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INTERRUPTING PROCEEDINGS *IN IURE: VADIMONIUM AND INTERTIUM*

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To suspend and resume a civil lawsuit was surprisingly complicated under the Roman formulary procedure. Some of the complexity was unavoidable; any legal system must try to anticipate events which cause interruptions, such as illnesses or conflicting engagements.¹ Much of the complexity, however, was caused by various rules which did not relate to procedure as such, but which incidentally gave significance to interruptions. For example, if a judge failed to give judgement, he could become liable to the plaintiff whose case he was adjudicating.² This meant that an interruption during the trial phase ('*apud iudicem*') before judgement was given could put the judge in jeopardy of liability. And the liability rules had to be interwoven with rules on interruption, so that an innocent interruption (e.g., where the working day was over) could be distinguished from a doubtful one (e.g., where the working day was over, but the judge had no intention of returning).³ Similar complications could arise in the first stage of the lawsuit ('*in iure*'), conducted before a magistrate. A plaintiff's claim was at risk until he reached the conclusion of the first stage, marked by *litis contestatio*. His claim was at risk of being barred by the passage of time, the death of a party, or a loss of status. If however the proceedings reached *litis contestatio* the claim was 'perpetuated' and the plaintiff had no further worries in this respect.⁴ An interruption before *litis contestatio* might therefore cause a plaintiff to lose his claim. Accordingly we find that rules dealing with these interruptions attempt to balance a plaintiff's need to preserve his claim with the event prompting the interruption.⁵

The various ways in which rules on interruption took account of other, non-procedural rules have recently become clearer with the discovery of new evidence. Subjects such as interruption interested Justinian's compilers only to a degree.⁶ Much of our information therefore comes from laws and written legal transactions recorded in inscriptions and papyri. Generous discoveries of such sources in recent decades have benefited the study of Roman civil procedure. Our knowledge of the two institutions treated here, *uadimonium* and *intertium*, owes a good deal to the discovery of the *lex Irnitana* in Spain in 1981, and of a banker's archive of wax tablets – many recording *uadimonia* – near Pompeii in 1959.

This is not to say that the rules with all their refinements are revealed in the new evidence. The evidence does not announce the rules; it reflects and anticipates them. This means that to determine what the rules are, it often is not enough simply to relate what the sources appear to describe. This gives no assurance that one has come to the right answer. Sometimes the better approach is to suggest, with

* For convenience the following are cited by abbreviation: G. Camodeca, 'Nuovi documenti dell'archivio Puteolano dei Sulpicii', *SDHI* 61 (1995), 693–705; id., *L'archivio puteolano dei Sulpicii* (Naples, 1992); J. González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law', *JRS* 76 (1986), 147–243; M. Kaser, *Das römische Zivilprozessrecht* (Munich, 1966) and 2nd ed. (Munich, 1996); E. Metzger, *A New Outline of the Roman Civil Trial* (Oxford, 1997); A. Rodger, 'Postponed Business at Irni', *JRS* 86 (1996), 69–73; Pauly–Wissowa, *Realencyclopädie der classischen Altertumswissenschaft*, vol. 7A (2nd ser.), 2058, s.v. 'Vadimonium' (A. Steinwenter); TP = Tabula(e) Pompeiana(e); TPSulp. = Tabula(e) Pompeiana(e) Sulpiciorum; TH = Tabula(e) Herculans(es).

¹ The complexity is conveyed well in Ulpian, *On the Edict*, book 74 (Lenel, *Paling.* cols. 854–56).

² See E. J. H. Schrage, 'The Judge's Liability for Professional Mistakes', *Journal of Legal History* 17 (1996), 103.

³ On the ways in which a judge could postpone the trial without bringing liability on himself, see *lex Irni*. ch. 91, tab. XA, ll. 51–3; tab. XB, ll. 15–17; *P. Ant.* I.22, *recto* (Egypt Exploration Society, *The Antinoopolis Papyrus*, ed. C. H. Roberts (London, 1950)), and the discussion at Metzger, *A New Outline*, ch. 11.

⁴ See e.g. D.12.2.9.3 (Ulpian, *Edict*, book 22) and D.27.7.8.1 (Paul, *Replies*, book 9).

⁵ See Rodger (1996), 67, and the discussion below.

⁶ See e.g. D.2.11 (*Si quis cautionibus in iudicio sistendi causa factis non obtemperauerit*); D.2.12 (*De feriis et dilationibus et diuersis temporibus*). Rules on interruption during the period of the formulary procedure are hard to discover from Byzantine sources not only because the formulary procedure was no longer used, but because *litis contestatio* did not have the same extinctive effect on a claim.

the benefit of educated guesses, what the rules might be, and then to consider whether those are indeed the rules that the sources reflect or anticipate. A model of this sort of reasoning may be found in an argument discussed below, in which the argument's author has presented a particular legal problem, suggested a likely solution in the form of a rule, and then shown how such a rule appears to be reflected in a particular provision of the *lex Irnitana*.⁷

The purpose of the present discussion is to give a better account of *uadimonium* in light of what we know of *intertium*. Both of these institutions are concerned with interruptions and are influenced to some extent by non-procedural rules, such as the rules just mentioned concerning lost claims and liability. And both institutions are reflected rather than described in the sources. The task is to determine what rules the sources reflect.

To anyone familiar with the literature on *intertium*, however, it might seem that *intertium* could have nothing whatsoever to do with *uadimonium*. This is because *intertium* is commonly understood to describe a three-day interval⁸ falling after the conclusion of the first stage of a lawsuit, and before the trial phase. A *uadimonium*, on the other hand, is a promise to appear at the first stage, and never arises after the first stage is completed. *Vadimonium* and *intertium* would therefore seem to belong to separate stages.

The discussion below assumes a different explanation of *intertium*. As understood here, the interval that *intertium* denotes does not always fall after the conclusion of the first stage, but may instead interrupt the first stage. That is, after the parties appear before him, a magistrate may suspend the proceedings by granting *intertium*, and then resume the proceedings for *litis contestatio* on a later date. The *uadimonium* plays a part under this explanation of *intertium*, because before *litis contestatio* has taken place and the matter has been entrusted to a judge, a defendant has no special reason to volunteer his appearance. One would expect a *uadimonium* to be exacted from a defendant where the first stage has been interrupted by *intertium*.

The relevance of *intertium* to *uadimonium* therefore depends very much on a certain view of *intertium*. To put it another way, the evidence on *uadimonium* may tend to support this view of *intertium*.

I. INTERTIUM

Most of what we know of *intertium* comes from chapters 90–92 of the *lex Irnitana*, a municipal charter for a small town ('Irni') in Baetica, dating from AD 91.⁹ These chapters fall within a section of the statute which treats the administration of justice. Because this section is written largely in the form of directions to magistrates, judges, and parties, and because it is not a complete statement of the relevant procedures,¹⁰ it is not clear at once what system of rules the statute assumes. Chapter 90 states that the *duumvir* must grant something called *intertium*, and that if he does not do so he will incur a fine. The word *intertium*, though undefined in the statute, probably denotes a three-day interval.¹¹ It is accepted in

⁷ Rodger (1996), 69–73.

⁸ References to 'three days' in this article follow Roman reckoning; to us it is two days. See Pauly–Wissowa, *RE*, vol. 4 (1901), s.v. 'Comperendinatio' (Kipp).

⁹ What follows in the next few paragraphs is a much abbreviated argument which appears more fully in Metzger, *A New Outline*, ch. 4.

¹⁰ See M. Crawford, 'The Laws of the Romans: Knowledge and Diffusion', in J. González and J. Arce (edd.), *Estudios sobre la Tabula Siarensis (Anejos de Archivo Español de Arqueología)* (Madrid, 1988), vol. 9), 128.

¹¹ *Intertium* is widely thought to be the successor to a practice under the *legis actiones*, described by Gaius, where the parties gave one another notice to appear before the judge on the *comperendinus dies*. The phrase *dies tertius* and the word *perendinus* appear to have been used as equivalents within a formal legal vocabulary. See Cic. *pro Mur.* 27; Probus 4.9 (*FIRA* II, 456). There are also several substantive similarities between *intertium* and Gaius' *comperendinus dies*. See Kaser (1996), 355; J. Crook, D. Johnston, and P. Stein, 'Intertiumjagd and the *Lex Irnitana*: A Colloquium', *ZPE* 70 (1987), 182–3.

much of the literature that the three-day interval fell between the first and the second stage of a lawsuit.¹² This is a much narrower understanding of *intertium* than the evidence justifies. For example, the interval must conclude on a day on which trials may take place (per quos dies ... iudicia fieri licebit oportebit, in eos dies omnes, ll. 27–8). This reference to trial days might be taken to suggest that the interval under discussion is one that falls immediately before the trial. But this assumes too much: the first day of the second stage is also the last day of the first stage. The first stage closes with *litis contestatio*, and as this is the event by which the suit is passed on to the judge for trial, the day of *litis contestatio* might sensibly take place on a day permitted for trials. Thus the reference to days on which trials may take place is no more appropriate to an interval preceding trial than to an interval preceding *litis contestatio*.

A close reading of the statute reveals that the interval *intertium* denotes does not fall invariably after the first stage is completed. Chapter 90 of the statute is constructed as a rule and an exception, a rule that the magistrate must interrupt the first stage for three days and an exception that, if conditions are satisfied, the first-stage interruption is unnecessary and the parties and judge may proceed to trial on a day of their choosing. The rule is expressed as an injunction that the magistrate must grant a three-day interruption in the proceedings before him, and that he will be fined 1,000 sesterces if he does not.¹³ The interruption is made necessary by the inherent awkwardness in selecting judges: unless the parties have agreed on a person to serve and he is amenable to selection as judge, that person cannot be appointed as judge on the spot. The person whom the parties might wish to select, or the person whom the *reiectio* procedure produces, could be dead, ill, absent from the town, or have suffered a loss of status.¹⁴ An interruption before *litis contestatio* gave an opportunity to consider his availability to serve as judge.¹⁵

Yet an interruption before *litis contestatio* carried its own hazards: a plaintiff's claim could be lost and forever barred if *litis contestatio* were delayed too long. Thus chapter 90 treats the matter of interruption seriously, not only fixing the third day as the day when proceedings *in iure* must resume, but imposing a fine on the magistrate if he does not follow the rules. The fine is 1,000 sesterces which, being roughly the jurisdictional limit on lawsuits that may be brought in Irni,¹⁶ is in most instances the largest sum a plaintiff stands to lose if *litis contestatio* is delayed too long and his claim is barred.¹⁷

On the limits of the resemblance between *intertium* and *comperendinus dies*, see Metzger, *A New Outline*, 77–88, and below, text accompanying notes 22 to 29.

¹² See e.g. A. d'Ors, 'Nuevos datos de la ley Irnitana sobre jurisdicción municipal', *SDHI* 49 (1983), 40; Intertiumjagd, above note 11, 176; W. Simshäuser, 'La jurisdiction municipale à la lumière de la *lex Irnitana*', *RHDFE* 67 (1989), 631–2; A. Rodger, 'The *Lex Irnitana* and Procedure in the Civil Courts', *JRS* 81 (1991), 78; F. Lamberti, '*Tabulae Irnitanae*': *municipalità e 'ius Romanorum*' (Naples, 1993), 185–6; Kaser (1996), 355.

¹³ Ch. 90, ll. 27–9 (injunction to grant *intertium*); ll. 37–40 (fine).

¹⁴ Chapter 87 speaks directly about the problem of a person whose name is not on the *album iudicum*, but whom the parties wish to have as judge. The magistrate has to satisfy himself that the person is not a duumvir, aedile, or quaestor, that he is not too ill to serve, that he is willing to serve, and that he is twenty-five years of age or older. Ch. 87, ll. 43–9. The magistrate might also have to satisfy himself that the person is a *municeps*. Compare P. Birks, 'New Light on the Roman Legal System: The Appointment of Judges', *Cambridge Law Journal* 47 (1988), 51, with F. La Rosa, 'La "lex Irnitana" e la nomina del giudice', *IURA* 40 (1989), 66–8.

¹⁵ 'Praetor eos, quoscumque intellegit operam dare non posse ad iudicandum, pollicetur se excusaturum.' D.50.5.13 pr (Ulpian, *Edict*, book 23). 'Si post causam actam coeperit se excusare iudex, si quidem priuilegio, quod habuit antequam susciperet iudicium, uelit se excusare, nec audiendus est.' D.h.t.13.3. Mazeaud takes the 'audiendus' in the latter quote as proof that the judge was present *in iure*. J. Mazeaud, *La Nomination du Juge Unus* (Paris, 1933), 149 n. 2. For other arguments in support of special hearings *in iure* to aid the selection of the judge, see O. Lenel, 'Zur Form der klassischen Litiskontestation', *ZSS* (rom. Abt.) 24 (1903), 338–9; L. Wenger, *Praetor und Formel* (Munich, 1926), 64–6.

¹⁶ Chapter 84. See especially A. Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the *Lex Irnitana*', *ZPE* 84 (1990), 147–61.

¹⁷ The common interpretation of *intertium*, I believe, does not account properly for the 1,000-sesterces fine. After *litis contestatio* time is no longer of the essence (cf. the eighteen-month span before *mors litis*; see G. Zanoni, 'De intertium dando', *SDHI* 58 (1992), 320). Moreover, a 1,000-sesterces fine for failing to set a trial date in these circumstances would

Accordingly, the rule is that the magistrate grants a three-day postponement *in iure*. The exception is expressed at lines 31–7, and describes the circumstances under which it is not necessary to interrupt the *in iure* stage:

Item si inter eos, inter quos ambigetur, et iudicem, qui inter eos iudicare debebit, in aliquem diem uti intertium inter eos detur conueniet, neque is dies propter uenerationem domus Augustae festus erit feriarumue numero propter eandem causam haberi debebit, in eum diem intertium inter eos dato.

Moreover, if the persons between whom the dispute exists and the judge who is obliged to adjudicate their dispute should agree that their three days' postponement might be granted to a certain day, and that day is not a feast day devoted to the worship of the *domus Augusta* nor ought to be deemed a festival day for the same reason, then he shall grant their three days' postponement to that day.

The exception is referring to an interval preceding trial, not an interval that interrupts the *in iure* phase. (1) The day the clause refers to ('in aliquem diem') is a trial day. The class of days permitted for trials is different from the class of days on which a magistrate may administer justice: the criteria allowing each to take place on *dies nefasti* is not the same.¹⁸ Agreement among the parties and judge, as described in the quoted language, belongs to the criteria for scheduling trial days. (2) The words '[iudex] qui inter eos iudicare debebit' state a condition: the agreement requires the consent of the judge who will in fact serve. A name selected from the *album iudicum*, or an agreed judge whose qualifications are not yet known, is not enough to render an *in iure* interruption unnecessary and permit the parties to pass to the trial phase.

The procedures may be summarised as follows. The *intertium* described in the *lex Irnitana* is a postponement. By default it interrupts the first stage of the lawsuit for three days, probably because the judicial selection procedures required it. But where there was an available judge, and the judge and the parties could agree on a trial date, *litis contestatio* could take place without a preceding interval, and the trial then would take place on the agreed date.

II. VADIMONIUM

A *uadimonium*, generally speaking, was an undertaking by a defendant to make himself available for an appearance at the first stage. It took the form of two promises, which together assured the plaintiff the payment of a penalty if the defendant did not make himself available.¹⁹ *Vadimonia* are distinguished by the purpose for which they were used; according to the prevailing opinion they were used (1) before a lawsuit was commenced, to bring a person within the summoning power of the magistrate (*uadimonium* for summons), (2) to ensure a person's return to the magistrate when the proceedings *in iure* were interrupted (*uadimonium* for postponement), and (3) to ensure a person's presence before a different magistrate (*uadimonium* for transfer).²⁰ To some degree these distinctions are useful in discussing

not accomplish anything, because a magistrate would be free to evade the fine simply by declining to grant a trial. For more on the relation between the jurisdictional limits at Irni and the 1,000-sesterces fine, see Metzger, *A New Outline*, 66–71.

¹⁸ The magistrates at Irni were not permitted to administer justice during the harvest or vintage unless the matter were urgent; the parties, on the other hand, could attend trial on these prohibited days, provided they and their judge agreed to do so. See *lex Irni*. ch. K, ll. 34–40; ch. 92, ll. 27–46.

¹⁹ The first promise is given by the defendant to assure his appearance at a certain place and time, and is expressed in the formula *uadimonium factum Numerio Negidio*, where the dative expresses the doer of the act, the defendant. See Wolf (1985), 68–9, and the discussion below, notes 37 to 40 and accompanying text. The second promise is a conditional one, joined to the first; the defendant promises to pay a certain sum if he does not appear. Most of the surviving promises of this kind are *sponsiones*, though where the defendant was not a citizen he gave a *fidepromissio*. See TPSulp. 4, 13, 14.

²⁰ Kaser (1996), 226–31. The *lex Irnitana* contains references both to *uadimonia* for appearance before the provincial governor (ch. 84, ll. 20–23) and *uadimonia* for postponement (ch. K, ll. 40–2).

uadimonia, though differences among the three are sometimes less obvious than the categories suggest. In particular, (1) and (2) may be indistinguishable in the examples of *uadimonia* we possess.²¹

If it was common to interrupt the *in iure* phase for three days, then three-day *uadimonia* for postponement must have been common also. Gaius says that *uadimonia* for postponement were exacted from a defendant when business *in iure* could not be completed on the day (G. 4.184). Gaius' words *neque eo die finiri potuerit negotium* certainly contemplate delays brought on by, e.g., lengthy legal arguments, but they also contemplate delays brought on by the granting of *intertium*. During the *in iure* phase, unless the parties have a suitable judge with whom they can agree on a trial date, the business *in iure* cannot be completed. Thus, if a trial date is agreed among the parties and judge no *uadimonium* is needed, but if a trial date is not agreed or there is no suitable judge, a defendant would be obliged to give a *uadimonium* assuring his appearance at a further hearing *in iure* three days on.

This at least is what one would expect, given the practice of postponing proceedings *in iure* for three days. Before the discovery of the *lex Irnitana* and of numerous examples of *uadimonia*, the best evidence we possessed for three-day *uadimonia* was in Macrobius. In the *Saturnalia* he undertakes to explain the meaning of various terms in the legal vocabulary, including this: 'comperendini [dies sunt] quibus uadimonium licet dicere' (*Saturnalia* 1.16.14). Until the discovery of the *lex Irnitana*, this comment did not seem to make much sense.²² The expression 'comperendinus dies' in general refers to a matter put off for three days, and yet in no source does this expression or certain similar expressions (*comperendinatio*,²³ *comperendinatus*,²⁴ *res comperendinata*²⁵) describe a postponement during the *in iure* stage of a lawsuit, the only stage at which a *uadimonium* could arise. Macrobius would therefore seem to be confused.²⁶

The *lex Irnitana* to some extent explains Macrobius' definition of *comperendinus dies*. As mentioned above,²⁷ the act of granting *intertium* described in the *lex Irnitana* is widely thought to be the successor to a similar act followed under the *legis actio* procedure. Gaius at *Institutes* 4.15 describes how parties who proceeded under the *legis actio sacramento* would give one another notice to appear before the judge for trial on the 'comperendinus dies'. This *comperendinus dies* could not be the same as the one Macrobius describes, since it arises during the second and not the first stage of a lawsuit. Yet Gaius appears to say that the *comperendinus dies* he describes was abolished under a *lex Pinaria* in favour of a new procedure, under which a thirty days' interval was observed before *litis contestatio*.²⁸ If therefore *intertium* is related to Gaius' *comperendinus dies*, but via the *lex Pinaria*, we have at least a

²¹ See the discussion below, notes 32 to 42 and accompanying text.

²² See D. Johnston, 'Three Thoughts on Roman Private Law and the *Lex Irnitana*', *JRS* 77 (1987), 74.

²³ Pliny, *Ep.* 5.9.1, 6.2.6; Tac. *Dial.* 38; Sen. *Ep.* 97.5; Gellius, *NA* 14.2.1.

²⁴ Cic. *pro Mur.* 27; I *in Verr.* 11; II *in Verr.* 1.7, 1.9; *Brut.* 22, 87.

²⁵ Festus, *De verborum significatu* (Bruns⁷ II, p. 32).

²⁶ It is appropriate to mention here a related reference to 'the day after tomorrow' in Aulus Gellius, *NA* 6.1.7–11. He relates the story of Scipio Africanus presiding over a lawsuit during a campaign to capture a Spanish town. When asked about the *uadimonium* he intended to order, he replied 'perendie ... sese sistant illo in loco' (indicating the town under siege). The trial took place *die tertio*. Cf. the same story in Valerius Maximus: 'uadimonium in posterum diem facere iussit'. *Factorum et Dictorum Memorabilia* 1.7.1a.

²⁷ Above, note 11.

²⁸ 'Ut autem die XXX. iudex detur, per legem Pinariam factum est; ante eam autem legem statim dabatur iudex. ... Postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem uenirent, denuntiabant' G.4.15 (*Gai Institutiones*, edd. E. Seckel and B. Kuebler (Leipzig, 1939), with the omission of an unrelated clause, as suggested by J. Juncker, 'Haftung und Prozeßbegründung im altrömischen Rechtsgang', in *Gedächtnisschrift für E. Seckel* (Berlin, 1927), 255 n. 1). The 'comperendinus dies' described here is usually understood as a practice belonging to the post-Pinarian procedure; I believe the better understanding is that, with the word *tamen*, Gaius is indicating that he has not yet left the subject of the pre-Pinarian procedure. See Metzger, *A New Outline*, 82–4.

partial explanation for Macrobius' *comperendinus dies*: he is describing a postponement which once took place after the *in iure* stage but at the time he writes interrupts the *in iure* stage.²⁹

III. THREE-DAY VADIMONIA

We possess several *uadimonia* promising appearances *in iure* three days after their execution. It is of course impossible to prove conclusively that such documents have anything to do with *intertium*. Perhaps the documents show simply a preference for putting matters off for three days, a preference well attested in Roman litigation.³⁰ Also, the parties and the magistrate were presumably able, in any instance, to decide that a date three days later was convenient for them. As it happens, fully half of the *uadimonia* we possess that show both relevant dates promise an appearance three days after execution. The most one can say about this sort of evidence is that, if one accepts that *intertium* (in default of an agreement otherwise) would interrupt the proceedings *in iure* for three days, then one should not be surprised to find (as we do find) a large number of three-day *uadimonia* among *uadimonia* that survive.

Nearly all of the *uadimonia* we possess come from collections of wax tablets discovered in this century in Herculaneum and Puteoli. Though most are incomplete in some respect, they are remarkably uniform in content; each would declare the names of the parties, the sum promised, the date of execution, and the day, time, and place for appearance.³¹ For purposes of the present discussion, the principal difference among their contents is that – where comparison is possible – some describe promises to appear locally, while others describe promises to appear in another town or city. Only those which describe appearance locally and which show both the date of appearance and the date of execution could conceivably tell us something about the relation between *uadimonium* and *intertium*.

These documents are usually understood to describe *uadimonia* for summons.³² The reasons for this are not altogether clear. Some of the documents perhaps might be understood in this way because they were executed well in advance of the promised appearance date.³³ This is something one might not expect to find in a *uadimonium* for postponement. But the better explanation for why they are understood to describe *uadimonia* for summons is in the way some in the past have interpreted the documents' technical language. A *uadimonium* for summons is believed – by scholars past and present

²⁹ The *lex Pinaria*, of course, only goes so far in explaining Macrobius' comment: the thirty-day *in iure* interruption of the *lex Pinaria* is not the same as the three-day *in iure* interruption that Macrobius describes. But if the three-day (first stage) interruption of the formulary procedure is ultimately derived from Gaius' (second stage) *comperendinus dies*, and if the *comperendinus dies* did not survive the *lex Pinaria*, then the *lex Pinaria* must play a part in the evolution of one institution into the other. Perhaps the thirty-day interruption was later shortened to three, or the Verona manuscript simply gives us the wrong number – thirty instead of three – as a result of some effort to reconcile the procedures described there with those described under the *legis actio per conductionem* (see G. 4.17b), where the plaintiff declares 'in diem trigensimum tibi iudicis capiendi causa condico'.

³⁰ See the sources cited above, notes 23 to 25.

³¹ Wolf (1985) gives a model *uadimonium* on 66.

³² See I. Buti, *Il "praetor" e le formalità introduttive del processo formulare* (Camerino, 1984), 316; T. Giménez-Candela, 'A propósito del "vadimonium" en las "tabulae pompeianae" de Murécine', in *Studi in onore di C. Sanfilippo I* (Milan, 1982), 184; L. Bove, *Documenti processuali dalle tabulae Pompeianae di Murécine* (Naples, 1979), 44; Camodeca (1992), 43.

³³ TH 14 (8 September – 3 December); TPSulp. 1 (25 October – 6 or 12 November); perhaps also TH 13 (reconstructed on the pattern of TH 14, see note 46 below). The various texts are cited in notes 43 and 44 below. Another clue to the nature of these *uadimonia* concerns the sum that the defendant promises. Gaius, in discussing the *uadimonia* for postponement, says that in most cases the sum could not exceed half of the amount of the claim. G. 4.186. If a given *uadimonium* did not observe this rule, one might conclude that it described a *uadimonium* for summons. We lack the evidence for this, however, and whether *uadimonia* for summons were subject to this limitation remains disputed. See Camodeca (1992), 52 (saying that the sum ought to be equal or near the amount of the claim); U. Manthe, [Lecture], *Labeo* 40 (1994), 370–1 and n. 7 (saying that the question is not resolved, and pointing out that 50,000 sesterces is the highest amount shown on the surviving *uadimonia*). On TPSulp. 3, see note 51 below.

– to have been entirely voluntary on the defendant’s part; he was not required by the magistrate to promise his appearance, as under the other two types of *uadimonia*.³⁴ The voluntary character is in keeping with the idea that, as the defendant has not yet made an appearance, there has been no opportunity for a magistrate to exact a promise from him. The words used in the *uadimonia* discovered at Herculaneum seemed to some to reflect this voluntary character. The first part, reciting a promise to appear at a certain time and place, was understood to be a unilateral injunction by the plaintiff to the defendant.³⁵ The plaintiff would say *uadimonium tibi facio*, naming a time and place for the defendant’s appearance *in iure*. The defendant would accede to this, not because he had to, but because it was in his interests to do so: by agreeing to appear and giving a *sponsio* or *fidepromissio* for payment in the event of default, the defendant would avoid the *in ius vocatio* and the threat of *missio in possessionem*.³⁶

Much of this explanation of the *uadimonium* for summons has been revised in light of the Puteoli *uadimonia* and a better reconciliation of the sources. The *uadimonium* for summons is still believed to have been voluntary, but other aspects are seen differently. First, under the current view the doer of the act *uadimonium facere* appears to have been the defendant, not the plaintiff. In describing the *uadimonium* for postponement Gaius explains the meaning of the phrase ‘vadimonium ei faciendum est’ as follows: ‘id est, ut promittat certo die se sisti’.³⁷ It is difficult to avoid the conclusion that Gaius is using the same terminology as the *uadimonia* documents, and that *uadimonium facere* describes the giving of a promise.³⁸ This is consistent with several other juristic sources,³⁹ which present various promises to appear as ‘double stipulations’; if the surviving *uadimonia* also present double stipulations, then *uadimonium facere* records a stipulation to appear at a certain time and place, and not a ‘unilateral injunction’.⁴⁰ (The *sponsio* or *fidepromissio*, promising the payment of a sum, would count as the second stipulation.) All of the cited sources, however, are concerned with postponements and not first appearances, and therefore if one accepts that they are relevant to the construction of the *uadimonia* documents, then one also accepts a large degree of similarity between *uadimonia* for summons and *uadimonia* for postponement.

A second revision in the earlier understanding of *uadimonia* for summons concerns the *in ius vocatio*. A defendant still freely gives a *uadimonium* for summons in order to avoid the consequences of the *in ius vocatio*, but the *uadimonium* does not replace the *in ius vocatio*. The surviving *uadimonia* show that a defendant does not promise to appear *in iure*, but at a place close by the magistrate’s tribunal. This suggests that the *uadimonium* is operating in concert with the *in ius vocatio*: because the *in ius vocatio* would summon a defendant immediately and not for some time in the future, what was needed was a means of bringing the defendant to a place at which the immediate summons could take

³⁴ Steinwenter, 2057.

³⁵ See especially V. Arangio-Ruiz, ‘Il processo di Giusta’, *La Parola del Passato* 3 (1948), 138, but also the authorities cited in Wolf (1985), 68 n. 38.

³⁶ Kaser (1966), 168 n. 8, 170.

³⁷ G.4.184; see also G.4.186 (‘tanti fit uadimonium ... quanti actor iurauerit non calumniae causa postulare sibi uadimonium promitti.’).

³⁸ A.-J. Boyé, ‘Pro Petronia Iusta’, in *Droits de L’Antiquité et Sociologie Juridique: Mélanges Henri Lévy-Bruhl* (Paris, 1959), 36–8; Camodeca (1992), 44–6. The dative *ei* expresses the doer of the act. Wolf (1985), 68–9. Gaius apparently wanted to describe the giving of a *uadimonium* in its proper technical language, but recognised that the construction was slightly unusual, and therefore took the trouble to explain it with ‘id est ...’.

³⁹ Cited in Wolf (1985), 61 n. 9, and U. Manthe, [Rezension], *Gnomon* 53 (1981), 157 n. 40 (reviewing L. Bove, *Documenti processuali dalle tabulae Pompeianae di Murécine*). A good example is from Papinian: ‘Ita stipulatus sum: “te sisti in certo loco: si non steteris, quinquaginta aureos dari spondes?”’ D.45.1.115 pr (*Questions*, book 2). Manthe, *op. cit.*, 158, nevertheless believes that the first portion (‘uadimonium factum ...’) of the surviving *uadimonia* do not contain stipulations, and therefore do not square with the juristic sources.

⁴⁰ Wolf (1985), 67.

effect. The *uadimonium* for summons was the means, and the defendant willingly gave it. It was modelled on the *uadimonium* for postponement.⁴¹

This brief sketch of the evolution of the literature on *uadimonia* for summons suggests two conclusions. The first is that, under the now prevailing opinion, the *uadimonium* for summons was more closely modelled on the *uadimonium* for postponement than previous opinion had accepted. As Wolf says, ‘Das Vertagungsuadimonium unterschied sich von dem außergerichtlichen unserer Urkunden nach Anlaß und Zweck, nicht aber in seiner Struktur.’⁴² The second conclusion, following from the first, is that it is no longer possible to assume that *all* of the surviving *uadimonia* describe *uadimonia* for summons. If there is no difference in structure between a *uadimonium* for summons and a *uadimonium* for postponement, then resort must be had to other factors, such as the gap between execution and appearance, to distinguish the two types of *uadimonia*.

In the three *uadimonia* described below, the gap between execution and appearance is three days, and it is suggested (1) that these three *uadimonia* describe *uadimonia* for postponement, and (2) that they reflect the practice of postponing proceedings *in iure* for three days. It is natural that, in the literature, these should have been misconstrued as *uadimonia* for summons, because the three-day *in iure* interruption was not apparent in the sources before the discovery of the *lex Irnitana*. (That is, without knowledge of the interval created by *intertium dare*, one might have expected a *uadimonium* for postponement to arise principally where arguments before the magistrate ran on too long, and thus to show a gap of perhaps only a single day between execution and appearance.) The *uadimonia* cited below accept Camodeca’s reconstruction in all instances:

Twenty-one *uadimonia* survive from the finds at Herculaneum⁴³, Puteoli⁴⁴, and Pompeii⁴⁵.

Six of these twenty-one are complete enough to show at least partly both the date of execution and the date of appearance: TPSulp. 1, 3, 4, 1 bis; TH 14, 15.⁴⁶

Three of these six were executed three days before the promised appearance;⁴⁷ all of them are from Puteoli:

1. TPSulp. 1 bis.⁴⁸ A *uadimonium* executed on 10 November [41–45⁴⁹] in Puteoli, recording a *sponsio* of (perhaps) 2,666⁵⁰ sesterces by C. Varius Cartus in favour of (perhaps) C. Sulpicius Cinnamus for appearance in the forum at Puteoli on 12 November.

⁴¹ Id., 61.

⁴² Id., 68.

⁴³ TH 6, 13, 14, 15. See G. Pugliese Carratelli, ‘Tabulae Herculenses’, *La Parola del Passato* 1 (1946), 383 (TH 6); V. Arangio-Ruiz, ‘Tavolette cerate ercolanesi’, *BIDR* (new ser.) 12–13 (1948), 396 (TH 6); G. Pugliese Carratelli, ‘Tabulae Herculenses’, *La Parola del Passato* 3 (1948), 168–69 (TH 13); V. Arangio-Ruiz, ‘Tavolette ercolanesi (il processo di Giusta)’, *BIDR* (3rd ser.) 1 (1959), 226–29 (TH 14, 15).

⁴⁴ TPSulp. 1–15, 1 bis. See Camodeca (1992), 1–83 (TPSulp. 1–15); Camodeca (1995), 702–3 (TPSulp. 1 bis).

⁴⁵ There is a partly recovered palimpsest of a *uadimonium* on a wax tablet from Pompeii. Very little of its contents can be read. See *CIL* IV (suppl. 1898), no. 3340, tab. 33; H. Erman, ‘Die pompejanischen Wachstafeln’, *ZSS* (rom. Abt.) 20 (1899), 174 n. 1; Arangio-Ruiz, above note 35, 136.

⁴⁶ In reconstructing TH 13 Pugliese has suggested that the dates of execution and appearance are identical to those visible on TH 14. See Pugliese Carratelli (1948), above note 43, 168–70. If this is correct, then TH 13 is identical to TH 14 in every respect except as to abbreviations. I have not included TH 13 with the complete six *uadimonia*, first because the dates are not preserved, and second because, if Pugliese’s reconstruction is correct, TH 13 records the same events as TH 14 (which is included among the six).

⁴⁷ The other three show the following gaps: 8 September – 3 December (TH 14); 25 October – 6 or 12 November (TPSulp. 1); 12 March – 12 March (TH 15).

⁴⁸ Camodeca (1995), 702–3 (= TP 31; AE (1973), no. 152). The earlier publication of this tablet in C. Giordano, ‘Nuove tavolette cerate Pompeiane’, *Rendiconti Napoli* 46 (1971), included only a small portion of the tablet. Camodeca was able to read some of the remainder of the tablet with the help of infrared photography. See Camodeca (1995), 701–2.

⁴⁹ See Camodeca (1995), 705 and n. 51.

⁵⁰ Based partly on the conjecture that this is a *sponsio tertiae partis*. See id., 703–4.

2. TPSulp. 3.⁵¹ A *uadimonium* executed on 3 July 48 in Puteoli, recording a *sponsio* of 50,000 sesterces (the suit itself being worth more than this), and a ring worth 1,000 sesterces given as *arra*, by C. Sulpicius Faustus in favour of L. Faenius Eumenes for appearance in the forum at Puteoli on 5 July.
3. TPSulp. 4.⁵² A *uadimonium* executed on 9 June 52 in Puteoli, recording a *fidepromissio* of 1,200 sesterces by Zenon of Tyre in favour of C. Sulpicius Cinnamus for appearance in the forum at Puteoli on 11 June.

IV. VADIMONIUM IN THE *LEX IRNITANA*

The *lex Irnitana* briefly treats *uadimonia* for postponement in chapter K. In doing so it does not refer directly to three-day *uadimonia*, but certain language in the chapter may nevertheless anticipate the practice of granting three-day *uadimonia*. This language was recently taken up by Rodger and analysed in a way consistent in most respects with the conclusions presented here. Rodger's method was to identify how the language fits into the context of Chapter K, to indicate how on its face the language seemed to lead to an odd result, and to suggest (to avoid the odd result) that the language was drafted to answer a particular procedural event.⁵³ The discussion below departs from Rodger's analysis only in the final step, suggesting that the procedural event the language sought to answer was the three-day *uadimonium*.

Chapter K is concerned with the postponement of business during the period of the harvest or vintage. Ordinarily, this was a period of time during which neither trials nor proceedings before the magistrate were permitted. Exceptions were allowed for both, but the circumstances differed under which each could take place.⁵⁴ A trial might take place during otherwise prohibited periods so long as the judge and parties agreed to it, but proceedings before a magistrate might take place during prohibited periods only under more strict conditions. A magistrate's willingness to preside on such days had nothing to do with it; the issue instead was whether the matter were sufficiently urgent to permit the magistrate to say the words *do, dico*, or *addico* on days otherwise regarded as *nefasti*. The prohibition is relaxed in this context in order to accommodate a body of procedural and substantive rules which gave significance to the timeliness of *litis contestatio*, the final event before the magistrate. Under various rules – notably rules concerning limitation of actions, but also, e.g., those concerning heritability of actions – a plaintiff might lose the opportunity to bring an action if *litis contestatio* were delayed. This result was regarded as sufficiently unjust to warrant a departure from the rule barring the administration of justice⁵⁵ during the harvest or vintage.⁵⁶

⁵¹ Camodeca (1992), 60–1 (= TP 41; AE (1973), nos. 163, 164). This *uadimonium* has attracted particular notice, in part because after reciting the sum 50,000 sesterces it mentions that the suit will be for a greater sum than this. I would take this reference as an indication that the sum, being part of a *uadimonium* for postponement, is limited to one-half of the amount in controversy (see Gaius 4.186 and note 33 above). Some believe, however, that the *poena* in a *uadimonium* for summons was not so limited, and that the sum expressed in this *uadimonium* is at least roughly equal to the amount in controversy. See J. G. Wolf, 'Aus dem neuen pompejanischen Urkundenfund: die Streitbeilegung zwischen L. Faenius Eumenes und C. Sulpicius Faustus', in *Studi in onore di Cesare Sanfilippo* (Milan, 1985), vol. 6, 783 n. 39; Camodeca (1992), 52; cf. Manthe, above note 33, *loc. cit.*

⁵² Camodeca (1992), 62–63 (= TP 70, TP 139). This tablet was formerly thought to belong to separate tablets. See G. Camodeca, 'Per una riedizione dell' archivio puteolano dei Sulpicii', *Puteoli* 4 (1982), 22–7.

⁵³ Rodger (1996), 65–73.

⁵⁴ See ch. K, ll. 34–40; ch. 92, ll. 27–8, 34–7. See also D.2.12.6 (Ulpian, *Edict*, book 77) (judgment given on a holiday).

⁵⁵ Some proceedings of course would not require a magistrate to say *do, dico*, or *addico*, and would not be barred in any event. W. W. Buckland, *A Textbook of Roman Law*, 3rd ed. rev. P. Stein (Cambridge, 1963), 730.

⁵⁶ Most of what we know of the rules allowing urgent matters to be heard is in D.2.12 (*De feriis et dilationibus et diuersis temporibus*). Limitation of actions was the most obvious threat to a plaintiff's claim. If his claim was founded on the praetor's jurisdiction (see G.4.110) and classed as 'temporary', it would expire after a year; bringing the matter to *litis*

In chapter K, the rules on hearing urgent matters during the period of the harvest or vintage are not spelled out, but mentioned indirectly; the reader who wanted to determine which matters were urgent was referred to the practice at Rome:⁵⁷

	Perque eos	34
dies duumviri		
... ius ne dicunto nisi si de is rebus, de quibus Romae		36
messis uindemiaeue causa rebus prolatis ius dici solet;		
... inque eos dies uadimonia fieri nisi de iis rebus de qui-		40
bus Romae messis uindemiaeue causa rebus prolatis ius di-		
ci solet, ne sinunto; item de ceteris, nisi in eos dies qui prox-		42
sumi futuri erunt post eos dies qui tum rerum prolatarum		
erunt, fieri ne sinunto ...		44

And throughout those days [i.e. the days set aside for the harvest or vintage during the duumviri's term of office] the duumviri ... shall not administer justice except in the circumstances in which it is the practice at Rome to administer justice during the period in which business is postponed on account of the harvest or vintage. ... And they shall not allow *uadimonia* to be given for those days except in the circumstances in which it is the practice at Rome to administer justice during the period in which business is postponed on account of the harvest or vintage; likewise, in other circumstances they shall not allow [*uadimonia* to be given⁵⁸] except for those days which fall immediately after the days in which business was postponed in that term of office⁵⁹.

The final clause (Il. 42–4) is the part that causes the difficulty.⁶⁰ The statute has just stated that the magistrate should not order an appearance during the harvest or vintage unless the matter is urgent. Yet it then appears to state that, unless the matter is urgent, the magistrate can only order an appearance for a day after the period of postponement. This seems at first to be a case of careless draftsmanship: the language would seem to include even lawsuits that might easily be postponed to a date before the prohibited period.⁶¹

Rodger argues that the language has been added to meet a very particular state of affairs. To apply the language to the magistrate's position *before* the period of postponement leads to the unlikely construction just mentioned, while the magistrate's position *after* the period of postponement does not call for any special rule of this kind. Rodger therefore suggests that the clause comes into effect when an urgent case is heard *during* the period of the harvest or vintage, but the case is then discovered not to be urgent.⁶² He gives the example of an action under the *lex Aquilia* brought before the magistrate during

contestatio, however, would 'perpetuate' it. See D.12.2.9.3 (Ulpian, *Edict*, book 22); D.27.7.8.1 (Paul, *Replies*, book 9). *Litis contestatio* also had the effect of making penal actions transmissible against the heir of the defendant, and in many cases fixing the value of the subject matter of the dispute. See Buckland, *Textbook*, 700–1.

⁵⁷ This is the text of González (1986), accepting all readings and emendations, with the exception of González's *de <interti>is* in line 42. The bronze shows DECRETIS, with ETER inscribed above it, to give *de ceteris*. See Johnston, above note 22, 70 n. 45, and Rodger (1996), 69.

⁵⁸ The translation accepts the suggestion of Johnston, above note 22, 70 n. 45, and Rodger (1996), 69–70, that the second clause deals with *uadimonium*, and that the words *de ceteris* (l. 42) recall the words *de iis rebus* (l. 40).

⁵⁹ I have given 'in that term of office' for *tum* (l. 43), because the *tum* seems to be a reference to the specific period of postponement declared during the relevant magistral cycle (see Il. 27–8). Cf. Rodger (1996), 72–3. In other words, one should not understand the reference to *res prolatae* here as a reference to last year's or next year's period of postponement.

⁶⁰ Rodger (1996), 70.

⁶¹ *Ibid.*

⁶² *Ibid.*

an otherwise prohibited period. The action is treated as urgent, because on the death of the wrongdoer it would not lie against the heir. During the proceedings it emerges that the magistrate would not grant an action under the *lex Aquilia*, but might grant a contractual action instead. The propriety of granting a contractual action cannot be determined on the day, and the magistrate must postpone proceedings and order the defendant to give a *uadimonium* for appearance on another day. A contractual action does not present the same urgency as an action under the *lex Aquilia*, as it would lie against the heir of the defendant. Accordingly the magistrate, heeding the words of Chapter K that non-urgent matters must be heard after the period of the harvest or vintage, postpones proceedings to, and orders the defendant to make a *uadimonium* for, a day after the prohibited period closes.⁶³

It is true that the circumstances Rodger describes could occur, and that applying the language of the clause to those circumstances would lead to the result he suggests. The question that nags is whether the clause is needed to effect this result. We cannot be certain what the clause means unless we have satisfactorily accounted for its presence in the statute. And it seems likely that, if it was indeed the rule that non-urgent cases previously thought urgent were postponed until after the period of the harvest or vintage, then that rule would be subsumed under the main *uadimonium* clause (ll. 40–2), forbidding *uadimonia* for prohibited days unless *de iis rebus de quibus Romae messis uindemiaeue causa rebus prolatis ius dici solet*. Therefore what Rodger's argument leaves unanswered is, why is the second *uadimonium* clause included in the statute?

The practice of postponing proceedings *in iure* for three days, and the consequent practice of ordering a defendant's appearance on the third day, would create an ambiguity that the second *uadimonium* clause might have sought to address. The ambiguity would arise whenever a suit was brought shortly before the beginning of the period of postponed business. One can take the example of a suit commenced on 8 October, in a jurisdiction where the period of postponed business begins on 10 October. If there were no period of postponed business approaching, the magistrate would be required to grant a postponement to 10 October, and order the defendant's appearance by *uadimonium* for that day. Chapter K, in the principal *uadimonium* clause, tells the magistrate that this is not possible. And in the event the magistrate is tempted to order the defendant's appearance for the same day⁶⁴ or the following day – which strictly speaking satisfies the terms of the principal *uadimonium* clause – the additional clause reminds him that the *uadimonium* must be given for appearance on a day after the period of postponed business.

V. CONCLUSION

The practice of granting three-day *uadimonia* for postponement, as a consequence of a magistrate's duty to grant *intertium*, may be proven only by inference. The inference is based on:

- (a) a statement by Macrobius that *comperendini dies* are days to which *uadimonium licet dicere*, supported perhaps by an anecdote in Aulus Gellius describing a *uadimonium* granted to 'the day after tomorrow';
- (b) three *uadimonia*, of the six *uadimonia* available for comparison, showing an execution date three days in advance of the appearance date;
- (c) a clause whose inclusion in the *lex Irnitana* may be explained by the practice of granting three-day *uadimonia* for postponement.

⁶³ Rodger (1996), 71.

⁶⁴ As in TH 15.