Having an Audience with the Magistrate

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Abstract. During the classical period of Roman law, civil lawsuits were divided into two proceedings: a brief proceeding before the magistrate, who decided certain preliminary matters, and a longer proceeding before a judge, who tried the case. The first proceeding is said to take place "in iure," which roughly means "in the magistrate's court." Unfortunately the figure "in court" has been understood too strictly to refer to the whole of the first phase, and this has given rise to the misunderstanding that the whole of the first phase took place in the magistrate's presence. The better view is that the first phase took place both in, and around, the magistrate's tribunal. This paper discusses several institutions of Roman civil procedure where the better view is evident. The paper concludes with a discussion of a first-century settle agreement from Puteoli; the settlement agreement illustrates the better view.

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A CIVIL lawsuit in classical Rome began with a short proceeding before the praetor, who helped the parties to compose their claims and defenses before he handed the matter over to a judge for trial.[1] The same short proceeding took place in the courts of provincial governors and local judicial magistrates in small towns in Italy and the empire. The Roman sources use the term *in iure* to refer to this proceeding. The term broadly means "in court" or more precisely "in the magistrate's court."[2] The modern literature has adopted the term, perhaps too hastily, to refer to the whole of the first phase, distinct from the second phase, before the judge.[3] Yet to use the term in this way suggests that the parties, from the beginning of the lawsuit to the conclusion of the first phase, are

[1] Here and elsewhere 'classical Rome' refers to Rome from the late republic to the middle third century CE. This marks a period in which the formulary procedure prospered and then declined, and is conspicuous for the great juristic works it produced, as well as a refined machinery of private justice.

[2] See e.g. D.1.1.11 (Paul., 14 *Ad Sab.*): *Alia significatione ius dicitur locus in quo ius redditur, appellatione collata ab eo quod fit in eo ubi fit*.

[3] See e.g. Arangio-Ruiz (1935) 3; Cannata (1982) 142-52; Cervenca (1983) 54; Seidl (1962) 161. To use the term in this way is not wrong, just an unfortunate shorthand.

"in the magistrate's court." The true picture is more complicated. During the first phase, the parties participated in a series of events, some taking place under the magistrate's supervision, others taking place privately, and still others taking place privately but with the magistrate's influence ever present. In short, not every event in the first phase took place "in the magistrate's court."

This would be nothing more than a point of terminology, but for the fact that the underlying assumption ("the first phase takes place in the magistrate's court") has so strongly affected our reading of the evidence and ultimately our reconstruction of Roman civil procedure. If the whole of the first phase took place before the magistrate, then any activity outside his presence, even activity that was obviously forensic in nature, was not properly part of the litigation. As it happens, much of this activity survives to us in documents. We therefore risk interpreting these documents without due appreciation of their relationship to the law of procedure. At worst, we risk interpreting them as examples of purely private decision-making. More generally, if the only meaningful events took place in the magistrate's presence, it is difficult to know where matters stood if the parties, for one reason or another, did not win an audience. Was their suit aborted? Was it "carried over" to the next sitting?

Until recently the common view stood by the proposition that a lawsuit's first phase took place entirely in the magistrate's court, and avoided any difficulties by drawing a very simplified picture of the proceedings. It was the common view that when a defendant had been summoned *in ius*, the parties appeared before the praetor straight away, and that the proceeding was usually completed on the day it began.[4] This simplified picture relied on a very small quantity of evidence, much of it drawn from the *Digest*. The evidence of the *Digest*, unfortunately, reflects the interests and priorities of Justinian's compilers, who not surprisingly were more interested in what magistrates did, and in the sources of the magistrates' authority, than in detailing day-to-day litigation in a system that had all but disappeared three hundred years earlier. Nevertheless, new evidence eventually improved our understanding, and the death of the common view's simplified

[4] See e.g. Talamanca (1990) 325-326: "Il convenuto *vocatus in ius* è tenuto a comparire immediatamente dinanzi al magistrato […] Dopo che le parti erano comparse dinanzi al pretore, la fase *in iure* della procedura si esauriva generalmente nel giorno stesso della presentazione." Compare Kelly (1966) 119 (doubting that cases could typically have passed through the *in iure* stage in a single day).

picture we owe largely to the discovery of waxed tablets from Herculaneum and Puteoli.[5] These documents record a great variety of different forensic transactions: oaths, stipulations, settlements, notice-giving, and many others. The old common view is hardly recognizable in this new evidence.

This essay discusses the mixed public and private nature of the first phase of a civil lawsuit in classical Rome. It presents a sample of evidence in order to underscore the misunderstanding in the statement "the first phase takes place in the magistrate's court." At bottom the misunderstanding is a confusion of space and time. A person can be actively engaged in a live lawsuit, properly commenced under the rules of the civil law, but nevertheless not in the presence of a magistrate. The phrases "in court" and "out of court," though commonly used in discussing Roman litigation, are ambiguous, referring as they do either to the state of being in litigation, or being in a certain space. The opening sections of this essay give a brief sketch of the first phase of a civil lawsuit while highlighting a few examples of events that are respectively private, *in iure*, or hybrid. The last section briefly examines a single document from Puteoli. The document records an oath, and the time and place of the oath nicely illustrate how two parties, even outside the magistrate's presence, are yet in the thick of litigation.

[5] The two finds contain collections of waxed wooden tablets that were originally attached as diptychs and triptychs. (This essay follows convention and refers to whole of the diptych or triptych as a "document.") The tablets from Herculaneum were discovered in the 1930s; texts were first published in the late 1940s and 1950s under the editorships of Giovanni Pugliese Carratelli and Vincenzo Arangio-Ruiz. In recent years Giuseppe Camodeca has re-edited many of these tablets, and a new edition is forthcoming. A catalogue of the Herculaneum tablets may be found in Rowe (2001), along with a bibliography. The Herculaneum corpus is best known for preserving a series of documents relating to a lawsuit brought by a young woman, Petronia Iusta. The literature on this lawsuit is enormous; a summary of the facts and a selection of literature may be found in Metzger (2005) 155-63; Lintott (2002) 560-565. The Puteoli tablets, a selection of which is discussed in this essay, were discovered in 1959 near Pompeii. These have been meticulously edited and published with photographs and extensive supporting materials in Camodeca (1990), with a useful review at Rowe (2001), and a more brief review at Metzger (2001). The Puteoli corpus comprises documents recording private transactions and events in litigation; its contribution to our understanding of civil procedure is enormous. An extensive treatment of Roman tablets generally, and the Campanian tablets in particular, may be found in Meyer (2004).

Summons and delay

From the time of the Twelve Tables, and throughout the period of the formulary procedure, a lawsuit would typically begin with *in ius vocatio*.[6] This means simply that the plaintiff would bring the defendant *in ius*. If the defendant did not come, and did not offer a suitable person (*vindex*) to represent him, the magistrate might grant an action against the defendant, or indeed threaten additional remedies.[7]

The common view is that summons by *in ius vocatio* was not only the means by which lawsuits typically began, but also the formal commencement of proceedings *in iure*. This view, however, credits the summons with greater significance than it possessed. The true picture is less tidy. For example, it was possible for a lawsuit to begin with a relatively informal "notice of the action," under which the plaintiff, by one of various means, informs the defendant about the action he intends to bring against him.[8] In such cases the notice, not the summons, would mark the beginning of the proceedings. A second example: a defendant might be *vocatus* more than once in the same lawsuit. There is a famous example in Horace (*Sat.* 1.9), where he relates how he was pestered in the street by a man who followed him about, even though the man was due to appear *in iure*. The man had apparently been *vocatus in ius* on some earlier occasion, because the appointment he was avoiding was not his first appointment in that lawsuit. Nevertheless, as he and Horace walk about, his adversary finds him and *rapit in ius* (1.9.77).[9]

The third example is an especially significant one. We know that *in ius vocatio* was not the formal commencement of proceedings *in iure*, because a magistrate was not necessarily present to receive litigants. From a text of Ulpian we learn that the praetor gave a special remedy to litigants in local courts in Italy. Italian litigants, apparently, would occasionally arrive at

[6] *XII Tab*. 1.1-4. The text, commentary, and sources for *in ius vocatio* in the Twelve Tables may be found in Crawford (1996) vol. 2, 584-90. The relevant *Digest* titles are *Dig.* 2.4-7.

[7] See Kaser and Hackl (1996) 222-225. Some textbooks recite an alternative to this procedure, under which the defendant makes a voluntary contract (a *vadimonium*) with the plaintiff to appear in court at a certain time. This view predates the discovery of documents from Herculaneum and Puteoli, and is disproved by them. See Metzger (2005) 7-64. The arguments are well summarized in these reviews: Scott (2007); Robinson (2006); Harries (2007); Meyer (2008).

[8] Kaser and Hackl (1996) 220. This is discussed at length in the next section.

[9] See the extended discussion at Metzger (2005) 166-171.

the magistrate's court, but could not have an audience with the magistrate, either because the crowds were too great, or because no magistrate was administering justice at that time. A plaintiff could feel the delay very keenly, because he might be under pressure to bring an action within a certain period of time. To the plaintiff who has lost his action in this unfortunate way, the praetor promises *restitutio in integrum*:

> Ait praetor: "sive cui per magistratus sine dolo malo ipsius actio exempta esse dicetur." 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. (*Dig.* 4.6.26.4 [Ulp., *12 Ad ed.*])
>
> 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 mean 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" also when the magistrate does not administer justice out of bias or corruption.

The lesson is that *in iure* is sometimes a privileged place to be, and summons by *in ius vocatio* is not necessarily the "formal commencement" of anything at all.[10]

Editio actionis

One of the earliest events in the first phase of a lawsuit might take place far from any magistrate; it was a private matter between the parties. A plaintiff was obliged to tell the defendant about the action he intended to bring.

[10] For further discussion of *restitutio* in this text, and the very different remedy employed in first-century Spain, see Metzger (2005) 117-119.

> Qua quisque actione agere volet, eam edere debet: nam aequissimum videtur eum qui acturus est edere actionem, ut proinde sciat reus utrum cedere an contendere ultra debeat, et si contendendum putat, veniat instructus ad agendum cognita actione qua conveniatur. Edere est etiam copiam describendi facere vel in libello complecti et dare vel dictare. Eum quoque edere, Labeo ait, qui producat adversarium suum ad album et demonstret quod dictaturus est, vel id dicendo, quo uti velit. (*Dig.* 2.13.1pr.1 [Ulp., *4 Ad ed.*])
>
> Anyone who intends to bring an action should give notice of that action. For it seems quite fair for one who is about to sue to indicate the action, so that the defendant will then know whether he should give in or mount a defense, and should he decide on the latter, so that he will come to the contest prepared, with an understanding of the action with which he will be sued. One can give notice by providing the means for writing down, by expressing it in a written statement and handing it over, or by dictating it. Labeo even says that one gives notice when he brings his adversary to the *album* and points to what he would otherwise dictate, or says what he intends to use.

This is the so-called *editio actionis*, or notice of the action. Ulpian states what were probably the main advantages of the rule — the possible avoidance of litigation, and barring that, a well-informed defendant. More generally, the proceedings before the magistrate, and particularly the settling of the words of the formula, would be intolerably slow and awkward if the defendant were learning then for the first time where his alleged liability lay.

The institution of *editio actionis* perfectly illustrates the nature of the first phase, as well as the evolution in scholarship on civil procedure. Until recently a strikingly dogmatic view, championed by Moritz Wlassak and Otto Lenel, strongly influenced the common understanding of *editio*.[11] This was the view that *litis contestatio* ("joinder of issue"), which closed the first phase, was a formal contract between the parties. Adherents of this view argued as follows. The contract was created by two acts:

[11] See Wlassak (1924) 72-104; Lenel (1894) 377. The argument is discussed at length and criticized in Jahr (1960) 165-206, but still holds sway in Cannata (1982) 143; Buti (1984) 193-94; Kaser and Hackl (1996) 220-221, 232; and Barreiro (1999) 37-38. The argument is criticized in Bürge (1995). Bürge's criticism is discussed briefly below. I have omitted any discussion of the second of Bürge's subjects, the disclosure of evidence (*editio instrumentorum*).

the *edere iudicium* of the plaintiff, and the *accipere iudicium* of the defendant. The *edere iudicium* "mirrored" the *editio actionis* described by Ulpian in the passage just quoted. Under each, the plaintiff informed the defendant about the nature of the action he intended to bring, and under each, the available methods for giving the information were largely the same (the exception being *producere ad album*, which was restricted to *editio actionis*). Crucially, however, the *editio actionis* was informal and took place at the time of summons. It was merely the "vorbereitende Edition" ("preliminary notice"), to be distinguished from the "endgültige Edition" ("final notice"), which was formal, took place in the presence of the magistrate, and contributed to *litis contestatio*.[12] Thus the view prevailed that *editio* was a two-fold act, first performed informally out-of-court, then performed formally before the magistrate.

The two-fold *editio* had doubters, but it was only in 1995 that Alfons Bürge put the idea to rest. Bürge's study of *editio* is valuable not only for what it brings to the subject itself, but also for our understanding of space. Briefly, Bürge argues that the parties would enjoy a degree of freedom of decision-making or "Spielraum" in the formulation of their claims and defenses, up until those claims and defenses were made firm at *litis contestatio*. In effect, the *editio actionis* was an opportunity and catalyst for advancing the suit in the direction of (if not in fact to) some resolution. A plaintiff might use this freedom of decision-making to change the nature of the action he intended to bring; a defendant, to negotiate some kind of settlement. Bürge also gives less obvious examples: representatives who have the freedom to contrive to their principal's advantage without being bound to a particular *editio*; debtors who admit the debt announced to them by *editio*, and thereby avoid the charge of recalcitrance, as well as winning some additional time to pay.[13] This is the kind of "Spielraum" that the sources on *editio* describe; there is no warrant for a supposed two-fold, informal-then-formal *editio*, nor the exaggerated spatial distinction between "in court" and "out of court" that the view presumes. "When we leave off supposing that a two-fold *editio* is attested anywhere in the sources, it becomes clear how the subject of the lawsuit is *gradually* finalized through the parties' interaction. We can view the *editio* requirement with emphasis on the parties' interaction, the product of private

[12] As Bürge points out, there has never been any direct evidence for the two types of *editio*. The theory is built largely on logical argument. See Bürge (1995) 2-3.

[13] Bürge (1995) 7-8, 14-16.

autonomy, or we can focus more on those acts of the magistrate that bring that preliminary activity to an end, but it makes very little difference which we do."[14]

Interrogatio in iure

If the parties cannot settle their dispute during this preliminary phase, a plaintiff may use his power of summons to bring the defendant to the magistrate. Many plaintiffs, having done so, will need nothing more from the magistrate than a formula and an "order to judge" directed at some suitable local man.[15] But others may have more specific business to conduct, and the document quoted below, from first-century Puteoli, records an example. The *interrogatio in iure* that the document records took place in the magistrate's presence, and is included here to show the obverse of the *editio* described above, which could take place virtually anywhere. That certain events in the first phase took place in the magistrate's presence is obvious; the value of the quoted document lies in the fact that, exceptionally, it declares on its face that the events took place *in iure*, and even names the magistrate.

> In iure apud Lucium Granium Probum duumvirum Gaius Sulpicius Faustus interrogavit Aulum Castricium Onesimum essetne heres Aulo Castricio Isochryso et quota ex parte. Aulus Castricius Onesimus respondit se ex parte XII Aulo Castricio Isochryso et ex parte XXIV partis quintae heredem esse. (*TPSulp*. 23) (35 CE).[16]
>
> *In iure* before Lucius Granius Probus, duumvir, Gaius Sulpicius Faustus questioned Aulus Castricius Onesimus as to whether he was heir to Aulus Castricius Isochrysus and to what share. Aulus Castricius Onesimus answered that he was heir to Aulo Castricius Isochrysus to the share (1/12 + 1/24) ÷ 5.

[14] Bürge (1995) 43-44 (emphasis added): "Verzichtet man darauf, eine in den Quellen nirgends belegte Zweiteilung der *editio* zu postulieren, tritt deutlicher hervor, wie das Prozeßthema im Zuge der Interaktion der Parteien *allmählich* verfertigt wird. Ob wir nun beim Zwang zur *editio* mehr den Akzent auf die von der Privatautonomie getragene Interaktion zwischen den Parteien legen, oder ob wir mehr auf die Handlungen des Gerichtsmagistraten achten, die das Vorverfahren abschließen, tut vorerst wenig zur Sache."

[15] The best surviving example of a formula, including the *iudicare iubere*, is *TPSulp*. 31 (52 CE), at Camodeca (1990) 97-98.

[16] Camodeca (1990) 79-80.

An *interrogatio* was required in certain cases to establish facts for the forthcoming trial, and also to help the plaintiff to decide whether he should proceed to trial or not. Here, Gaius Sulpicius Faustus is probably a creditor of Aulus Castricius Isochrysus, and is keen to determine to what degree the heirs of his debtor may be liable.[17] He must make this inquiry in the magistrate's presence.

Postponement

The natural end to the first phase is the drafting of a formula and joinder of issue. Not every pair of litigants is so fortunate, however. When the end of the day arrives, or when a magistrate is required to leave for some reason, there may still be groups of litigants nearby, either waiting their turn, or negotiating with each other. This is an awkward time, because the litigants know they will have to reassemble on some day in the future. The plaintiff, who is seeking an action or other remedy, does not need any special inducement to return, but the defendant of course feels differently. It is an easy matter for the defendant to make himself difficult to find, and he might even hope to "run out the clock," i.e., remain out of the way until the plaintiff's action is time-barred, or until some event hinders its prosecution.[18] The solution to this awkwardness is a simple one, and is described by Gaius.

> 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. (Gaius, *Inst.* 4.184)
>
> 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 present on a particular day.

A *vadimonium* was a stipulation-and-promise: a plaintiff asked the defendant whether he would promise to return on a certain day, and the defendant gave the promise. To that extent, it was a very ordinary private contract. But the contract was not a voluntary act, rather it was ordered to be performed by the magistrate: *vadimonium ei faciendum est*. This terse formula

[17] See *Dig.* 11.1.1pr (Call., *2 Ed. monit.*); Camodeca (1990) 83.

[18] The Roman legal system was not of course helpless against recalcitrant defendants; see the edictal provisions cited in Lenel (1927) 415-16. But there is reason to think that the more severe measures were cumbersome to enforce. See the discussion at Metzger (2005) 170.

reappears in virtually all of the surviving *vadimonium* documents from Herculaneum and Puteoli.[19] One imagines that the litigants were ordered to perform their *vadimonia* with some variant of these words, that they did so, and that they duly recorded the fact that they had performed what they were ordered to perform.

We run into a problem when we try to visualize many groups of litigants, all making these contracts at the same time, at the end of the day. Our first thought is perhaps that the litigants formed a line, and that each pair stood in front of the magistrate for a moment as he addressed them, telling each pair to make a contract. Happily, this does not appear to have been the case. With the help of new evidence, we now suspect that postponements were ordered *en masse*.

The new evidence that made this understanding possible is the *lex Irnitana*, discovered 25 years ago. It is a first-century "town charter" for a small *municipium* in Baetica, and contains a great deal of material describing how civil lawsuits were conducted.[20] The following excerpt is from a provision on postponements.

> 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. (*Lex Irnitana* 90.27–31)
>
> 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 he is supposed to grant three-day postponements, so that it can be read from ground level.

For present purposes, the most important new item of information given us by the *lex Irnitana* is the magistrate's obligation to perform a postponement once per day.[21] At the end of a sitting, he

[19] See Metzger (2005) appendix, Nos. 9-18, 20-24, 34-37. The formula has been discussed and debated for many years; the most recent discussions are in Platschek (2001); Metzger (2005) 55-63. Readers should note that Richard Neudecker, in this volume, interprets the *vadimonia* set out in these documents as substitutes for summons, rather than devices to aid postponements. At one time, it was indeed the common view to read the documents as Neudecker does. See Meyer (2008) 101-102.

[20] The leading critical texts are González (1986); Lamberti (1993).

[21] This much debated portion of the *lex Irnitana* is discussed thoroughly in Metzger (2005) 111-135.

would postpone pending matters until the day-after-the-next. A single, collective postponement is a powerful device. It allows an orderly exit of litigants at the end of the day, their *vadimonia* duly (and simultaneously) performed. And because the performance of *vadimonia* can be compelled *en masse*, no litigant requires a personal audience with the magistrate.[22] We come to appreciate that litigants can come and go, day after day, their lawsuits very much alive, yet never have a face-to-face meeting with the magistrate.

A Settlement Agreement from Puteoli

The argument of this essay is a very simple one: it is a mistake to assume that one who acts outside the presence of a magistrate is necessarily acting outside litigation. One document from the Puteoli archive illustrates the point well. It does so because it contains enough internal evidence to allow us to place the events squarely in the middle of litigation, but also out of the presence of the magistrate. The document records the giving of an oath, called a *iusiurandum in iure* ("oath *in iure*"). The institution requires a brief introduction.[23]

The *iusiurandum in iure* does not attract much notice in the literature; it was a limited and self-contained act, important only to the participants, and it employed a *sui generis* legal language. The purpose of the oath was to remove certain matters from litigation. The two contesting parties could agree to put any fact or facts out of dispute, and equally they could decide to put any legal conclusion out of dispute (i.e., to agree that the defendant

[22] The notice which the magistrate was obliged to publish for the better part of the day remains somewhat mysterious. Something like the following is possible: *In VIII kalendas Iulias vadimonia fieri iubebo*, or less specifically: *In diem tertium sive perendinum vadimonia fieri iubebo*. For the phrase *vadimonia fieri iubebo* see Val. Prob., *De Notis Iuris* 6.63 (*V.F.I. vadimonium fieri iubere*). For details on notice in the *lex Irnitana*, see Metzger (2007) 200-203.

[23] The principal evidence is in *Dig.* 12.2, though that title also contains fragments of discussion of different oaths, insufficiently distinguished from one another by Justinian's compilers. The edict on the specific oath discussed here, along with model *formulae*, is given in Lenel (1927) 149-151. Kaser gives a sound discussion of the institution, though not entirely up-to-date: Kaser and Hackl (1996) 266-269. The word *iusiurandum* is used in a wide number of contexts which have nothing to do with the specific institution under discussion; see Kaser and Hackl (1996) 266 note 1.

did not owe a debt was probably a typical use).[24] They could of course also put the entire controversy out of dispute, and not proceed to litigation at all. While there is perhaps little in the *iusiurandum* for a modern lawyer to admire and remark on,[25] to the Romans the institution was probably an important one. The reason is that it afforded the parties a degree of secrecy that the publicity of the *in iure* proceeding and trial would spoil. Any details in a legal affair that embarrassed or diminished one's reputation could be hidden from view by a *iusiurandum*. This is an important and underremarked aspect of the institution.[26]

There were two types of *iusiurandum in iure*, treated in different parts of the edict and subject to different rules.[27] The one that concerns us here is the so-called voluntary *iusiurandum in iure*, undertaken at the will of the parties. At its simplest it worked as follows. A plaintiff invited the defendant to give an oath denying the claim or allegation against him. This was called the *delatio* or the tendering of the oath, and was required to contain the very words that the defendant was invited to swear. If the defendant gave the oath as tendered, he prevailed on that claim or allegation. The same process worked in reverse: a defendant might tender an oath to the plaintiff, inviting him to swear to the justness of a claim or allegation. Again, if the plaintiff swore the oath as tendered, he would prevail. If the entire controversy were settled in this way, the oath was as good as a judgment, and the magistrate would enforce it with an appropriate action, and block any effort to reopen the matter with an appropriate defense. When pressed, the only matter the magistrate would revisit was the existence of the oath itself.

[24] The earliest attested uses of these oaths (if the institution is indeed the same) are in Plautus and concern debtors who glibly "swear off" their debts. Plaut., *Rud.* 13-20: [Arcturus:] *Qui falsas litis falsis testimoniis / petunt quique in iure abiurant pecuniam, / eorum referimus nomina exscripta ad Iovem; / cotidie ille scit quis hic quaerat malum: / qui hic litem apisci postulant peiurio / mali, res falsas qui impetrant apud iudicem, / iterum ille eam rem iudicatam iudicat; / maiore multa multat quam litem auferunt.* See also *Persa* 478; *Curc.* 496.

[25] Watson (1992) 48: "The [*iusiurandum in iure*] has nothing remarkable about it and we need not linger over it."

[26] See Greenidge (1901) 260. See also *Dig.* 12.2.15 (Paul., *6 Ad ed.*): *Ad personas egregias eosque qui valetudine impediuntur domum mitti oportet ad iurandum.*

[27] In the edictal commentaries, Book 18 of Paul and 22 of Ulpian treat the *iusiurandum* under discussion here. The other was a so-called compulsory oath, enforced by the magistrate in specific suits, and carrying a sting for the party who refused to swear an oath as tendered.

The document given below is one of a pair of oath documents from Puteoli, both dated 49 CE.[28] The surviving portions of our document record the *tendering* of an oath; its companion, inscribed in the same hand some weeks after the first document, describes the *swearing* of an oath. The documents appear to come from the same lawsuit, but whether they belong to the same oath is unclear.[29] Discussion of the first of the documents is sufficient for our purposes.[30]

> Cum ad vadimonium ventum esset, quod haberet Gaius Sulpicius Cinnamus cum Lucio Patulcio Fortunato, et Gaius Sulpicius Cinnamus diceret se paratum esse iurare, ita ut convenisset, si sibi HS 3,000 nummum darentur, Lucius Patulcius Fortunatus ei iusiurandum pecunia… detulit in foro apud statuam Matris Idaeae Magnae (*TPSulp*. 28) (49 CE)
>
> When Gaius Sulpicius Cinnamus had appeared to his bail, which he had with Lucius Patulcius Fortunatus, and Gaius Sulpicius Cinnamus said he was ready to swear, as it had been agreed, if 3,000 sesterces were given to him, Lucius Patulcius Fortunatus tendered to him an oath… money… in the forum by the statue of Mater Idaea Magna.

The following is what the document appears to describe. Cinnamus is the defendant, and Fortunatus is the plaintiff.[31] Cinnamus is indicating his willingness to give an oath: he is "prepared to swear."[32] The particular matter to which Cinnamus is prepared to swear is not preserved, though on our understanding of this institution, the oath would fall to his benefit. This latter fact, and the fact that Cinnamus is defendant, makes it rather puzzling that, as a condition to giving the oath,

[28] *TPSulp*. 28, 29. See Camodeca (1990) 93-96.

[29] Wolf (2001) 103.

[30] The text is a composite of Camodeca (1990) 93-94; Wolf (2001) 105; Camodeca (2000) 183-184. It is in the later of his readings that Camodeca gives *in [foro apu]d statuam [Matris Ida]eae magnae*. The tablet is a diptych; the second tablet is badly preserved.

[31] Compare Gröschler (2004) 124-125. But see Metzger (2007) 189-190 note 12.

[32] There is an echo here of a text of Paul (*Dig*. 12.2.6 [*19 Ad ed*.]), which describes an oath with the timing reversed. The party who intends to swear indicates his willingness to do so (*cum paratus esset adversarius iurare*) and his opponent tenders. The oath itself is said to be "remitted" in this instance. If this is indeed what is described in our document, as Camodeca (1990) 94, states, then Cinnamus will not have been required to swear the oath in order for the settlement to be complete.

Cinnamus must receive 3,000 sesterces, perhaps from Fortunatus. The matter of the 3,000 sesterces remains a mystery.[33]

For present purposes what matters is (1) *when* these events took place, and (2) *where* they took place. The principal clue for the time of the events is the opening: *Cum ad vadimonium ventum esset, quod haberet Gaius Sulpicius Cinnamus cum Lucio Patulcio Fortunato*. As already discussed, a *vadimonium* was a promise by a defendant, and ordered by a magistrate, to reappear on some future occasion for a continuation of the first phase. The defendant Cinnamus has therefore made some earlier appearance in the first phase, perhaps several such appearances. The opening words, in fact, use a formula that is familiar from other Puteoli documents (*vadimonium quod* X *haberet cum* Y[34]), a formula which records that X, the defendant, has indeed met the appointment he promised to Y, the plaintiff, and protects the defendant from a claim of recalcitrance. Thus our document attests both Cinnamus meeting his *vadimonium*, and Fortunatus tendering an oath, both events taking place after the lawsuit is well underway.[35]

The place or places at which the events occurred can be partly reconstructed. It is well known from the epigraphic evidence from Herculaneum and Puteoli, and from some literary sources as well, that a defendant who promised by *vadimonium* to return on some day in the future would ordinarily promise to appear at some landmark (an altar, a statue, a mural), rather than directly at the magistrate's tribunal.[36] In Puteoli, the most common meeting

[33] Humbert offers two alternative solutions; the first of these posits that there is some relation between the parties, other than which is treated in the oath, that explains the 3,000 sesterces; e.g., Cinnamus is Fortunatus' creditor. See Humbert (2000) 124. The second alternative assumes that the two oath tablets are related, which a cautious interpretation would exclude. See above note 29 and accompanying text, and the discussion in note 32.

[34] See *TPSulp*. 18, 20, 21: so-called *testationes sistendi*.

[35] This latter point — that the suit is underway at the time the events took place — is a matter of some small debate. Certain writers, who adhere to the view that a plaintiff used the *vadimonium* to bring a defendant to his first appearance *in iure* (see the discussion in note 7 above), would interpret these events as preliminary to the lawsuit. See Humbert (2000) 122-124 and Camodeca (2000) 183-184, and the discussion at Metzger (2007).

[36] See Metzger (2005) 16-17; the reasons for the practice are discussed ibid., 53-54. The most obvious reason is perhaps the intolerable crowds it would create if parties and their witness converged on the magistrate at the same time. The evidence for the practice is discussed extensively in Cloud (2002). On the Herculaneum tablets specifically, see also Bablitz (2007) 20-21.

place named in the surviving documents is *in foro ante aram* [*Augusti*] *Hordionianam*.[37] No meeting place is named in the document under discussion, though the place at which the tendering of the oath took place (reconstructed by Camodeca: *in foro apud statuam Matris Idaeae Magnae*, not otherwise known) is indeed mentioned. One supposes that the location of the parties' meeting, and the location of the oath-tendering, are not the same location, if only because the first of these locations would be crowded with other litigants, themselves meeting their bail, and because parties who participate in a voluntary *iusiurandum in iure* would, in many cases, value their privacy. In any event, Cinnamus and Fortunatus are settling their lawsuit, or some aspect of it, outside the magistrate's presence.

The lesson of this document is clear. The parties are in the middle of litigation, having commenced the first phase of the lawsuit on some earlier occasion, and having met, on the day, in compliance with a compulsory order to reappear. They are nevertheless conducting their business by themselves, outside the presence of the magistrate. Their oath is intrinsic to their litigation. The magistrate will not allow Fortunatus to reopen the matter to which Cinnamus has sworn. This is not a "private transaction," notwithstanding its location.

Conclusion

Earlier writers on Roman procedure were handicapped by the scarcity of the evidence. The *Digest* is our principal source for the classical law, and it was systematically stripped of procedure by Justinian's compilers. What remained behind were little "islands" of institutions, like *editio*, *interrogatio*, and *iusiurandum*. It seemed to early writers that anything procedural worth remarking on was taking place *in iure*; this is how the priorities of the Roman jurists made themselves felt in modern scholarship. Thus the proceedings *in iure* came to be equated with the entirety of the first phase, and the fiction arose that a suit commonly passed from *in ius vocatio* to *formula* largely uninterrupted. New evidence has allowed us to appreciate that the first phase took place both in and out of the magistrate's court. It was a far less orderly, and a far more sprawling affair, than earlier writers appreciated.

[37] *TPSulp*. 1, 1 bis, 2, 3, 4, 5, 6, 7, 8, 9?, 10, 11.

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