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Lawsuits in Context

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Abstract. The study of Roman procedure has benefited enormously from the discovery of wooden tablets near Pompeii. They are variously referred to as 'the Murecine tablets' (after the Agro Murecine, their place of discovery), 'the Pompeian tablets' (after the ancient site near their place of discovery), 'the Puteoli tablets' (after the ancient site from which they were removed in antiquity), or 'the archive of the Sulpicii' (after the presumed owner of the archive in antiquity).

Unfortunately, the tablets are sometimes misinterpreted, for the simple reason that the procedures they describe do not always match the procedures which more familiar sources have (wrongly) led us to believe existed. The tablets, in fact, give us the rare opportunity to revise our understanding of procedure, particularly when taken together with another remarkable find, the *lex Irnitana*.

This article gives a sketch of the 'new' Roman civil procedure now available to us as a result of these exciting finds.

THE STUDY of Roman civil procedure has benefited enormously from the discovery of the Murécine archive, a collection of first-century documents belonging to a banking family in Puteoli.¹ Lawyers and historians are indebted to Giuseppe Camodeca for his exceptional care in editing and presenting the archive and interpreting its contents. Opinions differ on questions of interpre-

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¹ The principal edition is G. Camodeca, *Tabulae Pompeianae Sulpiciorum* (TPSulp.). *Edizione critica dell'archivio puteolano dei Sulpicii* (Rome 1999), which mostly replaces the earlier edition: G. Camodeca, *L'archivio Puteolano dei Sulpicii*, 1 (Naples 1992). On the Murécine tablets and other finds from Campania, see also E. A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), chapter 6. The earlier readings and reconstructions that appeared in the *Rendiconti* of the *Accademia di Archeologia Lettere e Belle Arti di Napoli* are untrustworthy and should not be consulted.

tation, but this is inevitable: the sources on procedure available to date have not adequately prepared us to interpret the Murécine archive. The literary sources tend to mention rules of procedure only in passing, and the juristic sources (to recall perhaps Watson's law-in-books²) usually follow their own currents: the real and the hypothetical are mixed together, and what is interesting or contentious gets more attention than what, for Roman litigants, was routine and unremarkable. These are the sources that have shaped our views of procedure, and we have no prior assurance that they will fully explain the events described in the Murécine archive.

Some of the documents in the archive were prepared *in the middle of litigation*, and these are particularly rare and valuable. Yet identifying the 'litigation documents' is more difficult than one might think. This is because, in Roman procedure, it is difficult to fix the moment at which the parties' acts cease to be 'extra-judicial' ('outwith litigation') and become 'judicial'. Litigation ostensibly begins with a summons—and everything after that ought to be judicial—but the summons was a private act and did not necessarily lead to any real engagement between the parties (or even a meeting with the magistrate³). We therefore tend to take a narrower view and speak of a party's act as judicial if it takes place *in iure*.⁴ This ought to make judicial acts easier to identify, but often it does not: some acts *in iure* are performed under the obvious direction or guidance of a judicial magistrate (*iusiurandum*, *interrogatio*, *postulatio*), but others are performed in ways in which the magistrate's participation, if indeed he does participate, is not obvious at all (*editio*). One matter in which the magistrate's participation is not obvious is the matter of *postponements*. He orders the postponements, but the parties' 'promises to reappear' that follow are substantially the object of their own private negotiation. These promises are in every respect judicial: they arise in the middle of litigation, in the magistrate's court, and are performed under the compulsion of the magistrate. Unfortunately their judicial character is easily missed, because

² 'Roman Law: Reality and Context', in this volume.

³ We know that *restitutio* was offered to litigants in Italy who suffered the loss of their actions because a magistrate was unable to see them, D 4.6.26.4 (Ulpian 12 *ed.*); O. Lenel, *Das Edictum Perpetuum*, 3rd ed. (Leipzig 1927) § 44. This is discussed below.

⁴ The ambiguities in the terms 'judicial' and 'extra-judicial' are discussed in M. Zablocka, 'La costituzione del "cognitor" nel processo romano classico' 1983–84 (12) *Index* 146–7.

information about practical matters like postponements is hard to recover from the ancient sources, and we have had, to date, only incomplete information about these promises.

If we wrongly interpret these promises as extra-judicial, the cost is very great. A large number of documents in the Murécine archive record them, and many other documents in the archive refer to them in passing. All of these documents therefore provide, so to speak, first-hand information about various events in the magistrate's court. This kind of information is exceptionally hard to come by, and we lose this information if we misinterpret these promises as extra-judicial. The discussion below addresses two pre-trial matters, *iusiurandum* and the appointment of *cognitores*, which have been affected by a misinterpretation of these promises. Then follows a more general discussion of the postponement procedures, deduced with the considerable aid of the Murécine archive.

Iusiurandum

Two documents in the archive relate to an institution described at length in the Digest: the 'iusiurandum'.⁵ This was a device that helped to avoid unnecessary litigation. When it was performed voluntarily, it took the following form. One party would tender an oath to the other party: a defendant would be invited to give an oath denying his liability in the action, or a plaintiff would be invited to give an oath reaffirming that his claim was just. The giving of the oath settled the matter, respectively, in favour of the defendant or plaintiff, and it did so no less than a judgment would

⁵ Until the discovery of the Murécine archive, the *iusiurandum* was known mainly from Digest 12.2: see the discussion in M. Kaser and K. Hackl *Das römische Zivilprozessrecht*, 2nd ed. (Munich 1996) § 36; H. J. Roby, *Roman Private Law in the Times of Cicero and of the Antonines*, 2 (Cambridge 1902) 394–6; A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford 1901) 259–63. Much discussion followed the discovery of the archive: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 93–6; M. Humbert, 'À propos du *iusiurandum* de T Sulp. 28 et 29: Aveu d'*iniuria* ou défense, par un serment décisoire, à une action entachée de *calumniae*?' 2000 (11) *Cahier Glotz* 121; G. Camodeca, 'Per un primo aggiornamento all'edizione dell'archivio dei Sulpicii (TPSulp.)' 2000 (11) *Cahier Glotz* 173; J. G. Wolf, 'Der neue pompejanische Urkundenfund. Zu Camodecas "Edizione critica dell'archivio puteolano dei Sulpicii"' 2001 (118) *ZSS (rA)* 102–7; P. Gröschler, 'Der Eid in TPSulp. 28 und 29', 2004 (121) *ZSS (rA)* 110–28.

have done. This so-called *iusiurandum voluntarium*⁶ was usually performed *in iure* ('judicially'), but it could also be performed privately ('extra-judicially').⁷ Similar oaths might be tendered under the compulsion of the magistrate (*iusiurandum necessarium*), though the class of actions in which these were allowed was restricted. The two relevant documents in the archive appear to deal with a subject matter that could not be treated under the compulsory oath.⁸ The question is therefore whether the documents fall under the judicial or extra-judicial form of the voluntary oath.

The first of the documents, TPSulp 28, declares the following: 'After they had met the court appointment (*vadimonium*) that Caius Sulpicius Cinnamus had made with Iulius Fortunatus, and Caius Sulpicius Cinnamus had said he was ready to swear that, if 3,000 *sesterces* were proffered to him [sc. Cinnamus], then Iulius Fortunatus would . . . *iusiurandum* . . .'.⁹ The second of the documents, TPSulp 29, is probably part of the same affair,¹⁰ and sets out the oath itself:¹¹ 'On the invitation of Iulius Fortunatus, Caius Sulpicius Cinnamus swore . . .', followed by a mutilated text suggesting the charge was *iniuria* by way of *convicium*. It appears that Cinnamus was the defendant in an action on an *iniuria*, though Cinnamus' request for 3,000 *sesterces* is surprising (how can a defendant be in a position to demand 3,000 *sesterces*?) and remains somewhat of a riddle.¹²

⁶ D 12.2 (rubric).

⁷ See D 12.2.17pr.; D 12.2.28.10 (Paul 18 ed.).

⁸ It is apparently a suit on *iniuria* (Camodeca, *Tabulae Pompeianae Sulpiciorum*, 94), and though the point is disputed, this does not appear to be among the actions for which this type of oath was allowed. See Kaser/Hackl, *Das römische Zivilprozessrecht*, 268 n. 19; cf. D 47.10.5.8 (Ulpian 56 ed.); Roby, *Roman Private Law*, 296.

⁹ TPSulp 28: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 93–4; E. Metzger *Litigation in Roman Law* (Oxford 2005) 188 (no. 29).

¹⁰ Camodeca, *Tabulae Pompeianae Sulpiciorum*, 94.

¹¹ TPSulp 29: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 94–6. The words are only partly preserved, but the oath itself is apparent in the words *ex tui animi se[ntentia]*, at tab. 1, p. 2, l. 5 (see Cic. *Off.* 3.108) and *si sciens* at tab. 1, p. 2, l. 8 (see Livy 22.53.11). See Camodeca, *Tabulae Pompeianae Sulpiciorum*, 95.

¹² Gröschler proposes a solution in which Cinnamus assumes the role of *plaintiff* in the *vadimonium*. Gröschler, 'Der Eid', 124–5. He bases his argument on the ambiguity of roles in the formula *vadimonium quod X haberet cum Y* (see TPSulp. 28, page 2, ll. 1–4). He is certainly correct that the word *vadimonium* sometimes refers simply to the 'appointment' rather than to the contract itself (see, e.g., Cic. *Quinct.* 22 and, metaphorically,

Camodeca first presented this transaction as a *iusiurandum in iure*, that is, as a voluntary oath that was nevertheless performed *in iure*.¹³ Humbert, in reply, argued that the suit had not progressed so far as this: the parties' engagement to appear, mentioned expressly at the opening of TPSulp 28,

Cum ad vadimonium ventum esset, quod haberet Caius Sulpicius Cinnamus cum Iulio Fortunato . . .¹⁴

was, Humbert says, a private engagement for a first appearance, and as the matter had therefore not reached the magistrate, the *iusiurandum* was extra-judicial.¹⁵ Camodeca subsequently accepted Humbert's thesis and presented the transaction as extra-judicial.¹⁶ Thus the *iusiurandum* would have taken place 'on the way to litigation', and the general course of events described in

Juv. *Sat.* 3.297–9; Apul. *Met.* 3.12, 9.22). Thus an author might refer indifferently either to a plaintiff or defendant when saying 'had an appointment'. But one wonders whether the specific formula *vadimonium quod X haberet cum Y* is capable of conveying what Gröschler argues: this very formula recurs in other Muréchine documents where the subject of *habere* is almost certainly the promisor of the *vadimonium*, which is to say the defendant: TPSulp 18, 20, 21. These are all *testationes sistendi* ('attestations of appearance'), where the promisor is attesting his appearance.

¹³ Camodeca, *Tabulae Pompeianae Sulpiciorum*, 94. He titles TPSulp 28 'iusiurandum susceptum' on the understanding that Cinnamus was 'declaring himself ready to swear' (tab. 1, p. 2, ll. 6-7). See D 12.2.6 (Paul 19 ed.): *Remittit iusiurandum, qui deferente se cum paratus esset adversarius iurare gratiam ei facit contentus voluntate suscepti iurisiurandi. Quod si non suscepit iusiurandum, licet postea parato iurare actor nolit deferre, non videbitur remissum: nam quod susceptum est remitti debet.* (He "remits" an oath who, satisfied with his opponent's willingness to undertake the oath, indulges his opponent by tendering the oath when his opponent was prepared to swear it. But if the opponent did not undertake the oath, even if later he is prepared to swear but the plaintiff is unwilling to tender, the oath will not be regarded as remitted: for only an actual undertaking may be remitted.) Camodeca appears to be right, insofar as Cinnamus is signalling his willingness to undertake the oath. If however Cinnamus did eventually swear the oath, as Camodeca's reconstruction of TPSulp 29 suggests, then the transaction as a whole would not be the *iusiurandum remittere* described by Paul. See Kaser/Hackl, *Das römische Zivilprozessrecht*, 267.

¹⁴ Camodeca, *Tabulae Pompeianae Sulpiciorum*, 93.

¹⁵ Humbert, 'À propos du *iusiurandum* de T Sulp. 28 et 29', 122-4.

¹⁶ Camodeca, 'Per un primo aggiornamento', 183-4.

the documents, how ever the events are reconstructed,¹⁷ would not reflect the hand of the magistrate or events *in iure*.

Appointment of *cognitores*

A *cognitor* was a representative with a critical task: he stood in for a party, becoming in essence the litigant himself.¹⁸ A *cognitor* was appointed with formal words, but the sources leave open the question of when exactly these words were pronounced, and thus when the *cognitor* formally assumed his task and title.¹⁹ One form of words mentions the very action the plaintiff wishes to bring, and where this form is used the *cognitor* is appointed after proceedings *in iure* have begun (‘judicial’), but another form is more general, and leaves open the possibility that a *cognitor* appointed by this second form is appointed much earlier, perhaps earlier even than *in ius vocatio*.²⁰

Maria Zablocka expressed doubts that *cognitores* were ever appointed before *in ius vocatio*.²¹ In reply Aniello Parma set out to show that one of the documents in the Murécine archive describes two *cognitores* who were, in fact, appointed in this way.²²

¹⁷ Humbert, Wolf, and Gröschler offer several ‘extra-judicial’ alternatives in the cited works.

¹⁸ See Gai Inst 4.86–87; Kaser/Hackl, *Das römische Zivilprozessrecht*, 210–13.

¹⁹ For literature, see M. Zablocka, ‘La costituzione del “cognitor”’, 150 nn. 1–9.

²⁰ See A. Bürge, ‘Zum Edikt *De edendo*’ 1995 (112) ZSS (rA) 14–15; F. de Zulueta (ed.), *The Institutes of Gaius*, 2 (Oxford 1953) 275; Kaser/Hackl, *Das römische Zivilprozessrecht*, 211 n. 11. Both forms of words are in Gai Inst 4.83:

Cognitor autem certis verbis in litem coram adversario substituitur. Nam actor ita cognitorem dat: QUOD EGO A TE VERBI GRATIA FUNDUM PETO, IN EAM REM LUCIUM TITUM TIBI COGNITOREM DO; adversarius ita: QUIA TU A ME FUNDUM PETIS, IN EAM <REM> TIBI PUBLIUM MEVIUM COGNITOREM DO. Potest ut actor ita dicat: QUOD EGO TECUM AGERE VOLO, IN EAM REM COGNITOREM DO, adversarius ita: QUIA TU MECUM AGERE VIS, IN EAM REM COGNITOREM DO.

²¹ Zablocka, ‘La costituzione del “cognitor”’. Her conclusion is based on an analysis of the terminology in Gai Inst 4.83, (140–4), and an analysis of *editio actionis* (which, some believe, the *datio cognitoris* sometimes accompanied: 144–7).

²² A. Parma, ‘Sul momento della costituzione del “cognitor” nel processo romano’, 1997 (25) *Index* 439–45.

The document is a 'settlement agreement'²³ in a lawsuit for which we possess, remarkably, two other documents. The plaintiff, Lucius Faenius Eumenes, is suing one Caius Sulpicius Faustus *ex empto* and for a ring given as *arra*. We have these details from two documents prepared in the summer of 48. These two documents (both *vadimonia*) show that the parties anticipated having their case heard in Puteoli.²⁴ But shortly after these documents were prepared, the parties anticipated having their case heard in Rome instead of Puteoli. A transfer of this kind was ordinarily accomplished by a special kind of *vadimonium*, one in which a defendant promised to appear in Rome, rather than locally, at some time in the future.²⁵ We do not possess the very document recording Faustus' promise to appear in Rome, but we do possess an *allusion* to that promise in the settlement agreement, prepared some months after the other two documents. From the settlement agreement we understand that the promise to appear in Rome had not been performed by Faustus himself, but by his *cognitor*, in reply to a stipulation by Eumenes' *cognitor*.²⁶ The settlement agreement itself is the *chirographum* of the buyer Eumenes, who declares that he has agreed with Faustus to end the case. To effect the settlement, the *vadimonium* by which the parties' *cognitores* had agreed to meet in Rome must be withdrawn in some way; the parties opt to do so by declaring that Eumenes will indemnify Faustus' *cognitor*, should Faustus' *cognitor* fail to appear and an action be taken against him for his non-appearance.²⁷ Thus the sequence of events in the lawsuit is: (1) a promise by Faustus to appear in Puteoli; (2) a second promise by

²³ TPSulp 27: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 88–92; Metzger, *Litigation in Roman Law*, 188 (no. 28). Camodeca titles the document 'Conventio finiendae controversiae'.

²⁴ TPSulp 2: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 56; Metzger, *Litigation in Roman Law*, 182–3 (no. 11). TPSulp 3: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 56–7; Metzger, *Litigation in Roman Law*, 183 (no. 12).

²⁵ See Lenel, *Das Edictum Perpetuum*, § 6; R. Domingo, *Estudios sobre el primer título del edicto pretorio*, 2 (Santiago de Compostela 1993) 54–64; A. Rodger, 'Vadimonium to Rome (and Elsewhere)', 1997 (118) ZSS (rA) 160–96; D. Johnston, 'Vadimonium, the *lex Irnitana*, and the edictal commentaries', in U. Manthe and C. Krampe (eds.), *Quaestiones Iuris* (Berlin 2001) 111–23; Metzger, *Litigation in Roman Law*, 10–12, 22–27, 155–63.

²⁶ TPSulp 27, p. 2, l. 5 – p. 3, l. 4.

²⁷ TPSulp 27, p. 2, l. 12 – p. 3, l. 8.

Faustus to appear in Puteoli; (3) a promise by Faustus' *cognitor* to appear in Rome; (4) settlement agreement.

Parma's argument is based on the chronology of events. Parma's understanding is that all of the *vadimonium* in the lawsuit are private engagements for first appearances *in iure*. After the two proposed appearances in Puteoli were aborted, *cognitores* were appointed. Then followed the third *vadimonium*—also, according to Parma, a private engagement for a first appearance. According to the common opinion, private engagements such as these preceded summons by *in ius vocatio*.²⁸ Thus, Parma argues, both *cognitores* in the lawsuit were appointed before *in ius vocatio*, refuting the argument of Zablocka that *cognitores* were never appointed so early as this.

Extra-judicial acts

In both of the instances just discussed, the course of proceedings, and the role of the documents in those proceedings, have been deduced from the presence of a promise to appear (*vadimonium*). According to long-standing opinion, these promises usually took place before any proceedings had begun in the magistrate's court, and hence the appearance of the word 'vadimonium' in a document becomes the tell-tale that the document is extra-judicial. On this reasoning, such documents are not strictly speaking 'litigation documents', but 'pre-litigation documents'. They may anticipate what took place in the magistrate's court, but do not directly reveal how magistrates administered justice.

The documents should not be interpreted in this way. The error is in treating the *vadimonium* as extra-judicial, taking place before litigation, when in fact it is judicial, taking place *in iure*. Yet the error is easy to understand: for centuries this institution has been at the mercy of a slow trickle of evidence.²⁹ The idea

²⁸ Parma, 'Sul momento della costituzione del "cognitor"', 442, 444 nn. 13, 17. Parma cites the views of Giménez-Candela and Wolf who, in different ways, explain how the *vadimonium* and the summons by *in ius vocatio* work in concert with one another to ensure a first appearance *in iure*. See T. Giménez-Candela, 'Notas en torno al "vadimonium"', 1982 (48) *SDHI* 126–66; J. G. Wolf, 'Das sogenannte Ladungsvadimonium', in J. A. Ankum, et al. (eds.), *Satura Roberto Feenstra* (Fribourg 1985) 59–69. These views are discussed at length in Metzger, *Litigation in Roman Law*.

²⁹ For a full account of the evolution of this institution in the literature, see Metzger, *Litigation in Roman Law*, 12–17; E. Metzger, 'The Current View of the Extra-Judicial *vadimonium*', 2000 (117) *ZSS* (rA) 138–43.

that a *vadimonium* was a private, pre-litigation agreement between the parties developed at a time when the only available evidence was a handful of literary sources,³⁰ and the meaning of ‘*vadimonium*’ had to be got from context alone. It seemed to be a private event, not only because there was no magistrate visibly ordering it to be performed, but also because many believed—erroneously, as it turned out—that the Praetor had openly invited parties to use a *vadimonium* if they did not wish to use a formal summons.³¹ This was the general view before the discovery of Gaius’ *Institutes*.

Gaius was the first source actually to discuss the *vadimonium*, and he revealed what earlier scholars could have uncovered only with great difficulty: that a *vadimonium* was a promise to reappear *in iure*, ordered by a magistrate for parties with unfinished business.³² The *vadimonium* was therefore clearly an event that took place in the middle of litigation. The discovery of Gaius did not, however, put to rest the old view that the *vadimonium* was a private, pre-litigation agreement. The reason is that the *vadimonia* described in the literary sources appeared to have been performed without the participation of any magistrate, while Gaius’ account seemed to be describing the very opposite: a personal, face-to-face meeting with the magistrate, where the magistrate heard the details of the parties’ case and tailored a specific *vadimonium* for them. This is not in fact what Gaius describes, but this is how it seemed to earlier generations of scholars. The solution was to set aside and define a special category of *vadimonium*, different from the one described by Gaius: the wholly private, ‘extra-judicial *vadimonium*’. This is the *vadimonium* that has played such an important part in the

³⁰ The most significant was Cicero’s speech for Publius Quinctius, which contains several episodes where the parties or their *procuratores* are using *vadimonia*. These episodes were cited—and indeed are still cited—as examples of extra-judicial *vadimonia*. See Kaser/Hackl, *Das römische Zivilprozessrecht*, 231 n. 37. But compare J. Platschek, *Studien zu Ciceros Rede für P. Quinctius* (Munich 2005), 49.

³¹ This particular misapprehension is the ultimate source of the ‘extra-judicial *vadimonium*’: the belief that the edict had offered the plaintiff the choice of either summoning his defendant by *in ius vocatio*, or allowing his defendant to make a *vadimonium* for a later appearance. See D 2.6 (rubric) and Gai Inst 4.46 with Metzger, *Litigation in Roman Law*, 13–15. The Praetor had allowed defendants to give a *vindex* instead of appearing immediately; early writers had confused the *vindex* with *vadimonium*.

³² See below, text accompanying note 33.

interpretation of the Murécine archive and, in the examples given above, ultimately accounts for the ‘extra-judicial *iusiurandum*’ and the ‘extra-judicial *datio cognitoris*’.

Publicly ordered, privately performed

During the last century there were several important discoveries that improved our knowledge of Roman procedure, and this new evidence has helped us to make better sense of what Gaius is describing. Briefly, we can now see that when Gaius discusses postponements and *vadimonia*, he does not assume that every *vadimonium* is preceded by a face-to-face meeting between the litigants and the magistrate. Instead, postponements can be ordered *en masse*, for the benefit of all litigants who have come to the magistrate’s court. These are litigants who either cannot gain an audience, or do not wish for an audience on that day. The postponement procedure, moreover, is sufficiently regularized to permit the litigants to fashion their own promise, though the performance of the promise is indeed compelled by the magistrate.

This is what Gaius says:³³

Gai Inst 4.184. Cum autem in ius vocatus fuerit adversarius neque eo die finiri potuerit negotium, vadimonium ei faciendum est, id est, ut promittat se certo die sisti. 185. Fiunt autem vadimonia quibusdam ex causis pura, id est sine satisfactione, quibusdam cum satisfactione, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est, ut qui non steterit, is protinus a recuperatoribus in summam vadimonii condemnetur. Eaque singula diligenter praetoris edicto significantur. 186. Et siquidem iudicati depressive agetur, tanti fit vadimonium quanti ea res erit; si vero ex ceteris causis, quanti actor iuraverit non calumniae causa postulare sibi vadimonium promitti. Nec tamen pluribus quam sestertium CM fit vadimonium. Itaque, si centum milium res erit, nec iudicati depressive agetur, non plus quam sestertium quinquaginta milium fit vadimonium.

184. However, when the defendant has been called *in ius*, but matters cannot be completed on that day, ‘a *vadimonium* must be made to him’, that is, so that he promises to be pre-

³³ This is the text of Krüger and Studemund, but without Huschke’s emendation at 4.186. On the reasons for the omission, see Metzger, *Litigation in Roman Law*, 74–9.

sent on a particular day. 185. In some cases, moreover, *vadimonia* are plain, that is, without security, sometimes with security, sometimes with an oath, sometimes with *recuperatores* anticipated, in other words, so that if someone does not appear, he is condemned immediately for the *summa vadimonii*. These are all individually set out in detail in the Praetor's edict. 186. Now if it is the case that one is suing on a judgment or for a *sponsor's* payment, a *vadimonium* is made for as much as the matter is worth, but in all other cases it is made for as much as the plaintiff swears is being demanded him by *vadimonium* nonvexatiously. But a *vadimonium* is also made for not more than 100,000 sesterces. So for example if the matter is worth 100,000 and it is not an action on a judgment or for a *sponsor's* payment, a *vadimonium* is made for not more than 50,000.

Gaius is accurately describing, in barest outline, how litigants with unfinished business made engagements to reappear; how the defendant promised to appear on a certain day in the future; and how he promised in addition to pay the plaintiff a certain penalty if he did not appear. When we try to picture for ourselves precisely how these *vadimonia* were ordered and performed, two details in Gaius' account become important: the penalty, and the day of return. The amount of the penalty and the choice of day ought to vary from case to case, and it is not immediately obvious how a magistrate could order an engagement to take place on such specific terms without having seen the litigants personally.³⁴

The penalty

In 4.185 Gaius describes various different ways in which a defendant's appearance can be secured. It happens that the type of security that appears overwhelmingly in the surviving evidence is of the simplest kind: 'personal recognizance'.³⁵ The defendant promises to pay a penalty to the plaintiff, payment being conditional on the defendant's failure to fulfil his first promise, a

³⁴ There is no question, of course, that some postponements were preceded by a face-to-face meeting. See Gai Inst 3.224 with Metzger, *Litigation in Roman Law*, 92–4.

³⁵ The 'personal recognizance' type is not mentioned by Gaius, and quite possibly it was not an option offered by the edict, but simply adopted in practice as the most straightforward means of securing the first promise. See Metzger, *Litigation in Roman Law*, 68–9.

promise to return on the appointed day.³⁶ One might assume that when the magistrate orders the parties to return, he orders the performance of *both* promises.³⁷ If this were the case, the magistrate could not avoid meeting with the litigants personally, because different lawsuits call for different penalties. Even if the plaintiff had some freedom to select a penalty, the magistrate, it seems, is still left the task of ordering the performance of a specific stipulation-and-promise for a specific pair of litigants. Yet we notice that Gaius nowhere says that the magistrate actually orders the accessory promise to pay a penalty. Gaius speaks only about how great the penalty may be.

What Gaius is conveying only became clear with the discovery of documents recording the stipulation-and-promise of actual *vadimonium*.³⁸ The documents record the stipulation-and-promise in an unusual way. The general formula is this:³⁹

Vadimonium factum Numerio Negidio in <diem>, <loco>, <hora>.

<Summam> dari stipulatus est Aulus Agerius spondit Numerius Negidius.

The first sentence is expressed just as Gaius (4.184) would lead us to expect; if a magistrate ordered a '*vadimonium* to be made against the defendant', the litigants would perform the stipulation and dutifully record that a '*vadimonium* was made against the defendant'.⁴⁰ But the second sentence, standing alone as it does, is odd: the defendant, after all, has not simply 'promised to pay', but has promised to pay only if he does not appear. The second sentence in no way betrays the fact that the promise is condi-

³⁶ See D 45.1.126.3 (Paul 3 *quaest.*); D 45.1.81pr. (Ulpian 77 *ed.*).

³⁷ This does seem to be the assumption. Lenel, for example, assumes that the magistrate's permission is needed if the parties wish to omit the penalty clause. See Lenel, *Das Edictum Perpetuum*, 515, and the discussion in Metzger, *Litigation in Roman Law*, 69.

³⁸ The argument below is set out more extensively in Metzger, *Litigation in Roman Law*, 68–73.

³⁹ The formula is followed with remarkable consistency in the documents from Herculaneum and the Murécine archive. The one genuine departure is TPSulp 10. Also, some documents add items of information (e.g., the nature of the action is named in TPSulp 2, 15), though without disturbing the formula.

⁴⁰ This language has been studied exhaustively, most recently in J. Platschek, 'Vadimonium Factum Numerio Negidio' 2001 (137) *ZPE* 281–91; Metzger, *Litigation in Roman Law*, 55–64.

tional. The reason for this is that so-called praetorian stipulations, such as *vadimonia*, present special problems of *proof* when the stipulations are disobeyed.⁴¹ There may be, first, serious consequences for failing to perform them (e.g., trial by *recuperatores*⁴²) and, second, serious consequences for failing to fulfil the promise (e.g., being treated as *indefensus*⁴³). A litigant who wishes to prove that he did in fact obey the order to perform the stipulation, or the litigant who wishes to show that his opponent did not fulfil the promise in the stipulation, has, as evidence, only the document recording the stipulation. If the parties have added anything to what the magistrate has ordered them to do, it then becomes difficult, as a matter of proof, to distinguish what the magistrate ordered from what the parties voluntarily undertook to perform. Thus Ulpian, writing on praetorian stipulations:

D 46.5.1.10 (Ulpian 77 *ed.*). Sed et si quid vel addi vel detrahi vel immutari in stipulatione oporteat, praetoriae erit iurisdictionis.

Moreover, if there is to be anything added, taken away, or changed in the stipulation, that is a matter for the Praetor's jurisdiction.

D 45.1.52pr (Ulpian 7 *disp.*). In conventionalibus stipulationibus contractui formam contrahentes dant. Enimvero praetoriae stipulationes legem accipiunt de mente praetoris qui eas proposuit: denique praetoriis stipulationibus nihil immutare licet neque addere neque detrudere.

In private stipulations the contracting parties determine the form of the contract. But praetorian stipulations take their force from the will of the Praetor who published them, and accordingly one may not change anything in a praetorian stipulation either by adding or taking away.

Ulpian's warning reminds us that, in Roman litigation, what a magistrate ordered to be done must sometimes be inferred from what the parties said they did. Hence in a case like this it is in the interests of both parties to observe the formula faithfully, and record separately what they have voluntarily added (the penalty),

⁴¹ The sources and literature are given in Metzger, *Litigation in Roman Law*, 66–8.

⁴² *Lex de Gallia Cisalpina*, col. 2, ll. 21–4 (*Verweisungs vadimonium*).

⁴³ This was the central issue in the *Pro Quinctio*.

avoiding any suggestion that they have altered what they were ordered to do (reappear on such-and-such a day).

The main point is that we understand Gaius better with the help of these new documents. The magistrate orders the parties to perform a stipulation to reappear, but he does not order the parties to include an accessory promise for a penalty.⁴⁴ This frees him from having to concern himself in the details of a single case, and he does not, therefore, have to conduct a face-to-face meeting with the parties on this account.⁴⁵

The day of return

The most important variable in the postponement regime described by Gaius is, of course, the day of return. When we read Gaius we assume that, since some litigants will return on one day and other litigants on another, a magistrate has no choice but to order postponements case-by-case. Many years ago, however, Huschke and Karlowa noticed several texts in which *vadimonia* were being ordered for the day-after-the-next.⁴⁶ It was most obvious in this text of Gaius:⁴⁷

D 2.11.8 (Gaius 29 ed. prov.). Et si post tres aut quinque pluresve dies, quam iudicio sisti se [sc. vadimonium] reus promisit, secum agendi potestatem fecerit nec actoris ius ex mora deterius factum sit, consequens est dici defendi eum debere per exceptionem.

And if, after three or five or more days from the day the defendant promised the *vadimonium*, he makes it possible for suit to be brought against him, and the plaintiff's claim has not been made worse by the delay, the result is that he ought to be given an *exceptio* by way of defence.

The suggestion here is that, by some means, the defendant had been ordered to perform *vadimonia* for appearances on successive, alternate days. Neither Huschke nor Karlowa had available the

⁴⁴ But see note 34 above.

⁴⁵ Certain related issues, such as why a defendant would wish to include a penalty, and how a plaintiff determines what sum to demand, are treated in Metzger, *Litigation in Roman Law*, 73–87.

⁴⁶ P. E. Huschke, *Das alte Römische Jahr und seine Tage* (Breslau 1869) 317; O. Karlowa, *Der römische Civilprozess zur Zeit der Legislationen* (Berlin 1872) 360–5.

⁴⁷ See also the text of Macrobius, cited in note 71 below.

sources to decipher the overall regime. It was not until 1981 and the discovery of the *lex Irnitana*, a first-century town charter from Baetica, that the details of postponing to the day-after-the-next came to light.⁴⁸

The *lex Irnitana* assigns various tasks to the local magistrate charged with administering justice. Among his tasks is the duty to ‘grant *intertium*’ every day.⁴⁹ The statute does not spell out the specifics, but we can deduce that granting *intertium* requires him to order a postponement to the day-after-the next, at the end of a judicial sitting.⁵⁰ The postponement is a general one, for the benefit of any waiting litigants with unfinished business: a magistrate who simply leaves at the end of the sitting, without ordering the litigants to return, has put the litigants, and particularly the plaintiffs, in a precarious position. We can appreciate how important it was for the magistrate to perform these postponements when we see that the Praetor in Rome offered *restitutio* to litigants in Italy who had been wrong-footed by the delays or inaction of local magistrates:

D 4.6.26.4 (Ulpian 12 *ad edictum*). Ait praetor: ‘sive cui per magistratus sine dolo malo ipsius actio exempta esse dicitur’. Hoc quo? Ut si per dilationes iudicis [sc. magistratus] effectum sit, ut actio eximatur, fiat restitutio. Sed et si magistratus copia non fuit, Labeo ait restitutionem faciendam. ‘Per magistratus’ autem factum ita accipiendum est, si ius non dixit: alioquin si causa cognita denegavit actionem, restitutio cessat: et ita Servio videtur. Item per magistratus factum videtur, si per gratiam aut sordes magistratus ius non dixerit.

⁴⁸ The text of the *lex Irnitana*, with a translation into English and commentary, is in J. González, ‘The *lex Irnitana*: A New Copy of the Flavian Municipal Law’ 1986 (76) *JRS* 147–243. The postponement procedure is described in chapters 90 to 92 of the statute. We are fortunate to know, from chapter 91, that the postponement procedure we read in the *lex Irnitana* was also a feature of *iudicia legitima* at Rome.

⁴⁹ What I give below is the briefest summary of my arguments in Metzger, *Litigation in Roman Law*, 111–35, and ‘A Fragment of Ulpian on *intertium* and *acceptilatio*’, 2006 (72) *SDHI* (in press). For another use of postponements *in iure* to the day-after-the-next, see A. D. E. Lewis, ‘*Advocatio*: A Postponement *in iure*’, in R. van der Bergh (ed.), *Ex Iusta Causa Traditum: Essays in Honour of Eric H. Pool* (Pretoria 2005) 215–28.

⁵⁰ The magistrate who is charged with administering justice pays a single fine for each day on which he was supposed to grant the postponement and did not. *Lex Irni.*, c. 90, ll. 37–40.

The Praetor says ‘or if it is shown that an action was lost because of the magistrates, without fraud on [the claimant’s] part’. Why is this included? So that *restitutio* can be given when an action is lost by the delays created by a [magistrate]. Labeo says *restitutio* will also be given if magistrates were not available. Note that the words ‘because of the magistrates’ should be understood to include the failure to administer justice: if, on the other hand, the magistrate denied the action *causa cognita*, there will be no *restitutio*: this is Servius’ opinion. Moreover, something is regarded as done ‘because of the magistrates’ when the magistrate does not administer justice out of bias or corruption.

We imagine something like the following: a plaintiff summons his defendant *in iure*, but when they arrive the crowds are so great, or the magistrate so lazy or corrupt, that the plaintiff is not able to bring his case to *litis contestatio*. If his case is then time-barred, or his defendant makes himself scarce or dies (and the action does not survive to his heir), the plaintiff deserves *restitutio*. What may save the plaintiff’s action is a postponement—not, perhaps, to a day of his own choosing, since he has not had the luxury of an audience with the magistrate—but a postponement to the day-after-the-next.⁵¹ Of course the regime will be effective only if the defendant, at the conclusion of the sitting, is required to perform a *vadimonium*. The *vadimonium* is not mentioned among the provisions on *intertium* in the *lex Irnitana*, but there exist many examples⁵² of ‘*vadimonia* for the day-after-the-next’—not least the text of Gaius on the provincial edict, just quoted—so that we may safely assume that *vadimonia* accompanied this postponement regime.⁵³

⁵¹ The one-day gap may have been useful to allow *notice* of the day the case resumed. This would be necessary if a party appeared through a representative at the initial appearance, but had to appear in person for the final appearance (culminating in *litis contestatio*). This thesis is developed in Metzger, ‘A Fragment of Ulpian’.

⁵² These sources are discussed exhaustively in Metzger, *Litigation in Roman Law*, 99–110.

⁵³ Seckel suggests that, in its original state, the text of Ulpian just quoted included clauses on ‘failing to order *vadimonia*’. See *Index Interp.*, col. 59. The reason for his suggestion, it appears, is that a magistrate who fails to order the performance of *vadimonia* puts a plaintiff’s action at risk in the same way as other kinds of inactivity do so. When this paper was presented, John Richardson made the good point that Seckel’s emendation is redundant. Cf. Metzger, *Litigation in Roman Law*, 119.

For present purposes, the great value in the *lex Irnitana* is in the way it informs our understanding of Gaius' description of the *vadimonium*. Earlier scholars had looked at various instances where parties had performed *vadimonia*, and had concluded that these *vadimonia* were performed outwith litigation. We can now see that a *vadimonium* was ordered by the magistrate—thus within litigation—but could be performed without the magistrate's personal attention. The magistrate was not, as a rule, interested in the penalty for non-appearance, and the day of return was regularized:⁵⁴ this gave the magistrate the freedom to order postponements *en masse*. In short, we do not need to presume the existence of a second *vadimonium*, different from the one described by Gaius.

Publishing the day

The effectiveness of the postponement regime, outlined above, depends on the ability of the magistrate to inform litigants of the day on which they ought to return. If the litigants cannot depend on obtaining a face-to-face meeting with the magistrate, then the day of return ought to be published in a way that permits the litigants to gain the information on their own. There are two relevant items of evidence on the matter of publication. One item—far and away the most important one—has been discussed a good deal in the literature: the duty of the municipal magistrate to 'publish *intertium*', described in the *lex Irnitana*.⁵⁵

Lex Irni., c. 90, ll. 27–31. Quicumque in eo municipio duumvir iure dicundo praerit . . . intertium dato. Idque proscriptum in eo loco, in quo ius dicet, maiore parte cuiusque diei per omnes dies, per quos intertium dari debebit, habeto ita ut de plano recte legi possit.

Whichever *duumvir* in that *municipium* is in charge of administering justice shall grant three-day postponements. And he shall publish it, in the place where he administers justice, for the greater part of each day, throughout all days on which

⁵⁴ To be sure, some waiting litigants would be able to decide on their own day for reappearance. See D 2.8.8pr. (Paul 14 *ed.*) with Metzger, *Litigation in Roman Law*, 96–7. Cf. Platschek, *Studien*, 47.

⁵⁵ For more extended arguments and literature, see Metzger, *Litigation in Roman Law*, 113–14, 133–5.

he is supposed to grant three-day postponements, so that it can be read from ground level.

The text does not say what exactly must be published, and no answer can be certain. Under the circumstances, one would expect the magistrate to make known the day of return in some way. There are many ways in which this could be done.⁵⁶ The most straightforward way to make this known is to require the magistrate, each day, to publish the specific day on which parties are expected to return. This has the advantage of saving the parties from negotiating the judicial calendar for themselves.⁵⁷ One can only guess at the specific language to be published. One possibility is for the day to be published as part of the *vadimonium* order, e.g.,

In VIII kalendas Iulias vadimonia fieri iubebo.

If this statement, or something like it, were published for the greater part of each day on which justice was administered, waiting litigants would know precisely how to perform and record their *vadimonia*.

One last and somewhat obscure piece of evidence may help to complete the picture. In the first book of his commentary on the edict, Paul gives an isolated rule that, on its own, gives hardly a trace of its original context.

D 50.16.2.1 (Paul 1 *ad edictum*). ‘Cuiusque diei maior pars’ est horarum septem primarum diei, non supremarum.

‘The greater part of each day’ means the first seven hours, not the last.

Our starting point is the assumption that some part of the edict directed that something should be done for the greater part of each day, and that Paul’s rule is attempting to explain precisely what this means.⁵⁸ Lenel noticed that similar, formulaic lan-

⁵⁶ See the literature cited in E. Metzger, *A New Outline of the Roman Civil Trial* (Oxford 1997) 53 n. 63.

⁵⁷ This follows the suggestion of A. Rodger, ‘The *lex Irnitana* and Procedure in the Civil Courts’ 1991 (81) *JRS* 83–4, who has nevertheless put forward a different interpretation of these postponements.

⁵⁸ Johnston has argued that a substantial amount of the commentary we read in the opening books of the edictal commentaries was not edictal commentary at all, but rather commentary on local jurisdictional limits set forth in statutes. See Johnston, ‘*Vadimonium*’, 115, 118, 123. But Johnston does include this fragment: *ibid.*, 122.

guage is used in several texts to describe publication by a magistrate,⁵⁹ and this suggested that Paul was speaking about publication.⁶⁰ The discovery of the *lex Irnitana* brought to light more examples of the formulaic language (including the one quoted above),⁶¹ each example relating to publication, and to that degree the *lex Irnitana* supports Lenel. Thus both Domingo and Rodger, with the benefit of the *lex Irnitana*, have followed Lenel and suggested that Paul is speaking about publication.⁶² Rodger has gone further and has tried to discover precisely where in Paul's commentary this fragment was found.

A fragment from the same book of Paul, placed in the Digest immediately before the fragment under discussion, considers the distinction between 'urbs' and 'Roma'.⁶³ Rodger makes a strong case that this fragment is dealing with the subject of *vadimonium* to Rome.⁶⁴ A fragment of Ulpian, placed in the Digest immediately after the fragment under discussion, also deals with *vadimonium* to Rome.⁶⁵ Assuming no rearrangement of fragments in the editing, the fragment under discussion ought to be discussing *vadimonium* to Rome, or more specifically, some aspect of publication relating to *vadimonium* to Rome.⁶⁶ But what exactly was to be published for 'the greater part of each day'? Rodger suggests that the information to be published perhaps related in some way to the timing of the prospective appearance in Rome. The local magistrate might, for example, publish the day

⁵⁹ See *Lex repetundarum*, l. 65 (*Roman Statutes*, no. 1, 72: 'maiore parte diei'); *Tabula Heracleensis*, l. 16 (*Roman Statutes*, no. 24, 363: 'maiolem partem diei').

⁶⁰ Lenel, *Das Edictum Perpetuum*, 54 n. 13.

⁶¹ *Lex Irni.*, c. 85, tab. IXB, ll. 36–7; c. 86, tab. IXC, ll. 22–3; c. 90, tab. XA, ll. 29–30.

⁶² Domingo, *Estudios*, 56; Rodger, 'Vadimonium to Rome', 173–75; see also Johnston, 'Vadimonium', 122 (citing Rodger). Domingo cites Paul's text as relevant both to the publication of *intertium*, as described in the *lex Irnitana*, and the publication of a *vadimonium* to Rome, as described in the *lex de Gallia Cisalpina*, col. 2, ll. 21–2 (see *Roman Statutes*, no. 28, 466). Though I argue below, like Domingo, that Paul's text is relevant to the publication of *intertium*, Domingo's understanding of *intertium* is utterly different from my own, and thus my understanding of what must be published 'for the greater part of each day' differs from Domingo's also.

⁶³ D 50.16.2pr. (Paul 1 ed.): 'Urbis' appellatio muris, 'Romae' autem continentibus aedificiis finitur, quod latius patet.

⁶⁴ Rodger, 'Vadimonium to Rome', 169–73.

⁶⁵ D 50.16.3 (Ulpian 2 ed.).

⁶⁶ Rodger, 'Vadimonium to Rome', 173–5.

for which he would grant, on that particular day, a *vadimonium* to Rome, with due allowance for both the distance and the restrictions of the calendar.⁶⁷ This was conjecture on Rodger's part,⁶⁸ but we can see now that it is somewhat better than conjecture since, as was discussed above, the *lex Imitana*, in analogous fashion, appears to require the publication of the day of return for those litigants who need to perform *vadimonia*.

For present purposes the question is whether Paul's 'seven-hour rule' held also for postponements *in iure*, that is, whether a local magistrate was expected to publish the day of return in a conspicuous place for, at least, the first seven hours of the day.⁶⁹ Without evidence—and there is none—the most we can say is that this rule would be highly desirable. The reason is that litigants depend to a high degree on the existence of a regularized postponement procedure. No litigants can be assured that a magistrate will attend to their business on a given day, and no plaintiff can be assured that his defendant will return voluntarily. The very lawsuit is at stake: we know this because the Praetor offered *restitutio* for actions lost through the delays and inaction of local magistrates.⁷⁰ Given the uncertainties, what the litigants need, at the very least, is an assurance that the magistrate will order their return on another day, and thus perform the bare minimum needed to keep their lawsuit alive. The rule cited by Paul would assure them that, on days when justice is administered, they can count on the magistrate to perform this bare minimum for the

⁶⁷ Rodger, 'Vadimonium to Rome', 174.

⁶⁸ 'There is, of course, no way in which we can know what matter relating to *vadimonium* was to be published for the greater part of each day' Ibid.

⁶⁹ There is no reason to suspect that Paul, in D 5.16.2.1, might actually be speaking of the ordinary *vadimonium*, rather than the *vadimonium* to Rome. The opening title of the edict does contain a good deal of material about purely local matters, but even if one accepts that this part of the edict regulated the extent of local jurisdiction (see Domingo, *Estudios*, 26–54, 88), or that some of the material in this part of the edict was included purely for local consumption (i.e., in anticipation that the edict as a whole was republished in individual communities: Johnston, 'Vadimonium', 114, 123), an edict on publishing days-of-return in local courts probably belongs elsewhere. In the edictal commentaries, the ordinary *vadimonium* is discussed in Ulpian 6, and Paul 6 and 7, *ad edictum*. Delays by a local magistrate administering justice are given in Ulpian 12 *ad edictum* (see D 4.6.26.4). Local statutes of course are also a likely home for provisions on publishing days-of-return in local courts.

⁷⁰ D 4.6.26.4 (Ulpian 12 *ed.*), quoted above.

first seven hours of the day.⁷¹ Therefore litigants who arrive to see an insurmountable crowd ahead of them, or who are simply impatient to wait, can read the magistrate's words, e.g., *In VIII kalendas Iulias vadimonia fieri iubebo*, make their *vadimonium*, and leave. The magistrate would be present to administer justice, in at least this very minimal way, for the first seven hours of the day.⁷²

The Murécine archive as a window *in iure*

The foregoing is the briefest sketch of postponements *in iure*. In many respects it departs from the common opinion. The common opinion developed over a time when information on procedure was very poor. Ideas about what a *vadimonium* was, and what it was used for, predated by several centuries the discovery of the first solid evidence describing it, Gaius' *Institutes*. And the discovery of the *Institutes*, unfortunately, did not immediately help matters: what Gaius *seemed* to be describing (face-to-face meetings with the Praetor) was too much at odds with the *vadimonium* the literature had conceived for itself (private agreements). As a result these private agreements were never discarded, but instead survived in the textbooks as a distinct species of *vadimonium*. This has left a very peculiar legacy. The *vadimonium* that is

⁷¹ Macrobius suggests that the calendar recognized a category of days, *comperendini dies*, on which a magistrate performed *only* this bare minimum; these were days on which 'vadimonium licet dicere.' See Macrobius, *Sat.* 1.16.14; Metzger, *Litigation in Roman Law*, 101–5. Cf. the interpretation of Macrobius in Karlowa, *Der römische Zivilprozess*, 364.

⁷² Tablets from Herculaneum and the Murécine archive, as well as some literary sources, provide evidence for the times of day at which litigants arrived, or at least anticipated arriving. Among the *vadimonia* and *testationes sistendi* from the Murécine archive, the third hour recurs most frequently, but there are also single examples with the first, second, fourth, and fifth hours, and two examples with the ninth hour. See Camodeca, *Tabulae Pompeianae Sulpiciorum*, 51. From the Herculaneum tablets, there are two (?) examples with the second hour (TH 13 = (?) TH 14), and one example each with the third (TH 15) and fifth (TH 6) hours. (For the texts, see the sources cited in Metzger, *Litigation in Roman Law*, 190–1, nos. 34–37.) The literary sources have the fourth hour (Hor. *Serm.* 1.9) and some time before the fifth hour (Mart. *Ep.* 8.67). (On the literary sources see the discussion in D. Cloud, 'The Pompeian Tablets and Some Literary Texts', in P. McKechnie (ed.), *Thinking Like a Lawyer* (Leiden 2002) 235–7.) It is difficult to know whether any meaning can be got from these examples, particularly since Paul's rule, on the construction suggested here, serves only as guidance to litigants who wish to 'play it safe'.

directly and repeatedly attested in the juristic literature, we are given to understand, has left behind no epigraphic evidence, while the other, private, *vadimonium*, of which no jurist speaks at all, has left behind an abundance of such evidence. The greatest store of these is in the Murécine archive.

The mischief is not confined to interpreting *vadimonium* documents wrongly.⁷³ In a document of any character, an allusion to *vadimonium* will be an important point of reference in the chronology of events, and if the allusion is misunderstood as a private, pre-litigation event, the true chronology is lost. This is a great shame, because the Murécine archive promises to give us a good deal of new information about how business was conducted *in iure*, and this particular misunderstanding, in effect, puts this new information out of reach. The two examples given above, *iusiurandum* and *datio cognitoris*, illustrate the problem: the appearance of the word 'vadimonium' in the cited documents does not mark the *iusiurandum* as an extra-judicial *iusiurandum*, or the *cognitores* as extra-judicial *cognitores*. These documents are describing events *in iure*.

In the case of the *cognitores*, the consequences of this misunderstanding are considerable. TPSulp 27 should not be cited as evidence of extra-judicial *cognitores*, but the problem is deeper than this. What is unique about the three documents in the case (TPSulp 2, 3, 27) is the fact that the parties did not simply decide to bring their case in Rome, but first brought their case locally, and then were ordered to Rome by the magistrate. No other collection of documents shows this pattern of events in a single case, so far as I am aware. Now it is conceivable that the magistrate ordered the transfer at the wishes of the parties, but it is equally possible—and perhaps likely—that he did so after an examination of the case. The reason is simply that defendants do not usually relish being sent to defend in distant forums, nor should they be sent there on a whim. Transfers of this kind often took place when a case exceeded the local jurisdictional limit,⁷⁴

⁷³ Though there alone the threat of mischief is considerable. Elsewhere I have discussed how certain details appearing in the *vadimonium* documents reveal matters that took place *in iure*, matters of which we were previously unaware. See Metzger, *Litigation in Roman Law*, 82–7.

⁷⁴ The principal evidence is the *lex de Gallia Cisalpina*, c. 21, which allows the local magistrate to order *vadimonia* to Rome in actions on *certa pecunia* that exceed the local jurisdictional monetary limit; and the *lex Irnitana*, c. 84, which gives the local magistrate a 'residual' power to order *vadimonia* to the provincial governor in cases that otherwise exceed his

and that may well have been the situation here.⁷⁵ Hence in these three documents we *may* have an example of something common in practice, but otherwise unattested: a case brought locally which, on the examination of the magistrate, belonged in Rome.⁷⁶ And the documents may be more useful still, on the subject of *cognitores*. Gaius' second, more general formula for the appointment of *cognitores*, a formula which omits to name the specific action,⁷⁷ would be suitable for this kind of case, where the local magistrate cannot confidently anticipate the specific action the Praetor would be willing to grant.

Whatever the truth, the documents provide a rare and fascinating view into events *in iure*.

own jurisdictional powers (based on both subject matter and the amount in controversy). Also relevant is the *lex agraria*, ll. 34, 36, which gives the power to local magistrates in Italy to exact *vadimonia* in specific cases which certain magistrates in Rome had the sole competence to hear. On the Este Fragment, which preserves no provision on *vadimonium* but which at one time may have done so, see Metzger, *Litigation in Roman Law*, 24–6.

⁷⁵ See Metzger, *Litigation in Roman Law*, 82–3; Wolf, 'Der neue pompejanische Urkundenfund', 92; idem, 'Aus dem neuen pompejanischen Urkundenfund: Die Streitbeilegung zwischen L. Faenius Eumenes und C. Sulpicius Faustus', in *Studi in onore di Cesare Sanfilippo*, 6 (Milan 1985) 782–3. The jurisdictional limit in Puteoli, however, is unknown. The best evidence that this case exceeded the local limit is the very existence of TPSulp 27 but, assuming this is the case, we do not know whether it was pushed over the limit by the additional claim for the recovery of the *arra*, or whether the magistrate, on review of the case, believed that Eumenes' good-faith claim would ultimately exceed the local limit.

⁷⁶ There may be an analogous case in the dossier on 'Petronia Iusta' from Herculaneum. See Metzger, *Litigation in Roman Law*, 155–63, and especially 161–3. The dossier includes a series of witness statements which appear to have been prepared before three (or possibly only two) *vadimonia* to Rome were ordered by the magistrate. I have argued that the witness statements may have been prepared for the benefit of the magistrate who, on this theory, is charged with making a decision whether to order the case to Rome. The dossier lacks, however, any *vadimonia* for local appearance, such as we find in the case of Eumenes and Faustus.

⁷⁷ Above, note 20.