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## The Current View of the Extra-Judicial *Vadimonium*

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### Introduction

The extra-judicial *uadimonium* has a long history in the modern literature and the common opinion has changed several times. The changes in opinion were provoked by the discovery of new evidence; first, Gaius' Institutes, and then, a collection of *uadimonia* from Herculaneum and Puteoli preserved on wax tablets. With each of these two discoveries the common opinion discarded an earlier conception of how the extra-judicial *uadimonium* <132> was used. Over time a number of sources have been collected as instances of the extra-judicial *uadimonium*, some of which may support only one of these discarded conceptions. It will be useful to identify these sources, in particular (1) sources which, in the past, have been interpreted as instances of the extra-

judicial *uadimonium* using assumptions about Roman civil procedure that at present are less widely accepted; and (2) sources which new evidence suggests should not be treated as instances of the extra-judicial *uadimonium*. The exercise is useful if only to caution against misreading the sources. It is also useful because the chronology which emerges does not support the familiar proposition that the extra-judicial *uadimonium* was a common practice in the late Republic<sup>\*1)</sup>.

### I. Evolution of views on the extra-judicial *uadimonium*

The *uadimonium* came into use in civil cases with the introduction of the formulary procedure, perhaps being expressly introduced by the *lex Aebutia* in the latter half of the second century, B.C.<sup>2)</sup>. For the duration of the formulary procedure<sup>3)</sup>, *uadimonia* in civil cases are usually distinguished as judicial or

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The following sources are cited in an abbreviated form. M. von Bethmann-Hollweg, *Der römische Civilprozeß* (Bonn, 1864–66), 3 vols.; L. Bove, *Documenti processuali dalle tabulae pompeianae de Murécine* (Naples, 1979); G. Camodeca, *Tabulae Pompeianae Sulpiciorum* (Rome, 1999); A. Fliniaux, *Le vadimonium* (Paris, 1908); A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford, 1901); O. Karlowa, *Der römische Civilprozess zur Zeit der Legislationen* (Berlin, 1872); M. Kaser, *Das römische Zivilprozessrecht*, 2nd ed. rev. K. Hackl (Munich, 1996); O. Lenel, *Das edictum perpetuum*, 3rd ed. (Leipzig, 1927); E. Metzger, *A New Outline of the Roman Civil Trial* (Oxford, 1997); A. Steinwenter, *Vadimonium*, in Pauly-Wissowa, *Realencyclopädie der classischen Altertumswissenschaft* (2nd series) VII (Stuttgart, 1948) 2054; M. Vogt, *Über das Vadimonium* (Leipzig, 1887); L. Wenger, *Rechtshistorische Papyrusstudien* (Graz, 1902); J.G. Wolf, *Das sogenannte Ladungsvadimonium*, in J. A. Ankum, J. E. Spruit, F. B. J. Wubbe (edd.), *Satura Roberto Feenstra* (Freiburg/Schweiz 1985) 59–69.

The following abbreviations are used below. *Rendiconti Napoli* = *Rendiconti della Accademia di Archeologia Lettere e Belle Arti*; *RS I, II* = M.H. Crawford (ed.), *Roman Statutes* (*Bulletin of the Institute of Classical Studies*, suppl. 64) (London, 1996), 2 vols.; *TP* = *Tabula(e) Pompeiana(e)*; *TP Sulp* = *Tabula(e) Pompeiana(e) Sulpiciorum*; *TH* = *Tabula(e) Herculensis(es)*. <134>

<sup>1)</sup> See the authorities cited below note 29.

<sup>2)</sup> The principal evidence is Gell., *Noctes Atticae* 16. 10. 8. See Fliniaux 37–9; Kaser/Hackl 68–69 & n. 43.

<sup>3)</sup> The introduction of *litis denuntiatio* may have marked the end of the use of the *uadimonium* (see Kaser/Hackl § 86), as recited by Aur. Vict. de Caes. 16. 11, who attributes this reform to Marcus Aurelius. The passage is notoriously untrustworthy in its chronology, however, since it is difficult to attribute the 'repeal' or the 'replacement' of the *uadimonium* to Marcus and still account for its presence in later edictal commentaries. See

extra-judicial<sup>4</sup>). A judicial *uadimonium* arose in the course of a lawsuit, in particular during the first phase before the magistrate. A <135> defendant promised that he would appear again before the same magistrate or another magistrate. He would appear again before the same magistrate if the first phase could not be completed on the day<sup>5</sup>). He would appear before another magistrate if the matter exceeded the competence of the magistrate before whom he first appeared<sup>6</sup>). The judicial *uadimonium* was treated in the edict of the urban praetor and was discussed widely in the juristic literature.

The extra-judicial *uadimonium* was used before a lawsuit was commenced, as a means of bringing the defendant before the magistrate<sup>7</sup>). On an earlier

F l i n i a u x 108 & n.3; A. S t e i n w e n t e r, Studien zum römischen Versäumnisverfahren (Munich 1914) 163 & n.4; M. W l a s s a k, Zum römischen Provinzialprozeß (Vienna 1919) 37.

<sup>4</sup>) The differences are discussed in, e.g., D.T. M u t h e r, Sequestration und Arrest im römischen Recht (Leipzig 1856; repr. Amsterdam 1969) 107; A.F. R u d o r f f, Römische Rechtsgeschichte II (Leipzig 1859) 212; K a r l o w a 323–33; L. W e n g e r, Institutionen des römischen Zivilprozessrechts (Munich 1925) 93–4; B o v e 30–6; C a m o d e c a 49; R. D o m i n g o, Estudios sobre el primer título del edicto pretorio II (Universidade de Santiago de Compostela 1993) 54; K a s e r/H a c k l § 31. A third type of *uadimonium*, one which would bridge the gap between the two phases of a civil lawsuit, was suggested by a passage in Macrob. Sat. 1. 16. 14. See the literature cited in F. L. v o n K e l l e r & A. W a c h, Der römische Civilprocess und die Actionen (Leipzig 1883) 240 n.551; F l i n i a u x 108–10. The text appears to equate *uadimonium* with *comperendinatio*, and did not seem to make much sense until the discovery of the *lex Irnitana*, see below notes 120 to 124 and accompanying text. <135>

<sup>5</sup>) The principal evidence is G. 4. 184.

<sup>6</sup>) See especially D o m i n g o II (note 4) 54–64; Das Gerichtszuständigkeitsedikt des Prätors (§ 5), TR 64 (1996) 178–80. This sort of *uadimonium*, when undertaken voluntarily, is not always classed as judicial. See, e.g., K a s e r/H a c k l 231 n. 37 (citing Cic. pro Tull. 20 and II in Verr. 5. 34, both *uadimonia* to Rome, as instances of the extra-judicial *uadimonium*). For further discussion of this point see below notes 63 to 76 and accompanying text.

<sup>7</sup>) This description of the extra-judicial *uadimonium* is correct for most instances in which 'extra-judicial *uadimonium*' and 'Ladungs*uadimonium*' are used. Inevitably the terms are sometimes used differently. F l i n i a u x includes *uadimonia* by which a third person—perhaps a procurator, as in Cic. pro Quint. 7. 29—promises the first appearance of the defendant. F l i n i a u x 65 n. 3. T o m u l e s c u distinguishes extra-judicial *uadimonia* which are bilateral and compulsory from those which are unilateral and non-compulsory. (C. St. T o m u l e s c u, Das aussergerichtliche *uadimonium* in den in Herculaneum gefundenen Wachstafeln, RIDA (3rd series) 17 (1970) 320ff.). A *uadimonium* which is exacted in order to bring a party before a competent magistrate—sometimes called a 'Verweisungs*uadimonium*'; see below notes 69 to 74 and accompanying text—may be regarded as a *uadimonium* which 'introduces a lawsuit' (though one could not regard it as 'extra-judicial'). A portion of the *lex agraria* (111 B.C.; RS I, no. 2) has been treated in this way. At line 34 (and also perhaps at

view, long rejected, the urban edict gave a person who was summoned a choice of either following the plaintiff to the tribunal immediately, or promising by *uadimonium* to appear at a particular time<sup>8</sup>). On a later view, which has wide support, the extra-judicial *uadimonium* was not treated in <136> the edict, but was a purely voluntary act by the defendant<sup>9</sup>). The defendant chose to engage with the plaintiff in this way because by so doing he could both avoid the immediacy of the *in ius uocatio* and arrive before the magistrate in a better state of preparation<sup>10</sup>). The plaintiff, on this view of the extra-judicial *uadimonium*, also had an interest in engaging with the defendant for the latter's appearance. By so doing the plaintiff avoided the risk that the defendant himself was not available<sup>11</sup>), and with the defendant in a better state of preparation fewer adjournments *in iure* were necessary. Quite apart from the interests of either party, the *in ius uocatio* has been seen by some as a coarse and unseemly way of introducing a suit, particularly where a respectable person was to be sued<sup>12</sup>), and has been seen also as a cumbersome method of summoning those for whom the plaintiff required permission before summons<sup>13</sup>).

This later view, despite its departure from the earlier view, retained one aspect: an extra-judicial *uadimonium* continued to be regarded as a practice

line 36, reconstructed by analogy to line 34) the law refers to *uadimonium* in the course of seeking to assure that controversies over certain lands are heard only by certain magistrates. In its several reconstructions (except M o m m s e n 's first, 1863), the provision says that a party's refusal to promise a *uadimonium* for appearance before a competent magistrate does not bar that magistrate from issuing a decree in the case. The statute is therefore anticipating that a *uadimonium* is exacted by a magistrate who is not competent, for appearance before a magistrate who is competent. R u d o r f f (note 4, 212 n. 6) and C r a w f o r d (RS I, p. 168) refer to this *uadimonium* as a *Ladungsuadimonium*. This is consistent with the common use of the term only insofar as this *uadimonium* introduces a lawsuit.

<sup>8</sup>) This is discussed below in section II. <136>

<sup>9</sup>) See, e.g., v o n B e t h m a n n - H o l l w e g II 198–200; K a r l o w a 328–33; T. K i p p, Die Litisdenuntiation als Prozeßeinleitungsform im römischen Civilprozeß (Leipzig 1887) 113; W. K u n k e l, Epigraphik und Geschichte des römischen Privatrechts, in Vestigia: Beiträge zur alten Geschichte 17 (Akten des VI. Internationalen Kongresses für Griechische und Lateinische Epigraphik) (Munich 1973) 210; B o v e 31.

<sup>10</sup>) V o n B e t h m a n n - H o l l w e g II 199; F l i n i a u x 105; G. P u g l i e s e, Il processo civile romano II (Milan 1963) 401.

<sup>11</sup>) P u g l i e s e II (note 10) 401.

<sup>12</sup>) V o n B e t h m a n n - H o l l w e g II 199 & n. 15; F l i n i a u x 105: 'Nous savons ... qu'il devint le mode de citation usité entre gens de bonne société.'

<sup>13</sup>) P u g l i e s e II (note 10) 401. Gaius' Institutes [G.] 4. 183: *Quasdam tamen personas sine permissu praetoris in ius uocare non licet, ueluti parentes patronos patronas, item liberos et parentes patroni patronaeue, et in eum qui aduersus ea egerit poena constituitur.*

which the litigants resorted to in place of the *in ius uocatio*<sup>14</sup>). Under the earlier view, the edict offered the defendant the choice of following the plaintiff or giving a *uadimonium*; under the later view, the defendant exercised the same choice, but did so out of a regard for his own interests. <137>

The current view of the extra-judicial *uadimonium* is in most respects similar to the one just described. It differs only in the rôle it assigns to the *in ius uocatio*. The difference of view came about as a consequence of the discovery of *uadimonium* documents from Herculaneum and Puteoli. Before these discoveries it was widely assumed that when a person promised by *uadimonium* to appear, he promised to appear before the pertinent magistrate or court<sup>15</sup>). This is perhaps a natural reading of Gaius' words at Institutes 4. 184, where we are told that when business cannot be finished in one day, the person called *in ius* 'promittat se ... sisti' on some other occasion. Yet to the contrary, the new documents suggest that a person would promise to appear, not before a magistrate, but at a particular location close by the place where the magistrate would administer justice<sup>16</sup>). The new documents have therefore forced a re-evaluation of the idea that the extra-judicial *uadimonium* was used

<sup>14</sup>) Von Bethmann-Hollweg II 198; Greenidge 142–3; Wenger (note 4) 94; G. Pugliese, Les voies de recours sanctionnant l'*in ius uocatio*, RIDA 2 (1949) 253; F. La Rosa, Il uindex nella *in ius uocatio* e il garante del *uadimonium*, in Studi Betti III (Milan 1962) 325 n. 77; W. W. Buckland, A Textbook of Roman Law, 3rd ed. rev. P. Stein (Cambridge 1963) 63; Pugliese II (note 10) 401; Kunkel (note 9) 210; Bove 24–5; J. L. Murga, Derecho romano clasico II (Universidad de Zaragoza 1980) 264; V. Arangio-Ruiz, Istituzioni di diritto romano, 14th ed. (Naples 1982) 135. <137>

<sup>15</sup>) See e.g. Voigt 345, who reconstructs the *uadimonium* which Cicero refers to at pro Quinct. 7. 29 and 21. 67 as follows: *P. Quinctium idibus Septembribus in iure coram Burrieno praetore sisti et, si ita factum non erit, tum x aeris tibi dare promitto*. Similarly, Rudorff II (note 4) 211 n. 1. Lenel also assumed that a *uadimonium* to Rome would make reference to the magistrate before whom the promisor was to appear. O. Lenel, Beiträge zur Kunde des Edicts und der Edictcommentare, SZ 2 (1881) 38.

<sup>16</sup>) See e.g. TH 6 (*in foro Augusto ante signum Dianae Luciferae*); TH 14 (*in foro Augusto ante tribunal praetoris urbani*); TH 15 (*in foro Augusto ante aede Martis Ultoris*); TP Sulp 1–8, 9?, 10–11, (*in foro ante aram (Augusti) Hordionianam*). This may have been a feature of the *Verweisungs-uadimonium* as well; Rodger points out that *lex Irni*. c. 84, ll. 20–3, and a 'Letter of Vinicius' (27 B.C, quoted below note 71) permit a *Verweisungs-uadimonium* for appearance wherever the magistrate shall be on the promised day. A. Rodger, *Vadimonium to Rome (and Elsewhere)*, SZ 114 (1997) 161–3. The idea that a person promised to appear near a tribunal was, to some degree, apparent in some literary sources. See Cic. pro Quinct. 6. 25 (appearance *ad tabulam Sextiam*); Hor. Sat. 1. 9. 35 (appearance *ad Vestae*). On these latter sources see the literature cited in Wolf 65 n.28, and C. Giordano, Su alcune tavolette cerate dell'agro Murecine, Rendiconti Napoli (n.s.) 41 (1966 but 1967) 111–12. <138>

in place of the *in ius uocatio*. This idea, it will be recalled, is a survival from the very earliest view of the extra-judicial *uadimonium*, which accepted that the edict of the urban praetor gave the *uocatus* a choice of either following the plaintiff or making a *uadimonium*. The new documents suggest instead that the *in ius uocatio* retained its function even where the extra-judicial *uadimonium* was used: the defendant promised to appear close by the magistrate's tribunal, and on <138> his appearance the *in ius uocatio* was used to persuade him to go the rest of the way<sup>17</sup>).

The proposition that the extra-judicial *uadimonium* could not have replaced the *in ius uocatio*, first argued by Wolf, is confirmed by an examination of the two earlier views. This is the subject of section II below. The consequences of this proposition to our understanding of the extra-judicial *uadimonium* is the subject of sections III and IV, which treat the literary and documentary evidence, respectively. Most of the literary evidence relates to the late Republic, and tends to support the earlier views. Much of this evidence does not support the current view, and as a result the extra-judicial *uadimonium* is not well attested for the late Republic. The current view also affects the documentary evidence; the extra-judicial *uadimonium* is now assimilated to the judicial *uadimonium* to such a degree, that one can no longer identify all of the documents as instances of the extra-judicial *uadimonium*. The discussion of the literary and documentary evidence also takes account of other improvements in our understanding of civil procedure, in addition to the light shed by the current view.

## II. The edictal view

The view that the extra-judicial *uadimonium* was not used in place of the

<sup>17</sup>) For the development of this interpretation, see Wolf 63–5. See also Kaser/Hackl 231 ('In [dem freiwilligen *uadimonium*] verpflichtet sich der Gegner mit seinem Stipulationsversprechen, zu einer bestimmten Zeit an einem bestimmten Ort, der in der Nähe der Gerichtsstätte liegt, zu erscheinen. Scheitert bei diesem Treffen der Versuch, sich doch noch außergerichtlich zu einigen, kann von hier aus mit *in ius uocatio* vor Gericht geladen werden. '); K. Hackl, SZ 109 (1992) 768 n.3; Camodeca 49; A. Bürge, Zum Edikt *De edendo*, SZ 112 (1995) 4–5. Giménez - Candela also argues on the basis of the new documents that the extra-judicial *uadimonium* did not replace the *in ius uocatio*, though her views are slightly different from those just cited. In her view the new evidence shows that the defendant makes his promise to appear at the urging of the plaintiff, but that the *in ius uocatio* is the first step in a summons-procedure which induces the execution of the extra-judicial *uadimonium*. See T. Giménez - Candela, Notas en torno al "uadimonium", SDHI 48 (1982) 135, 165. <139>

*in ius uocatio* is well supported in the new documentary evidence. The evolution of the extra-judicial *uadimonium* in the modern literature confirms this view; the assumption that these two institutions were alternatives seems to have been almost a matter of accident. It is useful to discuss how this assumption found its way into the modern literature before considering its consequences. <139>

The extra-judicial *uadimonium* was founded initially on the rubric to D. 2, 6:

In ius uocati ut eant aut satis uel cautum dent.

That those who are called *in ius* should go, or provide a surety or an undertaking.

This text has long been recognised as interpolated; the *aut satis uel cautum dent* is probably a reference to the defendant's *cautio iudicio sisti* in the late procedure introduced by *libellus*, a *cautio* which might be accompanied by a surety<sup>18</sup>). The original contents of the praetor's edict are less transparent. It is now widely accepted that in its original state this portion of the edict treated the *in ius uocatio* and the *uindex*, and recited the civil law<sup>19</sup>): a *uocatus* was permitted either to appear or to give a *uindex* who would appear for him. The fact that there is a reasonable degree of agreement on the contents of the edict we owe largely to Gaius' Institutes<sup>20</sup>):

Ceterae quoque formulae quae sub titulo DE IN IUS VOCANDO propositae sunt, in factum conceptae sunt, uelut aduersus eum qui in ius uocatus neque uenerit neque uindicem dederit; ....

<sup>18</sup>) See K a s e r/H a c k l § 87 II.

<sup>19</sup>) On the rule in the civil law, see XII Tab. I, 1–4; Gell. NA 16. 10; W. S e l b, Das prätorische Edikt, in H.-P. Benöhr, et al. (edd.), *Iuris Professio* (Vienna 1986) 269.

<sup>20</sup>) G. 4. 46. This is the principal text on which both L e n e l and R u d o r f f reconstruct the edictal clause referred to in the D. 2, 6 rubric. See L e n e l § 11 (IN IUS VOCATI UT EANT AUT VINDICEM DENT); A. F. R u d o r f f, *Edicti Perpetui Quae Reliqua Sunt* (Leipzig, 1869) § 14 (IN IUS VOCATI UT VENIANT AUT VINDICEM DENT). The Gaius passage is valuable mainly because in mentioning two alternatives it presumably excludes a third, but also because in mentioning an *actio in factum* against one who does not give a *uindex*, Gaius discourages the idea that he somehow intends a reference to the *uadimonium*, which is sued upon by a civil-law *actio ex stipulatu*. On these arguments and others see O. L e n e l, *Der Vindex bei der in ius uocatio*, SZ 25 (1904) 232–54; P. F. G i r a r d, *Manuel élémentaire de droit romain*, 8th ed. (Paris 1929) 1062 n.2; cf. S. S c h l o ß m a n n, *Der Vindex bei der in ius uocatio*, SZ 24 (1903) 325 & n.1, perhaps the last proponent of the older view, arguing that the *uel cautum* is probably interpolated but that the *satisdent* may have been part of the edict.

The other formulae which are published under the title 'de in ius uocando' are also framed *in factum*, for instance the formula against one who is summoned to court and neither comes nor gives a *uindex*; ....

Before the discovery of Gaius's Institutes, however, it was not nearly so clear whether, and to what degree, the praetor had innovated on the matter of the *in ius uocatio*<sup>21</sup>). Though some recognized that the civil law probably <140> allowed the *uocatus* either to appear or to give a *uindex*<sup>22</sup>), many concluded, on the basis of the D. 2. 6 rubric, that the praetor had improved the civil law regime by allowing a defendant to promise his appearance at a later date

<sup>21</sup>) The compilers have made the matter particularly difficult, because throughout the Digest they have replaced references to the *uindex* with something like 'fideiussor <140> iudicio sistendi causa datus' (see L e n e l 65) and references to *uadimonium promittere* with something like 'iudicio sistendi promittere'; see Paul (6 ed.) D. 2, 8, 16; Gaius (1 prov. ed.) D. 2, 11, 1. That D. 2, 6 treated the *uindex* is not in doubt, but other texts where, on Lenel's argument, *fideiussor* is interpolated for *uindex*, have been construed by some as having treated the *uadimonium*. See L a R o s a (note 14) 326, where it is argued that Paul (4 ed.) D. 2, 8, 4, which speaks about a *fideiussor* who has guaranteed the appearance of one who dies after the decree to exhibit him, originally addressed *uadimonium*, not *uindex*. L a R o s a suggests that this decree is analogous to the decree to compel a *uadimonium* in the *lex de Gallia Cisalpina*, col. 2, ll. 21–4. Id. 311–13. On Ulpian (5 ed.) D. 2, 8, 2, 5, see S c h l o ß m a n n (note 20) 311–12; L e n e l's response (note 20) 251–2; and G i m é n e z - C a n d e l a's support for S c h l o ß m a n n (note 17) 143–4.

<sup>22</sup>) See A. H. van Hees, *Dissertatio philologico-juridica inauguralis de iis, quae antiquitus apud Romanos inter litigatores ante litem contestatam fiebant* (Leiden 1747), reprinted in D. Fellenberg (ed.), *Jurisprudentia Antiqua I* (Berne 1760) 529; C. F. G. Meister, *Vindex et Vas*, in *Selecta Opuscula* (Göttingen 1766) 278, 284; A. Schulting, *Notae ad Digesta seu Pandectas I*, ed. N. Smallenberg (Leiden, 1804) 278. Prior to the discovery of Gaius' Institutes, the use of the *uindex* at *in ius uocatio* was suggested by three sources: Festus (P.574), s.v. *Vindex*, in W. M. Lindsay (ed.), *Sexti Pompei Festi de uerbis significatu* (Leipzig 1913; repr. 1997) 516, defining the act of the *uindex* in such a way—'quo minus is qui preusus est ab aliquo, teneatur'—as to apply to the *uindex* both at *in ius uocatio* and at execution of judgment (see G. 4. 21, 25); Gell. NA 16. 10 (addressing who may be *uindex* under the Twelve Tables); Gaius (1 duod. tab.) D. 2, 4, 22, 1: *Qui in ius uocatus est, duobus casibus dimittendus est: si quis eius personam defendet, et si, dum in ius uenitur, de re transactum fuerit*. ('Defendere' is perhaps used in a non-technical way.) Godefroy constructed part of Table I of the Twelve Tables almost entirely on the basis of the Gaius passage: SI ENSIET, QUI ENDO VIA EM VINDICIT, MITTITO. J. Godefroy, *Fragmenta XII. Tabularum suis nunc primum tabulis restituta* (Heidelberg 1616) 153–4. Some writers, however, argued that the civil law flatly required the *uocatus* to follow, and that it was the harshness of this rule that the *praetor* sought to ameliorate. J. Raevard, *Tribonianus* (Antwerp 1561) 7–8; J. Cujas, *Observationes et Emendationes lib. 10, c. 10* (1569), in *Opera Prior III* (Paris 1658) cols. 282–3; J. Cujas, *Recitationes solemnes* (1605) at C.2.2, in *Opera Postuma V* (Paris 1658) cols. 20–4. See also F. Hotman, *Commentarius de uerbis iuris* (Lyon 1569), s.v. *Vas* (a defendant must come or give a *uas*).

instead of appearing immediately<sup>23</sup>). It was not the case that earlier writers <141> overlooked the possibility of interpolation, but rather that they underestimated the extent of the interpolation, assuming that the words of the Digest rubric, though altered by Tribonian to suit his time, nevertheless accurately revealed a practice introduced by the praetor. Accordingly some seized on *satis dent* and argued that a *uocatus* could avoid following the plaintiff immediately by promising to appear and providing a surety; some identified this promise with the *uadimonium* of the classical law<sup>24</sup>). Others argued that *cautum dent* referred to a *cautio* which allowed a defendant to promise, perhaps with a surety, to appear at a later time; again, some identified this promise with the *uadimonium* of the classical law<sup>25</sup>). And for some time after the discovery of Gaius' Institutes—which brought proof of both the *uindex* at *in ius uocatio* (4. 46) and *uadimonium cum satisdatione* (4. 185)—it was common to read that the civil law offered the *in ius uocatus* only the alternative of a *uindex*, but that the praetor permitted a second alternative—the *uadimonium* with a surety<sup>26</sup>). <142>

<sup>23</sup>) H. Doneau, *Commentaria de jure ciuili* (1596), lib. 23, c. 9, in *Opera Omnia VI* (Florence 1846) cols. 143–4 (also briefly *Commentaria in codicem Justiniani*, Leiden 1587, at tit. 2, lib. 2, in *Opera Omnia VII*, Florence 1846, cols. 80–1); Cujas (1569), (note 22) cols. 282–3; Raevard (note 22) 7–8; Cujas (1605) (note 22) cols. 20–4; G. Averani, *Interpretationes Juris* (Leiden 1751) 121; B. Voorda, *Dissertatio juridica <141> inauguralis de uadimonio* (1751), in D. Fellenberg (ed.), *Jurisprudentia Antiqua II* (Berne 1761) 14; Meister (note 22) 284–5; U. Huber, *Praelectionum juris ciuilibus tomi tres secundum Institutiones et Digesta Justiniani* (Louvain 1766) 95; G. Noodt, *Commentarius ad Digesta seu Pandectas*, in *Opera Omnia II* (Leiden 1767) 44; J. Westenberg, *Principia juris secundum ordinem Digestorum seu Pandectarum* (Berlin 1814) 75.

<sup>24</sup>) Cujas (1569) (note 22) cols. 282–3; Cujas (1605) (note 22) cols. 20–4; *Observationes et emendationes libri XVIII - XXIII* (Cologne 1587) 331–2; Noodt (note 23) 44. See also the authorities cited below note 26. Cujas reads the Digest rubric with only the alternative of *satisdatio* included: *In jus uocati ut eant, aut satisdent*. In omitting *uel cautum* he may be following Gregor Haloander, *Digestorum seu Pandectarum libri quinquaginta* (Nürnberg 1529) 54 (at D. 2. 5: 'In ius uocati ut eant, uel satis dent'). The idea that one required a surety to avoid having to appear immediately was suggested by Gaius (1 prov. ed.) D. 2, 8, 5, 1: *Qui pro rei qualitate euidentissime locupletem uel, si dubitetur, adprobatum fideiussorem iudicio sistendi causa non acceperit: iniuriarum actio aduersus eum esse potest, quia sane non quaelibet iniuria est duci in ius eum, qui satis idoneum fideiussorem det*.

<sup>25</sup>) Doneau (1587) (note 23) cols. 80–1; Raevard (note 22) 7–8; Averani (note 23) 121; Voorda (note 23) 14; van Hees (note 22) 529; Huber (note 23) 95; Westenberg (note 23) 75.

<sup>26</sup>) See M. von Bethmann - Hollweg, *Handbuch des Civilprozesses I* (Bonn 1834) 247 (but cf. von Bethmann - Hollweg II 198–200); P. Colquhoun, *A Summary of the Roman Civil Law III* (London 1853) 320; Muther (note 4) 108–13 (but expressing doubts that a surety was always needed); Rudorff II (note 4) 209–12 (but cf. Rudorff, note 20, § 14); K. Wieding, *Justinianische Libellprozess* (Vienna 1865) 571;

Although this line of reasoning eventually disappeared from the literature, a shadow of it remained. The extra-judicial *uadimonium* was no longer founded on the rubric to D. 2. 6, but it was assumed that a *uocatus* nevertheless exercised the same choice as had earlier been furnished him by the rubric. The possibility that the extra-judicial *uadimonium* might have some different relation with the *in ius uocatio* was not considered.

The persistence of this assumption affected the kind of evidence brought forward as examples of the extra-judicial *uadimonium*. After the rejection of the edictal view, and before the discovery of the Herculaneum and Puteoli *uadimonia*, the extra-judicial *uadimonium* was studied almost entirely from literary sources<sup>27</sup>). These sources had already been brought forward in support of the rejected edictal view, but were still regarded as relevant on the strength of a particular argument from silence. On the assumption that an extra-judicial *uadimonium* was used in place of the *in ius uocatio*, an extra-judicial *uadimonium* could be identified in a literary text, not on the basis of anything expressly stated, but by the absence of any reference to *in ius uocatio*<sup>28</sup>). This sort of argument made it possible to claim that the scarcity of references to *in ius uocatio* in Cicero suggested that, at least up to Cicero's time, the extra-judicial *uadimonium* was the ordinary and customary way of commencing a lawsuit in preference to the *in ius uocatio*<sup>29</sup>). Conclusions <143> derived in

C.F. v o n G l ü c k, Ausführliche Erläuterung der Pandecten III (Erlangen 1867) 418; K e l l e r / W a c h (note 4) 238–9. <142>

<sup>27</sup>) The exceptions were the *lex agraria*, on which see above note 7, and Paul (1 Plaut.) D. 2, 11, 10, 2 and Ulpian (75 ed.) D. 44, 2, 5, discussed below note 128.

<sup>28</sup>) See e.g. A. W. Heffter, Institutionen des römischen und teutschen Civilprocesses (Bonn 1825) 276 n.4; M. F u h r m a n n (ed.), Marcus Tullius Cicero. Sämtliche Reden I (Zürich 1970) 54. Sources treated in this way are discussed individually below.

<sup>29</sup>) V o n B e t h m a n n - H o l l w e g makes this claim both in his earlier book, which follows the edictal theory, and his later book, which abandons that theory in favour of the non-edictal, voluntary Ladungs*uadimonium*: 'Von diesem Vadimonium finden wir daher bei Cicero unzählige Beispiele; von der in ius uocatio nicht Eines ....' V o n B e t h m a n n - H o l l w e g (note 26) 247. On Cic. pro Quinct. 19. 61 ('in ius uocas'), see below notes 49–58 and accompanying text. See also M u t h e r (note 4) 108: 'Ganz anderer Natur ist die zweite Art de *uadimonium*, die schon zu Cicero's Zeit vorkommt. Die Parteien können sich ohne förmliche *in ius uocatio* über einen Tag, wo sie vor dem Prätor erscheinen wollen, einigen.'; v o n B e t h m a n n - H o l l w e g II 199: 'Bei Cicero erscheint [diese neue Einleitungsform] daher durchaus als das gewöhnliche Verfahren ....'; W. A. H u n t e r, A Systematic and Historical Exposition of Roman Law, 2nd ed. (London 1885) 972: '... by the end of the Republic, *uadimonia* seem to have been a regular way of beginning a civil lawsuit.'; G r e e n i d g e 142: 'The [*in ius uocatio*] was still theoretically existent in Cicero's day, but it was seldom resorted to. A gentler but equally effective means had been developed in the form of *uadimonium*.'; F l i n i a u x 105: 'Nous savons qu[e le *uadimonium* extrajudiciaire] est déjà

this way are doubtful under the current view. If, as now believed, the *in ius uocatio* continued to fulfil its function even where the extra-judicial *uadimonium* was employed, then an extra-judicial *uadimonium* cannot be identified in a source on the argument that the source is silent on the matter of *in ius uocatio*.

### III. Literary evidence

This section discusses the proposition that the extra-judicial *uadimonium* was a common practice in the late Republic. The proposition rests almost entirely on passages in Cicero. There are other literary sources which are later than Cicero and whose relevance to the extra-judicial *uadimonium* is uncertain, and these sources are not the subject of the discussion below<sup>30</sup>).

#### a) Cicero, *pro Quinctio*

The literary evidence on which the extra-judicial *uadimonium* principally relies is Cicero's speech on behalf of Publius Quinctius, delivered in 81 B.C.

très employé à l'époque de Cicéron ...'; J.M. Kelly, *Roman Litigation* (Oxford 1966) 6–7: <143> 'Towards the end of the Republic actual *in ius uocatio* came to be generally replaced, as a means of initiating litigation, by *uadimonium*, ... and this is the procedure found, for example, in all the speeches of Cicero.'; Kunkel (note 9) 210: 'Doch begegnet schon bei Cicero auch in der stadtrömischen Praxis statt [der *in ius uocatio*] auch das Zitationsvadimonium ...'

<sup>30</sup>) Of these, the most relevant to republican procedure is Livy 23. 32 (writing of the late 3rd-century B.C.): ... *praetores, quorum iuris dictio erat, tribunalia ad Piscinam publicam posuerunt; eo uadimonia fieri iusserunt, ibique eo anno ius dictum est*. Voigt 325 cites this as evidence for the extra-judicial *uadimonium*, apparently on the understanding that litigants were ordered to make their extra-judicial *uadimonia* to the place where justice was administered. I do not understand why he interprets it in this way. In any event, under the current view litigants do not promise to appear where justice is administered. A second literary source may also be relevant: Hor. Sat. 1. 9. 36, which speaks of a defendant who makes a *uadimonium* 'lest he lose the case'. The passage has been much discussed and its meaning remains mysterious. See Steinwenter 2060–1. Two other literary sources are late and their relevance to the present discussion is uncertain. Aur. Vict. de Caes. 16. 11 (praising the accomplishments of Marcus Aurelius): *Legum ambigua mire distincta, uadimniorumque solemnium remoto, denuntiandae litis operiendaeque ad diem commode ius introductum*. The *uadimonia* referred to are understood to be extra-judicial *uadimonia* by, e.g., Fliniaux 106–7 and M. Wlaskak, *Zum römischen Provinzialprozeß* (Vienna 1919) 37–59. Also, Juv. Sat. 3. 297–99, which describes a person striking another and then 'making a *uadimonium*'. This *uadimonium facere* appears to be used metaphorically; roughly translated: 'threaten to come back and do it again'. <144>

The speech contains three references to *uadimonia* that some have identified as extra-judicial. The discussion below suggests that these references would not be interpreted in this way under the current view of the extra- <144> judicial *uadimonium* and with the benefit of the new documentary evidence. Because a good deal turns on the sequence of events in this case, it will be useful first to set out a procedural chronology which puts each of the disputed *uadimonia* in context. (Entries below indicated by bold type contain the disputed passages.)

1. Quinctius' brother (Naeuius' partner) dies in Gaul, and Quinctius, his heir, goes to Gaul. 3. 14, 15.
2. Roughly a year passes. 3. 15.
3. Naeuius dissuades Quinctius from selling property in Narbo, the proceeds of which would be used to pay off some of Quinctius' debts in Rome. 4. 15, 16.
4. Quinctius and Naeuius go to Rome. 4. 17.
5. Quinctius asks Naeuius for some money; Naeuius refuses, 'nisi prius de rebus rationibusque societatis omnibus decidisset et scisset sibi cum Quinctio controuersiae nihil futurum'. 5. 18, 19.
6. Quinctius calls on Naeuius to have the matter settled. 5. 20.
7. Naeuius appoints Trebellius as his representative; Quinctius appoints Alfenus. 5. 21.
8. It is not possible to settle the matter. 5. 21.
9. 'res esse in uadimonium coepit'. 5. 22. 'uadimonia saepe dilata'. 5. 22. 'cum ... in uadimoniis differendis tempus omne consumpserit'. 14. 46.
- 10.** 'uenit ad uadimonium Naeuius'. 5. 22.
- 11.** Naeuius says that he 'had taken care' that the partnership did not owe him anything, and that he did not want to be promised, nor to promise, any further *uadimonia*; Quinctius did not request bail from Naeuius; he left 'sine uadimonio'. 6. 23; 13. 46; 28. 86<sup>31</sup>).

<sup>31</sup>) Much of the case turns on whether, at this point in the proceedings or perhaps a few days later, Quinctius in fact became bound to appear by *uadimonium*. Wolf says rightly that one might mistrust Cicero's denials. J. G. Wolf, Die litis contestatio im römischen Zivilprozeß (Karlsruhe 1968) 14. Cicero's language is evasive: Naeuius 'said' he would not ask for bail (6. 23), but did he? The parties departed 'sine vadimonio' (6. 23), but did both parties depart 'sine vadimonio'? Cicero's principal argument on the question (18. 57, 58) is that a person who was not present could not make a *uadimonium*, which is true enough, except

12. Quinctius postpones bail that he has with others, so that he can go to Gaul. 6. 23. <145>
13. On 27 or 29 January, Quinctius leaves Rome<sup>32</sup>). 6. 24; 18. 57.
14. On 5 February (Naeuius claims), a *uadimonium* was made for Quinctius' appearance. 18. 57.
15. Naeuius invites witnesses to the *tabula Sextia*, to witness that Quinctius has not appeared to his *uadimonium*. 6. 25; 14. 47.
16. On 20 February, Naeuius applies to the praetor Burrienus for *bona possidere* under the edict, giving the reason that Quinctius had not appeared to his *uadimonium*. The praetor orders the goods to be advertised for sale<sup>33</sup>). 6. 25; 14. 48; 15. 48; 18. 56; 19. 60; 25. 79.
17. Alfenus takes down the notices of sale, takes back a seized slave, and identifies himself as *procurator* to Quinctius. 6. 27; 19. 61; 20. 63; 22. 73; 29. 89.
18. Naeuius asserts that Quinctius owes him money; Alfenus denies it. 13. 44<sup>34</sup>); 19. 61.
19. Naeuius asks Alfenus to promise a *uadimonium*; Alfenus does so. 19. 61; 20. 63.
20. Naeuius summons Alfenus *in ius*; Alfenus follows. 19. 61.
21. Naeuius demands a trial; Alfenus says that, if Naeuius wishes

that Cicero left behind a procurator, who did indeed on a subsequent occasion (7. 29; 21. 67) promise Quinctius' appearance. Cicero's other arguments similarly appeal to logic rather than facts: that it was not seemly for Naeuius to go running to the *praetor* (15. 48), that a decent person waits until several *uadimonia* have been ignored (16. 51, 52), and that Quinctius was both kin and a partner to Naeuius (16. 52). The closest one finds to denials on Cicero's part seem, as it were, one step removed from assertions: 'Mitto illud dicere ... eum, qui tibi uadimonium non deseruisset ....' (27. 85); 'Docui ... omnino vadimonium nullum fuisse ....' (28. 86). Of course if Cicero is speaking in a political climate in which facts are not likely to be important, see H. J. R o b y, *Roman Private Law II* (Cambridge 1902) 470–1, his evasiveness may not be significant in the way suggested. <145>

<sup>32</sup>) On the dates, cf. the two cited passages.

<sup>33</sup>) Quinctius' property in Gaul is possessed on 23 February. 25. 79. Naeuius had waited until 20 February, two weeks after Quinctius' purported promise was made, perhaps to allow the possession to take place after the *praetor's* order. See R o b y II (note 31) 458 (estimating fourteen days travel between Rome and the estate), and 483 (expressing the opinion that there may have been nothing improper in anticipating the *praetor's* decision in this way).

<sup>34</sup>) The reference to Naeuius' demand for money at 13. 44 is made without any reference to chronology, but it may refer to the demand and denial which Cicero notes at 19. 61. In any event it is not a subject of the action which ensued; "'Non," inquit, "id ago"' (13. 43), are the words Cicero puts into Naeuius' mouth. See the discussion below at notes 50 to 56 and accompanying text. <146>

- it, he, Alfenus, will defend at a *iudicium*. 6. 27; 19. 61; 20. 62, 63; 22. 73.
22. Naeuius asks Alfenus for security, in the event Quinctius loses the suit; Alfenus refuses. 7. 29; 20. 63.
  23. Alfenus appeals to the tribunes. 7. 29; 20. 63.
  24. The tribune Brutus says that he will intervene unless Alfenus and Naeuius come to some agreement. 20. 65; 21. 69.
  25. Alfenus summons citizens to witness, in Naeuius' hearing, that Quinctius does not owe the money Naeuius claims, but that he, Alfenus, is ready to accept any trial which Naeuius announces. 21. 66, 67.
  26. Alfenus promises that Quinctius will appear on 13 September. 7. 29; 21. 67.
  27. Quinctius returns to Rome, and asks Naeuius on what day (eight months earlier) the *uadimonium* had taken place; Naeuius says 5 February. 18. 57.
  28. Quinctius appears to the *uadimonium* promised by Alfenus. 8. 30; 21. 67.
  29. Naeuius applies to the praetor Dolabella for Quinctius to give security for payment of the judgment, in accordance with the edict which allows such security from one whose goods have been possessed for thirty days in accordance with the *praetor's* edict. 8. 30. <146>
  30. Quinctius disputes whether his goods have in fact been 'possessed for thirty days in accordance with the *praetor's* edict', and Dolabella orders the parties to engage in a *sponsio* on this issue. 8. 30; 14. 46; 27. 84.
  31. Quinctius engages in the *sponsio*, declining to give security; he sues on the *sponsio*. 9. 32.

i) *uadimonia* prior to the grant of possession (5. 22; 6. 23; 18. 57)

After Naeuius and Quinctius realised they could not settle the matter of their debts privately, they made a number of *uadimonia* to one another<sup>35</sup>):

Itaque ex eo tempore res esse in uadimonium coepit. Cum uadimonia saepe dilata essent et cum aliquantum temporis in ea re esset consumptum neque quicquam profectum esset,

<sup>35</sup>) That Quinctius made at least one *uadimonium* to Naeuius we know from 'Ait [Naeuius] ... neque uadari amplius', 6. 23, and that Naeuius made at least one *uadimonium* to Quinctius we know from 'uenit ad uadimonium Naeuius', 5. 22.

uenit ad uadimonium Naeuius. (5. 22).

And so from that point the matter entered a *uadimonium* phase. After several *uadimonia* were postponed and a good deal of time used up in the matter without any progress, Naeuius appears to his *uadimonium*.

At the meeting to which Naeuius appears, perhaps the final (?) meeting before Quinctius left Rome, Cicero claims there were no further promises to appear.

Ait [Naeuius] ... se iam neque uadari amplius neque uadimonium promittere; si quid agere secum uelit Quinctius, non recusare. Hic cum rem Gallicanam cuperet reuisere, hominem in praesentia non uadatur; ita sine uadimonio disceditur. (6. 23).

[Naeuius] says ... he is no longer asking for a *uadimonium* to be promised to him nor is he promising a *uadimonium*; that if Quinctius wishes to sue him for something, he does not refuse. Since Quinctius wanted to visit his property in Gaul again, he does not ask for a *uadimonium* from Naeuius; thus they leave without a *uadimonium*.

However, Naeuius later claims that a *uadimonium* was made for Quinctius' appearance (18. 57); whether it was on the foregoing occasion is not clear from the speech.

The *uadimonia* described in these excerpts have been interpreted by some as extra-judicial because no *in ius uocatio* is mentioned and therefore the customary extra-judicial *uadimonium* is being used<sup>36</sup>). As already discussed, <147> the current view would not allow this argument from silence. To the contrary, it is difficult to fit these *uadimonia* within the current view. One would have to conclude that the parties brought themselves to a meeting place by single or mutual *uadimonia*, but then did not complete the procedure by using the *in ius uocatio*, or used the *in ius uocatio*, but then did not use the compulsory *Vertagungs-uadimonium*, preferring instead to use repeated voluntary *uadimonia* followed by *in ius uocationes*. The first alternative seems the more possible, except that a series of such appointments are tantamount to private meetings, and Cicero has told us expressly that Naeuius and Quinctius had by this time given up their attempts to settle the matter privately (*Res conuenire nullo modo poterat*, 5. 21), whereupon *res esse in uadimonium coepit*, 5. 22<sup>37</sup>).

<sup>36</sup>) See Heffter (note 28) 276 n.4; von Bethmann - Hollweg II 199; Greenidge 533; V. Arangio - Ruiz (ed.), 'Per Publio Quinzio', in Marco Tullio Cicerone. Le Orazioni I (Arnoldo Mondadori, 1964) 15; Fuhrmann (note 28) 54. <147>

<sup>37</sup>) See F. Kniep, Gai Institutionum Commentarius Tertius (Jena 1914) 166, who takes *res esse in uadimonium coepit* as an express indication that the matter has come before a tribunal; also, Karlowa 364–5, who argues that Cicero is describing a series of three-day

There is an additional reason for supposing that the purported *uadimonium* for Quinctius' appearance, which Naeuius alleges was made on 5 February, and from which the lawsuit itself derived, was not an extra-judicial *uadimonium*. Wolf has pointed out that this *uadimonium* and the edict under which Naeuius obtained possession must be reconciled with the current view of the extra-judicial *uadimonium*. The difficulty Wolf identifies arises from the fact that a failure to appear to an extra-judicial *uadimonium* must have somehow warranted the relief Naeuius was able to secure. Wolf resolves the difficulty by reconsidering the basis for Naeuius' relief. The discussion below suggests that the difficulty is more easily resolved if the purported *uadimonium* is not extra-judicial. <148>

Cicero devotes much of his defence to the argument that Quinctius' property was not possessed in accordance with various parts of the edict on possession of goods (19. 60 - 27. 85)<sup>38</sup>, his aim being to show that none of the conditions for such possession existed. He briefly argues (19. 60, with recapitulation at 27. 85 and 28. 86) that Quinctius was not one 'qui fraudationis causa latitabit'<sup>39</sup>, but he addresses most of his arguments here to the proposition that Quinctius was indeed defended in his absence by Alfenus. It is a matter of dispute whether fraudulently concealing oneself, and being absent and undefended, were part of the same edict or were independent grounds for ordering possession of the debtor's property<sup>40</sup>). But Alfenus'

*uadimonia* which take place *in iure* (discussed below, notes 107 to 125 and accompanying text). That the suit, once before the *praetor*, proceeded in such a halting fashion may be explained by Naeuius' motives. We know that Naeuius preferred to sue on a missed *uadimonium* rather than on the merits. From this we might infer that he was not satisfied with the kind of trial—or with the prospect of proving his case at trial—which the early negotiations offered to him. Two factors may have made his position difficult. First, it may have been uncertain at the time the negotiations took place whether he and Quinctius had been in a partnership. Cicero criticises Naeuius for proceeding against a partner who did not appear to his *uadimonium* (15. 48; 16. 52), and makes reference to subsequent transactions which might suggest a subsisting partnership (23. 74; 24. 76; 29. 88). Second, Quinctius himself seems to have had outstanding claims against Naeuius, 13. 44 ('quod peto satis det'); 22. 74 ('Naeuius ... cum ipse ultro deberet'); 28.85 ('si quid [Quinctius] peteret'), and this may have made Naeuius' prospects at a trial on the merits uncertain. <148>

<sup>38</sup>) See L e n e l tit. 38.

<sup>39</sup>) See K a s e r/H a c k l 222; L e n e l 415.

<sup>40</sup>) For the proposition that they are independent grounds, see A. F l i n i a u x, Les effets de la simple absence, in Études d'histoire juridique offertes à P.F. Girard I (Paris 1913; repr. Aalen 1981) 51–6; L e n e l 415 n.13; F. de Z u l u e t a (ed.), The Institutes of Gaius I (Oxford 1946) 174 n.2; A. G o m e z - I g l e s i a s C a s a l, Citación y comparecencia en el procedimiento formulario romano (Universidad de Santiago de Compostela 1984) 154; K a s e r/H a c k l 222–3. For the proposition that they are not independent, see B. K ü b l e r,

defence of Quinctius in his absence, regardless of its relationship in law to the issue of fraudulent self-concealment, is an issue which Cicero vigorously sets out to prove.

It is here that Wolf argues that the issue of Quinctius' absence and Alfenus' defence must fit within the current view of the extra-judicial *uadimonium*. Under the current view, Quinctius was (allegedly) bound to make himself available at a convenient site (*tabula Sextia*) from which he could be *in ius uocatus*. The praetor Burrienus appears to have allowed the possession of Quinctius' property on a showing, at least in part, that Quinctius was absent and undefended<sup>41</sup>). The difficulty is that Quinctius was not bound to appear *in iure*, nor (if his promise was extra-judicial) was he ordered by the praetor to appear, nor was he *in ius uocatus*, and therefore the notion that his property could be possessed and a sale advertised on the <149> ground of 'absence' seems impossible. Wolf resolves the difficulty by suggesting that the issue Cicero sets out to prove is not that Quinctius was *n e v e r* absent and undefended, but that Quinctius was defended *a f t e r* possession was granted, during the subsequent period of thirty days: 'Die Vermögensbeschlagnahme wäre aufgehoben worden oder hinfällig gewesen, wenn vor Ablauf der Proskriptionsfrist von 30 Tagen die Defension durch Quinctius selbst oder einen Dritten aufgenommen worden wäre.'<sup>42</sup>)

Is it really irrelevant whether Quinctius was defended before the order to possess was granted? It is certainly true that Alfenus undertook his defence of Quinctius after the order to possess was granted<sup>43</sup>), and that his defence during the thirty days after the order is a matter that Cicero carefully addresses. The issue is whether we should equate Cicero's argument with a proposition that would genuinely permit relief under the law, or conclude that Cicero is simply

Der Process des Quinctius und C. Aquilius Gallus, SZ 14 (1893) 63–5; Roby II (note 31) 471–4. Perhaps the best evidence for this proposition is G. 3. 78: *Bona autem ueneunt aut uiuorum aut mortuorum: uiuorum ueluti eorum qui fraudationis causa latitant nec absentes defenduntur*. 'Absence' refers to absence *in iure*. See authorities cited in K a s e r/H a c k l 223 n.24, and I. B u t i, Il "praetor" e le formalità introduttive del processo formulare (Camerino, 1984) 275. If 'absent and undefended' are independent grounds for possession of goods, there must have been other conditions for possession which are not apparent in the sources.

<sup>41</sup>) Cf. Wolf 66 n.30, who argues that possession was granted on grounds of fraudulent concealment, and not on grounds of 'absent and undefended'. <149>

<sup>42</sup>) Wolf 66 n.30. Cf. Greenidge 535–6: 'It is clear that this defence did not invalidate Burrienus' action. It came too late. It followed the *missio in possessionem* and, at the time of the issue of the writ, Quinctius was undefended.'

<sup>43</sup>) His defence, according to Cicero, began with the tearing down of the notices for sale. 19. 61.

giving the best argument he can under the circumstances<sup>44</sup>). Admittedly, whether Quinctius ought to have been defended before possession was ordered by Burrienus could be answered with certainty only with knowledge of the specific edictal rules under which possession was permitted. But it seems likely. Cicero raises the matter of Alfenus' defence of Quinctius in the course of arguing a specific proposition: 'ex edicto praetoris bona P. Quincti possideri nullo modo potuisse' (19. 60)<sup>45</sup>). He does not argue (or concede) that possession of Quinctius' goods was proper when it was ordered. Nor does he argue, as Wolf's interpretation <150> suggests he might, that the conditions for permitting a sale after the prescribed thirty days were not satisfied (no sale ever took place, 23. 73; 24. 76; 29. 88)<sup>46</sup>). He is simply arguing, on his own statement, that one of the possible grounds for possession under the edict did not exist, because Quinctius was, as it were, defended as ably as possible<sup>47</sup>). One suspects he is avoiding the proper argument, that Quinctius was defended simpliciter, and substituting the argument that Quinctius was defended from the earliest possible moment (19. 60, 61). The argument suggests that Alfenus is vulnerable to the charge that he did not defend as early as he ought to have.

<sup>44</sup>) Arangio-Ruiz, for example, appears to take Cicero at his word, suggesting that when Naeuius recognized Alfenus as representative, this in some way 'cured' the lack of representation at the crucial moment when Quinctius purportedly failed to appear to his *uadimonium*. Arangio-Ruiz (note 36) 23. Yet Alfenus appears to have been recognised as Quinctius' procurator much earlier, before Quinctius left Rome; see 5. 21.

<sup>45</sup>) This is the second of a three-part argument. Cicero puts his principal argument that Naeuius did not properly maintain possession in the missing third part of his argument, see 29. 89, 90; Severianus, *Praecepta Artis Rhetoricae* 16 (ed. A. L. Castellimontani, Bologna 1995, 101–3). This is where one would expect to find Wolf's proposition. In support of Wolf's argument, however, one should note that Cicero includes some arguments for 'improper maintaining of possession' at the end of part two (27. 84, 85). <150>

<sup>46</sup>) See Flinaux (note 40) 59: '... si, pendant le délai de trente jours, l'absent n'était pas revenu se défendre ou n'avait pas été défendu par un représentant, faire procéder à la *uenditio bonorum*.'

<sup>47</sup>) This part of the text (19. 60), where Cicero apparently turns to that part of the edict QUI ABSENS IUDICIO DEFENSUS NON FUERIT, is found in no extant manuscript and was supplied by early editors who declared they had seen it somewhere. See Lenel 415 n.13. It is clear, at least, that something must be supplied here which will introduce Cicero's argument that want of defence did not warrant possession of Quinctius' goods. But the details are unknown. As discussed above, most suggestions adhere to the view that the edict that is treated here followed on from, or formed part of, the edict QUI FRAUDATIONIS CAUSA etc. See Roby II (note 31) 471–4. On the other hand, there is no reason to exclude the possibility that Cicero is addressing something that fell elsewhere in the edict. Kübler raises the possibility that Quinctius' goods were possessed because he gave a *uindex* and then did not appear, see Ulpian (5 ed.) D. 42, 4, 2 pr. (ignoring interpolation), but admits we simply do not have enough information. Kübler (note 40) 58. <151>

As the issue is whether possession was warranted on grounds of 'want of defence', we might suspect that Alfenus could have begun his defence before the order for possession was granted.

If Quinctius' goods were possessed because he was absent and undefended, then his missed *uadimonium* could not have been an extra-judicial *uadimonium*. It would be incongruous for a praetor to adjudge as absent and undefended, and order possession and sale of the property of, a person who was never ordered by the praetor to appear, who was never *uocatus*, and whose only offence was to have been bound to appear in the forum and not to have done so. But indeed the problem does not arise: the very reason for treating Quinctius' purported promise to appear as an extra-judicial *uadimonium* (no mention of *in ius uocatio*) disappeared with the discovery of the Herculaneum and Puteoli tablets. And if the missed *uadimonium* was judicial, there is nothing incongruous in the order to possess. <151>

ii) first *uadimonium* by Alfenus as procurator (19. 61; cf. 20. 63)

Videamus quae deinde sint consecuta. Hominem P. Quincti deprehendis in publico, conaris abducere; non patitur Alfenus, ui tibi adimit, curat ut domum reducatur ad Quinctium. Hic quoque summe constat procuratoris diligentis officium. Debere tibi dicis Quinctium, procurator negat; uadari uis, promittit; in ius uocas, sequitur; iudicium postulas, non recusat.

Let us see what happened next. You seize a slave, in public, belonging to P. Quinctius, and try to take him away; Alfenus does not allow it, takes him from you by force, sees to it that he is taken back to Quinctius' house. Here also the performance of a diligent procurator is perfectly demonstrated. You say that Quinctius is in debt to you, the procurator denies it; you wish him to promise a *uadimonium* to you, he promises; you summon him *in ius*, he follows; you ask for a trial, he does not refuse.

As part of his claim that Quinctius' goods were not possessed in accordance with the edict, Cicero argues here that Quinctius was defended in his absence by Alfenus, and praises several of Alfenus' acts individually. Cicero appears to describe these acts in chronological order ('Videamus, quae deinde sint consecuta.'). In describing these acts, *uadari uis* precedes *in ius uocas*, and therefore this might appear to be an instance in which a *uadimonium* has been employed before a case has commenced.

Although this passage is often cited as evidence for the extra-judicial *uadimonium*, it has been cited for two very different propositions. On the earlier views of the extra-judicial *uadimonium*, it will be remembered, the extra-judicial *uadimonium* was believed to have replaced the *in ius uocatio*,

and (on those views) one would therefore not find the two institutions together, referring to the same court appearance. Accordingly von Bethmann-Hollweg, in defending the idea that Cicero nowhere refers to the *in ius uocatio* (thus demonstrating the prevalence of the extra-judicial *uadimonium*), argues that Alfenus as procurator could not be the object of a genuine, compulsory *in ius uocatio*<sup>48</sup>). On the earlier views, therefore, this passage is significant for the fact that a summons has been effected by a *uadimonium* alone.

On the current view of the extra-judicial *uadimonium*, however, this passage is significant for a different reason: it serves as an example of the *uadimonium* and the *in ius uocatio* working in concert with one another<sup>49</sup>). <152> This interpretation of the passage, unlike the one it replaced, depends on the assumption that Alfenus' promise to appear and the *in ius uocatio* which summoned him are associated with the same court appearance. Since this passage, on this assumption, would provide the sole surviving evidence of the two institutions working in concert, the proposition that they do indeed refer to the same appearance must be considered carefully.

The disagreement between Naeuius and Quinctius created two controversies. The first controversy concerned the debts the parties might or might not owe to one another. The second controversy concerned Quinctius' missed *uadimonium* and Naeuius' possession of Quinctius' goods under the edict. Although Cicero's speech is largely about the second controversy, he mentions the first controversy frequently. He speaks about the parties' difficulty in settling their debts before Quinctius left Rome (5. 22), how the present proceedings were born of Naeuius' preference for a complicated legal proceeding rather than a *pecuniarium iudicium* (28. 85), how Naeuius may have owed money to Quinctius<sup>50</sup>), and how Quinctius stood ready to go to trial on the real issues (13. 42 - 44). The debt controversy nearly came to litigation; the debts were the subject of repeated meetings *in iure* (5. 22; 6. 23), and in the sequence of events under discussion Cicero says to Naeuius 'Debere tibi dicis Quinctium, procurator negat'<sup>51</sup>).

This exchange between the parties to the debt immediately precedes the disputed *uadimonium*. The issue is whether the *uadimonium* is in some way related to this exchange or, as some believe, is related to the *in ius uocatio* that follows it. The exchange itself appears to be an allusion to the notice of a

<sup>48</sup>) Von Bethmann-Hollweg II 199 n. 17.

<sup>49</sup>) Wolf 65 n. 29. <152>

<sup>50</sup>) See passages cited above note 37.

<sup>51</sup>) Cf. also 13. 44: *Pecuniam petit; negamus deberi*. See note 34 above.

claim (*editio actionis*) that a claimant gives to his adversary prior to or at the time of summons<sup>52</sup>). So far as we are informed, the notice was an act which served to notify the party to be sued of the action for which he should prepare<sup>53</sup>). The party giving notice was also required to make known to his adversary the evidence on which he intended to rely at trial (*editio instrumentorum*)<sup>54</sup>). One of the aims of these rules was to inform the defendant and thereby lessen the need for a postponement *in* <153> *iure*<sup>55</sup>). But where the summons followed immediately on the *editio*, such that the defendant had an insufficient opportunity to consider his defence, the need for a postponement notwithstanding the *editio* is evident<sup>56</sup>).

This suggests the possibility that the cited *uadimonium* was a judicial *uadimonium* and was not associated with the *in ius uocatio* that followed it. Alfenus denies the debt and wins a delay before the praetor in the debt controversy, perhaps by insisting that Naeuius present proof of what was owing, or by requesting time to consider a defence, or by arguing, as Alfenus did indeed argue<sup>57</sup>), that it would be more just if Naeuius waited until Quinctius returned to Rome. Naeuius then becomes impatient with the delays in the debt controversy, decides to pursue the second controversy—Quinctius' missed *uadimonium*—and summons Alfenus to give security<sup>58</sup>).

<sup>52</sup>) A.-J. B o y é, Pro Petronia Iusta, in *Mélanges Lévy-Bruhl* (Paris 1959) 40 n. 2.

<sup>53</sup>) Ulpian (4 ed.) D. 2, 13, 1 pr.: *Qua quisque actione agere uolet, eam edere debet: nam aequissimum uidetur eum qui acturus est edere actionem, ut proinde sciat reus, utrum cedere an contendere ultra debeat* .... See L e n e l § 9 and especially B ü r g e (note 17). Cicero subsequently refers to Naeuius' *editio* at 20. 63 and 21. 66.

<sup>54</sup>) Ulpian (4 ed.) D. 2, 13, 1, 3; B ü r g e (note 17) 25–41. <153>

<sup>55</sup>) A. F e r n a n d e z B a r r e i r o, La previa informacion del adversario en el proceso privado romano (Pamplona 1969) 41–3; B u t i (note 40) 298.

<sup>56</sup>) F e r n a n d e z B a r r e i r o (note 55) 38–9; B u t i (note 40) 199–200. Postponement may also have been allowed to permit the claimant himself to bring forward further evidence supporting the action he intended to bring. This is suggested by Ulpian (4 ed.) D. 2. 13. 1. 5: *Eis, qui ob aetatem uel rusticitatem uel ob sexum lapsi non ediderunt uel alia iusta causa, subuenietur*. 'Other sufficient ground' ought to include cases in which evidence is not immediately available for production. B ü r g e rightly points out that new evidence would not be brought forward after the contents of the formula are determined, B ü r g e (note 17) 36–7, but before that instant there was room for the *praetor* to extend the protections he saw fit.

<sup>57</sup>) In an earlier part of the speech (6. 27) Cicero mentions that Alfenus, after tearing down the notices, carrying back the slave, and declaring himself Quinctius' agent, *denuntiat* ... *istum aequum esse famae fortunisque P. Quincti consulere et aduentum eius exspectare; quod si facere nolit atque imbiberit eius modi rationibus illum ad suas condiciones perducere, sese nihil precari et, si quid agere uelit, iudicio defendere*. This was perhaps the argument on which Alfenus won a delay in the partnership suit.

<sup>58</sup>) He may have sought from Alfenus the security that a procurator for a defendant is

One should ask why this explanation is preferable to the explanation that relates the *uadimonium* and the *in ius uocatio* to the same court appearance. The answer is that, under the latter explanation, Alfenus is not being the good procurator Cicero claims him to be. Alfenus, we would understand, had actively defended Quinctius in tearing down sale notices and taking back a seized slave, but then, instead of seeking relief from the praetor, has waited for Naeuius to demand bail and summon him. It would be odd for Alfenus <154> suddenly to abandon the initiative, and also odd (if it were true) for Cicero to take the trouble to mention it. Cicero would be praising Alfenus for coming to the praetor only on threat of a penalty, and singling out for praise ('in ius uocas, sequitur') the act of walking a few metres to the *praetor's* tribunal. It is more likely that Alfenus has approached the praetor of his own volition. Quite apart from Alfenus' obvious zeal, it is in Alfenus' interest to contest the grant of possession, and manifestly not in Naeuius' interest to give Alfenus that opportunity. Accordingly the *uadimonium* marks the conclusion of the first proceeding, while the *in ius uocatio* marks Naeuius' decision to pursue a new course that promises him quicker relief. On this interpretation Cicero's arguments in the quoted passage are more cogent: he is praising Alfenus for defending against the debt claim, for promising to reappear so the claim could be further explored, for obeying the summons (that is, not secreting himself or giving a *uindex*) when Naeuius decided to change tack, and for acceding (though belatedly) to the form of action of which Naeuius had earlier given him notice.

iii) second *uadimonium* by Alfenus as procurator (7. 29; cf. 21. 67)

Iste postulabat ut procurator iudicatum solui satis daret; negat Alfenus aequum esse procuratorem satis dare, quod reus satis dare non deberet, si ipse adesset. Appellantur tribuni; a quibus cum esset certum auxilium petitum, ita tum disceditur ut Idibus Septembribus P. Quinctium sisti Sex. Alfenus promitteret.

[Naeuius] requests that the procurator give security for potential payment of the judgment; Alfenus says that it is not fair for a procurator to give security where the defendant himself, were he present, would not have to give it. He appeals to the tribunes, and after he had sought particular relief from them the parties then went away, after Alfenus had promised that Quinctius would be present on 13 September.

obliged to give (see the sources cited below note 60), or perhaps had been waiting for thirty days after possession in order to seek from Alfenus the security which Quinctius was obliged to give him. On the latter possibility see A r a n g i o - R u i z (note 36) 23–4 & n. 18. <154>

This passage is only occasionally cited<sup>59)</sup> as an instance of the extra-judicial *uadimonium*, perhaps because it is not a *uadimonium* that introduces a lawsuit. It is indeed a *uadimonium* that evades any simple classification. Naeuius wishes Alfenus to give security pending the outcome of the case, and the praetor indicates that he would consider making an order to this effect (19. 63). Alfenus' appeal to the tribunes is not successful, resulting only in the tribune Brutus recommending that Alfenus and Naeuius come to some agreement (20. 65). Alfenus asks Naeuius not to act in Quinctius' absence, but says that if Naeuius persists (*sin autem inimicissime atque infestissime contendere perseueret*, 21. 66), Alfenus will defend. However, Alfenus then promises a *uadimonium* for Quinctius' appearance. <155>

We presume that nothing, except the intervention of the tribune, would have legally prevented Naeuius from pursuing Alfenus for the security which a procurator must provide<sup>60)</sup>, and from there proceeding against Alfenus as Quinctius' procurator. Naeuius has decided to leave the procurator alone and go against the principal<sup>61)</sup>; perhaps this was his own decision or (more likely) was the agreement recommended by Brutus. Of course it would not reflect well on Alfenus' 'defence' if he avoided his responsibilities as procurator by promising that his principal would appear, and understandably Cicero emphasises Alfenus' reluctance to follow this course.

The *uadimonium* Alfenus uses to bring his principal to court is not an extra-judicial *uadimonium*. It does not introduce a lawsuit, and however much it is 'voluntary' on Alfenus' part, it is not voluntary on Quinctius' part. Cicero does not say whether the praetor compelled Alfenus to make his promise, though perhaps the threat of being compelled to do so (that is, the *uadimonium* being Alfenus' 'voluntary' act only in the loosest sense of the word) makes the point moot. Alfenus' *uadimonium* can therefore be described as 'extra-judicial' only by altering the definition; Fliniaux comments on this passage as follows: 'Il s'agit là d'un *uadimonium* extrajudiciaire, c'est-à-dire d'un *uadimonium* qui servait à assurer pour la première fois la comparution d'un défendeur *in iure*.<sup>62)</sup>. There is of course no dispute that a procurator who has appeared *in iure* can promise the appearance of his principal.

<sup>59)</sup> It is so cited by Steinwenter 2057 and Fliniaux 65. <155>

<sup>60)</sup> See G. 4. 101; Ulpian (60 ed.) D. 3, 3, 51, 2, h. t. 53.

<sup>61)</sup> On the unlikely suggestion that Alfenus had already accepted a *iudicium*, maintained by Wlaskak and Jähr, see Wolf (note 31) 15–20.

<sup>62)</sup> Fliniaux 65 n. 3.

b) *uadimonia to other tribunals, in Cicero*

The *uadimonium* in which a person promises to appear at a remote tribunal ('Verweisungsuadimonium') is usually included among 'judicial *uadimonia*' and not 'extra-judicial *uadimonia*'<sup>63</sup>). This classification, however, assumes that the promise to appear at the remote tribunal is ordered by a magistrate, in the same way that an ordinary 'Vertagungsuadimonium' is ordered. Yet the classification may not hold where a *uadimonium* to a <156> remote tribunal has been promised voluntarily. Some *uadimonia* of this kind have been classed as extra-judicial on this assumption<sup>64</sup>), and two of these are from Cicero.

The first is a comment on Verres' administration of justice as praetor (II in Verrem 5. 34):

... unum illud, quod ita fuit illustre notumque omnibus ut nemo tam rusticanus homo L. Lucullo M. Cotta consulibus Romam ex ullo municipio uadimonii causa uenerit, quin sciret iura omnia praetoris urbani nutu atque arbitrio Chelidonis meretriculae gubernari ...

... this one fact was so obvious and so well known to everyone, that during the consulship of L. Lucullus and M. Cotta, any rube coming to Rome from some *municipium* for the sake of a *uadimonium* knew that the justice administered by the urban praetor was determined entirely by the will and whim of Chelidon the prostitute ....

The *uadimonium* in this passage has been cited by von Bethmann - Hollweg and some subsequent writers as an instance of the extra-judicial *uadimonium*<sup>65</sup>). That it might indeed be such an instance is beyond argument;

<sup>63</sup>) See Steinwenter 2056–7; W. Simshäuser, Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana, SZ 109 (1992) 166; and the discussion at Domingo II (note 4) 54–8, and (note 6) 178–80. The classification is not significantly different in Wenger 90–1, who classifies the *uadimonium* by which a magistrate orders a reappearance 'eigentliches Dilationsvadimonien', and the *uadimonium* by which a magistrate transfers the matter to another with greater, equal, or lesser jurisdiction, 'uneigentliches Dilationsvadimonien'. <156>

<sup>64</sup>) For example, three of the *uadimonia Romam* from Herculaneum have been classed as voluntary on the argument that they lack any reference to a magistral *decretum*. See below notes 86 to 88 and accompanying text.

<sup>65</sup>) Von Bethmann - Hollweg II 200 n.24 (citing this passage as evidence for both the voluntary and compulsory *uadimonium*). He also cites this passage for the proposition that parties could forgo having their case heard at the local level and voluntarily bring it to Rome instead. Von Bethmann - Hollweg II 24. See also Kaser/Hackl 231 n. 37; Steinwenter 2057. Cf. A. H. J. Greenidge, Roman Public Life (London 1901) 313, citing this passage for the proposition that 'The defendant [was] in some cases compelled to give bail (*uadimonium*) to bring his case to Rome.'

the ability of a person voluntarily to promise his appearance in Rome is not in doubt<sup>66</sup>). The alternative is that Cicero's *rusticanus* comes to Rome because he was ordered (or stipulated to another) to appear, or could have been so ordered and chose to make the promise without awaiting an order to do so<sup>67</sup>). Cicero gives no obvious indication which of these *uadimonia*—voluntary or involuntary—he is referring to, nor whether the distinction is even important<sup>68</sup>). If the passage is to support the argument that <157> the extra-judicial *uadimonium* was common in the late Republic, we must have some evidence that the *uadimonium* Cicero speaks of is indeed voluntary, and it is reasonable to ask what evidence there is.

The present state of the evidence on *uadimonia* to remote tribunals is considerably better than in von Bethmann-Hollweg's day. At the time he presented this passage as one of the 'innumerable examples' of the voluntary *uadimonium* in Cicero, the *lex de Gallia Cisalpina* had already shown that, within Italy in the late Republic, jurisdictional competence could be divided between a local court and Rome, and that where local competence was exceeded a defendant could be compelled to provide a *Verweisungsuadimonium* to Rome<sup>69</sup>). The subsequent discovery of the Este fragment<sup>70</sup>) confirmed the scheme of divided jurisdiction for roughly the same period, though a provision on *uadimonium* to Rome, comparable to that in the

Similarly, Fliniaux 117.

<sup>66</sup>) W. S i m s h ä u s e r, *Iuridici und Munizipalgerichtsbarkeit in Italien* (Munich 1973) 190. See also K a r l o w a 332–3.

<sup>67</sup>) It is only a terminological point whether to class as 'extra-judicial' a colourably extra-judicial *uadimonium* promised by a litigant who knows that his opponent's case exceeds local competence and chooses to make his promise without making a first appearance locally, as described in Paul (1 ed.) D. 2, 5, 2 pr., quoted below, note 73.

<sup>68</sup>) My own belief, based only on the tenor of Cicero's argument, is that he would <157> not have spoiled his remark by suggesting that litigants coming to Rome were willing to overlook the quality of justice administered by the urban praetor.

<sup>69</sup>) See *lex de Gallia Cisalpina*, col. 2, ll. 21–4: *quo minus in eum, qui ita uadimonium Romam ex decreto eius, qui ibei i(ure) d(eicundo) p(raerit), non promeisserit aut uindicem locupletem ita non dederit, ob e(am) r(em) iudicium recup(eratorium) is, qui ibei i(ure) d(eicundo) p(raerit), ex h(ac) l(ege) det iudicareique d(e) e(a) r(e) ibei curet, ex h(ac) l(ege) n(ihilum) r(ogatur)* (text of RS I, no. 28, p. 466). This provision was probably employed where the matter was worth more than 15,000 sesterces. F. J. B r u n a, *Lex Rubria* (Leiden 1972) 165; W. S i m s h ä u s e r, SZ 93 (1976) 391. On the relation between this statute and judicial administration in Italy, see A. L i n t o t t, *Imperium Romanum. Politics and Administration* (London 1993) 67–8, 136–7. G r e e n i d g e regarded the existence of this statute alone as a sufficient refutation of v o n B e t h m a n n - H o l l w e g ' s interpretation. G r e e n i d g e 102.

<sup>70</sup>) RS I, no. 16.

*lex de Gallia Cisalpina*, does not survive in the fragment. Other sources now attest the use of compulsory *uadimonia* to other tribunals (whether to Rome or to a provincial governor) outside Italy during the Republic<sup>71</sup>). And the *lex* <158> *Irnitana*, though of course much later than the Cicero passage and in the nature of a charter, appears to reflect a republican model<sup>72</sup>), insofar as it permits a local magistrate to exact a promise of a *uadimonium* for appearance before the provincial governor even in cases in which the magistrate otherwise had no jurisdiction<sup>73</sup>). Quite apart from new evidence, the compulsory

<sup>71</sup>) From Claros there is an inscription, from perhaps the 2nd century B.C, praising its ambassador Menippos for securing freedom from compulsory *uadimonia*, see Décret pour Ménippos, col. I, ll. 23–7, in L. & J. R o b e r t (edd.), Claros I. Décrets Hellénistiques (Paris 1989) 63–4: τῶν παραγινομένων εἰς τὴν Ἀσίαν τὰ κριτήρια μεταγόντων ἀπὸ τῶν νόμων ἐπὶ τὴν ἰδίαν ἐξουσίαν καὶ πρὸς μέρος αἰεὶ τῶν ἐγκαλουμένων πολιτῶν ἐγγύας ἀναγκαζομένων ὑπομένειν ....; ll. 37–9: τοὺς δὲ κατοικοῦντας τὴν πόλιν ἐλευθέρωσε κατεγγυήσεων καὶ στρατηγικῆς ἐξουσίας .... On the import of this decree, see Lintott (note 69) 39, 62, 66. See also the *SC de Aphrodisiensibus*, ll. 47–8, in J. R e y n o l d s, Aphrodisias and Rome (Society for the Promotion of Roman Studies, Journal of Roman Studies Monographs No. 1) (London 1982) 59, from the late 1st century B.C., forbidding within Plarasa and Aphrodisias the accepting or ordering of *uadimonia* to Rome: μήτε ἐγγύην εἰς Ῥώμην ἔντος τῶν ὄρων ἐκείνων τινα <158> ὁμολ[ο]γεῖν τιμὴν ἢ [κ]αὶ κελεύειν ὁμολογεῖν ....; and SEG 18 (1962), no. 555 ('Letter of Vinicius'), ll. 20–2, from perhaps 27 B.C., in J. A C r o o k, An Augustan Inscription in the Rijksmuseum at Leyden, Proc. Camb. Phil. Soc. (n.s.) 8 (1962) 23–4, 29, which advises the magistrates at Cyme that one Lysias must accept a price for a sanctuary he presently owns, or else make a *uadimonium* for appearance before the governor of Asia: *sei autem Lusiam contradeicit quae Apollonides posuit et uadimonium ei satisdato ubi ego ero Lusiam promittere uoltis, +vacat+probo*. (The text given here is much reconstructed; cf. R. K. S h e r k, Roman Documents from the Greek East, Baltimore, MD, 1969, 314, and K u n k e l, note 9, 212–13.) A fragment from the *lex Coloniae Genetiuae* (fr. 5; see RS I, pp. 411–12) appears to refer to a *uadimonium* for appearance before the provincial governor, but the compulsory character is not apparent.

<sup>72</sup>) K. H a c k l, Der Zivilprozeß des frühen Prinzipats in den Provinzen, SZ 114 (1997) 146–7. It certainly reflects the *lex de Gallia Cisalpina* in this respect, and perhaps also the *lex Coloniae Genetiuae*, cited above note 71.

<sup>73</sup>) *Lex Irni*. c. 84, ll. 20–3: (granting the *duumviri* jurisdiction) *omnium rerum [dumtaxa]t de uadimonio promittendo in eum [locum in] quo is erit qui [e]i prouinciae praerit futurusue esse uidebitur eo die in quem ut uadimonium promittatur postulabitur, ....* In D o m i n g o II (note 4) 57–8 and (note 6) 179 n. 29, the author suggests that there is an indirect reference to *uadimonia* to other tribunals at ll. 40–2 of chapter K (= c. 49) of the *lex Irnitana*. On the magistrate's power to grant a *uadimonium* in matters otherwise beyond his jurisdiction, see A. R o d g e r, The Jurisdiction of Local Magistrates: Chapter 84 of the *lex Irnitana*, ZPE 84 (1990) 150; S i m s h ä u s e r (note 63) 166. The clearest juristic text is Paul (1 ed.) D. 2, 5, 2 pr.: *Ex quacumque causa ad praetorem uel alios, qui iurisdictioni praesunt, in ius uocatus uenire debet, ut hoc ipsum sciatur, an iurisdictionis eius sit*. This rule may apply

character of the *uadimonium* to Rome treated in the edict is quite clear from its place near the beginning of the edict; Lenel argued that this was an indication that a local magistrate would transfer a case beyond his jurisdiction to a higher tribunal<sup>74</sup>). <159>

None of this evidence, of course, excludes the possibility that the cited *uadimonium* was voluntary. But given the well-attested use of compulsory *uadimonia* in the very context Cicero describes, one might ask what grounds exist to treat the cited *uadimonium* as voluntary. If the voluntary character is not apparent in some way, the passage cannot give much support to the thesis that voluntary *uadimonia* were common.

The second passage, pro Tullio 20, is in a similar posture to the first passage. As with the first passage, it may indeed give an instance of a voluntary *uadimonium*. But as with the first passage, it does not support a thesis about the prevalence of voluntary *uadimonia*. Tullius and Fabius disagree about the ownership of a piece of land near Thurii. They meet privately; their intention is to engage in an 'expulsion' (*deductio moribus*), and then have the matter resolved by some means at Rome:

Appellat Fabius ut aut ipse Tullium deduceret aut ab eo deduceretur. Dicit deducturum se Tullius, uadimonium Fabio Romam promissurum.

Fabius declares that either he should expel Tullius or be expelled by him. Tullius says that he himself will expel, that he will promise Fabius a *uadimonium* for appearance in Rome.

There is little known, and little consensus, on *deductio moribus*, an extra-judicial act whereby two persons engage in a collusive expulsion from possession before undertaking judicial proceedings, perhaps a suit on ownership, or perhaps an interdictal proceeding<sup>75</sup>). It is disappointing, for

to any incompetent magistrate, see K a s e r/H a c k l 179 n.52; cf. D o m i n g o II (note 4) 55 n. 138, who suggests that in its uninterpolated state the rule applied only to municipal magistrates. When a matter had been transferred by *uadimonium* to the provincial governor, there was no 'routine' second *uadimonium* to Rome by the governor. See G. P. B u r t o n, The Lex Iritana, Ch. 84, the Promise of Vadimonium and the Jurisdiction of Proconsuls, Classical Quarterly 46 (1996) 217–21.

<sup>74</sup>) L e n e l (note 15) 35–8; L e n e l 55–6. See also R o d g e r (note 16) 163–5; R. D o m i n g o, Estudios sobre el primer título del edicto pretorio I (Universidade de Santiago de Compostela 1992) 29–30. <159>

<sup>75</sup>) It is best attested in the quoted passage, and in the pro Caecina 7. 20; 8. 22; 10. 27; 11. 32; 32. 95. For the proposition that it was collusive, see the quoted passage from the pro Tullio and pro Caec. 8. 22: ... *Caecina ... ad eum fundum profectus est in quo ex conuentu uim fieri oportebat*. The *Deductio moribus* is discussed at length in G. N i c o s i a, Studi sulla

purposes of the present discussion, that the procedure to be followed after such an expulsion are unknown; neither in the pro Tullio nor in the pro Caecina did the parties, in the event, resort to *deductio*. We therefore do not know at what point in the subsequent proceedings Tullius' promise would have taken place, and most importantly, whether a suit of this type could be brought locally, with provision for (in the manner of the *lex de Gallia Cisalpina*) a compulsory *uadimonium* to Rome if the case were beyond local competence. With an answer to these two questions it would be possible to resolve whether Tullius' *uadimonium* was to be judicial or extra-judicial.

But for purposes of argument one can accept that this *uadimonium* is voluntary, and yet be left with no support for wider claims about the pre-<sup><160></sup> valence of voluntary *uadimonia*. This is because this ostensibly voluntary *uadimonium* arises in the course of a patently voluntary, collusive lawsuit. Von Bethmann-Hollweg vastly overstates the case in claiming, on the basis of this passage, that lawsuits within Italy were frequently transferred to Rome voluntarily<sup>76</sup>). A collusive promise in a collusive lawsuit cannot stand for such a proposition. The passage attests something much more modest: (1) that a person could promise his appearance voluntarily, a proposition that was never in doubt, and (2) that a person who willingly engaged in a collusive proceeding might willingly collude in a *uadimonium* as well.

#### IV. Documentary Evidence

##### Herculaneum *uadimonia*<sup>77</sup>)

TH 6, late 1st Cent. AD

TH 13, AD 75

TH 14, AD 75

TH 15, AD 75 or 76

'deiectio' (Milan 1965) 31–9, and B. Frier, *The Rise of the Roman Jurists* (Princeton/NJ 1985) 78–92. <sup><160></sup>

<sup>76</sup>) Von Bethmann-Hollweg II 200 ('durch freiwillige Vadimonia wurde die Sache häufig aus fernen Gegenden Italiens nach Rom überwiesen.').

<sup>77</sup>) TH 6: Arangio - Ruiz, *BIDR* 53–54 (1948) 396 (= *Studi epigrafici e papirologici*, Naples 1974, 311–12); Pugliese Carratelli, *Par. Pass.* 1 (1946) 383. TH 13: Pugliese Carratelli, *Par. Pass.* 3 (1948) 168–9 (= *L'année épigraphique* 1951, no. 215). TH 14: Arangio - Ruiz, *BIDR* 62 (1959) 226–8 (= *Studi epigrafici e papirologici*, Naples 1974, 555–6); Pugliese Carratelli, *Par. Pass.* 3 (1948) 169–70. TH 15: Arangio - Ruiz, *BIDR* 62 (1959) 228–9 (= *Studi epigrafici e papirologici*, Naples 1974, 556–7); Pugliese Carratelli, *Par. Pass.* 3 (1948) 170–1.

Puteoli *uadimonia*<sup>78)</sup>

- TP Sulp 1 (= TP 1), AD 47
- TP Sulp 1 bis (cf. TP 31), AD 41 or 43-45
- TP Sulp 2 (= TP 32), AD 48
- TP Sulp 3 (= TP 41), AD 48
- TP Sulp 4 (= TP 70 + TP 139), AD 52
- TP Sulp 5 (= TP 36), mid-1st Cent. AD
- TP Sulp 6 (= TP 38), mid-1st Cent. AD
- TP Sulp 7 (= TP 12), mid-1st Cent. AD
- TP Sulp 8 (= TP 2), mid-1st Cent. AD
- TP Sulp 9 (= TP 106), mid-1st Cent. AD
- TP Sulp 10 (= TP 42, TP 93), mid-1st Cent. AD <161>
- TP Sulp 11 (= TP 11), mid-1st Cent. AD
- TP Sulp 12 (cf. TP 116, TP 79), AD 40 or 43-44
- TP Sulp 13 (= TP 3), mid-1st Cent. AD
- TP Sulp 14 (cf. TP 4), mid-1st Cent. AD
- TP Sulp 15 (cf. TP 33), mid-1st Cent. AD

The *uadimonia* from Herculaneum and Puteoli are generally regarded as extra-judicial *uadimonia*<sup>79)</sup>. They came to be regarded in this way on the basis of both internal and external evidence. The discussion below addresses the proposition that all of the documents are extra-judicial *uadimonia*. I suggest that the grounds for classifying all of the documents in this way have been weakened by current scholarship, and that some individual documents, to the contrary, are probably judicial *uadimonia*<sup>80)</sup>.

<sup>78)</sup> TP Sulp 1: Camodeca 53–4; Manthe, Gnomon 53 (1981), 152. TP Sulp 1 bis: Camodeca 54–5. TP Sulp 2: Camodeca 56; Manthe, Gnomon 53 (1981) 153. TP Sulp 3: Camodeca 56–8; Manthe, Gnomon 53 (1981) 154. TP Sulp 4: Camodeca 58–9; Bove 58. TP Sulp 5: Camodeca 59–60; Giménez - Candelera, Studi Sanfilippo I 187 (= AE 1984, no. 240). TP Sulp 6: Camodeca 60; Manthe, Gnomon 53 (1981) 154. TP Sulp 7: Camodeca 60–1. TP Sulp 8: Camodeca 61–2. TP Sulp 9: Camodeca 62. TP Sulp 10: Camodeca 63. TP Sulp 11: Camodeca 64. TP Sulp 12: Camodeca 64–5. TP Sulp 13: Camodeca 66; Triantaphyllopoulos, Mélanges hellénique G. Daux (Paris, 1974) 136–8 (= AE 1974, no. 278). TP Sulp 14: Camodeca 66–7; Triantaphyllopoulos, Mélanges hellénique G. Daux (Paris, 1974) 136–8 (= AE 1974, no. 278). TP Sulp 15: Camodeca 68–9. <161>

<sup>79)</sup> J. G. Wolf, Aus dem neuen pompejanischen Urkundenfund, SDHI 45 (1979) 165 n. 83; Camodeca 49; P. Gröschler, Die tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden (Berlin 1996) 63 n. 247.

<sup>80)</sup> I do not argue that none of the documents are extra-judicial *uadimonia*.

a) *uadimonium factum ei*

The Herculaneum *uadimonia* were the first to be treated as extra-judicial. Of the four, three (TH 13-15) are part of a series of documents concerning a lawsuit over the free-born status of one Petronia Iusta<sup>81</sup>). For purposes of discussion, a portion of the scriptura interior to TH 15, a *uadimonium* to Rome stipulated by Petronia Iusta (Arangio-Ruiz, 1959, abbreviations resolved), is reproduced below.

Vadimonium factum M. Calatorio Speudonti in IIII Idus Martias primas Romae in foro Augusto ante aede Martis Ultoris hora tertia HS M dari stipulata est ea quae se Petroniam Spurii filiam Iustam esse dicat spondit M. Calatorius Speudon.

All of the *uadimonium* documents (including those from Puteoli) appear to follow this model very closely<sup>82</sup>). And as with most of the documents, the meaning is fairly plain, even though the syntax is mysterious: a person <162> who calls herself Petronia Iusta has stipulated that M. Calatorius Speudon should appear in the forum at Rome on 12 March or pay a penalty of 1,000 sesterces<sup>83</sup>). What is not immediately clear is (1) whether this *uadimonium* and the two others in this lawsuit are Verweisungs*uadimonia* from Herculaneum to Rome<sup>84</sup>), ordered by a magistrate, or simply voluntary agreements to appear in Rome (that is, extra-judicial *uadimonia*), and (2) how to explain the syntax. In presenting these documents Arangio-Ruiz addressed both of these questions<sup>85</sup>). To the first question he suggested that the three *uadimonia* in this lawsuit were extra-judicial, because they did not

<sup>81</sup>) See V. Arangio-Ruiz, Il processo di Giusta, Par. Pass. 3 (1948) 129–51; V. Arangio-Ruiz, Testi e documenti IV, BIDR 62 (1959) 223–45; J. A. Crook, Law and Life of Rome (London 1967) 48–50; F. Costabile, Nuove luci sul 'processo di Giusta', in Studi Sanfilippo VII (Milan 1987) 185–230; P. R. C. Weaver, Children of Freedmen (and Freedwomen), in B. Rawson (ed.), Marriage, Divorce, and Children in Ancient Rome (Oxford 1991) 166–90.

<sup>82</sup>) See Bove 63–4; Wolf 66. An exception to this model is found in TP Sulp 10, which in Camodeca's edition begins 'Vadimonium cum' and is lacking several elements, most conspicuously the stipulation. Camodeca suggests persuasively that the text may be only a draft. Camodeca 63. <162>

<sup>83</sup>) We do not know from the documents whether she is the plaintiff or the defendant in the case, Crook (note 81) 48–9, but in each of the *uadimonia* in which she appears, she is stipulating for another's appearance.

<sup>84</sup>) One should note that the Herculaneum *uadimonia*, unlike many of those from Puteoli, do not indicate the place of execution; that they are Verweisungs*uadimonia* is therefore an inference.

<sup>85</sup>) His arguments may be found at Par. Pass. 3 (1948) 137–40, and BIDR 62 (1959) 230–4.

make reference to a *decretum* of the local magistrate<sup>86</sup>). He relied on a portion of the *lex de Gallia Cisalpina*<sup>87</sup>), which refers to the power of a local magistrate to order a *uadimonium* to Rome *ex decreto*. He did not attempt to classify in this way the remaining Herculaneum *uadimonium*, TH 6, which is not well preserved<sup>88</sup>).

On the second question, regarding syntax, the principal problem is that the documents say flatly that one of the parties promises to pay; they do not say that he promises to pay in the event he does not appear. This immediately raises a question about the relationship, if any, between the first and second parts (in the quoted document, between *Vadimonium ... tertia* and *HS ... Speudon*). Arangio-Ruiz suggested that these two halves were distinct phrases, and that they represented two acts; that the first phrase was a unilateral injunction in which the plaintiff called on the defendant to appear at a particular day, place, and time, while the second was the familiar bilateral *uerborum obligatio*, by which the defendant promised to pay a sum, and wherein it was implied that the sum was to be paid only if he did not appear. For this construction Arangio-Ruiz relied on Gaius' discussion of the judicial <163> *uadimonium*. With respect to the first proposition, Gaius appears to use language similar to that found at the beginning of each tablet (Institutes 4.184):

Cum autem in ius uocatus fuerit aduersarius, neque eo die finiri potuerit negotium, uadimonium ei faciendum est, id est, ut promittat se certo die sisti.

However, when the defendant has been called *in ius*, but matters cannot be completed on that day, *uadimonium ei faciendum est*, that is, that he promises to be present on a particular day.

As with the tablets, according to Arangio-Ruiz, the defendant ('ei') is in the dative and the *facere* is performed by the plaintiff. With respect to the second proposition, Gaius refers to the ability of a person to bind another to appear by *uadimonium* (Institutes 4.187):

Quas autem personas sine permissu praetoris impune in ius uocare non possumus, eisdem nec uadimonio inuitas obligare nobis possumus, praeterquam si praetor aditus

<sup>86</sup>) Arangio-Ruiz (1948) (note 81) 136. Pugliese rejects the argument on the ground that the documents are sparing with their language and a decree is unnecessary to the purpose of a *uadimonium*. G. Pugliese, Le "Tabulae Herculenses" relative al processo di Giusta, in *Scritti giuridici scelti I* (Camerino 1985) 131–2.

<sup>87</sup>) Column 2, ll. 21–2, quoted above note 69.

<sup>88</sup>) See Arangio-Ruiz (note 36) 33 n. 12. <163>

permittat<sup>89</sup>).

However, those persons whom we may not with impunity summon *in ius* without the *praetor's* permission are the same as those whom we may not bind by *uadimonium* against their will, unless the praetor gives his permission.

This passage, according to Arangio-Ruiz, may be taken to suggest that a person may bind another to appear, the obligation being imposed *in iure* with the threat of a magistrate's sanction if the defendant refuses, or imposed extra-judicially, as in the *uadimonium* tablets<sup>90</sup>).

Arangio-Ruiz accordingly formulated independent arguments about the classification of the *uadimonia* and the character of the language employed therein. There is nevertheless a close relationship between these arguments: the notion of a 'unilateral injunction', plaintiff to defendant, is consistent with the way an extra-judicial *uadimonium* is used. And Arangio-Ruiz makes note of this relationship, commenting that a unilateral injunction is entirely appropriate to an institution which historically replaced the patently unilateral *in ius uocatio*<sup>91</sup>). Those writing after Arangio-Ruiz on the whole did not agree with his construction of the tablets' language<sup>92</sup>), but many did <164> put forward similar interpretations which emphasised the rôle of the plaintiff in initiating the *uadimonium*, e.g., that (1) *uadimonium facere* expresses an unconditional bilateral agreement to appear, created on the invitation of the plaintiff<sup>93</sup>), or that (2) a *uadimonium* could be either the unilateral act of the plaintiff, or a bilateral agreement, or even a combination of the two<sup>94</sup>), or that (3) *uadimonium facere* expresses an invitation, by the plaintiff to the defendant, to make a promise<sup>95</sup>), or that (4) though *uadimonium facere*

<sup>89</sup>) Arangio-Ruiz uses this text, which follows Seckel and Kübler in resolving *n(obis) possumus*.

<sup>90</sup>) As Boyé notes, this is not the strongest of arguments, since it does not follow from the statement 'we may not oblige certain persons without the *praetor's* permission' that 'we may indeed oblige any person'. Boyé (note 52) 37–8. But in support of Arangio-Ruiz, see Buti (note 40) 317–22.

<sup>91</sup>) Arangio-Ruiz (1948) (note 81) 139. Cf. Boyé (note 52) 38–40; A.-J. Boyé, *Replicatio pro Iusta*, in *Syntelesia Arangio-Ruiz* (Naples 1964) 1006.

<sup>92</sup>) See the literature cited in Boyé (note 52) 35 n. 1; cf. G. Pugliese, *L' "actio" e <164> la "litis contestatio" nella storia del processo romano*, in *Scritti giuridici scelti I* (Naples 1985) 429; Kunkel (note 9) 212 n.29.

<sup>93</sup>) Boyé (note 52) 36–7; (note 91) 1001–6.

<sup>94</sup>) Bove 34–5.

<sup>95</sup>) T. Giménez-Candela, *A propósito del "uadimonium" en las "tabulae pompeianae"* de Murècine, *Studi Sanfilippo I* (1982) 186; S. Taffaro, *Fideiussor iudicio sistendi causa*, *Labeo* 22 (1976) 240–1.

describes the act of the defendant, the reality behind the expression was that a plaintiff had invited the defendant to make a *uadimonium*, and that the defendant was obliged to give it<sup>96</sup>).

In this way the Herculaneum and Puteoli *uadimonia* came to be treated as extra-judicial, on the assumption that the initiative of the plaintiff was in some way evident in the transaction<sup>97</sup>). To be sure, if a *uadimonium* is extra-judicial, one expects its language to be consistent with that fact. But none of the interpretations to date attempts to point out any special 'indicia' by which all of the Herculaneum and Puteoli *uadimonia* can be identified as extra-judicial and not judicial<sup>98</sup>). To the contrary, every attempt to discover <165> the meaning of *uadimonium facere alicui* is an attempt to explain the expression (1) in the tablets, and (2) in Gaius' discussion of the *j u d i c i a l uadimonium* (G. 4. 184). W o l f has made this point explicit in offering what is perhaps the most persuasive construction of the tablets to date. He has argued that *uadimonium factum ei*, as it is used in both the tablets and in Gaius' discussion of the judicial *uadimonium*, does not express the plaintiff's initiative, but an act of the defendant, in particular that the defendant has promised to furnish a stipulation. And Wolf has brought a great deal of clarity to the discussion of the tablets' language by pointing out that 'Das Vertagungs*uadimonium* unterschied sich von dem außergerichtlichen unserer Urkunden nach Anlaß und Zweck, nicht aber in seiner Struktur.'<sup>99</sup>)

<sup>96</sup>) B u t i (note 40) 315–22. For the notion of obligation B u t i relies, in addition to G. 4. 187, on Juv. Sat. 3. 297–299 (where I would take the *uadimonium facere* as a metaphor, see note 30 above) and Nep. Timol. 5.2 (*uadimonium imponere*) which contains, as the author acknowledges, a promise to appear by an opponent of Timoleon of Sicily, 4th century B.C.

<sup>97</sup>) See e.g. G i m é n e z - C a n d e l a (note 17) 134 & n. 40: 'Es constante en estos documentos la expresiòn *uadimonium facere alicui*, que testimonia que la iniciativa del *uadimonium* correspondía siempre al demandante.' C a m o d e c a also appears to interpret the language of the Herculaneum and Puteoli tablets as if it reflected a model for extra-judicial *uadimonia*. See G. C a m o d e c a, Per una riedizione dell'archivio puteolano dei Sulpicii, Puteoli 6 (1982) 23–4; G. C a m o d e c a, Per una riedizione dell'archivio puteolano dei Sulpicii, Puteoli 7/8 (1983/1984) 29–30. But compare Puteoli 6 (1982) 23–4 (suggesting that *uadimonium factum* expresses the initiative of the plaintiff) with C a m o d e c a 49 (accepting that *uadimonium factum* is probably the act of the defendant).

<sup>98</sup>) One possible exception is in J. G. W o l f, Aus dem neuen pompejanischen Urkundenfund, in Studi Sanfilippo VI (Milan 1985) 787–8, where the author argues that the lack of a surety in any of the Herculaneum and Puteoli *uadimonia* suggests <165> that all are extra-judicial. Yet the lack of a surety would not necessarily indicate an extra-judicial *uadimonium* if, as Gaius says (Inst. 4. 185), the judicial *uadimonium* was sometimes permitted *sine satisfactione*. Cf. also W o l f's observation, quoted below accompanying note 99, that the judicial and extra-judicial *uadimonium* do not differ from one another in structure.

<sup>99</sup>) W o l f 66–9. Similarly, Wolf (note 98) 781 n. 35. His interpretation of the

This does not mean of course that none of the surviving *uadimonia* tablets are extra-judicial; it simply means no one has yet identified a method of classifying all of the surviving *uadimonia* tablets as extra-judicial, and that most of the tablets still await classification. Arangio-Ruiz, it will be recalled, identified three of the four Herculaneum *uadimonia*—apparently Verweisungs*uadimonia*, Herculaneum to Rome—as extra-judicial on the negative argument that a Verweisungs*uadimonium* which is ordered by a magistrate would contain a magistrate's *decretum*, as suggested in the *lex de Gallia Cisalpina*. Whether one accepts or rejects this argument, one is still left to find some means of classifying the remaining Herculaneum *uadimonium* (TH 6), as well as the great majority of the Puteoli tablets, which are not Verweisungs*uadimonia* and on which the *lex de Gallia Cisalpina* therefore gives no guidance.

*b) provenance*

There is a further reason why the *uadimonia* from Puteoli have been treated as extra-judicial *uadimonia*. The tablets themselves were discovered near Pompeii<sup>100</sup>), suggesting incorrectly that they had been executed in Pompeii, and giving rise to the misunderstanding that the lawsuits described <166> in the *uadimonia* were transferred from Pompeii to other tribunals<sup>101</sup>). On this misunderstanding the thesis was put forward that lawsuits transferred from Pompeii to Puteoli (identified as the place of appearance in most of the *uadimonia*) must have been done so voluntarily, because compulsory Verweisungs*uadimonia* ordinarily occur where a magistrate with limited jurisdiction transfers a suit to a magistrate with greater jurisdiction, and it was unlikely that magistrates at Puteoli had greater jurisdiction than those at Pompeii<sup>102</sup>). With the newer restorations by Camodeca, however, it became apparent that nearly every tablet (where the pertinent words were legible) had been executed in Puteoli itself, none in Pompeii; the archive had apparently

language in the tablets is accepted by the principal editor of the Puteoli tablets, see C a m o d e c a 49.

<sup>100</sup>) On the circumstances of the find see C a m o d e c a 11–13. <166>

<sup>101</sup>) Specifically, to Puteoli and Rome. Using the current numbering of the tablets, TP Sulp 1–11 are *uadimonia* for appearance in Puteoli; TP Sulp 13–15, in Rome. C a m o d e c a identifies TP Sulp 12 as a *uadimonium* for appearance in Capua; this third site was not apparent to the early editors. See C a m o d e c a 64–5.

<sup>102</sup>) K u n k e l (note 9) 210: 'In munizipalen Verhältnissen war diese Art der Ladung [das Ladungs*uadimonium*] sogar die einzig mögliche, sofern es sich um die Einleitung eines Prozesses vor einem auswärtigen Gerichtsmagistrat handelte.'

been moved from Puteoli to Pompeii for some reason<sup>103</sup>). Hence the supposed 'voluntary *Verweisungs uadimonia*' were simply promises made in Puteoli for appearance in Puteoli, and if the promises were voluntary this would not be apparent from their provenance.

c) *individual uadimonia as judicial uadimonia*

On some of the Puteoli and Herculaneum *uadimonia* it is possible to read both the date of appearance and the date of execution<sup>104</sup>), and the span of time between these two dates may help to determine whether a given *uadimonium* is a judicial *Vertagungs uadimonium* and therefore not an extra-judicial *uadimonium*. This means of identification is possible because a *Vertagungs uadimonium*, under certain conditions, created an interval of three days. The fact that several of the Puteoli *uadimonia* show an interval of three days suggests that these *uadimonia* are not extra-judicial. This, in turn, suggests that one cannot identify all of the Herculaneum and Puteoli *uadimonia* as extra-judicial on the basis of a common model. <167>

Of the six *uadimonia* that show both relevant dates, the two from Herculaneum (TH 14, 15) are for appearance at a remote tribunal, and are therefore not *Vertagungs uadimonia*. Of the four remaining<sup>105</sup>), one (TP Sulp 1) gives the dates 25 October AD 47 (execution) and the uncertain span 6 to 12 November (appearance). The three remaining are:

— TP Sulp 1 bis, which records a *uadimonium* executed on 10 November AD 41 or 43-45 in Puteoli, reciting a *sponsio* of (perhaps) 2,666 sesterces by C. Varius Cartus in favour of (perhaps) C. Sulpicius Cinnamus for appearance in the forum at Puteoli on 12 November.

— TP Sulp 3, which records a *uadimonium* executed on 3 July AD 48 in Puteoli, reciting 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

<sup>103</sup>) See C a m o d e c a 20-1.

<sup>104</sup>) TP Sulp 1, 3, 4, 1 bis; TH 14, 15. One might also include TH 13, except that it has been reconstructed on the basis of TH 14, and appears to be identical to it (except for abbreviations). See G. P u g l i e s e C a r r a t e l l i, *Testi e documenti*, Par. Pass. 3 (1948) 168-9. On the dates of appearance and execution in TH 15 (both 12 March), see C o s t a b i l e, (note 81) 224-6. <167>

<sup>105</sup>) The dates given are based on the reconstructions of C a m o d e c a.

Puteoli on 5 July<sup>106</sup>).

— TP Sulp 4, which records a *uadimonium* executed on 9 June AD 52 in Puteoli, reciting 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.

For the reasons below, it seems likely that the three-day interval in each of these *uadimonia* marks them as *Vertagungs-uadimonia*.

The relationship between the *uadimonium* and three-day intervals has been mentioned occasionally in the literature, but before the discovery of the *lex Irnitana* it was difficult to see what the relationship was. Brisson argued that the words *in diem tertium siue perendinum*<sup>107</sup>) were part of the formal words for ordering a *uadimonium*, but believed that the *uadimonium* ensured the defendant's appearance *apud iudicem*<sup>108</sup>). Meister agreed that the formal words for ordering a *uadimonium* somewhere <168> contained *in diem tertium siue perendinum*, but declined to speculate exactly how the words were used<sup>109</sup>). Karlowa argued that three-day *uadimonia* were ordered as a matter of course during proceedings *in iure*<sup>110</sup>). Voigt argued that a three-day *uadimonium* was used to introduce the trial phase in recuperatorial procedure<sup>111</sup>).

Such wide differences of opinion existed, because the available evidence suggested some relation between the *uadimonium* and three-day intervals without showing what the relation was. The best evidence was in Macrobius (Sat. 1. 16. 14), describing various days observed in the calendar, and here,

<sup>106</sup>) This tablet is discussed in more detail below.

<sup>107</sup>) Probus 4.9 (FIRA II, p. 456): *I.D.T.S.P in diem tertium siue perendinum*. See also Cic. pro Mur. 27: *Iam illud mihi quidem mirum uideri solet, tot homines, tam ingeniosos, post tot annos etiam nunc statuere non potuisse utrum 'diem tertium' an 'perendinum', 'iudicem' an 'arbitrum', 'rem' an 'litem' dici oporteret.*

<sup>108</sup>) B. Brisson, *De formulis et sollempnibus* (Paris 1583) 412. Brisson adopted the now-discarded view that the *uadimonium* was used between the two phases of the lawsuit; see note 4. The argument relies on G. 4. 15, where Gaius, in speaking of the *legis actio per sacramentum*, says: *postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem uenirent, denuntiabant*. See also ps-Asc. at Cic. II in Verr. 1. On how these passages may be reconciled with a three-day interruption *in iure*, see Metzger 77–88, and Interrupting Proceedings *in iure*: *uadimonium* and *intertium*, ZPE 120 (1998) 219–20. <168>

<sup>109</sup>) Meister (note 22) 298–99. He notes: *Sunt uero quidam in ea sententia, uadimonii diem olim semper fuisse tertium siue perendinum, ducti praecipue loco Ciceronis [pro Murena 27] ...; aliorum scriptorum, qui uadimonium in tertium diem conceptum esse testantur*. Ibid.

<sup>110</sup>) Karlowa 364–5. Cf. Fliniaux 28–31, who finds unpersuasive Karlowa's attempt to attribute the three-day interval to the *in iure* stage.

<sup>111</sup>) Voigt 332–5.

*dies profesti:*

Comperendini [sc. dies sunt] quibus uadimonium licet dicere.

But the meaning here is far from clear; *dicere* is an unusual word to find with *uadimonium*<sup>112</sup>) and the sense of *quibus* is ambiguous. The *comperendini dies* should not be the days 'on which' the *uadimonium* is determined, as the words might suggest<sup>113</sup>). Karlowa<sup>114</sup>) came the closest to what is probably the correct meaning (he paraphrases: 'comperendini dies sind solche, auf welche den Termin vor Gericht anzusagen gestattet ist.'). However, his formulation did not indicate exactly when this rule held, and was therefore vulnerable to counter-evidence showing that it was not always the custom to order three-day *uadimonia*<sup>115</sup>). Other evidence associating <169> *uadimonia* with three-day interruptions is found in two accounts of Scipio Africanus (*maior*) presiding over lawsuits while at the same time conducting a campaign to capture a Spanish town.

Aulus Gellius, NA 6.1.10-11:

Scipio, manum ad ipsam oppidi quod obsidebatur arcem protendens, 'perendie', inquit, 'sese sistant illo in loco.' Atque ita factum; die tertio, in quem uadari iusserat, oppidum captum est eodemque die in arce eius oppidi ius dixit.

Scipio, extending his hand toward the very fortress of the town under siege, said 'they shall make their appearance right there'. At so it happened: on the third day, for which he had ordered them to promise their appearance, the town was captured, and on the same day he administered justice in the fortress of the town.

Plutarch, Scipio 3:

<sup>112</sup>) See Fliniaux 29–30 n.3. Fliniaux abandoned any effort to make sense of this text. Ibid. I suggest a translation below, note 124 and accompanying text.

<sup>113</sup>) Although Voigt 332–5 uses the Macrobius passage as evidence, he says that as a statement it is false, 'denn comperendinus dies is der Termin, nicht der Tag, an dem der Termin anberaumt wird ...'. M. Voigt, Die XII Tafeln. Geschichte und System des Civil- und Criminal-rechtes I (Leipzig, 1883) 641 n.23. The *quibus* simply needs a different translation: see below note 124.

<sup>114</sup>) Karlowa 364. He understands Macrobius to be using *uadimonium* in the sense of 'the court day fixed by the *uadimonium*', citing Cic. pro Quinct. 5.22: *uenit ad uadimonium Naeuius*.

<sup>115</sup>) Fliniaux 29 n. 2 points out that in the Gellius passage cited below, the soldiers ask Scipio which day he will order them to reappear, therefore showing that a three-day interval was not the rule in every case. <169> <170>

ἔκέλευσεν ἐκεῖ τὰς ἐγγύας ὁμολογεῖν, ὥς εἰς τρίτην ... ἀκουσόμενος τῶν διαδικούντων ....

He ordered them to promise *uadimonia* for appearance there, with the intention of hearing litigants on the third day.

But compare:

Valerius Maximus, *Facta et Dicta Memorabilia* 3.7.1b:

Nam cum oppidum Badium circumsederet, tribunal suum adeuntis in aedem, quae intra moenia hostium erat, uadimonium in posterum diem facere iussit continuoque urbe potitus et tempore et loco quo praedixerat sella posita ius eis dixit.

For while he was laying siege to the town of Badia, he ordered the *uadimonium* of one who came to his tribunal to be made for the next day in a building which was behind enemy walls, and immediately on getting possession of the city he set up his court and administered justice at both the time and place he had earlier announced.

Again, it is not clear how these passages should be interpreted. In the most important detail the accounts are inconsistent (Valerius: 'for the next day'), and the relevance of the event—a postponement granted by a general in Spain in the third century BC—to classical Roman procedure cannot be taken for granted. The last item of evidence relied on by earlier writers is from Gaius (29 ed. prov.) D. 2, 11, 8:

Et si post tres aut quinque pluresue dies, quam iudicio sisti se [sc. uadimonium] reus promisit, secum agendi potestatem fecerit nec actoris ius ex mora deterius factum sit, consequens est dici defendi eum debere per exceptionem.

And if three or five or more days after a defendant has promised a *uadimonium*, he shall have made a suit against him possible, and the plaintiff's position is not made worse by the delay, it follows that the defendant ought to have a defence, by an *exceptio*.

The text seems to address the relief permitted to a defendant who has not appeared to his *uadimonium*, but nevertheless submits to *litis contestatio*. If <170> it were part of the urban edict, it would probably be among the provisions treating *Si quis uadimoniis non obtemperuerit*<sup>116</sup>). Like the Macrobius passage, it suggests in a vague way that a *uadimonium* might create an interval of three days<sup>117</sup>).

On the whole, therefore, earlier efforts to discover the relationship between

<sup>116</sup>) L e n e l § 269.

<sup>117</sup>) K a r l o w a 364.

the *uadimonium* and intervals of three days were based on very little evidence. There was enough evidence to show that a relationship might exist, but not enough evidence to reveal the actual conditions under which a person would promise by *uadimonium* to appear after three days. The *lex Irnitana* reveals some of these conditions. It does so, not in speaking directly about *uadimonium*, which it addresses only very briefly<sup>118</sup>), but in a very detailed description of the practice of interrupting proceedings *in iure*. Under certain circumstances these interruptions would last for three days<sup>119</sup>).

The chapters of the *lex Irnitana* which treat the administration of justice generally follow the chronology of a lawsuit and, among these chapters, chapter 90 holds a position between the treatment of proceedings *in iure* and proceedings *apud iudicem*<sup>120</sup>). The text of this chapter anticipates two <171> alternatives: (1) that the parties-to-be, having already appeared, will reappear before the magistrate after three days in order to complete, if possible, *litis contestatio*, or (2) that the parties- and the judge-to-be will commence trial after an agreed interval of days. In both cases it expresses the interval with the word *intertium*. It first states a rule: the magistrate grants an *intertium* to the day-after-the-next<sup>121</sup>). It then states an exception: the magistrate grants an

<sup>118</sup>) See c. K, ll. 34–44. I have argued elsewhere that these lines indirectly reflect the practice of granting three-day *uadimonia*. See Metzger (note 108) 223–5. Cf. A. R o d g e r, Postponed Business at Irni, JRS 86 (1996) 65–73.

<sup>119</sup>) The *lex Irnitana* dates to AD 91 and is a copy of a Flavian municipal law of perhaps AD 78. References here are to J. G o n z á l e z, The *lex Irnitana*: A New Copy of the Flavian Municipal Law, JRS 76 (1986) 147–243, except that 'in tertium' appears here as 'intertium'. For other editions, see Metzger 3–4, and for other copies of the Flavian law, see Metzger 2 nn. 4–10. The *lex Irnitana* governed various matters of local administration in the Baetican *municipium* of Irni. The statute says expressly that several procedural rules, including the three-day interval, are part of Roman procedure as well as of the procedure in Irni. See *lex Irni*. c. 91, col. A, l. 53 – col. B, l. 10; col. B, ll. 17–21; Metzger 4–5. However, some of the details of the three-day interval are described without any reference to the practice at Rome. This means that, although the three-day interval is part of Roman practice, some of the details known to us may not themselves be Roman.

<sup>120</sup>) The chronology is not perfectly observed, but on the whole the subject matter in this sequence of chapters tends to follow the progress of a lawsuit. See A. R o d g e r, The *lex Irnitana* and Procedure in the Civil Courts, JRS 81 (1991) 78. According to some, chapter 90 is not concerned with the *in iure* stage. See id. 78 n. 23; J. A. C r o o k, Cambridge Law Journal (1998) 414; J. C r o o k, et al., Intertiumjagd and the *lex Irnitana*: A Colloquium, ZPE 70 (1987) 176. This is a difficult judgment to make on the basis of the sequence of chapters, because chapter 90 falls between treatments of the first and second stage. The fact that chapter 90 is concerned entirely with the acts <171> of magistrates is surely significant. See D. J o h n s t o n, Three Thoughts on Roman Private Law and the *lex Irnitana*, JRS 77 (1987) 71.

<sup>121</sup>) Chapter 90, ll. 27–9: *Quicumque in eo municipio Huir iure dicundo praerit, per quos*

*intertium* to another day, if the parties- and the judge-to-be can agree on a day<sup>122</sup>). The aim of the rule and exception, it appears, is to allow a case to proceed to trial if it is ready to do so, but to interrupt the suit before *litis contestatio* for three days if, for example, a judge cannot be appointed immediately<sup>123</sup>). <172>

There is a third circumstance that the text does not anticipate. It does not anticipate the circumstance in which proceedings ought to be postponed to a specific day other than three days, but there is nevertheless no immediately available judge to lend his agreement. This must have occurred fairly often as when, for example, it was known that a party-to-be would be unavailable until a particular day. One assumes that the magistrate had the authority to order the defendant's reappearance for that specific day, but this circumstance and the way it would be handled are not mentioned. His authority in this respect

*dies ex hac lege ibi iudicia fieri licebit oportebit, in eos dies omnes intertium dato.* The fact that he must grant *intertium* (to paraphrase) 'to all trial days' might suggest that the terminus of the interval must be the trial and not *litis contestatio*. However, the rule is probably recognizing the wisdom of allowing the judge to take the suit on a day when he can actually preside. Moreover, that the statute should specify 'to all days on which trials may take place' is an attempt to include both classes of trial days (those which are generally permissible, and those which are permissible only with the agreement of the parties and judge: see c. 90, ll. 31–7; c. 92, ll. 27–46). That the interval will span three days is supported by the fact that *in diem tertium* (= *comperendinatio*) was part of a formal legal vocabulary (see the sources cited above, note 107), and by the fact that under certain conditions the *intertium* was announced (presumably by plaintiff to defendant) 'in biduo proximo', see c. 91, col. A, l. 49; c. 92, l. 47, which perhaps permits an announcement within two days of the granting of *intertium*, for an appearance on the third day. Moreover, in one of the tablets from Puteoli, TP 24, a trial on the *perendinus dies* appears to be the consequence of *intertium sumere*. See generally Metzger 79–80.

<sup>122</sup>) Chapter 90, ll. 31–7: *Item si inter eos, inter quos ambigetur, et iudicem, qui inter eos iudicare debet, in aliquem diem uti intertium inter eos detur conueniet, neque is dies propter uenerationem domus Augustae festus erit feriarumue numero propter eandem causam haberi debet, in eum diem intertium inter eos dato.*

<sup>123</sup>) The interruption of proceedings *in iure* is not a part of most explanations of *intertium*, which follow d'Ors in interpreting *intertium* as a bridge between the two stages. A. d'Ors, *Nuevos datos de la ley Irnitana*, SDHI 49 (1983) 40–3. Yet *intertium* seems to serve as a bridge only in the exceptional case set out in c. 90, ll. 31–7, quoted above. This is suggested by, among other things, the fact that the conditional relative clause *qui inter eos iudicare debet* is inserted after *iudicem*, and by the fact that the statute appears to distinguish *intertium denuntiare* from *intertium denuntiare iudicandi causa*, compare c. 91, col. A, ll. 48–9, with c. 92, ll. 46–7. On the uncertainty surrounding a given judge's selection, see D. 50, 5, 13 pr. and D. h. t. 13, 3 <172> (Ulp. 23 ed.). The arguments for the explanation adopted here are set out in full in Metzger, chapters 4, 5, and 6. See also D. Ibbetson, *Journal of Legal History* 19 (1998) 186–7; J. A. Crook, *Cambridge Law Journal* (1998) 413–15; A. Lintott, *JRS* 89 (1999) 235–6.

does not seem to be excluded by any language.

A magistrate in Irni will therefore grant a three-day interval *in iure* unless the statute instructs him to the contrary. Gaius says (G. 4. 184) that when business cannot be finished on a given day, the defendant must make a *uadimonium*. Because a defendant ordinarily would not appear again *in iure* voluntarily, a three-day interval will entail a three-day *uadimonium*. In this way the *lex Irnitana* is suggesting that three-day *uadimonia* were ordered in default of any other instruction.

The procedures at Irni, of course, are not necessarily those in Italy or at Rome. The *lex Irnitana* itself (c. 91) tells us that the three-day interval (and by implication the three-day *uadimonium*) was a feature of *iudicia legitima*, but the specific conditions are not certain. With this limitation in mind, the sources on three-day *uadimonia* cited above may be interpreted as follows.

(1) The statement by Macrobius (Sat. 1. 16. 14) associating *uadimonium* with *comperendinus dies* may be interpreted to mean that a magistrate sometimes ordered the parties to engage in a *uadimonium* for appearance on the third day, and may be translated: 'Days-after-tomorrow are those days according to which a magistrate may determine a *uadimonium*'<sup>124</sup>). <173>

(2) Gellius and Plutarch have improved the story of Scipio Africanus by incorporating a practice—the three-day interval—of their own time. The writers' aim, of course, is to show a general so confident of events that he saw no reason to alter the usual procedure, and a reader can better appreciate the story if a contemporary and perhaps familiar procedure is substituted<sup>125</sup>).

(3) When Gaius (D. 2. 11. 8) speaks about a defence available to a defendant who despite non-appearance to his *uadimonium* has nevertheless submitted to the suit, he uses the *uadimonium*-interval 'three or five or more days' as an example. The example is significant, because three days represents one *intertium* while five days represents two (that is, an appearance on the third day and a further three-day postponement). Gaius therefore appears to

<sup>124</sup>) On this understanding the *quibus* is an ablative of specification, as described in J.B. Hofmann & A. Szantyr, *Lateinische Syntax und Stilistik* (Munich, 1965) 134–5, which makes special note of the use of this ablative with numerals. The use of *dicere* is not out of place if we recall the magistrate's somewhat indirect involvement in the *uadimonium* procedure: he 'orders' (*iubet*) the *uadimonium* to be made, see Livy 23. 32; Probus 6. 63; cf. Val. Max. *Facta et dicta mem.* 3. 7. 1b; Pliny *Hist. Nat.* 7. 53 (*iudex?*); Plutarch *Scipio* 3, but it is the claimant who stipulates for his adversary's appearance, see e.g. Papinian (2 *quaest.*) D. 45, 1, 115 pr. in answer to which the adversary promises to appear on the third day. <173>

<sup>125</sup>) Whether Plutarch's reference to εἰς τρίτην is a deliberate translation of *intertium* is uncertain, as ἡμέρα is often implied, see H.W. Smyth, *Greek Grammar* (Cambridge/MA 1920) § 1027b. <174>

acknowledge the practice of employing *uadimonia* for intervals of three days.

(4) The three *uadimonia* from Puteoli which recite three-day intervals appear to reflect the practice of postponing proceedings *in iure* for three days. It is barely conceivable that in each case the length of the interval was determined voluntarily (see *lex Irni*. c. 90, ll. 31-7), and not by reference to a practice of postponing proceedings *in iure* for three days. But the uniformity of the evidence counsels against this: only four *uadimonia* for local appearance are available for consideration (preserving the two relevant dates), and three of these four carry the same interval. It is unlikely that, in three out of the four cases available to us, the parties voluntarily chose the same interval of days.

Accordingly three of the Puteoli *uadimonia* appear to be *Vertagungsuadimonia*, and not extra-judicial *uadimonia*. This contradicts the claim that all of the Herculaneum and Puteoli *uadimonia* are extra-judicial. Moreover, there is some reason to doubt Arangio-Ruiz' argument that three of the Herculaneum *uadimonia* are extra-judicial because they lack any reference to a magistrate's *decretum*. The three *Vertagungsuadimonia* identified above contain no form of words indicating the magistrate's participation, and by analogy perhaps a *Verweisungsuadimonium* required no such form of words either.

#### d) TP Sulp 3

One of the *uadimonia* identified above as a *Vertagungsuadimonium* (TP Sulp 3) contains language which has been interpreted to suggest that it is, <174> instead, an extra-judicial *uadimonium*. The document is part of a lawsuit between Lucius Faenius Eumenes (plaintiff) and Caius Sulpicius Faustus (defendant), a lawsuit to which three of the Puteoli tablets refer<sup>126</sup>). The relevant portions of the two *uadimonia* in the case are below (from Camodeca, abbreviations resolved).

TP Sulp 2: *Vadimonium factum Caio Sulpicio Fausto in VIII kalendas Iulias primas, Puteolis in foro ante aram Hordionianam hora tertia; HS 50,000 acturus ex empto dari stipulatus est Lucius Faenius Eumenes, spondit Caius Sulpicius Faustus.*

TP Sulp 3 (scriptura exterior, ll. 1-8): *Vadimonium factum Caio Sulpicio Fausto in III nonas Iulias primas, Puteolis in foro ante aram Augusti Hordionianam hora tertia; HS 50,000 maioris summae rei in iudicium deducturus et HS 1,000 depositi anuli arae nomine stipulatus est Lucius Faenius Eumenes, spondit Caius Sulpicius Faustus.*

<sup>126</sup>) TP Sulp 2 (*uadimonium*), TP Sulp 3 (*uadimonium*), TP Sulp 27 (= TP 66) (settlement agreement). See Wolf (note 98) 769–88.

The first tablet is conspicuous for the fact that it recites the nature of the lawsuit, an *actio ex empto*<sup>127</sup>). The second tablet is conspicuous for the fact that, after reciting the sum promised, it says that the suit itself is for an amount greater than the sum. Both tablets refer to the suit in the future tense (TP Sulp 2: *acturus*; TP Sulp 3: *deducturus*).

One of the early editors of the tablets noted the use of the future *acturus* in TP Sulp 2 and 15 and suggested that this marked them as extra-judicial *uadimonium*<sup>128</sup>); by the same logic TP Sulp 3 is extra-judicial on the evidence of *deducturus*. It seems unlikely, however, that a *uadimonium* could be identified as extra-judicial on this evidence. The future tense in each of these examples is almost certainly looking forward to *litis contestatio*, and is therefore no more appropriate to an extra-judicial *uadimonium* than to a judicial *uadimonium*. That *in iudicium deducturus* is looking forward to *litis* <175> *contestatio* is plain<sup>129</sup>). That *acturus* is also looking forward to *litis contestatio* is very likely; it is well known that *agere* often describes a plaintiff's participation at *litis contestatio*, even though the precise relationship between *agere* and *litis contestatio* is a matter of debate<sup>130</sup>). Two texts cited by Wlassak<sup>131</sup>) illustrate the relationship well. The first is from Julian, in Ulpian (46 Sab.) D. 46. 1. 5. He is describing the case of a promisee under a

<sup>127</sup>) See also TP Sulp 15 (a *uadimonium* to Rome), tab. I, l. 6: *acturus ex uendito*.

<sup>128</sup>) C. G i o r d a n o, Nuove tavolette cerate Pompeiane, Rendiconti Napoli 46 (1971 but 1972) 185–6. The argument mirrors an argument by K i p p about two juristic sources. Paul (1 Plaut.) D. 2. 11. 10. 2: *Qui iniuriarum acturus est, stipulatus erat ante litem contestatam ut aduersarius suus iudicio sistat: commissa stipulatione mortuus est. Non competere heredi eius ex stipulatu actionem placuit ....* Ulpian (74 ed.) D. 44. 2. 5: *... si quis mandati a c t u r u s, cum ei aduersarius iudicio sistendi causa [sc. uadimonium] promississet, propter eandem rem agat negotiorum gestorum uel condicat, de eadem re agit.* K i p p argues that the use of the future in each of these texts identifies the respective *uadimonia* as *Ladungsuadimonia*. K i p p (note 9) 178–9. This argument is equally answered by the discussion below. <175>

<sup>129</sup>) See H. Cancik & H. Schneider (edd.), *Der neue Pauly III* (Stuttgart 1997) s.v. 'Deductio'; M. W l a s s a k, *Die Litiskontestation im Formularprozess* (Leipzig 1889) 20–3, with citations.

<sup>130</sup>) M. W l a s s a k, *Die klassische Prozeßformel* (Vienna 1924) 64 n. 15: 'Das im Munde der Klassiker *agere* wie *petere* regelmäßig = *litem contestari* ist, braucht jetzt kaum noch dargetan zu werden.'; M. W l a s s a k, *Römische Processgesetze II* (Leipzig 1891) 357; cf. G. J a h r, *Litis Contestatio* (Graz 1960) 72–4. On 'actor' see e.g. S. R i c c o b o n o, *Die Vererblichkeit der Strafklagen*, SZ (1927) 94: 'Vor der Litiskontestation gibt es keinen *actor*, sondern nur den "qui agere vult" und dem "cum quo agitur".' Similarly, K a s e r/H a c k l 204 n. 2.

<sup>131</sup>) W l a s s a k cites these texts for the thesis that *agere* describes the plaintiff's act at the moment of *litis contestatio*. See W l a s s a k (note 129) 40–42. His explanation is that there can be no *agere* until a formula has been decided. <176>

stipulation, who then becomes heir to another promisee under the same stipulation.

Plane si ex altera earum [obligationum] egerit, utramque consumet, uidelicet quia natura obligationum duarum, quas haberet, ea esset, ut, cum altera earum in iudicium deduceretur, altera consumeretur.

Clearly if he should sue on one obligation the other will be consumed, simply because the nature of the two obligations that he has is such that, when one is brought to joinder of issue, the other is consumed.

The second is from Gaius (Institutes 4. 98), on the duty of procurators to give security.

Procurator uero si agat, satisdare iubetur ratam rem dominum habiturum. Periculum enim est ne iterum dominus de eadem re experiatur. Quod periculum non interuenit si per cognitorem actum fuerit, quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit.

But if a procurator is bringing an action, he is ordered to give security that his principal will indeed ratify his acts. The danger is that the principal may sue again on the same matter. There is however no such danger if a cognitor brought the action, because anyone who sued on a matter through a cognitor has no greater right to sue on that matter than if he brought the suit himself.

In short, there is nothing to indicate that the words *acturus ex empto* or *acturus ex uendito* were necessarily uttered before the parties had appeared *in iure*. <176>

A more difficult problem is raised by the reference in TP Sulp 3 to the fact that the defendant is to be sued for a sum greater than the sum he has promised. The problem is that at first glance this language does not appear to comport with the rules governing judicial *uadimonia*, and this suggests that TP Sulp 3 must therefore be an extra-judicial *uadimonium*, to which (on this reasoning) the rules of judicial *uadimonia* do not apply<sup>132</sup>). The relevant rules are found in Gaius (Institutes 4. 186), who says that a judicial *uadimonium*, with certain exceptions not applicable here, must recite a sum that is not greater than half of the amount claimed, and in any event not more than

<sup>132</sup>) On what follows see especially D. Nörr, Zur condemnatione cum taxatione im römischen Zivilprozeß, 112 SZ (1995) 80–2. Both Camodeca 52 and Wolf (note 98) 783 n. 39 argue that Gaius' rules do not apply to extra-judicial *uadimonia*; Camodeca adds that the sum promised in the stipulation will at least be roughly equal to the amount in controversy. Cf. U. Mantel, Labeo 40 (1994) 370–1 & n. 7, saying that the question is unresolved.

100,000 sesterces<sup>133</sup>). Accordingly one way to explain the 'greater than 50,000' language is to conclude that the suit is worth 100,000 and that 50,000 is a reflection of Gaius' rule. But the defendant is also promising an additional 1,000, and this means either that the plaintiff is demanding more than Gaius' rule would permit (assuming a suit worth 100,000), or that when the tablet says 'greater than 50,000', it means 'greater than 100,000'. If the latter alternative is correct, one would then have to explain why, in the earlier *uadimonium* in the same suit, the plaintiff has demanded that the defendant promise less than half of the amount in controversy. Both alternatives would suggest that the tablets are not following Gaius' rules for the judicial *uadimonium* and that they are accordingly extra-judicial.

A *uadimonium* in an *actio ex empto*, where the *intentio* is *incerta* and the judge condemns the defendant in accordance with good faith, raises difficulties which are not present in actions where the amount in controversy is certain. It is obviously not a straightforward matter for a magistrate to calculate one-half of an amount which will only be determined later by the judge. A similar difficulty arises in the *actio iniuriarum*, though the sources there are more helpful<sup>134</sup>). For guidance on the present issue we have principally G. 4. 186, which says that the plaintiff must swear that the amount he requests is not requested for the sake of being vexatious. I suggest that if the magistrate within the constraints of this rule accepted a sum as the <177> maximum amount in controversy, then this would be enough to explain the 'greater than 50,000' language in TP Sulp 3. That is, if Faenius' *actio ex empto* is worth as much as 100,000<sup>135</sup>), as the 50,000 figure in TP Sulp 2 indicates, then TP Sulp 3 would suggest, as it appears to, that the suit will be for more than 50,000 but perhaps less than 100,000. One supposes the additional claim for 1,000 *depositi anuli arrae nomine* is the subject of a separate action<sup>136</sup>). If the above analysis is correct, then TP Sulp 3 complies with the rules for judicial *uadimonia*, and need not be classified as extra-

<sup>133</sup>) The rules are to some degree reconstructed from an imperfect text: see the authorities cited in Nörr (note 132) 79 n.117.

<sup>134</sup>) See Paul, Coll. 2. 6. 1; G. 3. 224; Nörr (note 132) 77–8. <177>

<sup>135</sup>) This figure might indeed represent the largest suit that could be brought locally, though the evidence for this is lacking, see Wolf (note 98) 783 n. 39; Camodeca 52. On the other hand, the fact that the parties anticipated transferring the case to Rome, see TP Sulp 27; Wolf (note 98) 782–3, raises the possibility that the case in some way exceeded local competence.

<sup>136</sup>) See the authorities cited in Nörr (note 132) 80 n. 125. Several of the Puteoli *uadimonia* (TP Sulp 1, 5, 8, and possibly 7) recite multiple sums; these may represent separate actions, although it has been suggested that they represent debts supported by separate sureties, see Giménez-Candela (note 95) 187–8.

judicial on account of a supposed divergence from those rules<sup>137</sup>).

## V. Summary

In the modern literature the extra-judicial *uadimonium* has been the subject of three successive views. It is unfortunately only the first of these views—the now rejected view that the extra-judicial *uadimonium* was treated in the *praetor's* edict—that offered direct evidence for this *uadimonium*. Since the rejection of the 'edictal view', examples of and allusions to the extra-judicial *uadimonium* are drawn solely from indirect evidence. That is, the extra-judicial character of a *uadimonium* must now somehow be identified from its context. This is often a very difficult thing to do, because an extra-judicial *uadimonium* necessarily resembles the two <178> judicial *uadimonia*. Under the current view, in fact, the task of distinguishing among the three *uadimonia* is especially difficult: each of the three comprises a promise to appear near a magistrate's tribunal, and uses the same form of words. In light of the current view, the following conclusions were presented above.

(1) The proposition that the extra-judicial *uadimonium* was the customary way of introducing a lawsuit in the late Republic is not supported by the evidence. Specifically, (a) under the current view the proposition cannot be supported, as formerly, on the scarcity of references to *in ius uocatio*; (b) Cicero's pro Quinctio contains no examples of the extra-judicial *uadimonium*; (c) the *uadimonium* referred to in Cicero II in Verr. 5. 34 is probably not an extra-judicial *uadimonium*; and (d) the *uadimonium* referred to in Cicero pro Tullio 20, though it may indeed be extra-judicial, cannot support wider claims about the prevalence of extra-judicial *uadimonia*.

(2) The proposition that all of the Herculaneum and Puteoli *uadimonia* are extra-judicial is not supported by the evidence. Specifically, (a) these

<sup>137</sup>) To explain why TP Sulp 3 takes the trouble to recite the 'greater than ...' language is a separate question. G i m é n e z - C a n d e l a (note 95) 188, mentions that it was perhaps necessary in actions *bonae fidei* to recite the nature of the action, but she does not attempt to explain why it was necessary, nor why the nature of the action is not mentioned in TP Sulp 3 (apparently the same good-faith action as in TP Sulp 2). N ö r r (note 132) 81, who interprets TP Sulp 3 as extra-judicial, suggests that the plaintiff is reserving for himself the right to exceed the sum named in the *uadimonium*. A further possibility is that Faenius is seeking adequately to protect himself in the event Sulpicius does not appear, and that the inclusion of 'greater than ...' (as perhaps the inclusion of 'acturus ex empto' in TP Sulp 2) would give Faenius the opportunity of bringing an *actio in factum* for his loss, or an *actio incerti ex stipulatu*, the stipulation in TP Sulp 3 treated as one for *quanti ea res erit* (see Neratius, D. 2, 11, 14 i.f.). But this is speculation.

*uadimonia* have not yet been successfully identified en masse as extra-judicial, either on the basis of internal indicia or external evidence; (b) three of the Puteoli *uadimonia* (TP Sulp 1 bis, 3, 4) are *Vertagungsuadimonia* and therefore not extra-judicial; (c) the argument that three of the Herculaneum *uadimonia* (TH 13, 14, 15) are extra-judicial *Verweisungsuadimonia* because they lack the *decretum* of a magistrate is less persuasive, in light of the fact that among the tablets are three *Vertagungsuadimonia* which themselves do not reflect the magistrate's participation; and (d) given the presence of three *Vertagungsuadimonia* among the tablets, one cannot identify all of the tablets as extra-judicial *uadimonia* on the assumption that they share a single model.

#### Errata

Note 15 Voigt 345 315

Note 17 ~~Gimenez~~ Giménez

Note 75 ~~Deductio~~ deductio