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THE JURISDICTION OF LOCAL MAGISTRATES: CHAPTER 84 OF THE LEX IRNITANA

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THE JURISDICTION OF LOCAL MAGISTRATES: CHAPTER 84 OF THE LEX IRNITANA*

The Lex Irnitana[1] is of outstanding importance for our understanding of Roman law. The publication of the edition and commentary by Professor González gave most scholars their first opportunity to grapple with the difficulties of the text. The present article concentrates on certain aspects of Chapter 84: first, the limits of the jurisdiction of the duumviri and aediles at Irni and secondly the specific provision on actions of theft and iniuria.

The text of Chapter 84 is as follows:

<LXXXIV>

R(ubrica). Quarum rerum et ad quantam pecuniam in eo municipio i(uris) d(ictio) sit.

IXB

[Qu]i eiu[s] municipi incolaeue erunt, q(ua) d(e) r(e) ii inter se suo alte-
[r]i<us>ue nom[i]n<e> qui municeps incolaue sit priuatim intra fines eius
[mu]nicipi agere petere persequi uolent, quae res HS(sestertium) ∞(mille) minorisue
[eri]t, neque ea res diuidua quo fraus huic legi fieret facta sit fiatue
aut de capite libero deue maiore pecunia quam HS(sestertiis) ∞(mille) praeiudicium
futurum erit sponsioue {[s]ponsioneue} facta futuraue erit, neque
ea res agetur qua in re u[i] factum sit quod non ex interdicto
decretoue iussuue eius qui iure dicundo praerit factum sit, ne-
que de libertate, neque pro socio aut fiduciae aut mandati qu-
od d(olo) m(alo) factum esse dicatur, aut depositi, aut tutelae cum quo
qui{s} suo nomine [q]uid earum rerum fecisse dicatur, aut lege
Laetoria, aut d[e spo]nsione quae in probrum facta esse dic[a]-
tur, aut d(e) d(olo) m(alo) et [fraud]e, aut furto cum homine libero libera-
ue, aut cum seru[o dum i]d ad dominum dominamue perti-
nebit, aut iniur[iaru]m cum homine libero libera{m}ue
agetur, eaue de re [qua in re] praeiudicium futurum sit de ca-
pite libero, de is re[bus etia]m, si uterque inter quos ambig{er}etur
uolet, de ceteris quo[que o]mnibus de quibus priuatim age-
tur neque in iis prae[iudici]um de capite libero futurum

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[1] For the text see J.González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law' JRS 76 (1986), 147-243, with an English translation of the law by Michael Crawford (henceforth cited as "González").

erit, et omnium rerum [dumtaxa]t de uadimonio promittendo in eum
[locum in] quo is erit qui [e]i prouinciae praerit futurusue esse ui-
debitur eo die in quem ut uadimonium promittatur postula-
bitur, Πuir(i), qui ibi i(ure) d(icundo) praeerit, iuris dictio, iudicis arbitri
recuperatorum, ex is qui ibi propositi erunt, iudico datio
addictio, it[e]m eadem condicione, de eo quod HS(sestertium) ∞(mille) minoris-
ue erit, aedilis qui ibi erit iuris dictio iudicis arbitri re-
ciperatorum ex eodem genere iudicique datio addictio(que)
esto.

I have reproduced the text as printed by González, except that in line 16 I have adopted a conjecture kindly suggested by Professor Lebek and print 'qua in re' instead of 'aliquid'. The change does not affect the argument in this paper.

I Jurisdiction of the duumviri

The commentary of González contains certain errors which obscure what the lex says about the jurisdiction of the local magistrates.

The chapter concerns the 'iuris dictio, iudicis arbitri recuperatorum ... iudici datio addictio' (lines 23-25) of the duumvir (line 23) and of the aedile (lines 25-28). In this part we concentrate on the duumvir. Although the scope of the chapter is significantly wider than "jurisdiction" as we normally use that word in English, it will be convenient to refer to "jurisdiction" while bearing in mind the broader aspects.

The duumvir exercises his jurisdiction in respect of certain cases and these are introduced in the chapter by the preposition *de*. The key construction is 'de x ... iuris dictio'. The matters of his jurisdiction are therefore to be found in line 1 'qua de re', in line 17 'de is rebus etiam', in line 18 'de ceteris quoque omnibus' and in line 20 'de vadimonio promittendo'.

The longest part is that from line 1 to line 17 and it is easy to lose sight of what exactly the text is saying. We must simply ask what kind of cases is being allotted to the duumvir at this point. The basic answer is that he is being given jurisdiction in private disputes of up to 1000 sesterces: 'quae res sestertium mille minorisve erit' (lines 3-4). What then follows in lines 4-17 is a series of exceptions from this basic category. That is to say, they are types of case which, even though the value of the matter in dispute is less than 1000 sesterces, are none the less excluded from the local court. So, for instance, if there was an action on mandate where fraud was alleged and the sum sought was 800 sesterces, that action could not be brought locally.

Then in lines 17-18 we are told 'de rebus etiam' if both parties wish. Now this clearly confers jurisdiction by agreement, but over which cases? The answer must be: over the cases mentioned in lines 4-17, i.e. cases of 1000 sesterces or less which fall into one of the

excepted categories. So, for example, with the mandate case figured above, the duumvir would have jurisdiction if both parties wished.

We then come to 'de ceteris quoque omnibus de quibus privatim agetur' which González considers to be "strictly speaking redundant"[2] since the cases covered have not been excluded. He suggests that the draftsman may have put it in to allow him to reiterate the illegality of a praeiudicium on free status. Nothing could be less likely. We should be very wary of a conclusion that part of the text is redundant.

In fact the words are not redundant. González thinks that in lines 1-17 the duumvir has been given complete jurisdiction with certain exclusions. He says that since "the cases covered" in line 18 have not been excluded, therefore they have already been included. This is wrong since the only cases mentioned up to this point are those for a sum of 1000 sesterces or less. When therefore the draftsman writes 'de ceteris quoque omnibus de quibus privatim agetur' he is conferring jurisdiction in all the other matters about which private actions will be brought. The words 'de quibus privatim agetur' echo the words 'qua de re ii ... privatim intra fines eius municipi agere petere persequi volent' (lines 1-3). The purpose of this provision is therefore to confer jurisdiction on the duumvir in matters where the sum in issue exceeds 1000 sesterces. The words are the reverse of redundant: they are absolutely essential.

We may then ask in what circumstances the local court is to have jurisdiction in these cases involving a larger sum than 1000 sesterces. Here we cannot help remembering the late classical jurist Paul who tells us that 'inter convenientes et de re maiori apud magistratus municipales agetur'[3] which González quotes[4] inappropriately in connexion with 'de is rebus etiam' in line 17. As was explained above, the agreement in line 17 has nothing to do with suits for sums over 1000 sesterces. It is an agreement on cases of 1000 sesterces or less which are excepted by the statute. When we come to lines 18-19 we are, on the other hand, dealing with cases over 1000 sesterces. Taking our cue from Paul we must anticipate that the duumvir has jurisdiction in these cases where both parties agree.

When we now return to the text, that is what we find. Lines 17-20 speak of jurisdiction "over these matters also, if each party to the dispute wishes, in the same way too over all the other matters about which there will be a private action". The word *quoque* ("in the same way too")[5] - which is not translated by Professor Crawford - is important, because it links the provision on all the other matters with the provision on the exempted cases and means

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[2] González, 229.

[3] D.50.1.28, Paul 1 ad edictum. See O.Lenel, 'Beiträge zur Kunde des Edicts und der Edictscommentare' ZSS 2 (1881), 14, 19 n.10; O.Lenel, Das Edictum Perpetuum (3rd edition, 1927) (henceforth "E.P."), 51 n.4.

[4] González, 229.

[5] O.L.D. s.v. quoque 1.

that what applies to the exempted cases applies equally to all the other matters, viz. that there is jurisdiction if both parties are agreed.

This interpretation is confirmed by Chapter 69 lines 11-13 which deal with proceedings for *pecunia communis*. Jurisdiction is given to a body of decuriones and conscripti in certain cases where the amount is more than 500 sesterces but not so large "that if it were a private action no action could take place there if either party were unwilling".[6] This implies that the limit operated only where either party was *invitus,* and that if both agreed an action for a larger sum could be dealt with locally.

Returning to Chapter 84, we then find the qualification 'neque in iis praeiudicium de capite libero futurum erit' (lines 19-20). That qualification means that even where the parties agree, there can be no local jurisdiction where the case involves a praeiudicium on free status. The qualification certainly applies to cases over 1000 sesterces, but I suspect that it is also aimed at those under 1000 sesterces, thereby removing the problem mentioned by González in his commentary on lines 17-18 that otherwise the 'de is rebus etiam' provision would seem to give consensual jurisdiction even in cases involving an issue of free status.

Finally we move on to line 20 'et omnium rerum dumtaxat de vadimonio promittendo'. This completes the picture by saying that the duumvir has jurisdiction for promises of vadimonium to the governor in all matters, i.e. even in cases involving free status. That vadimonium leads to a hearing before the governor where vadimonium will be made for appearance before the praetor in Rome.[7] Suffice it to say that the comment by González on lines 20-24 is muddled.

The picture which emerges is coherent, as we should expect. The duumvir has jurisdiction in cases up to 1000 sesterces. In such cases the plaintiff may insist on his case being heard locally unless it falls into one of the exempted categories. In that event, unless both parties agree, the duumvir will have jurisdiction only for vadimonium to be made to the governor who will in turn deal with vadimonium for a hearing before the praetor in Rome. If on the other hand both parties concur, the duumvir will have jurisdiction in exempted actions of up to 1000 sesterces, the only exception being cases where an issue of free status arises. If such an issue does arise, the jurisdiction of the duumvir is restricted to dealing with vadimonium to the governor. In cases over 1000 sesterces the duumvir has no jurisdiction unless both parties agree. If the parties do not agree, again the duumvir has jurisdiction only for vadimonium to the governor. If, however, the parties do agree, the duumvir has jurisdiction in all matters except again where an issue of free status arises. If that issue arises, he has jurisdiction only for the vadimonium to the governor.

Lastly, it should be noted that there is nothing anomalous in the fact that we find the exempted cases specified only in connexion with suits up to 1000 sesterces. Even though

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[6] González, 192, Crawford's translation.

[7] D.Johnston, 'Three Thoughts on the Lex Irnitana' JRS 77 (1987), 60, 65.

they apply to all suits irrespective of value, the exemptions have to be stated in relation to the smaller suits because otherwise, in these minor suits, the plaintiff has a unilateral right to proceed in the local court. The exemption prevents him using that right and means that he can proceed locally on these exempted matters only if both parties agree. By contrast, no-one can proceed locally in any class of case, whether ordinary or "exempted", where the sum involved is over 1000 sesterces, unless his opponent agrees. So this means that there is no need to make special mention of the "exempted" cases over 1000 sesterces. The general need for agreement to confer jurisdiction means that, just as where the sum is less than 1000 sesterces, such cases cannot be brought locally except by agreement of the parties.

II Jurisdiction of the aediles

Since the publication of the lex Irnitana a belief has taken hold that the jurisdiction of the aediles at Irni was identical with that of the duumviri.[8] Galsterer[9] even proceeds to speculate on the significance of "this equivalence of the two magistracies" in matters of jurisdiction. But in fact the jurisdiction of the aediles is different from, and more restricted than, that of the duumviri.

Chapter 19 (lines 13-16) says that the aediles are to have jurisdiction up to 1000 sesterces on the same matters and over the same persons as the duumviri. The important point to notice is that it is the jurisdiction of the aediles, not of the duumviri, which is limited to 1000 sesterces. The effect is that the aediles have a parallel jurisdiction with the duumviri up to 1000 sesterces, but they have no jurisdiction beyond that. In other words there is no consensual jurisdiction for suits involving larger sums. Consensual jurisdiction in the larger cases is the preserve of the duumviri.

This is confirmed in Chapter 84 which again specifies for the aediles jurisdiction up to 1000 sesterces (lines 25-28). Once more the construction with *de* is found: 'de eo quod ... iuris dictio...' (lines 25-26). The jurisdiction is described as 'eadem condicione' (line 25). This means that the same exceptions are made as in the duumvir's jurisdiction in suits up to 1000 sesterces and it corresponds to the limitation 'de is rebus et inter eos' in Chapter 19 (lines 13-14). The aedile will have jurisdiction in the excepted cases under 1000 sesterces only by agreement of the parties. The account in Chapter 84 confirms the distinction between the duumvir and the aedile: the duumvir has consensual jurisdiction in suits of over 1000 sesterces whereas the aedile does not.

III The Supposed Action against a Slave

According to Crawford's translation, among the types of action excluded from the jurisdiction of the local courts are actions "over theft brought against a free man or woman or

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[8] See, for instance, A. D'Ors, La Ley Flavia Municipal (1986), 172; González, 201-202.

[9] H.Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', JRS 78 (1988) 78, 83.

brought against a slave so long as it relates to his master or mistress".[10] González comments "The reference to an action against a slave is remarkable."[11] In this commendably understated sentence he announces what would be a revolution in our understanding of Roman law. In fact the news from Irni is not quite so dramatic, but it is still extremely interesting.

In Parts I and II we have examined the overall structure of the provisions on jurisdiction and have noted that certain matters are excluded from the jurisdiction of the local courts unless the defendant agrees. The significant point is that the cases were excluded because of their perceived importance, even though the actual sum in issue was small. The exclusions from local jurisdiction were neatly summarised by the sixth-century author Isidorus: 'liberales et famosissimae causae (et quae ex principe proficiscuntur) ibi non aguntur. haec enim ad dignitatem civitatum pertinent' (Origines 15.2.10).The cases which were too important for the local magistrates were sent off to the praetor in Rome.

Isidorus refers to one category of the excluded cases as *famosissimae*. This is probably intended simply to cover the kinds of case where condemnation involved *infamia*.[12] However that may be, the provision in Chapter 84 on, say, mandate, involving *dolus,* is designed to show that the matter is especially grave. When we come to look at the qualifications which are attached to the excluded cases of theft and iniuria in lines 13-16, we are also justified in proceeding on the footing that these qualifications are meant to identify cases of a serious nature.

It is when describing the excluded case of theft that the draftsman says in effect: 'neque ... de ... furto cum homine libero liberave aut cum servo dum id ad dominum dominamve pertinebit ... agetur ...' (lines 9-16). These are the words which Crawford translates as indicated above.[13] It is here that we find the idea that, among the excluded cases, are actions of theft where a slave is the defendant - so long as it refers to his master or mistress. The qualification is not meant apparently to detract from the prposition that the slave is the defendant.

The fact that the translation leads to the conclusion that the defendant is a slave is sufficient in itself - for a Romanist at least - to show that the translation is incorrect. The sources testify beyond all doubt that a slave could not be a party to an action in Roman law.[14] Indeed it is part of the essence of being a slave rather than free that the slave was simply not capable of such a thing.

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[10] González, 195.

[11] González, 229.

[12] So, for instance, Lenel ZSS 2 (1881), 37; W.Simshäuser, Iuridici und Munizipalgerichtsbarkeit in Italien (1973), 198.

[13] Text at note n.10.

[14] W.W.Buckland, The Roman Law of Slavery (1908), 83 (hereafter "Slavery").

Close inspection of Chapter 84 confirms in any event that the chapter was not concerned with actions in which slaves were parties.

In lines 1 and 2 we are told specifically that the courts are to deal with cases brought by municipes and incolae concerning disputes 'inter se', i.e. among municipes and incolae. The words 'inter se' clearly involve both plaintiffs and defendants. Slaves were, of course, neither municipes nor incolae.[15] So they are not in contemplation either as plaintiffs or as defendants.

The argument is reinforced by reference to Chapters 93 and 94. They contain provisions which allow parties to deduce which law is to be used. Chapter 93 gives the position for municipes, while 94 says that incolae are to follow the lex in the same way as municipes. It is noteworthy that in 93 the lex refers to the law by which municipes are to litigate inter se - again both plaintiffs and defendants are covered. So the lex will tell the reader which law municipes are to use and thereby which law incolae are to use in litigation.The reader will search in vain to find which law a slave would use in litigation. The reason is obvious: municipes and incolae litigate, while slaves do not.

The idea that one of the excluded cases should involve a slave as a defendant is in any event quite inconsistent with the scheme of the legislation. A case involving a slave as a defendant would arguably be less, not more serious. So why should it be reserved to Rome? The idea of a slave solemnly making his promise of vadimonium before the duumvir, going off to the provincial governor, and then making another promise there before setting off from Spain to present himself as a defendant before the praetor's tribunal in Rome, the very heart of high classical Roman law, is extraordinary to say the least.

Looked at more carefully still, the picture is seen to be even more flawed. The actions which are reserved to Rome are ones where condemnation involves infamia. Infamia is by its very nature a mark which can attach only to persons who are capable of having a reputation in the first place. Slaves are certainly not beings with fama. It migh be suggested that the qualification "so long as it relates to his master or mistress" could somehow be prayed in aid. Yet it is hard to see how the actings of a slave would cause his master to be so severely judged - on the contrary, in lines 10 and 11 stress is put on the personal involvement of the defendant. The point is even more difficult in the case of a mistress since the technical notion of infamia, which was really concerned with removing the capacity to represent others in court, did not apply at this time to women any more than to slaves.[16]

A further argument emerges when we turn to the provision on iniuria in line 15: 'neque ... iniuriarum cum homine libero liberave agetur'. It looks like a construction which parallels that found in lines 13 and 14 for theft. Crawford indeed treats it as such: "or over iniuria brought against a free man or woman". Now such a qualification seems manifestly

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[15] When freed a servus publicus will become a municeps: Chapter 72, lines 16-19.

[16] E.P., 77 et seq.

unnecessary. As we saw above, the chapter purports to deal with actions on disputes among municipes and incolae who are by definition free men and women. Why ever should it be necessary to stress that the defendant in the iniuria action required to be free? Why should the same point not be made, say, in the case of the action on the lex Laetoria in line 12? Given the whole structure of the chapter dealing with municipes and incolae, the fact that the defendant was free, if it could ever be made as a relevant point, would emerge simply by implication. It would only be if - on the assumption that such a thing were possible - the defendant were other than free that a special point would require to be made.

Since then the words 'cum homine libero liberave' in line 15 cannot sensibly be taken as referring to the defendant in the action, we are justified in inferring that equally they do not refer to the defendant where they occur in connexion with theft in lines 13 and 14. This in turn means that in the full phrase 'cum homine libero liberave aut cum servo' the words 'cum servo' also do not refer to the defendant.

The foregoing remarks indicate that Crawford's translation cannot be accepted. We must now try to establish an alternative version.

IV The Translation of 'cum'

The clause is long and complex but we are concerned at present with the part which begins with 'neque' in line 9 and ends with 'agetur' in line 16. In the course of these lines *cum* is used four times: in lines 10, 13, 14 and 15. Crawford translates it in each case as though it were dependent on the verb 'agetur' and were used to define the person against whom the action is being brought. It may be helpful if the individual cases are spelled out as he sees them:

line 10: neque ... (tutelae) cum quo quis suo nomine quid earum rerum fecisse dicatur ... agetur

line 13: neque --- (de furto) cum homine libero liberave ... agetur

line 14: neque ... (de furto) cum servo dum id ad dominum dominamve pertinet ... agetur

line 15: neque ... (iniuriarum) cum homine libero liberave agetur.

Now in the first case that construction of the Latin is unquestionably correct. There *cum* is being used, as constantly in juristic texts, to express the relationship of the defendant to the litigation. 'Agere cum illo' is one of the best known constructions in legal Latin. Here the defendant is being specified as one who is alleged to have been personally involved in actings giving rise to the case.

Just because 'agere cum' is such familiar legal Latin, we may easily overlook the fact that the preposition *cum* is used not merely in dependence on a verb. It is also used in association with nouns to express the relationship between the concept in the noun and, say, a person.[17]

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[17] In legal Latin the best-known example is perhaps Gaius, Institutes 2.218 where he says that a legacy may be invalid if left to someone "in respect of whom there is no power of testation": F. de Zulueta, The Institutes of Gaius vol. 1 (1946), 131.

In the Thesaurus it is said that, when used to express a relationship, *cum* can be dependent on nouns 'coniungendi, conversandi, loquendi, al.'[18] So for instance we find it used with nouns such as *pugna* and *prolusio*[19] and *iurgium*[20] which are words describing actions involving some degree of hostility between the persons involved. Into that general area it does not seem too difficult to fit *furtum* and *iniuria,* both of which describe a hostile act towards another person. It must be said, of course, that no other examples of *furtum cum* or *iniuria cum* in this sense have been preserved. It is also right, however, to point out that the Thesaurus lists only three texts for a phrase "theft from".[21] Two come from plays of Seneca and one from St. Jerome and in each case the construction is an objective genitive. There are no texts, say, with *adversus*. For *iniuria* we find the objective genitive or a personal pronoun, *in* with the accusative, and *adversus* to express 'iniuria against' someone.[22]

It is submitted that what we have in lines 13, 14 and 15 are examples of the usage where *cum* is dependent on the preceding noun. In other words in line 13 *cum* expresses the relationship between the *furtum* and a free man or woman; in line 14 it expresses the relationship between the *furtum* and a slave, while in line 15 it expresses the relationship between the iniuria and a free man or woman.

So in each case, instead of translating *cum* along with *agetur* we should translate the phrases:

de ... furto cum homine libero liberave (line 13)
de ... furto cum servo (line 14)
iniuriarum cum homine libero liberave (line 15).

Adopting the neutral translation used by de Zulueta[23] for *cum* at Gaius 2,218 we could translate:

about ... theft in respect of a free man or woman (line 13)
about ... theft in respect of a slave (line 14)
for iniuria in respect of a free man or woman (line 15).

So, whereas in line 10 *cum* is used to express the relationship between a person (the defendant) and the litigation, in lines 13, 14 and 15 it expresses the relationship between a person and the delict which is the subject-matter of the action. What we must do now is explore the nature of that relationship.

Phrases such as *pugna cum* and *iurgium cum* suggest that *cum* governs the person towards whom the action in the noun is directed. Thus *furtum cum* will express the

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[18] T.L.L. V, 1372 line 54 - 1374 line 32.
[19] Cicero, div. Caec. 47.
[20] Cicero, epist. 10.11.1.
[21] T.L.L. VI, 1646 lines 26-28.
[22] T.L.L. VII 1, 1676.
[23] See note 17.

relationship of theft and victim, while *iniuria cum* will express the relationship of insult and victim. In line 13 the victim of the theft is a free man or woman, in lines 14 a slave, but the theft must affect his master or mistress. In line 15 the victim of the insult is a free man or woman.

A translation of the passage as it would fit into Crawford's translation, as a whole would be:

... and provided that the case is not over freedom ...
or over theft from a free man or woman or from a slave so long as it affects his master or mistress, or over iniuria to a free man or woman or there may be in that matter a praeiudicium as to free status.

In the light of the revised translation the excluded actions are:

(1) those for guardianship etc. where the defendant was personally responsible for the actings (line 10)

(2) actions of theft where a free man or woman was the victim (line 13)

(3) actions for theft where a slave was the victim but the theft affected his master or mistress (line 14)

(4) actions for iniuria where a free man or woman was insulted or there may be a praeiudicium on free status (line1 15).

Case (1) requires no further elaboration. It is convenient to start with case (4).

V Actions of iniuria

The first matter to be considered is the praeiudicium. Two further small but significant corrections to Crawford's translation should be noted. He says that the local court is to have jurisdiction provided the case is not "over iniuria brought against a free man or woman, *and* provided that there be *no* praeiudicium concerning a free person in this matter" (emphases added).

In fact the Latin says 'or' (*eave*) and there is no negative so that the proper translation is "or there may be in that matter praeiudicium as to free status".

The commentary of González does not really explain why the draftsman mentions the praeiudicium at this point. It is plain that where a free man or woman is involved, the action of iniuria is already counted among the excluded actions. If that is so, what would be the point of adding "and provided there be no praeiudicium concerning a free person in this matter"? It cannot mean that where no praeiudicium occurs, this kind of iniuria action is competent locally. Nor is it just a free-standing action on status, since that matter has already been covered in the words 'de libertate' in line 9.

In fact the whole matter, including the use of "or" and the absence of a negative, becomes clear when we consider a certain kind of iniuria to a free person. In D.47.10.11.8, from book 57 of his edictal comentary, Ulpian tells us that if X says that Y is his slave and Y asserts his free status, then Y has an *actio iniuriarum* against X. In D.47.10.12, from book

22 of his commentary on the provincial edict, Gaius also says that if X knowingly claims a free person as his slave, he is liable for iniuria. (I leave aside the complexities). We must therefore envisage iniuria actions where the insult in question is a claim by the defendant that the plaintiff, or perhaps his son, is a slave. In that situation the status of the alleged victim would have to be determined. It would not be determined in the course of the delictal action itself but by means of a subsidiary process, a praeiudicium.[24] Once the question of status was determined in the praeiudicium, that decision would be used for the purposes of the delictal action.

This is the kind of praeiudicium to which the law refers in lines 16-17. The preceding exclusion is of all iniuria actions for under 1000 sesterces where the insult was to a free person. But the draftsman is anticipating a difficulty of interpretation which could arise and may indeed have arisen with some other version of the lex municipalis.

Suppose the plaintiff wishes to sue for iniuria because the defendant claimed that the plaintiff was his slave. The plaintiff, of course, denies this and asserts that he is free. The parties come before the duumvir and the plaintiff argues that since the case is one of iniuria to a free man, he wishes a vadimonium to the governor so that the case may be taken to the praetor in Rome. The defendant protests that his whole defence is based on the fact that the plaintiff is not a free man, but a slave, and that therefore there was no iniuria to a free man. The defendant therefore argues that the case falls within the competence of the duumvir who should accordingly deal with it himself and appoint a local judge to decide it. There is a real dilemma here because, if the plaintiff is right, the case should indeed be heard in Rome, whereas if the defendant if right it should be heard locally. The *eave* clause neatly resolves this potential difficulty by blocking off the defendant's line of argument. The dratftsman says that an action for iniuria is excluded from the local courts where the person insulted was free *or* where there may be a praeiudicium as to whether he was free or not. So if any question of status may arise, the action is excluded. The periphrastic future subjunctive, to which González draws attention,[25] is appropriate: at the stage when the case comes before the duumvir there will not be a praeiudicium, but at most it is possible that there may be one during the proceedings. One cannot say for certain because the defendant may eventually change his mind and alter the basis of his defence so that it does not involve a praeiudicium. The potential force of the subjunctive expresses the position correctly.

The second point to notice is that our proposed interpretation fits broadly into what we know already about the attitude to iniuria. The effect of the translation is to distinguish actions involving iniuria to free persons from actions involving iniuria to slaves. The former go to the praetor, the others to the local court. The former are more important than actions for iniuria to slaves.

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[24] On such praeiudicia see M.Kaser, Das römische Zivilprozessrecht (1966), 184 et seq.
[25] González, 227.

In his edict[26] the praetor promised an action to his master where a slave was beaten or tortured *contra bonos mores,* but in the case of other alleged insults to slaves he promised only to grant an action if he thought appropriate, *causa cognita*.[27] This contrasts with the position where a free person is wronged. In such cases no question arises of the praetor weighing the facts before granting an action. If a relevant case of iniuria is made out, then he will grant an appropriate action. The difference of approach plainly stems from a policy which starts from the premise that insults to slaves are different from those to free men and are in effect to be treated less seriously. In a slave-owning society any other underlying attitude would be surprising. Against that background we should not think it remarkable that actions for iniuria to free men are themselves regarded as more serious than actions for insults to slaves. The provisions in lines 15-17 reflect that policy

VI Actions of Theft

We now revert to cases (2) and (3) involving theft from a free person or a slave so long as it concerns his master or mistress.

Here again we are concerned with the victim, in this instance the person from whom the object has been stolen. In the case of a free man or woman the victim may or may not also be the plaintiff. A free person who is *sui iuris* will be the plaintiff if something is stolen from him. A victim who is a filiusfamilias will not usually sue, since the stolen property belongs to his paterfamilias who must sue. There are some exceptions. At least by the later classical period, for instance, there is an exception for the son's *peculium castrense*. If an object were part of the *peculium castrense* of a son, then he would have the appropriate right of action for its theft.[28]

With a slave the position is entirely different. He can never bring an action himself. It will always be brought by his master or mistress. None the less even in the case of slaves it is necessary to distinguish between objects which are simply part of his master's patrimony and objects which form part of the slave's *peculium*. Let us suppose that a slave is walking along the street carrying an ornament, when a thief comes along and steals the ornament. If the ornament was one which, say, usually sat on his master's desk, then the ornament will truly form part of his master's patrimony. But if on the other hand, the ornament was part of the stock-in-trade of the antique business run by the slave, then the ornament will form part of the *peculium* of the slave. It will be a *res peculiaris*. In each case the theft will be a theft

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[26] E.P., 401.

[27] It is at least possible that those actions for insults to slaves which would not be actionable except *causa cognita* would be excluded from the local courts. Cf. D.50.17.105, Paul 1 ad edictum. But the local magistrates' powers may have been greater at this period than they were later. See González, 228-229 with references.

[28] D.49.17.4, Tertullian libro singulari de castrensi peculio.

"from the slave", *furtum cum servo,* and even for theft of a *res peculiaris* any action will have to be brought by the slave's owner.[29]

Nevertheless the Roman jurists were not blind to the difference between the two kinds of situation so far as theft was concerned. For instance, if a *res peculiaris* which had been stolen were returned to the *potestas* of the slave, then it would be held to be once more in his master's possession.[30] There were special rules to determine when a slave would be held to have stolen a *res peculiaris*.[31] Ulpian tells us that a slave may compromise an action for theft of a *res peculiaris* and the defendant will be discharged from liability even if the whole two-fold penalty is to be paid to the slave.[32] According to Ulpian also, any sum due to a slave in an *actio furti* or other action is counted as part of his *peculium*.[33] All this indicates that the jurists differentiated between *res peculiares* and other objects in regard to theft. More particularly they recognized different categories of action for theft. Where a *res peculiaris* was involved, even though the action was brought by the owner, the slave's *peculium* rather than the master's patrimony was affected.

The distinction between actions for theft of objects in the master's patrimony and actions for theft of *res peculiares,* it is submitted, lies behind the words 'dum id ad dominum dominamve pertinebit' in lines 14-15. The qualification is designed to mark off those cases where, though the object has been stolen from a slave, none the less the theft affects his master or mistress directly. The interests of the master or mistress are affected.[34] Such cases are put on a par with cases of theft from a free person. Nor is that surprising, for it would be strange if the law took a radically different view of the theft depending on whether the object was stolen from my desk, or, say, from the workroom of my slave who was repairing it. Where on the other hand the object was part of the slave's *peculium*, its loss would often not affect the master directly. The *peculium*, at least in its developed state, could be so extensive and so much under the slave's control that, whatever the legal technicalitites might be and whatever they might require, it was in substance the slave's affair. That being so, theft of an object from the *peculium* could be seen as in substance theft from a slave and as not really affecting the interests of his owner.

Lines 13-15 are therefore designed to reserve for the praetor, as being more important, actions of theft for 1000 sesterces or less where the object has been stolen from a slave but the theft directly affects his owner's patrimony. By implication it leaves to the local court cases of theft from a slave which do not affect his master, i.e. theft of a *res peculiaris.* It may be asked: why does the draftsman not refer directly to the *res peculiaris* case? The answer is

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[29] Cf. D.15.1.41, Ulpian 40 ad Sabinum.
[30] D.47.2.57.2, Julian 22 digestorum; D.41.3.4.7 Paul 54 ad edictum; Slavery, 189 n.3 and 200 n.6.
[31] D.47.2.57.3, Julian 22 digestorum; Slavery, 189 n.3.
[32] D.47.2.52.26, Ulpian 37 ad edictum.
[33] D.15.1.7.5, Ulpian 29 ad edictum.
[34] For the usage, cf. Chapter 65 line 8; Chapter 67 line 23.

simply that he has chosen to proceed by defining the excluded actions and not by specifying those which may be brought locally. He must therefore find a formula to define the class of action for theft from a slave which is excluded and that he does by using the formula 'dum id ad dominum dominamve pertinebit'.

Comparison with lines 3 and 4 of the Fragmentum Atestinum is instructive. It also excludes certain cases from the local jurisdiction and among them we find 'aut quod furti quod ad hominem liberum liberamve pertinere deicatur, aut iniuriarum agatur ...' Mommsen[35] cites D.39.4.1.pr. where the emended text, referring to members of a *familia* of *publicani,* reads 'si hi ad quos ea res pertinebit non exhibebuntur' i.e. 'if those are not produced whom that matter involves'. There the reference must be to the perpetrators of any delict.[36] So Mommsen takes 'quod ad hominem liberum liberamve pertinere deicatur' to mean "which is alleged to involve a free man or woman“, i.e. as the actual perpetrator. He says that it means the same as 'qui furtei quod ipse fecit fecerit' in line 111 of the Tabula Heracleensis. But even leaving aside the clear wording of the Tabula Heracleensis, in the light of the formulation just above in lines 2 and 3 of the Fragmentum Atestinum, we should surely expect the draftsman to have used some phrase like 'quod ipse fecisse dicetur' to describe an actual perpetrator.

In the light of the lex Irnitana we can approach the translation afresh and say that the measure excludes actions "for theft which is alleged to affect a free man or woman, or for iniuria". That is to say, it excludes actions for theft from a free man or woman or for iniuria.

The provision is by no means identical to that in the lex Irnitana. This is hardly surprising given the difference in date and given that the scheme of the two leges is by no means exactly the same. Still the distinction between actions for theft which affect a free person and those (of *res peculiares*) which essentially affect a slave must lie behind this measure also. But this draftsman uses a formula which does not specifically mention thefts from slaves which affect their masters. This could either be because he has not thought of the refinement or because he has chosen a form of words which will in effect cover all cases of thefts which affect free persons, whether the object is stolen directly from the free person or indirectly from his slave. It is also noteworthy that this fragment does not specify that the *actio iniuriarum* must concern insult to a free person and hence there is no mention of the praeiudicium which we find in the lex Irnitana. It may be that it dates from a period before actions for iniuria in respect of slaves had been fully worked out.[37]

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[35] Th.Mommsen, 'Ein zweites Bruchstück des rubrischen Gesetzes vom Jahre 705 Roms' Gesammelte Schriften vol. 12 (1965), 175, 190 n.1 citing I.Alibrandi, 'Di un frammento di legge Romana sopra la giurisdizione municipale' Studi e documenti di storia e diritto 2 (1881), 3.

[36] Cf. E.P., 388 n.2.

[37] The edict in respect of slaves is different from the others. See E.P. 401 and n.7 where the reference should be to Gaius 3.222.

Finally, Crawford includes in Appendix 1 to the González article[38] a revised publication of certain fragments which have been attributed to the lex Coloniae Genetivae. Fragment III[39] lines 2 and 3 seem to be relevant

[m servo furti ac[
[ominum it furtum pertineat [

It does not seem rash to restore 'cum servo furti' followed by some part of 'actio' and 'dum ad dominum it furtum pertineat'.

Again, if some such reconstruction is right, then the provision would be excluding actions for theft from a slave, provided that the theft affected his master. That would correspond to what we find in the lex Irnitana. Of course, this fragment does not itself take the argument any further since it is too incomplete to provide any additional support for either interpretation. All that can be said is that it would be open to interpretation along the same lines.

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[38] González, 239 et seq.
[39] González, 241.