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THE *LEX IRNITANA*, CH. 84, THE PROMISE OF VADIMONIUM AND THE JURISDICTION OF PROCONSULS

In an important recent article, A. Rodger expounded a cogent analysis of ch. 84 of the *Lex Irnitana* and especially of the logic of its account of the limits of the jurisdiction of the *duumviri* (lines 1–25).[1] He sums up (p. 150) his analysis of the jurisdiction of the *duumviri* as follows: 'the picture which emerges is coherent, as we should expect. The *duumvir* has jurisdiction in cases up to 1,000 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 1,000 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 1,000 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.'

Although in general Rodger's analysis carries great conviction, legitimate doubts may be raised about his interpretation of the purpose of giving vadimonium to appear at the governor's (i.e. the proconsul of Baetica) tribunal. Rodger claims the purpose was, in turn, to make vadimonium to appear before the praetor in Rome.[2] In this paper I will try to show that this restrictive conception of the role of the proconsul is implausible. Instead I will argue that the proconsul exercised jurisdiction over the parties once they appeared before him. On this hypothesis the proconsul's tribunal was not merely a staging-post on the way to appearance at Rome, but rather the normal legitimate tribunal for the resolution of private disputes which lay outside the competence of the *duumviri* of Irni (or of all the other Latin municipia in Baetica).[3]

[1] A. Rodger, 'The jurisdiction of local magistrates: Chapter 84 of the *Lex Irnitana*', *ZPE* 84 (1990), 147–61; a clear improvement on the original analysis of J. Gonzalez, 'The *Lex Irnitana*: a new copy of the Flavian Municipal Law', *JRS* 76, (1986), 147–243.

[2] A. Rodger, 150: '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' (the paragraph preceding the one quoted in my text); cf. also pp. 152, 153, 157 and 159. In all the latter references the claim is made in the context of the categories of cases (fundamentally *actiones famosae*) which were exempt from the jurisdiction of a *duumvir*, whatever the sum at issue, unless both parties agreed to his jurisdiction.

[3] Such a hypothesis is assumed, for example, by A. Lintott, *Imperium Romanum* (London, 1993), 143–4: 'those lawsuits which it was illegal to try locally ... would be referred to the Roman proconsul or his *legatus*, either for investigation themselves or for submission to a judge or panel of judges'; cf. H. Galsterer, 'Municipium Flavium Irnitanum: A Latin Town in Spain', *JRS* 78 (1988), 78–90 at 87: 'all cases which went beyond the competence of the magistrates of Irni belonged to the jurisdiction of the proconsul, a process facilitated by vadimonia, which the law considers in detail; there is a clear disposition on the part of the legislator to forestall as far as possible any direct appeals to Rome.'

As a preliminary we may note that Rodger assumes, rather than argues, that the parties, when they appeared before the proconsul, in turn made vadimonium to appear in Rome. A brief footnote refers the reader to an article of D. Johnston. He notes in his relevant passage: 'this [the making of vadimonium to the *duumviri*] is an interesting link in the chain: for the edictal commentaries show that the governor's edict contained provision in the case of matters beyond his competence for a vadimonium to be made for appearance in Rome.'[4] In his relevant footnote Johnston refers us to book two of Ulpian's and Paul's commentaries on the edict and book one of Gaius on the provincial edict. These books are all given the rubric *de vadimonio Romam faciendo* by Lenel. However none of the surviving extracts of these books makes any clear (to me at least) reference to the remission via vadimonium of cases from the governor's tribunal to Rome (see further infra).[5] In contrast a variety of considerations, based on what we know of the civil and criminal jurisdiction of proconsuls and on *a priori* reasons of practicality, can be deployed in favour of the hypothesis that the court of the proconsul was the normal legitimate forum for the resolution of private disputes which came to it via vadimonium from local municipal courts.

THE CIVIL JURISDICTION OF PROCONSULS

Ulpian claimed in a famous statement, in the first book of his *de officio proconsulis*, that: 'cum plenissimam autem iurisdictionem proconsul habeat, omnium partes qui Romae vel quasi magistratus vel extra ordinem ius dicunt ad ipsum pertinent.'[6] The limitations of our evidence make it difficult to illustrate systematically this generalization through the citation of specific case-law. However sufficient examples exist of proconsuls exercising jurisdiction in serious civil suits involving Roman citizens to suggest that *a fortiori* they also exercised jurisdiction in private actions involving *municipes* and/or *incolae* of Latin communities in their provinces.

For example in 158/9 the proconsul of Africa, Claudius Maximus, heard at Sabratha the property-dispute between Apuleius' wife, Pudentilla, and the Granii.[7] Almost contemporaneously in Asia Aelius Aristides recounts how an estate which he had purchased in Mysia was attacked and taken over by some neighbouring landholders who had employed slaves and hired thugs. These landholders perhaps had some real claim to the estate, but Aristides through the good offices of his consular friend L. Cuspius Pactumeius Rufinus quickly gained access to the proconsul's tribunal at Pergamum. The latter adjudicated the estate to Aristides and had one of the attackers put in jail.[8] Another second century proconsul of Africa, Marcellus, judged that a charge brought before him by a Boccius Copo against a priest of Lepcis, Tullus, was calumnious. Tullus was then free to bring an *actio iniuriarum* against Boccus, although the two seem to have settled out of court.[9] Finally we may note a complex civil suit, presumably concerning Roman citizens,

[4] D. Johnston, 'Three Thoughts on the *Lex Irnitana*', *JRS* 77 (1987), 62–77 at 65.

[5] Perhaps *Dig.* 2. 11. 1 (from Gaius) may have a provincial context.

[6] *Dig.* 1. 16. 7. 2.

[7] Apuleius, *Apologia*, 1. 1ff and 59 (for the site of the trial).

[8] Aelius Aristides, *Or.* 50. 105ff.K.

[9] *IRT* 304: 'Mercurio et Minervae votum solvit Tullus sacerdos ex pecunia quam a Boccio Copone accepit ne cum eo ex decreto Marcelli proconsulis qui eum kalumniatorem cognoverat iniuriarum ageret' (for the possible date and identity of Marcellus see R. Syme, *Emperors and Biography* [1971], 135 suggesting Q. Pomponius Marcellus, *suff.* 121); also see *C.J.* 2.11.5. (198) for a proconsul finding a decurion guilty of *iniuria*. It is noteworthy that the *actio iniuriarum* is one that Rodger (157) assumes had automatically to go to Rome from Irni, unless both parties agreed to accept the jurisdiction of a *duumvir*.

heard by C. Serius Augurinus, proconsul of Africa 169/70, who consulted Marcus Aurelius on the difficult question of the compensation to be awarded to a plaintiff who had successfully sued for an inheritance from defendants who had held his property in good faith.[10]

If the above account, which accepts Ulpian's claim that proconsuls had complete civil jurisdictional powers, is correct, what then of the procedure of making vadimonium to appear at Rome?[11] This form of vadimonium, which is quite distinct from the use of normal vadimonia in the course of proceedings *in iure*, is ill-known.[12] Although, as noted above, Lenel ascribed the rubric *de vadimonio Romam faciendo* to book two of both Ulpian's and Paul's commentaries on the edict, none of the surviving extracts is especially perlucid.[13] However non-juristic evidence is more helpful. The *lex Rubria* ch. 21, lines 21–4, had already laid down rules on the use of vadimonium to appear at Rome for cases outside local municipal jurisdiction. Even more helpful from our point of view are Italian documents of the first century A.D. from Herculaneum and Puteoli which demonstrate the practical use of vadimonia to appear before the urban praetor's tribunal in cases which fell outside the competence of the local municipal courts.[14] In Italy, therefore, in the first century A.D. the practice of *vadimonium Roman faciendum* provided the procedural link whereby municipal litigants, whose civil-law disputes fell outside the competence of their local magistrates, could get their cases to the competent tribunal, that of the urban praetor at Rome. In contrast in a public province, such as Baetica, the proconsul's tribunal functionally performed the role of the urban praetor's tribunal in Italy. The provision of vadimonium to appear before the proconsul was, therefore, for municipal litigants in Baetica the structural equivalent of providing vadimonium in Italy to appear before the praetor.

THE CRIMINAL JURISDICTION OF PROCONSULS

As Rodger noted, certain civil actions (*actiones famosae*) fell automatically outside the jurisdiction of the *duumviri* of Irni (unless both parties agreed) because condemnation led to *infamia*.[15] But this consideration will hardly explain why such actions could not be routinely heard by the proconsul. For proconsuls exercised criminal jurisdiction over Roman citizens in their provinces. Both severe penalties (such as condemnation to the mines, relegation, deportation) and loss of civic status were possible consequences of condemnation on serious charges.[16]

For example during the reign of Domitian the proconsul of Pontus-Bithynia, Velius Paulus, had sentenced to the mines a Roman citizen, Flavius Archippus, on charges

[10] *C.J.* 3.31.1.

[11] It is worth noting that the most recent account of the powers of late republican governors ascribes full powers of civil jurisdiction to them; so A. Lintott, op. cit. (n. 3), 54–69.

[12] Thus M. Kaser, *Das römische Zivilprozessrecht* (1966), p. 170, has only the briefest of comments on it.

[13] As often in the *Digest* many of the relevant extracts lack the original context necessary to make them fully intelligible. It is noteworthy that none of the 21 extant extracts of Ulpian or of the 12 extant extracts of Paul use the term vadimonium. Nor, for example, is it clear how the extract of Ulpian (*Dig.* 1.12.3.) on the powers of the urban prefect is relevant.

[14] *Tabulae Herculaneae* nos. 13–15 in *La Parola del Passato* 3 (1948), 165ff.; Puteoli: see generally L. Bove, *Documenti processuali dalle Tabulae Pompeianae di Murecine*, (1979).

[15] Rodger, 152.

[16] In general see P. D. Garnsey, 'The Criminal Jurisdiction of Governors', *JRS* 58 (1968), 51–9 for a clear analysis. The examples cited in my text are not exhaustive, but merely intended to be illustrative of the powers of a proconsul.

of forgery.[17] Marius Priscus, proconsul of Africa *c.* 97/8, sold the condemnation of two Roman knights and some of their friends for a million sesterces.[18] Also in Africa in 158/9, when Apuleius' enemy Sicinnius Aemilianus laid charges against him of misuse of magical practices, the proconsul heard the case without delay.[19] An extract from Ulpian on the validity of the wills of condemned persons is also instructive. He states: 'however all those whose wills we have said are made ineffectual by condemnation for a crime do not change their civil status if they have appealed, and, therefore, wills which they have made previously are not rendered ineffectual, and they could then make a will; for this has very often been laid down by *constitutio*, and they will not be regarded as not having *testamenti factio*, as being in doubt about their status; for they have a definite status and are not themselves uncertain about their status in the meantime. But what if the governor has not accepted an appeal, but postponed punishment by writing to the emperor? I think that such a person also retains his status in the meantime, and his will is not made ineffectual; for, as is set out in a speech of the deified Marcus [to the senate], even if the appeal of the appellant or the person on whose behalf the appeal is made has not been accepted, punishment is to be deferred until the emperor has replied to the governor's letter and the petition of the accused sent with the letter unless, perhaps, a robber caught in the act, or an outbreak of sedition and savage violence, or some other just cause, which the governor will immediately justify in his letter, does not brook delay, not by hastening the punishment, but in order to prevent danger; for in those circumstances it is permissible to punish, then write.'[20] This extract merely takes as given the idea that governors were competent to condemn Roman citizens on serious criminal charges which led to loss of status.

In short if proconsuls were competent to try Roman citizens on serious criminal charges, why should they not have been competent to hear civil suits concerning the inhabitants of Latin *municipia*?

PRACTICAL EXPEDIENCY

Thanks to the publication of the *lex Irnitana* it is now certain that in the Flavian period each new Latin *municipium* in Baetica received a new civic charter. These charters had a common form, but contained minor variations, according to local circumstances, which embraced matters such as (e.g.) the number of decurions or the upper financial limits of the jurisdiction of the local courts.[21] On Rodger's hypothesis we have to believe that litigants not only from Irni, but from every other new Latin *municipium* in Baetica, had to take their private disputes, when for whatever reason they fell outside the competence of the local courts, via vadimonium first to the tribunal of the proconsul and then via a second vadimonium to Rome. The costs and difficulties affecting provincial litigants who need to appear before the proconsul are reasonably well documented.[22] To claim that litigants from all the Latin *municipia* of Baetica had routinely in addition to undergo the costs and difficulties of appearing at Rome is to my mind frankly incredible.[23]

[17] Pliny, *Ep.* 10.58.3. [18] Pliny, *Ep.* 2.11. [19] Apuleius, *Apologia*, passim.
[20] *Dig.* 28.3.6.8–9.
[21] In general see the exposition of H. Galsterer, op. cit. (n. 3).
[22] See my brief comments in 'Proconsuls, Assizes and the Administration of Justice under the Empire', *JRS* 65 (1975), 92–106, at 101–2.
[23] It is perhaps pertinent that in the second century cases of judicial appeal from governors to the emperor were routinely mediated by letter rather than by the personal appearance of the appellant in Rome. Also if in this period analogous charters were issued to all the new Latin communities of Tarraconensis, Rodger's hypothesis becomes even more implausible.

CONCLUSION

The inhabitants of Irni and the other new Latin *municipia* of Baetica were able to try to resolve their private disputes by informal arbitration, by recourse to violence, or by the third classic mechanism of dispute-resolution, namely going to law. Their local courts possessed a quite wide-ranging jurisdiction over private disputes. However, if a dispute fell outside that jurisdiction, the parties had to make vadimonium to appear before the proconsul. In this article I have tried to show, through consideration of the jurisdiction of the proconsul over Roman citizens in civil and criminal cases and through reasons of practical expediency, that the tribunal of the proconsul, either in person or through delegation, was the normal competent forum to hear such cases. There is no good reason to believe that the parties had routinely to make a second vadimonium to appear before the praetor at Rome.[24]

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[24] I need to thank the anonymous referee for helpful comments.