Agree to Disagree: Local Jurisdiction in the lex Irnitana

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A student has the pleasure of discovering a good book or article and then lingering over it too long. This has less to do with acquiring knowledge than with prolonging the company of the author. In 1990 Alan Rodger published an article on the *lex Irnitana*, a first-century municipal charter from Spain, and the article was my companion for a very long time. It addressed a difficult section: chapter 84 on jurisdiction. This became the subject of our first correspondence, and marks the beginning of our friendship. At the time I had nothing to contribute to the issue, and in any event I was confident (and am still confident) that he had it mostly right. Other opinions have appeared in the years since the article was published, and this is the occasion to defend his views. It is also the occasion to revisit a companion that gave me such pleasure twenty years ago.

1. The Text of Chapter 84

Two classes of magistrates, duumviri and aediles, were in charge of administering justice in the Baetican town of Irni. Their powers were limited, and if a case were presented that exceeded their powers, the litigants would bring their case instead before the provincial governor. The extent of the magistrates' powers to

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1 Alan Rodger, ‘The Jurisdiction of Local Magistrates: Chapter 84 of the *Lex Irnitana*’ (1990) 84 *ZPE* 147.
administer justice are set out in this chapter.²

Rubrica. Quarum rerum et ad quantam pecuniam in eo municipio iuris dictio sit.


neque³ ea res diuidua quo fraus huic legi fieret facta sit fiatve


² These are the main sources to which the notes immediately below refer: Michael H. Crawford (ed), Roman Statutes (1996); Julián González and Michael H. Crawford, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law' (1986) 76 JRS 147; Francesca Lamberti, 'Tabulae Irnitanae'. Municipalità e 'ius romanorum' (1993); Wolfgang Dieter Lebek, 'La Lex Lati' di Domiziano (Lex Irinitana): le strutture giuridiche dei capitolii 84 e 86' (1993) 97 ZPE 159; Alvaro d'Ors, La ley Flavia municipal (texto y comentario) (1986); Alvaro d'Ors and Javier d'Ors, Lex Irnitana (Texto Bilingüe) (1988); Josef Georg Wolf, Die Lex Irnitana: ein römisches Stadtrecht aus Spanien: lateinisch und deutsch (2011).

³ For NEVE, aes (?), which Lamberti (n 2) and Wolf (n 2) prints. From the photograph it appears that a crack makes the reading NEVE or NEQVE difficult. González/Crawford (n 2) do not indicate the uncertainty of the reading.

⁴ EIVS NON, aes. González/Crawford (n 2) omit eius and Lamberti (n 2) prints non {eius} ex.

eave de re, [qua in re6] praeiudicium futurum sit de ca- [17] pine libero,

\^ de is rebus7 etiam,8 si uterque inter quos ambigetur [18] volet, de ceteris quoque omnibus de quibus privatim age- [19] tur, neque in iis praeiudicium de capite libero futurum [20] erit,


\textsuperscript{5} For quod see Michael H. Crawford, 'The Text of the Lex Irnitana' (2008) 98 JRS 182. cf Roman Statutes (n 2) i, 448 (nisi); González/Crawford (n 2) (dum).
\textsuperscript{6} See Lebek (n 2) (qua in re); Crawford (n 5) (qua in re). cf Lamberti (n 2) (nullum); González/Crawford (n 2) (aliquid); Wolf (n 2) (aliquid). For the suggestion in qua, see note 45 below.
\textsuperscript{7} DE IS RE[c. 7]+M, aes.
\textsuperscript{8} cf Lebek (n 2) 167 (item).
\textsuperscript{9} Crawford (n 5). cf Lamberti (n 2) (quoque); González/Crawford (n 2) (dumtaxat).
eodem genere iudicique datio addictioque [28] esto.\textsuperscript{10}

\textbf{2. Summary and Points of Disagreement}

Chapter 84 is constructed as a positive statement of the duumviri’s jurisdictional powers, with a series of exclusions. The exclusions are then qualified to permit jurisdiction in certain

\textsuperscript{10} Rubric. Over what matters and up to what sum there may be jurisdiction in that municipium.

Whichever municipes or incolae of that municipium wish privately within the boundaries of that municipium to bring an action against or sue or claim against each other on any matter in their own names or in that of someone else who is a municipes or incola,

provided that the matter is worth 1,000 sesterces or less and has not been or is not divided in order to evade this statute,

and provided that there will not be a praejudicium concerning a free person or a larger sum than 1,000 sesterces, and provided that there has not been and will not be a sponsio,

and provided that the matter at issue is not one in which there has been vis other than under the interdict, judgment or order of the person who is in charge of the administration of justice, and provided the case is not over freedom, or over partnership or fiducia or mandate, involving an accusation of wrongful intent, or depositum or tutela, brought against someone who is accused of having done any of those things in his own name, or under the Lex Laetoria, or over a sponsio which is said to have been made \textit{in probrum}, or over wrongful intent, or over \textit{fraus}, or over theft brought against a free man or woman or brought against a slave so long as it relates to his master or mistress, or over iniuria brought against a free man or woman,

and provided that there be no praeiudicium concerning a free person in this matter;

the duumvir who is in charge of the administration of justice there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from those (whose names are) displayed there, and a trial; and even about these matters if each of the two parties is willing; and about all other matters about which actions are brought privately and in which there will not be a praeiudicium concerning a free person; and he is to have jurisdiction [at any rate] over the promise of a vadimonium concerning all matters for the place in which the person who governs that province will be or is expected to be on that day for which the request for the promise of the vadimonium is made. And likewise the aedile who is there is to have jurisdiction and the right of granting and assigning a iudex or arbiter or recuperatores from the same group and a trial, under the same conditions, concerning anything which is worth 1,000 sesterces or less. (Trans. by Crawford: González/Crawford (n 2) 195-196.)
cases if the parties are willing. Thus the text permits jurisdiction in private cases valued up to 1,000 sesterces (ll. 3-4, 23-28), but then excludes the following: actions which have been divided to avoid the monetary limit (Exclusion A);\(^1\) certain actions which lead to *praesidicia* or are begun by *sponsiones praesidiciales* (Exclusion B);\(^2\) and a series of enumerated actions, most of which fall into the class of *actiones famosae*, i.e., actions in which condemnation brings *infamia* on the defendant (Exclusion C).\(^3\) These exclusions are then qualified — the details are disputed — by a ‘derogation section’, which allows some of the excluded actions to take place locally if the parties agree.\(^4\) Last, the duumvir who has no jurisdiction over the case nevertheless retains jurisdiction to order the parties to prepare a *vadimonium* for appearance before the governor.

The main source of disagreement concerns the highest value of a suit which may be heard locally, and this turns on the derogation section. There appear to be two result clauses in that section — both hanging on ‘if each of the two parties is willing’ — and they overlap in content. The first half refers to certain enumerated actions, and the second half refers to ‘all other matters about which actions are brought privately’. This redundancy does not resolve itself easily, and the whole of the section must be accommodated to the statement further down, that aediles exercise jurisdiction ‘under the same conditions’ as duumviri in matters worth 1,000 sesterces or less. That statement, in turn, must be reconciled with chapter 19, line 15, where the statute appears to limit the aediles’ jurisdiction to 200, not 1,000, sesterces.\(^5\) The following is a summary of the

\(^{1}\) See Alan Rodger, ‘Jurisdictional Limits in the lex Irnitana and the lex de Gallia Cisalpina’ (1996) 110 *ZPE* 189, 189-191; Gaius *Inst*. 4.56, 122.

\(^{2}\) See below notes 58 to 63 and accompanying text.

\(^{3}\) See below notes 54 to 56 and accompanying text.

\(^{4}\) See below notes 15 to 29 and 64 to 87 and accompanying text.

\(^{5}\) Various readings are given at Lamberti (n 2) 272. Most read *CC*; González/Crawford (n 2) 153, 201, read a lacuna, though *CC* appears to be visible in the photograph: Fernando Fernández Gómez and Mariano del Amo y de la Hera, *La lex Irnitana y su contexto arqueológico* (1996) 40. There is a discrepancy between the sum given here and the sum \(\infty\) (*mille*) given at ch 84, l. 25. Wolf and
different views, so far as they relate to the value of suits which may be heard locally.

1. The duumviri, by agreement of the parties, could exercise jurisdiction above 1,000 sesterces, and the aediles possessed the same jurisdiction as the duumviri in cases of 1,000 sesterces or below.\(^\text{16}\)

2. The jurisdiction of the two magistrates was precisely the same, both in respect of subject matter and amount in controversy (1,000 sesterces or less).\(^\text{17}\)

3. The jurisdiction of the duumviri was limited to cases worth 1,000 sesterces or less, and of the aediles, 200 sesterces or less.\(^\text{18}\)


\(^\text{16}\) See Armando Torrent, ’Lex Irisana: cognitio de los magistrados locales en interdictos, y limitació n a su competencia por cuantía’ (2008) 12 Anuario da Facultade de Dereito da Universidade da Coruña 987, 1000-1003; Ernest Metzger, A New Outline of the Roman Civil Trial (1997) 69-70; Rodger (n 11) 190; G. P. Burton, The Lex Irisana, Ch. 84, the Promise of Vadimonium and the Jurisdiction of Proconsuls’ (1996) 46 Classical Quarterly 217, 217; Lamberti (n 2) 148-149; Rodger (n 1) 149; Wilhelm Simshäuser, ’La juridiction municipale à la lumière de la lex Irisana’ (1988) 67 RHDFE 619, 644-645; Peter Birks, ’New Light on the Roman Legal System: The Appointment of Judges’ (1988) 47 Cambridge LJ 36, 41. Rodger’s 1990 article was crucial in establishing the common opinion; earlier opinion was ambivalent. More recently, Wolf has taken aim at the common opinion: ’[S]uch is the fine tuning of the jurisdictional rules, contained in a single sentence, grammatically taut but so complex that for years important aspects of the rule were misunderstood by modern scholars.’ Josef Georg Wolf, The Romanization of Spain: The Contribution of City Laws in the Light of the Lex Irisana in Andrew Burrows, Alan Rodger (eds), Mapping the Law (2000) 439, 450.

\(^\text{17}\) See Lebek (n 2) 165; Gonzáleoz/Crawford (n 2) 201; Hartmut Galsterer, ’Municipium Flavium Irisitanum: A Latin Town in Spain’ (1988) 78 JRS 78, 83. See also Karl Hackl, Der Zivilprozeß des frühen Prinzipats in den Provinzen’ (1997) 114 SZ (rA) 141, 151-152; idem, ’Il processo civile nelle province’ in Francesco Milazzo (ed), Gli ordinamenti giudiziari di Roma imperiale (1999) 299-310 (agreement between the parties in one of the enumerated actions does not also allow suits above 1,000 sesterces in value).

\(^\text{18}\) See Wolf (n 2) 27; idem, ’La lex Irisana’ (n 15) 214; idem, ’Jurisdiction’ (n 15) 55; González (n 15) 807-808. cf the suggestion of Mentxaka, reported in Francesca Lambertti, ’La “maggiore età” della lex Irisana: un bilanciamento di diciotto anni di studi’ (2000) 4 Minima Epigraphica et Papyrologica 237, 246-247. Nör
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The main issue is whether the parties may, by agreement, confer jurisdiction on the duumviri to entertain cases of a value higher than 1,000 sesterces. At stake is not simply a detail of local jurisdiction, but the degree of autonomy in civil litigation enjoyed by Baetican communities in the early empire. An absolute limit reduces the importance of local jurisdiction considerably. And if civil litigation of any consequence took place only at the governor’s *conventus*, then the extensive legal materials on display locally — the provincial edict and its many details — will primarily have served, not to aid local magistrates in administering justice, but to prepare local litigants for distant litigation (or dissuade them from pursuing it). The answer to this question rests ultimately on the ‘reach’ of the derogation section’s two result clauses.

Wolf is the main proponent of the view that 1,000 sesterces was an absolute limit, and has analysed the structure of chapter 84 to that end. His argument focuses on the first of the result clauses: *de is rebus etiam [sc. iuris dictio esto] (l. 17)*. This clause is preceded by four clauses introduced by *neque*, each *neque*-clause expressing in the negative an exception to the positive

accepts the respective limits of 1,000 and 200, but does not offer an opinion on whether these limits may be exceeded. See Dieter Nörr, *Lex Irnitana c. 84 IXB 9-10: “neque pro socio aut fiduciae aut mandati quod dolo malo factum esse dicatur”* (2007) 124 SZ (rA) 1, 3-4 & n10; idem, *Zum Interdiktenverfahren in Irni und anderswo* in *Iuris Vincula* (2001) iv, 73, 96 & n89.

19 See e.g. Hartmut Galsterer, ‘Local and Provincial Institutions and Government’, in Alan K. Bowman, et al. (eds), *The High Empire, A.D. 70 - 192* [The Cambridge Ancient History, 11] (2nd edn, 2000) 344, 351 (‘Jurisdiction had lost much of its former importance. *Duoviri* in small towns like Irni were restricted to cases of very little importance as concerns civil law ....’); Torrent (n 16) 1003 (‘[S]i se entiende que la L[ex] Irnitana es una ley de control y no de ampliación de las competencias de los magistrados locales, se explica entonces aquella tajante limitación del techo competencial de los du[u]mviros ....’).


grant of jurisdiction up to 1,000 sesterces (ll. 3-4).\footnote{The reading neque at line 4 is uncertain; see note 3 above.} Wolf argues that the words de is rebus etiam, insofar as they attempt to defeat the neque clauses, could conceivably ‘reach’ only as far as the first of those clauses. It is a matter of logic, he argues, that a clause which purports to permit what has been forbidden by a series of prohibitions can only cover what has been expressed in the negative. Hence the crucial clause setting out the 1,000-sesterces limit (quae res HS mille minorisve erit, ll. 3-4), being a positive statement, lies beyond the force of de is rebus etiam.\footnote{Wolf, ‘Iurisdictio’ (n 15) 34-35, 45-46; idem, ‘La lex Irnitana’ (n 15) 210-211. Wolf refines the argument as follows. Logic also dictates that de is rebus will cover all of the four neque clauses, or only the last of them. He rejects the first possibility, and therefore only the last of the four neque-clauses falls within the force of de is rebus. Wolf, ‘Iurisdictio’ (n 15) 37, 45-46; idem, ‘La lex Irnitana’ (n 15) 211-213. A consequence of this all-or-last reasoning is to limit local jurisdiction very considerably: actions alleging violence (ll. 6-8) and actions concerning freedom (ll. 8-9) are not within the parties’ power of consent. See Wolf, ‘Iurisdictio’ (n 15) 40-42; idem, ‘La lex Irnitana’ (n 15) 211-212. This is perhaps the very narrowest construction of local jurisdiction to be proposed. For further remarks on Wolf’s construction, see note 54 below. See also ch 85, which repeats the 1,000-sterces limit without qualification.} The 1,000-sesterces limit, according to Wolf, is therefore absolute.\footnote{Körn criticises the style of this argument. Körn, ‘Zum Interdiktenverfahren’ (n 18) 96 n89.}

Proponents of the opposite view, that the 1,000-sesterces limit could be exceeded by agreement, look to the second of the result clauses: de ceteris quoque omnibus de quibus privatim agetur [sc. iuris dictio esto] (ll. 18-19). If the clause is in fact joined to the si volet clause, then this is the correct view: willing parties may agree to have all private law cases heard locally. But are the clauses joined? Wolf argues that they are not, and that de ceteris quoque etc. found its way into the text by an accident of redaction.\footnote{Wolf, ‘Iurisdictio’ (n 15) 34-35, 45-46; idem, ‘La lex Irnitana’ (n 15) 210-211. Wolf refines the argument as follows. Logic also dictates that de is rebus will cover all of the four neque clauses, or only the last of them. He rejects the first possibility, and therefore only the last of the four neque-clauses falls within the force of de is rebus. Wolf, ‘Iurisdictio’ (n 15) 37, 45-46; idem, ‘La lex Irnitana’ (n 15) 211-213. A consequence of this all-or-last reasoning is to limit local jurisdiction very considerably: actions alleging violence (ll. 6-8) and actions concerning freedom (ll. 8-9) are not within the parties’ power of consent. See Wolf, ‘Iurisdictio’ (n 15) 40-42; idem, ‘La lex Irnitana’ (n 15) 211-212. This is perhaps the very narrowest construction of local jurisdiction to be proposed. For further remarks on Wolf’s construction, see note 54 below. See also ch 85, which repeats the 1,000-sterces limit without qualification.} Therefore, on Wolf’s view, because the clause de ceteris quoque etc. does not permit any new class of suit not
otherwise permitted, the clause is redundant and should be ignored.\textsuperscript{27} Rodger, taking the view that the 1,000- sesterces limit could be exceeded, argues emphatically against this redundancy. He argues that the \textit{de ceteris} etc., permitting suits \textit{de quibus privatim agetur}, openly recalls the principal 'empowering' clause at the beginning, \textit{qua de re ii \ldots privatim \ldots agere petere persequi volent} (ll. 1-3).\textsuperscript{28} So on Rodger's interpretation, a duumvir could hear suits of a value higher than 1,000 sesterces if both parties agreed. This would distinguish the jurisdiction of the duumviri from that of the aediles, who exercise jurisdiction \textit{eadem condicione de eo quod sestertium mille minorisve erit} (ll. 25-26).\textsuperscript{29}

The extent of local jurisdiction described in the statute ultimately turns on structure: how the positive grant, exclusions, and derogation fit together. The discussion below addresses the structure by considering the condition of the text. First, there is a question of \textit{composition}. Chapter 84 has an error in its redaction, and acknowledging the error improves the structure.

\textsuperscript{27} See Wolf, ‘La lex Irnitana’ (n 15) 212-213; idem, ‘Iurisdictio’ (n 15) 52. González/Crawford add that the clause may have been introduced as a platform for the prohibition on \textit{praeiudicia} that follows: González/Crawford (n 2) 229. Similarly: Miriam Indra, \textit{Status quaestio. Studien zum Freiheitsprozess im klassischen römischen Recht} (2011) 105.

\textsuperscript{28} Rodger (n 1) 149. The words \textit{quae de re} (\textit{de is rebus}) to match \textit{de is rebus} (Lebek (n 2) 166) though \textit{qua res \ldots erit} (ll. 3-4) might counsel against it. Rodger also notes that \textit{lex Irni.}, ch 69 (and, in part, the corresponding section of the \textit{lex Malacitana}) refers to suits brought in the name of the \textit{municipes}, suits which are worth more than 500 sesterces \textit{neque tanti sit ut de eo si privatim agetur ibi invito alterutro actio non esset}. This seems a fairly clear statement that chapter 69 contemplated private suits beyond a fixed monetary limit, if the parties so agreed. Rodger (n 1) 150; cf Wolf, ‘Iurisdictio’ (n 15) 58-59. One issue that Rodger does not consider, however, is the meaning of \textit{privatim} in ch 84. Mantovani has compared the opening of chh 69 and 71 (on \textit{pecunia communis}) with the similar opening of ch 84, and concluded that \textit{privatim} in the latter does not refer to the nature of the lawsuit (i.e., ‘private trials’), but has been introduced to distinguish suits brought in one’s own name or the name of another from suits brought in the name of the \textit{municipes} collectively.

\textsuperscript{29} This last clause in fact, like the \textit{de ceteris quoque} clause, would be redundant if a duumvir did not have jurisdiction above 1,000 sesterces, though the redundancy is also removed if one accepts the emendation \textit{CC for <}, at ch 84, l. 25. See note 15 above.
Second, there is a section of text that requires restoration, and again, a better restoration improves the structure. The structure that emerges is far more coherent, and simpler, than the structure that is now the subject of disagreement. It reveals that duumviri in Irni were permitted to hear cases above 1,000 sesterces, if the parties agreed.

3. Composition of the Lex Irnitana

The lex Irnitana is usually dated to AD 91 on the evidence of the ‘letter of Domitian’ appended at the end; the immediate model on which the lex Irnitana is based (‘the Flavian law’) dates to some time after the grant of Latin rights to Spain (or Baetica) in AD 73/74. To assign a date to the text of the law is naturally more challenging, since the underlying model reuses old material and the model has then been adapted to Irni.30 Thus among the last material to be added were provisions specific to Irni, for example the number of decuriones that existed by custom at Irni before it received its charter (chapter 31) — a number which could conceivably have been added as late as the time of engraving — and the various sums recited as fines, property qualifications, jurisdictional limits, etc., sums which, where comparison is possible, varied among Baetican municipia. But chronologically earlier are provisions (presumably) common to all the Baetican charters and dating to some time after AD 73/74, to the reigns of Vespasian or Domitian (for example, chapters 21-23 on acquiring citizenship). Earlier still are provisions which date to the reign of Augustus, and from even earlier one finds material borrowed from republican legislation.31

30 See generally the very helpful discussion in Lamberti (n 2) 227-239.
31 Some specific borrowings are noted in Lamberti (n 2) 227-228. On internal references to the law as lex rogata and their origin in comital legislation from the late republic, see Michael H. Crawford, ‘How to Create a municipium: Rome and Italy after the Social War’ (1998) 42 Bulletin of the Institute of Classical Studies (special issue) 31, 38; Roman Statutes (n 2) i, 5-6. cf González (n 15) 815 (arguing that Augustus extended urban procedure to Spanish municipia via a comital lex Iulia municipalis, and that the Flavian law is modelled on that law); Galsterer (n 17) 89 n60 (arguing that the presence of rogata is due to a copyist’s error).
Provisions attributable to the reign of Augustus are the most important for purposes of the present discussion. That the text of the Flavian law is Augustan to an appreciable extent has never been in dispute. Much of the law reflects the legislative agenda of Augustus, and the law shows a number of innovations which can be identified as Augustan. But the most noticeable indication falls in the latter part of the law, in a sequence of words that apparently declares its provenance on its face. This part of the law is setting down the rule that trials that remain unadjudicated (and the judges who fail to adjudicate) shall be treated according to the laws that would obtain if the trials had taken place in Rome. Referring to one aspect of unadjudicated trials, the eighteen-month limit on their duration, the law says:

... if judgment is not given within the time period specified by chapter 12 of the lex Iulia on private trials which was most recently (proxime) passed . . . .

The significance of this language has been discussed a great deal and only a brief summary is necessary. Opinion divides at its broadest between those who see the language as tralatician and those who do not. The former opinion holds that the language is borrowed from a supposed Augustan lex municipalis passed shortly after the lex Iulia de iudiciis privatis of 17 B.C, and that


33 See Crawford (n 32) 426-427. Crawford cites chh 54 and 86 on the minimum age of eligibility for the local senate and for being placed on the roster of judges; ch 87 on allowing persons other than members of the local senate to act as judges; and ch 66 on the local senate acting as a court. He also points out that the draftsman, with great regularity, has removed instances of publicus and its cognates and replaced them with corresponding forms of communis. He suggests this was done to remove the suggestion that certain matters arising in subordinate communities pertained to the whole Roman people. This was arguably a concern of Augustus himself, from which Crawford concludes that the standard local charter, of which the Flavian law is a descendant, is Augustan. Ibid, 428-429.

34 Lex Irni., ch 91, tab XA, l. 53 - tab XB, l. 2.
the Augustan law is one of the 'duae Iulieae' which, according to Gaius (Institutes 4.30), substantially abolished the legis actiones.\textsuperscript{35} This is roughly where the common opinion stands.\textsuperscript{36} Naturally one does not have to accept the association with Gaius,\textsuperscript{37} or agree with d'Ors — this opinion's original proponent — that the Flavian law is drafted on the model of the supposed lex municipalis,\textsuperscript{38} to draw from the quoted passage the less ambitious conclusion that the Flavian law contains material from an Augustan lex municipalis. At the other end of opinion are those who read no special significance into proxime: to them it indicates simply the latest statute dealing with private trials, a statute which happens to be the lex Iulia of 17 B.C.,\textsuperscript{39} or alternatively, indicates the (supposed) second of two leges Iulieae on private trials.\textsuperscript{40} It is worth mentioning that these differences of opinion, for the most part, do not rest on differences of

\textsuperscript{35} Alvaro d'Ors, 'La nueva copia Irnitana de la “lex Flavia municipalis”' (1983) 52 Anuario de Historia del Derecho Español 5, 8-10; idem, ‘Nuevos datos de la ley Irnitana sobre jurisdicción municipal’ (1983) 49 SDHI 18, 20-27; González/Crawford (n 2) 150.

\textsuperscript{36} See the literature cited in Federica Bertoldi, La Lex Iulia Iudiciorum Privatorum (2003) 11 n39. González, in a departure, argues that the Augustan lex municipalis was directed to Spanish, not Italian, communities. González (n 15) 815.

\textsuperscript{37} See David Johnston, ‘Three Thoughts on Roman Private Law and the Lex Irnitana’ (1987) 77 JRS 62, 66-67; Simshäuser (n 16) 641; idem, ‘Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana’ (1992) 109 SZ (rA) 173-174. The association with Gaius rests partly on lex Irni., ch 85, which directs the local magistrate to administer justice according to the edicts and formulae of the provincial governor, and therefore may be read implicitly to abolish legis actiones in the provinces: d'Ors, 'Nuevos datos' (n 35) 8.

\textsuperscript{38} See d'Ors, 'Nuevos datos' (n 35) 20-27.


\textsuperscript{40} Lamberti (n 2) 212-220; eadem (n 19) 243-244. Replies: González (n 15) 812-819; Alvaro d'Ors, 'Sobre legislacion municipal' (1994) 40 Labeo 89, 92-93; Bertoldi (n 36) 40.
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...translation, but simply on the significance to be assigned to the appearance of the word *proxime* in reference to a law substantially older than the law in which it appears.41

The discussion below proceeds from a point on which there is wide agreement, that the Flavian law contains material dating to the reign of Augustus, most probably taken from general legislation passed for subordinate communities in Italy. The discussion below, moreover, attempts to identify a careless redaction which is Augustan or post-Augustan, and to that extent contributes to the common opinion.

### 4. Composition of Chapter 84

Chapter 84 contains a single sentence which is mostly straightforward. In the few places where it reads poorly, the explanation may lie in its composition. In the derogation section at lines 17-19, where the text directs what will result if the parties agree, two separate conclusions with overlapping content appear to depend on a single condition. Assuming the usual restoration is correct, this is poor drafting.42 A second stumble is the want of any obvious indication (e.g., ‘de is rebus’) at line 23 that the magistrate’s *iuris dictio, iudicis iudici datio addictio*, etc., relate to the *res* mentioned in the earlier part of the chapter; an apparent anacoluthon. Wolf acknowledges the problem in his recent translation;43 Lebek also sees the problem and resolves it.

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41 See e.g. Crawford (n 32) 428 (‘which is the most recent to have been passed about private cases’); Paricio (n 39) 135 (‘que es la última promulgada sobre los juicios privados’). cf Lamberti (n 2) 365 (‘emanata per ultima intorno ai giudizi privati’); d’Ors and d’Ors (n 2) 78 (‘que se ha dado recientemente sobre juicios privados’); Ángel Gómez-Iglesias, ‘Lex Irnitana cap. 91: lis iudici damni sit’ (2006) 72 *SDHI* 465, 468 n7 (‘[ley] dada recientemente’). In my opinion, *recientemente* is a mistranslation.

42 Lebek sees the problem and avoids it by supplying *de is re[bus ite]m*, thereby associating the condition with the second apodosis only. Lebek (n 2) 167. See Section 6 below. Wolf argues that the second apodosis is left over from an earlier redaction and should be ignored. Wolf ‘La lex Irnitana’ (n 15) 213-214; Wolf ‘Jurisdictio’ (n 15) 51-53.

43 He inserts ‘<in all diesen Rechtsachen>: Wolf (n 2) 119. Crawford, in his English translation (González/Crawford (n 2) 195), indicates the break with a semi-colon; Le Roux (Année Epigraphique 1986, no. 333, p. 134), in his French translation, indicates the break with a dash.
by adopting a different text. Further discussion of the point must be postponed to the end.

The third instance falls at lines 16-17 and introduces much of the discussion below. It appears between the last exclusion and the derogation section:

*Lex Irni.*, ch. 84, ll. 16-17: eave de re [in qua]
praediudicium futurum sit de capite libero

In substance this is much the same as we read elsewhere in the chapter: *praediudicia de capite libero may never be heard locally.*

The problem is with the syntax and the placement of the clause. Wolf has analysed the syntax of chapter 84 exhaustively, and objects that this clause, introduced by *-ve*, follows a sequence of clauses introduced by *aut*, and therefore falls outside the structure of the chapter. He concludes that the clause is left over from an earlier redaction, and brackets it. Rodger, reasoning on the same lines, points out that the syntax is such that the clause is expressing a positive (‘or there may be in that matter *praediudicium* as to free status’) where one expects a negative, and attempts to explain the anomaly. Lamberti has made the same observation, and makes the clause negative by supplying *nullum* in the lacuna: *eave de re [nullum] praeiudicium etc.* All of these objections are sound, and in fact lead back to a single problem. The clause is objectionable because it is followed immediately by the statement that the cases described *may be heard locally*, and we know this is emphatically not true for *praediudicia de capite libero*. The clause is not wrong, it is simply wrong here.

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44 See note 42.
45 Lebek offers [qua in re], citing ch 84, l. 7. See note 6 above. The gap may not accommodate those letters. For *res ... in qua* see *lex Irni.*, ch. I, l. 4.
46 *Lex Irni.*, ch 84, ll. 5-6, 19-20.
47 Wolf ‘Jurisdiction’ (n 15) 32-33 n28, 52-53; Wolf ‘La lex Irnitana’ (n 15) 213-214, 237.
48 Discussed immediately below.
49 Lamberti (n 2) 350. Nevertheless, *futurum sit* should sit in a subordinate clause.
Rodger offers an ingenious though imperfect argument that both accepts the clause as presented and explains the contradiction.\textsuperscript{50} He integrates the clause with the clause that immediately precedes and argues that the two clauses together settle a specific issue.

\textit{Lex Irni.}, ch. 84, ll. 15-17. . . . aut iniuriarum cum homine libero liberave agetur, eave de re qua in re\textsuperscript{51} praeiudicium futurum sit de capite libero . . . .

He points out that an \textit{iniuria} is committed when a person wrongly claims a free person as his slave.\textsuperscript{52} This means that if a plaintiff claims he was insulted in this manner and the defendant wishes to defend himself on the ground that the plaintiff is indeed a slave, a \textit{praeiudicium} on free status would naturally take place locally — but for this clause, which has been inserted to foreclose that very possibility. One objection to Rodger’s argument is that, on his reasoning, the clause under discussion could be inserted in many places in addition to this: wherever a potential litigant is challenged as unfree, Roman procedure calls for a \textit{praesidicium} (or \textit{sponsio praeiudicialis} and trial) to settle the matter. A second objection is that, on Rodger’s understanding, ‘de capite libero’ in this context would refer specifically to a matter of \textit{libertas}, while the same phrase elsewhere in chapter 84 is usually taken to refer to both \textit{libertas} and \textit{ingenuitas};\textsuperscript{53} one might expect a different expression if the draftsman’s purpose were as Rodger understands it. A third and more general objection is that Rodger’s solution is juristic in character, and that the \textit{lex Irnitana}, to the contrary, is not the type of law to propose \textit{uber}-specific solutions to \textit{uber}-specific problems.

\begin{itemize}
  \item \textsuperscript{50} Rodger (n 1) 147, 156-158 (accepting also Lebek’s restoration \textit{qua in re}). Accord: Indra (n 27) 104.
  \item \textsuperscript{51} See note 50.
  \item \textsuperscript{52} See D.47.10.11.8 (Ulpian 57 ed.); h.t.12 (Gaius 22 ed. prov.).
  \item \textsuperscript{53} Matteo Bernardi, ‘\textit{Lex Irnitana} LXXXIV - LXXXV - LXXXIX: Nuovi spunti per una riflessione sulla \textit{sponsio} nel processo Romano’ in \textit{Testimonium Amicitiae} (1992) 95, 121; Indra (n 27) 81.
\end{itemize}
A. Displaced section

The clause under discussion belongs with the text at lines 5-6. The clause has been orphaned by the insertion, in the wrong place, of a distinct section at lines 6-16, a list of specific actions. In the text quote above, it is marked as Exclusion C. The displaced section is a statement of those actions — mostly *actiones famosae* — which may not be heard locally.\(^{\text{54}}\) Such evidence as survives shows that the accepted list of *actiones famosae* was the object of regular revision; we possess versions (both 'praetorian' and 'censorian') from the Este fragment (ca. 80 B.C.) up to Justinian (*Institutes* 4.16.2), with significant versions in Gaius (*Institutes* 4.182) and the edict (Digest 3.2.1, Julian\(^{\text{55}}\) 1 ad *edictum*) in between. The particular version we see in chapter 84 is perhaps Augustan, perhaps later.\(^{\text{56}}\)

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\(^{\text{54}}\) For discussion of the character of these actions in the *lex Irnitana*, and the evolution of the list of recognised actions, see Alvaro d'Ors, ‘Una nueva lista de acciones infamantes’ in *Sodalitas: Scritti in onore di Antonio Guarino* (1984) vi, 257-55; Lamberti (n 2) 153-166; Wolf ‘Jurisdictio’ (n 15) 49-45; Wolf ‘La lex Irnitana’ (n 15) 212. On *de sponsione quae in probrum facta esse dicatur* (ll. 12-13), which may not be classed among *actiones famosae*, see M. L. Peluso, ‘Die sponsio in *probrum facta* im Jurisdiktionskatalog der *Lex Irnitana*’ (2003) 120 SZ (rA) 42; cf Nörr (n 18) 4 n12. The statement above that these are ‘mostly *actiones famosae*’ passes over a great deal of uncertainty, and there is not space here to discuss it. There are two related issues. The first issue is whether all of the text at lines 6-16 is subject to the derogation section; note that Wolf identifies only the last of the *neque*-clauses as containing *actiones famosae*; the other clauses are excluded from local jurisdiction for other reasons, and the exclusions, according to Wolf, may not be evaded by agreement. The second issue is the precise scope and meaning of the reference to actions *de libertate* (ll. 8-9), on which see Lamberti (n 2) 152-153.

\(^{\text{55}}\) Such is the inscription, but Julian is not the author: Otto Lenel, ‘Beiträge zur Kunde des Edictus und der Edictkommentare’ (1881) 15 SZ (rA) 14, 58.

\(^{\text{56}}\) The Augustan ‘hallmarks’ are only a *terminus post quem*, unless one subscribes to the strong view that the Flavian law is closely modelled on Augustan legislation. See the (very cautious) discussion in Nörr, ‘Zum Interdictverfahren’ (n 18) 79-81; idem, ‘Lex *Irnitana*’ (n 18) 17, 21-23. The following details are relevant. (1) The phrase *quod eius non ex interdicto … factum sit* (ll. 7-8) appears openly to recall a provision of the *lex Iulia de iudiciis privatis*. See D.48.19.32 (Ulpian 6 ed.); Lamberti (n 2) 155; Nörr, ‘Zum Interdictverfahren’ (n 18) 100-101. (2) The appearance of the *lex Laetoria* would be slightly anachronistic in an Augustan text, and more so if the text were much later. The earlier (44 B.C.) *Tabula Heracleensis* includes it; the later edictal list of *actiones famosae* (D.3-2.1 (Julian 1 ed.)) omits it (as does Gaius at *Inst.* 4.182). See Lamberti (n 2) 159; d’Ors (n 54) 2582. (3) The *actio vi bonorum raptorum* is
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The displacement does not appear to be an engraver’s error. There are none of the usual textual prompts (e.g., homeoteleuton) and nothing on the bronze (corrections, spacing, formation of strokes) suggests the engraver departed from what was before him.\(^{57}\) In any event, this being a displacement of a distinct section of the law, an engraver’s error is *a priori* unlikely.

B. Restored clause

When lines 16-17 are reunited with lines 5-6, the text reads as follows:

> aut de capite libero deve maiore pecunia quam sestertiis mille praeiudicium futurum erit sponsiove facta futurave erit, eave de re [in qua] praeiudicium futurum sit de capite libero

or a *praeiudicium* will take place, or a *sponsio* has been made or will take place, about free status or for a higher sum than 1,000 sesterces, or a matter in which a *praeiudicium* [sc. of whatever value] about free status would take place.

The two forms of proceeding treated here are *praeiudicium*, a form of adjudication which does not condemn or absolve,\(^{58}\) and *sponsio praeiudicialis*, a wager, initiated either before or during the hearing *in iure*, serving as a predicate for an adjudication at a later time.\(^{59}\) Construing the passage requires pairing these two forms of proceeding in some manner with the two limitations (*de capite libero deve maiore pecunia quam sestertiis mille*).\(^{60}\) The

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\(^{57}\) The condition of Tablet IX is discussed in Fernández Gómez (n 15) 60-64.


\(^{59}\) See Lamberti (n 2) 151-153; De Bernardi (n 53) 119-24.

\(^{60}\) Note that there is a parallel passage in chapter 89. There, the duumviri are directed to assign judges in cases not exceeding 1,000 sesterces in value, and special mention is made of both *sponsiones* and *praeiudicia* not exceeding this sum.
words *de capite libero* must be joined to one or both forms of proceeding.\(^6\) The usual view is that they are joined to both.\(^6\) One suspects that the two forms would be addressed in a single clause, but for the fact that the *sponsio* requires *facta erit* to cover cases in which the litigants present themselves to the magistrate *sponsio*-in-hand (and of course the difference in gender).

The two limitations are joined by a weak disjunctive (*deve*), leaving open whether they should be read together (‘matters of free status worth more than 1,000 sesterces’). Hence the formerly orphaned clause has been included to make clear that *praeiudicia de capite libero* are forbidden regardless of value. A *sponsio de capite libero*, in contrast, is not mentioned in this clause, and indeed is implicitly permitted, if the parties are willing, at lines 17-19.\(^6\)

The reuniting of these clauses has very little effect on their meaning. The orphaned clause now finds itself within the force of *neque*, and properly reads as a prohibition rather than a concession, but beyond this there is no change. Nor is there any change in the meaning of the displaced section on *actiones famosae*. The value in acknowledging this admittedly small error in redaction lies in the clarity it brings to the derogation section.

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\(^6\) The words ‘*de capite libero*’ are not part of the clause that precedes (*res dividua . . . facta sit fiatve*) and must therefore be associated with *futurum erit*, or *facta futurae erit*, or both: even the most telegraphic portion of this chapter, the list of *actiones famosae* from line 8 to 16, eventually finds its *agetur* in line 16. cf Wolf (n 2) 119 (offering perhaps a literal translation in which *de capite libero* is not associated with *praeiudicium* or *sponsio*). On the import of *facta sit fiatve*, see Rodger (n 11) 191.

\(^6\) De Bernardi (n 53) 119-20; Lamberti (n 2) 150-151; González/Crawford (n 2) 228; Wolf ‘*Jurisdiction*’ (n 15) 39-40; cf González/Crawford (n 2) 195 (Crawford’s translation, pairing the two limitations with *praeiudicium* only); Lebek (n 2) 171 n21 (taking the whole of *aut de capite libero* as ‘*un*intrusione secondaria’). Note that, in regard to a *sponsio praeiudicialis* for a sum greater than 1,000 sesterces, the sum does not refer to the wager (which is a trifle), but to the amount at stake in the underlying controversy. De Bernardi (n 53) 119.

\(^6\) This is acceptable and in fact desirable, as it allows the parties to make their wager locally, even if the actual adjudication on status must take place in the governor’s court. Similarly, De Bernardi (n 53) 123, would allow *sponsiones* about status by agreement, but relies on the first derogation clause rather than the second, as argued below.
That section is the source of all disagreement over the extent of local jurisdiction. In the uncorrected text, *de is rebus* follows immediately after the orphaned clause, creating a contradiction that the corrected text removes. But this alone does not settle the disagreement. The derogation section is not fully preserved on the bronze, and to restore it, and discern how to read it in relation to the surrounding text, requires further discussion. Specifically, the derogation section must be appreciated as the product of the Augustan reforms of civil procedure.

5. Derogation formulae

Chapter 84 permits the parties to allow certain matters to be heard locally *si uterque inter quos ambigetur volet*. The significance of this form of words is disputed. The earlier Este fragment supplies the closest comparison. It contains a list of excluded *actiones famosae*, but adds the following:

Este Fragment, col. I, ll. 4-9:  
...sei is, a quo petetur quomve quo agetur, de ea re in eo municipio colonia praefectura judicio certare <volet> et si ea res sestertium decem milium minorisve erit, quo minus ibei de ea re iudex arbiterve addicatur detur quove minus ibei de ea re iudicum ita feiat, utei de ieis rebus, quibus ex hac lege iudicia data erunt, iudicium fierei exerceri oportebit, ex hac lege nihilum rogatur.

...if the person who shall be sued or against whom the action shall be brought <shall wish> to stand trial over that matter in that *municipium*, colony, *praefectura* and if that matter shall be worth 10,000 sesterces or less, to the effect that a judge or arbiter should not be confirmed or appointed there concerning that matter or to the effect that a trial should not take place there concerning that matter just as it shall be appropriate for a trial to take...

64 *Roman Statutes* (n 2) no 16.
place and be directed concerning those matters for which
trials shall be appointed according to this statute,
nothing is proposed according to this statute.

As its editors note, this provision appears to assume that,
elsewhere in the statute, suits on these actions and suits for more
than 10,000 sesterces were barred. The quoted provision would
then clarify that suits on these actions for 10,000 sesterces or less
were permitted, so long as the defendant were willing.\(^{65}\) The
form of words used in the quoted provision, demanding the
defendant’s willingness only, is different from the form of words
used in the \textit{lex Irnitana}, where jurisdiction is permitted if both
parties are willing. The issue is whether there is any significance
to this difference.

The editors of the fragment, along with the 1986 editors of the
\textit{lex Irnitana}, maintain strongly contra Laffi, Pugliese and others\(^ {66}\) that the Este fragment does not require an \textit{accord}
between the parties, and that in this respect it is different from the \textit{lex
Irnitana}.\(^ {67}\) Simshäuser regards this as unconvincing and
reminds the reader of a point ‘familier à tout spécialiste de
procédure civile’, namely that a defendant’s will is evinced by his
conduct in litigation and that a defendant who allows an
otherwise incompetent tribunal to proceed has, by that fact,
entered into an accord with the plaintiff.\(^ {68}\) Wolf adds that the

\(^{65}\) \textit{Roman Statutes} (n 2) no 16, i, 313-314. On <volet> see ibid., i, 322.

\(^{66}\) Umberto Laffi, ‘La lex Rubria de Gallia Cisalpina’ (1986) 64 \textit{Athenaeum} 5,
25; Giovanni Pugliese, \textit{Il processo civile romano 2. Il processo formulare} (1963)
165-166; Karl-Heinz Ziegler, ‘Kompetenzvereinbarung im römischen Zivilprozeß-
recht’, in \textit{Festschrift für Max Kaser zum 70. Geburtstag} (1976) 557, 559; Wilhelm
Simshäuser, \textit{Iuridici und Munizipalgerichtsbarkeit in Italien} (1973) 198-99;
Simshäuser (n 16) 645 & n125. On Laffi’s view, see also note 67 below.

\(^{67}\) \textit{Roman Statutes} (n 2) no 16, i, 322-323. The comments echo earlier
comments in González/Crawford (n 2) 230, but make clear that what is lacking in
the Este fragment is an explicit accord in advance. This is apparently an effort to
clarify the nature of the disagreement between Crawford (the fragment’s principal
editor) and Laffi (a contributor, who nevertheless does not agree with the views
published there: Umberto Laffi, ‘Osservazioni sul contenuto e sul testo del
\textit{fragmentum Atestinum}’ (1997) 85 \textit{Athenaeum} 119, 119-120).

\(^{68}\) Simshäuser (n 16) 645 n125, responding specifically to González/Crawford
(n 2) 230.
plaintiff — unmentioned in the Este fragment — has clearly made an accord with the defendant, because the plaintiff is the one who has brought the action. Therefore to Wolf, as to Simshäuser, there is an accord in both the Este fragment and the lex Irnitana.69

The weakness in these arguments lies in the assumption that the parties tacitly enter into an accord by their conduct. This is precisely the assumption that the later law found wanting and attempted to improve. The vehicle of that improvement was the Augustan lex Iulia de iudiciis privatis.70

D.5.1.2 pr.-1 (Ulpian 3 ad edictum). Consensisse autem videntur, qui sciant se non esse subjectos iurisdictioni eius et in eum consentiant. Ceterum si putent eius iurisdictionem esse, non erit eius iurisdiction: error enim litigatorum, ut Iulianus quoque libro primo digestorum scribit, non habet consensum. Aut si putaverunt alium esse praetorem pro alio, aequa error non dedit iurisdictionem: aut si, cum restituerit quvis ex litigatoribus, viribus praeturae compulsus est, nulla iurisdiction est. 1. Convenire autem utrum inter privatos sufficit an vero etiam ipsius praetoris consensus necessarius est? Lex Iulia iudiciorum ait ‘quo minus inter privatos conveniat’: sufficit ergo privatorum consensus. Proinde si privati consentiant, praetor autem ignoret consentire et putet suam iurisdictionem, an legi satisfactum sit, videndum est: et puto posse defendi eius esse iurisdictionem.

69 Wolf ‘Iurisdiction’ (n 15) 48-49 n130 (citing D.5.1.2 pr. and D.2.1.15, discussed below). Some writers in fact see a longstanding continuity in Roman procedure on this point, from at least the time of the Este fragment to the late classical edictal commentaries: Wilhelm Simshäuser, [Review] (1976) 93 SZ (rA) 380, 393-94; Ziegler (n 66) 559-561.

70 For an overview, with literature, see Bertoldi (n 36) 199-204. See also D.2.1.15 (Ulpian 2 omn. trib.): Si per errorem alius pro alio praetor fuerit aditus, nihil valebit quod actum est. Nec enim ferendus est qui dicat consensisse eos [in praesidem] <in praesentem>, cum, ut Iulianus scribit, non consentiant qui errant: quid enim tam contrarium consensui est quam error, qui imperitiam detegit?
Only those who know they are not subject to his jurisdiction and have consented to him are regarded as having consented (*consensisse*). If however they believe he has jurisdiction, he will not have it: for error by the litigants does not bring consent (*consensum*), as even Julian writes in the first book of his *Digest*. Moreover if either one of the litigants, having resisted, was compelled by the powers of the praetorship, there is no jurisdiction.

1. Now does agreement (*convenire*) between the private parties suffice or is the agreement of the praetor himself also necessary? The *lex Iulia iudiciorum* says ‘to the effect that it shall not be agreed (*conveniat*) between the private parties’; the consent (*consensus*) of the parties is therefore enough. Further, we must consider whether the *lex* is satisfied if the parties consent but the praetor is unaware of their consent and believes jurisdiction is his: I believe it is possible to maintain that he has jurisdiction.

The context is praetorian, not municipal, jurisdiction: the *lex Iulia* itself is addressing the question of consent to the jurisdiction of the urban or peregrine praetor, while the later commentary is presumably including the various extraordinary praetorships (*fideicommissarius, de liberalibus causis*, etc.) created after the law. Though some believe the text is speaking to municipal jurisdiction as well, others more cautiously regard

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71 This common formula in the negative will have been completed by *ex hac lege nihilum rogatur* or something similar: Paul Girard, *Les leges Iulias iudiciarum publicorum et privatorum* (1913) 34 SZ (rA) 295, 334 n1.

72 Girard (n 71) 335-336 n1; Feliciano Serrao, *La 'jurisdiction' del pretore peregrino* (1954) 148; Pugliese (n 66) 163-164.

73 Girard would attribute the quoted text to the edict *de vadimonio Romam faciendo* and thereby apply it to municipal magistrates in addition to the several praetors, deeming it probable even that the quoted words of the *lex Iulia* applied to municipal magistrates: Girard (n 71) 336 n1. The usual view, however, is that Ulpian’s commentary on *vadimonium Romam* concludes in his second book. See Otto Lenel, *Das Edictum Perpetuum* (3rd edn, 1927) 55-57, and the discussion in Alan Rodger, *Vadimonium to Rome (and Elsewhere)* (1997) 114 SZ (rA) 160, 163-165. Serrao would apply D.5.1.2.1 to municipal magistrates, partly on the example of the Este fragment: Serrao (n 72) 146-147.
the text as a single application of a wider principle (parties’ consent) that held for municipal jurisdiction. The latter position is more sound, because we now have, in the *lex Irnitana*, clear evidence for some manner of Augustan municipal law, and because that law, as against the *lex Iulia*, is a more likely home for any treatment of municipal jurisdiction vis-à-vis a higher authority. In any event the principle clearly found its way into municipal jurisdiction on the evidence (apart from chapter 84) of the edict *de vadimonio Romam faciendo*. In commenting on that edict Ulpian describes the same principle of consent and Paul, discussing jurisdictional limits under that edict, explains that parties may agree to local jurisdiction for cases of a higher value than otherwise permitted.

Thus the *lex Iulia* supplies the earliest evidence of a rule allowing the parties, by some manner of bilateral accord, to permit an otherwise incompetent praetor to exercise jurisdiction, and that rule came to be applied in the municipal context as well. One wishes to know what form the accord took. In D.5.1.2 pr.,

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74 Pugliese (n 66) 161-64; Simshäuser (n 69) 393; Johnston (n 37) 64; Simshäuser (n 16) 644-645; Lamberti (n 2) 146 n17.
75 D.5.1.1 (Ulpian 2 ed.): *Si se subiciant aliqui iurisdictioni et consentiant, inter consentientes ciascuae iudicis [sc. magistratus], qui tribunal praest vel aliam iurisdictionem habet, est iurisdiction.* On the contents of Ulpian’s second book on the edict, see Rodger (n 73) 163-165 with Otto Lenel, *Palingenesia iuris civilis* (1889) ii, Ulpian nos 190-209. On the evident interpolations in the text (*iudicis and tribunal praest*), see the Index Interpolationum, ad h. i., with Lenel *Palingenesia*, ii, Ulpian no 194 n5 and Girard (n 71) 335 n1.
76 D.50.1.28 (Paul 1 ed.): *Inter convenientes et de re maiori apud magistratus municipales agetur.* Rodger shows, contra Lenel, that this text is part of Paul’s commentary on the edict *de vadimonio Romam faciendo*: Rodger (n 73) 180-181. One should stress that the contents of this edict are significant to provincial communities, such as Irni, only by analogy: the edict will have dealt with Italy (and Cisalpine Gaul), while the corresponding provisions of the provincial edict, one assumes, will have dealt with the jurisdictional divisions between provincial communities and the court of the provincial governor. See David Johnston, *Vadimonium, the lex Irnitana, and the Edictal Commentaries* in Ulrich Manthe, Christoph Krampe (eds), *Quaestiones Iuris* (2001) 111, 111-123. cf Rodger (n 73) 192-193 (suggesting tentatively that the latter portions of Paul’s commentary, placed by Lenel under *de vadimonio Romam faciendo*, might in fact have discussed provincial communities).
77 On the nature of the accord, see the discussion and authorities cited in Josef Georg Wolf, *Error im römischen Vertragsrecht* (1961) 15-19; Pugliese (n 66)
quoted above, Ulpian cites Julian's opinion on the effect of knowledge: parties who are unaware that their magistrate is incompetent cannot form a *consensus* for jurisdiction. Naturally parties in this position have formed no overt accord of any kind — they were unaware it was needed — and Ulpian/Julian are putting to rest any suggestion of *consensus*. Wolf infers from this the reverse proposition, that, had the parties known the magistrate was incompetent and proceeded, jurisdiction would arise, not by *Prorogationsvereinbarung*, but by *Unterwerfungswille*. Yet the use of *conventio/convenissesse* in both the *lex Iulia* and commentary suggests the parties, in the situation Wolf describes, would use some manner of informal agreement founded on the parties' will. Africanus says that if the will of the parties changes (*mutata voluntas*) after they have agreed (*convenire*) to allow jurisdiction by an otherwise incompetent praetor, they will not be forced to stand by their earlier *conventio*. It is difficult to see how Africanus’ subject could be anything but an overt accord expressing the parties’ will. Also, if it were only a question of a tacit accord — if the parties’ conduct in an otherwise forbidden suit were outwardly indistinguishable from their conduct in any other suit — it would be nonsense for Ulpian, in D.5.1.2.1, to consider the praetor's awareness of that accord.

Most important for present purposes, adherents of a 'tacit accord' fail to mark the distance the law has traveled from the Este fragment to the *lex Irnitana*. The *lex Iulia* introduced a

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78 Wolf (n 77) 17: ‘Aus dieser Begründung ergibt sich zwingend, daß die Litiganten die Zuständigkeit des Magistrats begründet hätten, wenn ihnen bekannt gewesen wäre, daß er an sich für sie nicht zuständig war. Dann hätten sie sich, indem sie ihn angingen, seiner Gerichtsgewalt unterworfen ....’

79 Pugliese (n 66) 171; Ziegler (n 66) 570.

80 D.2.1.18 (Afr. 7 quaest.).
form of accord which is open to challenges for error in consent, and Ulpian’s discussion of error, unless a pure flight of fancy, presumes there was a forum for those challenges. In Irni we can envision a defendant, condemned in an otherwise prohibited action and now famosus, raising the issue of error if he were otherwise qualified to sit among the decuriones conscriptive (ch. 31) or to serve as judge (ch. 86, ll. 10-12). A plaintiff who sues by an otherwise prohibited action and is nonsuited might challenge the integrity of the parties’ consent by application to the governor for restitutio in integrum. A defendant condemned and famosus might choose the same route if he wished to be permitted to postulate in a later action. In short, Ulpian is engaged in a discussion of error in consent that the earlier regime, permitting jurisdiction solely on the strength of the defendant’s willingness, could not have provoked. The derogation regime of the lex Iulia is genuinely new.

6. de is re[bus etia]m

How does this innovation bear on the interpretation of the derogation section in chapter 84? The answer depends on the strength of the restoration de is re[bus etia]m (l. 17). This is printed in every published edition of the lex Irnitana. If it is right, then the derogation section, as already noted, is hard to interpret: we either ignore de ceteris quoque etc., or force it to share a condition (si uterque etc.) with de is rebus. We might forgive the ambiguity on the argument that a new model ‘bilateral accord’ has been added along with the new list of actiones famosae, and that an Augustan draftsman made a hash of both. But even this misses the real problem. Unless we accept an anacoluthon (there being no ‘de is rebus’ at line 23), the first half of the chapter (the permissible cases) and the second half (duumviri ... iuris dictio ... esto) must be joined severally, at

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81 Tablet IX is missing a 3 cm x 6 cm piece of bronze in the second column, and this affects the reading of lines 14-20. Fernández Gómez (n 15) 61.
82 D’Ors (n 2) 82; González/Crawford (n 2) 176; d’Ors and d’Ora (n 2) 67; Fernández Gómez (n 15) 99; Lamberti (n 2) 350; Wolf (n 2) 118.
precisely three places: *de is rebus etiam* (l. 17), *de ceteris quoque omnibus* (l. 18) and *de vadimonio promittendo* (l. 20). The last causes no problems, but the first two are either too broad or too narrow. If *de is rebus* alone is conditioned, then the duumviri have unconditional jurisdiction over all private law cases (except *praediudicia de capite libero*) by virtue of *de ceteris quoque omnibus*. If both *de is rebus etiam* and *de ceteris quoque omnibus* are conditioned, then the duumviri have jurisdiction only over cases that the parties have agreed to litigate locally, i.e., a minority of cases. This is either a further error in redaction or, better, an opportunity to reconsider *de is re[bus etia]m*.

It is not cynical to suggest that the restoration *de is re[bus etia]m* was prompted too hastily by the example of the Este fragment, without taking account of how the reforms of the *lex Iulia de iudiciis privatis*, and its accompanying municipal legislation, had changed the way in which parties manifested their consent to jurisdiction. The suggested restoration appeared simultaneously in two 1986 editions, but d’Ors, one of the 1986 editors, had commented in 1984:

> In these [*actiones famosae*] the local magistrate has jurisdiction when both parties are in agreement (*si uterque inter quos ambigeretur volet*), which coincides with the *Fragmentum Atestinum*.83

This, we have seen, is not correct. The new regime is based on an explicit accord between the parties, and we have indirect evidence that, post-*lex Iulia*, parties were permitted to litigate locally cases of a value higher than otherwise permitted.84 Moreover, unlike the Este fragment, chapter 84 forbids these actions, unless the parties strike an accord. Our evidence of the new regime is admittedly small, but sufficient at least to caution

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83 D’Ors (n 54) 2581: ‘[E]n ellas [*actiones famosae*], sólo tiene jurisdicción el magistrado local cuando ambas partes están de acuerdo (*si uterque inter quos ambigeretur volet*), lo que coincide con el *Fragmento Atestino*.’ (In modern editions, *ambigeretur* is usually emended to *ambigatur*.)

84 See note 76 above.
against rashly assimilating our law to an older one — and needlessly printing a difficult text.

The solution is simply to abandon *etiam* as unsupported by the example of the Este fragment, and thereby disassociate *de is rebus* from the condition that follows, e.g.,

\[
de\ is\ re[bus\ ite]m\ si\ uterque\ inter\ quos\ etc.\
de\ is\ re[bus\ et\ du]m\ si\ uterque\ inter\ quos\ etc.\]

The words *de is rebus* will refer (unconditionally) to all of the cases, and allow for all of the exceptions, listed in the first part of the chapter, which is to say, cases worth up to 1,000 sesterces. Abandoning *etiam* has not seriously been entertained up to now. When Lebek first suggested it, it would have seemed impossible. In the text as preserved, the words *de is rebus* are preceded immediately by *eave de re [in qua] praetudicium futurum sit de capite libero*. To restore *de is re[bus etia]m*, as was usual, was only plausible because the mistake was seen as ‘cured’ at lines 19-20. To restore without *etiam* (or equivalent) will have seemed incurably wrong, granting the duumviri jurisdiction over cases that were unconditionally prohibited. This objection, however, vanishes if we accept that *eave de re* etc. has been orphaned by the displacement of the section on *actiones famosae*. If we ignore the displacement, then the unconditionally prohibited cases are ‘out of range’ of *de is rebus*, and a restoration without *etiam* is perfectly satisfactory.

This greatly improves both the syntax and the sense of the entire chapter. The duumviri are given jurisdiction over three distinct matters. Stripped to its essentials (and omitting *praetudicium de capite libero*, which is unambiguously

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85 Lebek (n 2) 167.
86 See *lex Irnii*, ch 83, ll. 42. Judging from the photograph, after the *b* (which is partly preserved), there is space for 5-6 letters.
87 See González/Crawford (n 2) 229: ‘The fact that the parties may agree to a hearing ‘de is rebus etiam’ of course does not allow them to proceed to a ‘praetudicium de capite libero’ even if this is only implicitly, not explicitly excluded.’
forbidden), the chapter reads as follows.88

Qui ... municipes ... erunt, qua de re ii ... privatim ... agere ... volent, quae res sestertium mille minorisve erit, neque [exclusions] ...

[1] de is rebus
[2] item [or et dum] si uterque inter quos ambigetur volet, de ceteris quoque omnibus de quibus privatim agetur ...

[3] et ... de vadimonio promittendo ...

duumviri ... iuris dictio ... esto.

In short, the duumviri, by virtue of [2], are permitted to entertain all private cases whatsoever, including cases of a value higher than 1,000 sesterces, if the parties agree, excepting praeiudicia de capite libero. This is not precisely how Rodger himself reasoned,89 but this was indeed his view.

7. A long sentence

Chapter 84 describes the whole of local jurisdiction in a single sentence. In a 1998 lecture, Rodger drew attention to the fact that long sentences were common in the lex Irnitanca, and he suggested90 there was some convention which required that all of a single legislative provision, including the necessary qualifications, should be contained within a single sentence so that there could be no doubt about its precise scope. In other words, if you read the single sentence,

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88 This schema is indebted to Lebek, who sets out a similar structure.
89 Rodger believed that de ceteris quoque was aimed specifically at allowing suits higher than 1,000 sesterces by agreement: Rodger (n 1) 149. The better view is Lamberti’s: this language is aimed at allowing all private suits, of whatever value, to be heard locally if both parties agree (excepting praeiudicia de capite libero). Lamberti (n 2) 148 & n28.
you learned from it all that you needed to know about the provision, including the various qualifications. This of course is only a brief observation and not a developed thesis, but it contains the seeds of some very good advice. In reading this kind of material, it is important to 'identify the period' and explain fully the qualifications within it. Contradictions from outwith the period are more forgivable than those within it. This article, I hope, interprets chapter 84 in the spirit of that advice.

91 When presenting this paper in various forums, I suggested that the Roman draftsman sometimes anticipates a reader who sees the statute only through a 'letterbox', i.e. the draftsman focuses on the integrity of the period and does not demand, as the modern draftsman does, perfect consistency through the whole of the statute. This is useful to keep in mind when discussing chapter 84 in relation to chapter 85 (see note 24) and chh 69 and 71 (see note 28).