to administer justice at Rome

[32] González (1986), 162.
[33] ibid.
[34] González (1986), 214.
[35] Lamberti (1993), 302.
[36] As reported by Lamberti (1993), 302 in her apparatus to l. 42.
[37] Lamberti (1993), 302.
[38] ITQUE.EOS, *aes*.
[39] Lamberti (1993), 303.
[40] Le Roux, *AÉ* 1986, 88 ff., 122.
[41] González (1986), 187.

> when business has been postponed for the harvest or the vintage; likewise concerning the others they are not to allow them to be entered into except for those days which will follow immediately after that period which will then be the period of postponed business . . . .

If that is indeed what the text says, the next thing is to discover what it means. Certain points can be stated with some confidence. In the first place the part beginning 'item de ceteris' is dealing with vadimonium. In the second place it is dealing with vadimonium in connection with 'other' matters, i.e. matters other than the special ones mentioned in l. 40. Thirdly, while such an interpretation might just at a pinch be possible, it seems unlikely that the clause is intended to lay down a rule that, where, say, the vintage period has been declared, then in any hearing in an ordinary case during the period running up to it vadimonium must be made to the days after the vintage period. A rigid rule to that effect would make no kind of sense. Suppose that I were the plaintiff in ordinary proceedings the first stage of which started, but could not be completed, on 12 October and the vintage period began on 15 October. I might suggest that the proceedings should continue on 18 October, only to be told that this was impossible due to the vintage break. But that could hardly mean that the magistrate was bound to insist on vadimonium being made to a date *after* the vintage period. If, for instance, the case could be continued on 14 October, then vadimonium to that day would be perfectly in order. So the passage cannot be construed as laying down some inflexible rule to be applied before the vintage period. At most it would have to be taken as a very loosely framed provision to the effect that, where postponement could not be made to a date before the break, it required to be made to a date after it. The obvious difficulty with such an approach is that it involves assuming that in this passage the draftsman used language loosely and in a manner not found elsewhere in the statute. Fourthly and lastly, we can be confident that the provision has no application to the position after the end of the vintage period, since at that stage the ordinary rules apply.

If then the provision does not properly apply to the position *before* the harvest or vintage break and it certainly does not apply to the position *after* it, then the logical deduction is that the provision is concerned with the position *during* the harvest or vintage break. In other words it is concerned with the situation where, during such a break, the magistrate finds himself confronted with an ordinary matter and has to consider what rule on vadimonium to apply. Since magistrates are told 'ius ne dicunto' in such cases during the vintage break (ll. 34–7), it might seem that such a problem could not arise. But in fact it could.

## VII. ORDINARY BUSINESS DURING THE HARVEST OR VINTAGE

In approaching this matter, we should return for a moment to the provision in ll. 40–2. As we saw, the most obvious application of that provision is to a case where, before the vintage break begins, the question of vadimonium arises. Continuation to a day during the vintage break was not possible except in special urgent cases which could be heard during that period. But that is not the only situation where the provision would apply, as a moment's reflection makes clear. Suppose that I am involved in an urgent case which comes before the magistrate on 18 October during the vintage break, in accordance with the rules referred to in ll. 36–7, but the hearing is not completed on that day. The question of vadimonium arises. In that situation it is the provision in ll. 40–2 which comes into play and it tells the magistrate that, since the case is one of the special ones, he can allow vadimonium to be made for, say, 21 October even though that day also falls within the vintage break. So the provision in ll. 40–2 applies not only before, but also during the vintage break. That certainly suggests that the parallel provision in ll. 42–4 could also apply during that period.

But, it may readily be argued, how could the question of a continuation during the vintage ever arise in an ordinary case which the magistrate is directed not to hear during that period? The objection seems overwhelming unless we try to imagine how a litigation might actually work under the system which the statute envisages.

In fact there may have been various ways in which the point could have arisen, but I mention just one. To judge by what Ulpian tells us,[42] one of the kinds of cases which could be heard during the vintage break was an action for loss due to damage to property based on the Lex Aquilia, since that kind of action was penal and could not be brought against the heir of the wrongdoer.[43] So a plaintiff would be allowed to summon the defendant to court during the vintage break and the magistrate would have to sit to consider the case. If he does not finish on the first day, then ll. 40–2 allow the matter to be resumed on another day during the vintage when the magistrate may grant the plaintiff his action. Thereafter, as we saw earlier,[44] the second part of the procedure involving the hearing before the judge could not take place during the break unless both the judge and the parties agreed.

But let us suppose that the plaintiff summons his opponent to court during the vintage break with a claim under the Lex Aquilia and after hearing argument the magistrate reaches the view that his claim under that head is bad, but considers that in the circumstances the plaintiff may have a contractual claim. Unfortunately, the point is complicated and before reaching a final decision the magistrate will require to hear further argument and to take a little time to consider the point. The hour is late and so matters cannnot be concluded that day. The question of adjournment arises. Such a situation must quite often have occurred since the hearing before the magistrate was used to argue out legal points and to decide which type of action might be available.

It is possible, using an example based loosely on a passage in the *Digest*,[45] to envisage the kind of situation in which this could have happened. Suppose that we have arranged that you will train my slave as an apprentice. You then injure him in the course of instructing him. I summon you to court during the vintage period, say, on 18 October, claiming damages for the loss to me due to the injury to my slave based on Chapter 3 of the Lex Aquilia, one of the special cases and perhaps I also have an alternative claim based on contract.[46] Before the magistrate you argue that I should not be given an action based on the Lex Aquilia since our relationship was governed by a *bonae fidei* contract of *locatio conductio* between us. The particular jurist advising the magistrate agrees with the general thrust of your argument and the magistrate is therefore satisfied that in the circumstances I am not entitled to an action based on the Lex Aquilia. None the less it is not quite clear to the magistrate and his adviser precisely what the terms of the arrangement between us were and so what their exact legal effect would be. The magistrate would, therefore, wish to hear further argument as to the basis on which I should be given any formula for a contractual claim against you. Unfortunately the argument would take too long to complete that day and the hearing will need to be adjourned. I therefore ask you to make vadimonium to appear at a particular place on another day. The point immediately arises: can the vadimonium be to another day later in the vintage period, say, 21 October when everyone is available, or must it be to a date after the end of the vintage period?

At this point ll. 42–4 of Chapter K come into play. Given the magistrate's decision that he will not grant an action on the Lex Aquilia, the case is no longer entitled to be treated as special. The only issue remaining is whether I am entitled to an action based on contract. Since contractual actions were available against the estate of the defendant, any contractual action would lie against your heir even if you were to die. So the contractual action would not seem to fall within the special category of cases which could be dealt with by the praetor during the vintage. The contractual claim is therefore not one of the special *res* envisaged in l. 40, but is rather one of the 'ceterae res' envisaged in l. 42. The provision in ll. 42–4 accordingly applies. By virtue of that rule, the magistrate will hold that he cannot allow vadimonium to be for any date earlier than one of the days immediately following the vintage period. In other words the first possible day would be 1 November.

[42] *Dig.* II.12.3.
[43] Gaius, *Inst.* IV.112; *Dig.* IX.2.23.8, Ulpian 18 *ad edictum*.
[44] At the end of Part IV *supra*.
[45] *Dig.* IX.2.5.3, Ulpian 18 *ad edictum*.
[46] On *editio* of alternative actions see recently A. Burge, 'Zum Edict De edendo', *ZSS* 112 (1995), 1–50, esp. 9 ff.

Anyone with experience of the work of a vacation court will know that problems of the kind which I have outlined would be likely to have presented themselves to the magistrate who was on duty during the harvest or vintage. We can elaborate a little on the circumstances where such issues could arise. It is often at the very least a psychological advantage for a plaintiff to get his opponent into court. A period when the court doors are closed can therefore be frustrating. The temptation accordingly will be to dress up the action in such a way as to gain admittance to the court during the break. Today, for example, a litigant who wants to keep up the pressure on his opponent may try to obtain the kind of interim or interlocutory order which a judge may be persuaded to grant during vacation even when he will not deal with more routine matters. Similarly one can easily envisage that a Roman litigant might well be tempted to frame his suit in such a way as to justify bringing it before the magistrate during the break, even where there would be some other, perhaps more suitable, basis for an action, but that other basis would not meet the necessary criteria for a hearing at that time. In such a situation the magistrate might well find himself rejecting the supposedly urgent basis for an action, but continuing the proceedings until a later date when an action on the ordinary basis might be granted. So, for instance, in the case of the injured apprentice discussed above, even if on the first day of the hearing during the vintage break the magistrate were satisfied not only that the Aquilian action should not lie, but also that I would be entitled to an *actio ex locato*, he would not be able to grant the contractual action there and then, but would require to adjourn the hearing until after the end of the break. To do otherwise and to grant an action on the alternative contractual ground would be to infringe the ban 'ius ne dicunto' during the vintage break except in relation to urgent cases (ll. 36–7). Moreover that ban would have required to be strictly applied in such a situation or else it would have been tempting for a litigant to circumvent the legislation by deliberately bringing forward his case on a supposedly urgent basis and then, when that was shown to be wrong, simply asking the magistrate to grant an action of a kind which would not have justified a hearing during the break if it had been put forward initially as the basis for the plaintiff's statement of claim (*editio actionis*).[47]

In certain entirely genuine cases on the other hand a plaintiff would be ill-advised not to advance even a doubtful claim during the break. For example, if the plaintiff thought that he might have a particular claim but that it would be time-barred if not brought by a certain date during the vintage break, then he would bring the action simply as a precaution against losing the claim. If the magistrate held that the plaintiff did indeed have such a claim, then he would grant the action on that basis. If on the other hand, the magistrate thought that this particular claim was unfounded, he would refuse an action on that basis, though, depending on the circumstances, he might adjourn the case till after the break when he could grant an action on another footing. Either way, the plaintiff would have been right to start the proceedings.

Contrary to what has been suggested, when interpreted as referring in this way to the making of vadimonium during the harvest or vintage break, the provision in ll. 42–4 does actually make good legal sense. Any difficulty for us in interpreting the provision lies not so much in translating what it says as in seeing how the point would arise in practice. That kind of difficulty has indeed to be kept constantly in mind when we are attempting to understand Roman legal texts, since they presuppose an understanding of the actual working of the system which we simply do not have.

## VIII. TWO LINGUISTIC ARGUMENTS

The proposed interpretation is supported by the language of the provision. When I first looked at this passage during the Cambridge seminar on the Lex Irnitana in March 1987, I was immediately struck by the word 'tum' in the phrase 'post eos dies qui tum

[47] For the freedom to change from the basis stated in the extra-judicial *editio actionis*, see, for example, O. Lenel, *Das Edictum Perpetuum* (3rd edn, 1927), 61 ff. and Burge, op. cit. (n. 46), 13 ff.

rerum prolatarum erunt . . . .' (l. 43). At that time, however, while seeing that it must have been included in the clause for some purpose, I could not see what that purpose might be.[48] I should now argue that 'tum' is used, in a familiar way,[49] precisely to make the point that the time when the magistrate is having to consider whether to permit vadimonium to a particular date coincides with the period when *res* are *prolatae*. He is not to allow vadimonium except for a period after the days which will *then* (i.e. when the issue of vadimonium arises and the magistrate has to consider it) be a time of postponed business. This confirms my interpretation that ll. 42–4 are dealing with a situation which arises when the magistrate is sitting during a harvest or vintage break.

This construction is also confirmed by the sequence of tenses in ll. 42–4. The magistrate is to permit vadimonium only for the days 'qui proxsumi futuri erunt post eos dies qui tum rerum prolatarum erunt'. We have first a periphrastic future and then a simple future tense. The simple future refers to the time when, the issue of vadimonium having arisen, the magistrate will be considering the point. This is also a time during the days which 'will be' (*erunt*, l. 44) days of postponed business. The statute tells the magistrate, who will have to deal with the point at that time, that he is not to allow vadimonium except for the days which 'will be' (further in the future) (*futuri erunt*, l. 43) next after the period of postponed business. The careful distinction between the future and periphrastic future tenses in ll. 42–4, especially when taken along with the use of 'tum', serves to stress that, while both events will occur in the future, the acting of the magistrate will occur during the period of harvest or vintage, but any postponement will be to a time further in the future after that period.

## IX. APOLOGIA

This paper has been taken up with technical matters, not all of which may be immediately attractive. Unfortunately, however, Roman Law is technical and the devil is in the detail. If we do not follow the ancient legislators and jurists into the technicalities, then, whatever else we may be doing, we are certainly not approaching their law in the same way as the Romans approached it. Doubtless then, just as today, there were lots of laymen — and, worse still, perhaps some lawyers — who should have known better but believed that law could and should always be simple.[50] But just as today, so in the first century A.D. a rather technical approach to drafting would often be essential — not just to be awkward, but rather to try to achieve the aims behind the legislation. In the passages discussed above, the aim was to ensure that for the most part people could go off and attend to the harvest or vintage and doubtless enjoy themselves at the traditional ceremonies which accompanied them. But even that apparently simple aim demanded quite a lot of complex drafting to cover various contingencies which we may have difficulty in appreciating but which the draftsman foresaw all too clearly because, far better than we ever could, he knew the kinds of problems which would sooner or later be thrown up by the fertile imaginations of Roman litigants and their lawyers. And indeed it is often the business of a lawyer to think up objections and devise complications. Nor should anyone who is interested in Rome and its legal system imagine that such problems and their solutions are unworthy of his attention. On the contrary, it is precisely because the jurists envisaged and tackled hundreds of thousands of such complex, technical, and sophisticated questions that they created a legal system which has never been surpassed and which is one of the imperishable glories of the Roman legacy to us.

*Advocates Library, Edinburgh*

[48] cf. J. A. Crook, D. E. L. Johnston and P. G. Stein, 'Intertiumjagd and the Lex Irnitana: a colloquium', *ZPE* 70 (1987), 173–84, at 181.

[49] *OLD*, s.v. *tum* 2b.

[50] For examples of criticism of jurists (many of them deliberately exaggerated), see D. Nörr, *Rechtskritik der römischen Antike* (1974), esp. 84 ff.