ADVOCATIO: A POSTPONEMENT *IN IURE*

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During a lawsuit the hearing may have to be interrupted for some reason. In the formulary procedure of classical Rome this need may occur at any of the following times: (i) during the hearing *in iure*, (ii) between the hearing *in iure* and the hearing *apud iudicem*, and (iii) during the hearing *apud iudicem*. Recent scholarship, stimulated by the discovery of the *lex Irnitana* and the procedural documents from Herculaneum and elsewhere, has gone some way towards establishing the means utilised in these situations.[1] *Vadimonium* was a means both of securing initial attendance to enable formal summons before the magistrate and for arranging for a party's return in case of an interruption of proceedings *in iure*. It has been strongly argued that the procedure for establishing the date of the hearing before the judge was that of *intertium*.[2] The same device, necessitating a return of the parties before the magistrate, may have been available, at least in the provinces, to postpone a hearing *apud iudicem* which had been once fixed. But what if it should prove necessary to interrupt the proceedings *in iure*? On one view, perhaps, this need not pose a problem: the magistrate possesses, perhaps, sufficient authority to entertain the parties' application under whatever conditions seem most appropriate.[3] But this is unrealistic in practice. The urban praetor in Rome sits to hear cases in any number and is undoubtedly pressed for time. Moreover the delay, whilst suiting one party, may inconvenience the other. So there was an automatic procedure for postponement, either to an agreed permitted date or to the day-after-next (*in tertium die*). But there is other evidence of a formal procedure, designed perhaps for limited purposes, to ensure an interruption in the proceedings *in iure*.

In the 50s BC Cicero's young friend and supposed protégé, the jurist Trebatius Testa, spent a couple of years with Julius Caesar in Gaul. The sequence of Cicero's letters to Trebatius is prefaced with a letter of introduction to Caesar of around April 54 commending its bearer Trebatius to Caesar's service.[4] In this

1 See, eg, G. Camodeca, *Tabulae Pompeianae Sulpiciorum* (Rome 1999); J.G. Wolf, "Das sogennante Ladungsvadimonium" in J.A. Ankum, *et al*., (eds.) *Satura Feenstra* (Freiburg 1985), 59; E. Metzger, *A New Outline of the Roman Civil Trial*, (Oxford 1997). See also Metzger, *Litigation in Roman Law*, (Oxford 2005). I am grateful to Dr. Metzger for allowing me to see a copy of this in proof.

2 Most recently J.G. Wolf, "*Intertium* – und kein Ende?" (2001) 39 *Bullettino dell'Instituto di Diritto Romano* (3 ser.), 1.

3 A casual reference, aimed at a non-juridical audience and speaking to his military rather than judicial prowess, has Scipio Africanus Maior, hearing a suit between two of his soldiers at the siege of Badia, order a postponement by *vadimonia* to a hearing in two days' time inside the besieged city: Aulus Gellius, *Noctes Atticae* 6,1,8.

4 Cicero, *Ad Fam*. 7,5.

letter Cicero plays up the role of patron though it is far from certain that Cicero's was the only or indeed the chief influence upon Trebatius at this time. It seems probable that Caesar was actually looking for a lawyer to advise him on public affairs. Trebatius served in Gaul for the next year or so but he declined Caesar's offer of a position as a military tribune, somewhat to Cicero's surprise. Although he would have arrived in Gaul in time for Caesar's invasion of Britain in the summer of 54 he took no part in it.[5]

Cicero's letters to Trebatius are mainly concerned to explore conditions in Gaul. One gains the impression that Trebatius was not as good a correspondent as his appointed mentor would have wished. But every now and then Cicero passes on some titbit about affairs at home. In January 53 he wrote:[6]

> *Nisi ante Roma profectus esses, nunc eam certe relinqueres. Quis enim tot interregnis iure consultum desiderat? Ego omnibus unde petitur hoc consili dederim, ut a singulis interregibus binas advocationes postulent. Satisne tibi videor abs te ius civile didicisse?*
>
> Were you not already gone from Rome, now would certainly be the moment to leave. For who needs a lawyer with so many *interregna*? I myself give the following advice to anyone who enquires: Apply for two *advocationes* from each *interrex*. Are you satisfied that I seem able to learn civil law in your absence?

In January 53 BC there were as yet no magistrates elected, the consular elections of July 54 having been postponed by a series of spurious religious objections.[7] Instead a series of *interreges* hold office, by tradition for five days each. The point of the jest is that Trebatius is already away in Gaul. Even were he in Rome, Cicero quips, there would be no work for him. You do not have to be a lawyer to see what to do in these circumstances. Keep on applying for *advocationes*. The force of *dederim* is perhaps that *even* Cicero can manage this.

But what exactly is an *advocatio*? The word is not much attested in a technical, legal sense. Its metaphorical meaning is delay, postponement. The dictionaries offer three possible meanings in a formal sense:

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5 Cicero takes him to task for the missed opportunity in the text of *Ad Fam*. 7,10,2 quoted below.

6 Cicero, *Ad Fam*. 7,11,1.

7 The impending crisis can be traced through a series of letters from Cicero to his brother Quintus: *Ad Q.f.* 3,2,3; 3,3,2; 3,8,4; 3,9,8.

(i) A group of legal advisers

Cicero, *Pro Roscio Comoedo* 15:

... et advocatio ea est quam propter eximium splendorem ut iudicem unum vereri debeamus

... since the distinguished and brilliant assembly of counsel present ought to make us respect them as though they were a single judge.

Cicero is here appearing in a civil suit presided over by a single judge. He has just praised his own client's reputation and the judge's standing. The *advocatio*, the assembly of lawyers, seems best understood as the judge's assessors.

(ii) The duties of an advocate

Cicero, *Ad Familiares* 7,10,2:

… sed tu in re militari multo es cautior, quam in advocationibus, qui neque in Oceano natare volueris, studiosissimus homo natandi, neque spectare essedarios, quam antea ne andabata quidem defraudare poteramus.

… but you are more cautious in military than in advocacy matters, since you, a most diligent person in the baths, have not wished to bathe in the Atlantic, nor to admire the charioteers though formerly we could not stint you of as much as a gladiator.

This to Trebatius a month before 7,11. The incidental reference is to Trebatius' unwillingness to cross the Channel to Britain where the Britons were known for their expertise with war-chariots. To suppose that attendance at the baths or the games is part of the (professional) duties of an advocate seems a very heavy-handed jest, though, even for Cicero, and it may be that something closer to advice or friendship is to be understood.[8]

Pliny *Epistulae* 5,9,4

Suberat edicto senatus consultum: "hoc omnes qui quid negotii haberent iurare priusquam agerent iubebantur, nihil se ob advocationem cuiquam dedisse promisisse cavisse."

8 One may compare *Pro Caecina* 8,22: *se in fugam conferunt una amici advocatique eius.*

> The terms of the senatusconsult were attached to the edict: "All those having business in court are hereby required to swear before pleading that they have not given, promised or guaranteed anything to anyone for legal advice."

This is from a letter of Pliny in which he starts by saying that he had gone down to the centumviral court in order to hear argument in a case in which he was retained as counsel in the second hearing – the *proxima comperendinatio*. The case never comes on because the praetor in charge has learnt that one of his colleagues, the praetor Nepos, has promulgated an edict enforcing the *senatusconsultum* against employing counsel for reward and so suspends the hearing whilst he decides what to do about it.

(iii) A postponement

> Seneca the Elder, *Controversiae* 1,8,1:
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> *Ego advocationem in unam pugnam petii.*
>
> I asked for a postponement for one fight.

This is from a *controversia*, a formal oratorical exercise on a fictitious theme. The subject of debate arises from a typical rule that one who has fought well thrice should be exempt from further military missions. A son who has fought well three times volunteers a fourth time and his father disinherits him. The orators defend the father on the issue whether this is a proper disinherison, and one of them, apparently Cestius, suggests that the father had received a warning from the gods that his son should not take part this time: “I sought a postponement only for this time.”

As the metaphorical meaning of delay is well established this would suggest that the primary legal meaning was something along the lines of a postponement of hearing or process, even were this not already clear from Cicero’s jest with Trebatius. The etymology and other uses of the word further suggest a postponement for the purpose of consultation with an *advocatus*.[9] Even if we accept that the combination of metaphorical usage and etymology points towards this meaning for *advocatio* in legal usage this still leaves much

9 See further Seneca’s *Apocolocyntosis* cited in note 15. There is a striking parallel in the mediaeval English legal term "imparl". Literally the word means discuss or talk but the technical legal meaning is to withdraw from the court during the pleading stage to allow discussion between counsel and client and from this it comes to mean a postponement allegedly, but not necessarily, for such purpose. See J.H. Baker, *A Manual of Law French*, 2nd ed. (Aldershot 1990), *s.v.*

unanswered. Is such a postponement available only *in iure* or is it also available *apud iudicem*? Is it only available by grant from a magistrate? And how long is it for?

Digest 4.6.23.4 is one of the few surviving uses of *advocatio* in a juridical text. Ulpian (book 12 *ad ed.*) is discussing the availability of *restitutio in possessionem*:

> *Deinde adicit praetor: secumve agendi potestatem non faceret. ut si, dum hoc faciat, per usum adquisitio impleta vel quid ex supra scriptis contigit, restitutio concedatur: merito nec enim sufficit semper in possessionem bonorum eius mitti, quia ea interdum species esse potest, ut in bonis latitantis mitti non possit aut non latitet: finge enim, dum advocationes postulat, diem exisse, vel dum alia mora iudicii contingit.*
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> Then the praetor continues: "or has not provided the means by which he might be sued." So that if, whilst he is acting in this way, acquisition is completed by *usucapio* (or another of the above-listed circumstances occurs) restitution can be granted – and rightly for it is not always enough to be ordered into possession of the property, because sometimes the situation can be such that one cannot be put into possession of goods of someone who is in hiding or even when he is not in hiding: for suppose that the period for bringing the action has expired whilst he asks for *advocationes*, or whilst something else has held up the case.

The implications of this passage should be viewed in the wider context of praetorian restitution of the *status quo*, which is the context of this edictal extract. Ulpian deals with restitution in his twelfth book *ad edictum*, substantial extracts from which are preserved in the *Digest* title 4.6. Ulpian starts by setting out the whole of this edict, a passage more or less preserved in *Digest* 4.6.1.1. In the remainder of the extracts from his twelfth book scattered through *Digest* title 4.6 he frequently repeats the terms of the edict as lemmatic introductions to each bit of his commentary.[10]

10 *D.* 4.6.1.1 (Ulpian, 12 *ad ed.*) *Si cuius quid de bonis, cum is metus aut sine dolo malo rei publicae causa abesset, inve vinculis servitute hostiumque potestate esset* [*posteave non utendo deminutum esse* ins. B]; *sive cuius actionis eorum cui dies exisse dicetur; item si quis quid usu suum fecisset, aut quod non utendo amisit* [*sit amissum h.t.* 21*pr.*] *consecutus, actioneve qua solutus ob id, quod dies eius exierit, cum absens non defenderetur, inve vinculis esset, secumve agendi potestatem non faceret, aut cum eum invitum in ius vocari* [*vocare h.t.* 26,2] *non liceret neque defenderetur, cumve magistratus de ea re appellatus esset; sive cui per magistratus sine dolo* [*malo* ins. *h.t.* 26,2] *ipsius*

A major concern of the praetor in this edict is the possibility that property may be lost by the operation of the rules of *usucapio* whilst the claimant is prevented from acting to avoid this outcome. Bringing suit is of course one of the ways of effectively interrupting the period of one or two years' usucapion: the so-called *usurpatio civilis*. The period of one or two years' possession for *usucapio* can be interrupted, either actually by re-acquiring possession, or constructively by bringing a *vindicatio*. If successful the *vindicatio* interrupts the possessor's *usucapio* even if the claimant does not trouble to retake possession. The possessor's initial possession being interrupted, he will have to recommence a new usucapion period – and will now be on notice of the claimant's title and so not in good faith. The critical moment is that of *litis contestatio*. But this effect is only achieved after judgment. It is apparent that in classical law a possessor might have usucaped property between *litis contestatio* and judgment:

> *Digest* 6.1.18 (Gaius, 7 *ad ed. prov*.)
>
> *Si post acceptum iudicium possessor usu hominem cepit, debet eum tradere eoque nomine de dolo carere: periculum est enim ne eum vel pigneraverit vel manumiserit.*
>
> If after joinder of issue the possessor usucapes the slave, he must still deliver him and give the stipulation against fraud in respect of him. For the risk is that he might pledge or manumit him.

As this passage itself makes clear, however, a successful pursuit of the case to judgment will have the effect of putting the claimant in the position he was in before *litis contestatio.* The losing defendant will have to surrender the object even though the usucapion period has elapsed by the time of judgment, so long as it had not yet done so at *litis contestatio*.

More problematic are any formal barriers or corrupt practices which prevent a *vindicatio* from being effectively launched or which interrupt process before the stage of *litis contestatio* is reached. If the defendant is not available to be sued, or fails to proceed with the case as far as *litis contestatio*, then the claimant's position is threatened by the possibility that usucapion will intervene before he can launch his case.

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actio exempta esse dicetur; earum rerum actionem intra annum, quo primum de ea re experiundi potestas erit, item si qua alia mihi iusta causa esse videbitur, in integrum restituam, quod eius per leges plebis scita senatus consulta edicta decreta principum licebit.

In *Digest* 4.6.23.4 Ulpian discusses the edictal words "or has not provided the means by which he might be sued". Property belonging to the applicant for restitution is in the possession of his opponent. The applicant's attempt to mount effective proceedings has been frustrated by his opponent with the result that the period of *usucapio* is completed and the opponent's possession turned into ownership at civil law. Two examples of conduct by the opponent sufficient to frustrate proceedings are given in this text, namely he may go into hiding or he may apply for *advocationes.*

If the opponent is in hiding – and the praetor used this term of any who did not answer the summons – then proceedings cannot commence in his absence. If they have already commenced the praetor may seek to put pressure on the defendant by threatening *missio in possessionem* of the goods in dispute. But even this remedy will be ineffective if the defendant has decamped with them, as the effectiveness of *missio* depends upon the claimant's being able to get into actual physical possession of the goods and this he cannot do. By the time the opponent re-emerges the usucapion period has expired and he is now owner at civil law and the damage is done.

Even if the opponent is not in hiding he may still frustrate proceedings by applying for *advocationes*. During the period of adjournment the period of *usucapio* expires and the plaintiff's claim effectively lapses. A difficulty here is that the granting of an *advocatio* is an act of the magistrate, not the defendant. Later in his commentary, Ulpian treats of other circumstances where the magistrate's actions may be responsible for the plaintiff's loss, with or without the assistance of the defendant:

> *Digest* 4.6.26.4 (Ulpian 12 *ad ed.*)
>
> *Ait praetor:* "*sive cui per magistratus sive dolo malo ipsius actio exempta esse dicetur*"*. hoc quo? ut si per dilationes [iudicis] <magistratus> effectum sit, ut actio eximatur, fiat restitutio. sed et si magistratus copia non fuit, Labeo ait restitutionem faciendam. per magistratus autem factum ita accipiendum est, si ius non dixit: alioquin si causa cognita denegavit actionem, restitutio cessat: et ita Servio videtur. item per magistratus factum videtur, si per gratiam aut sordes magistratus ius non dixerit: et haec pars locum habebit, nec non et superior* "*secumve agendi potestatem non faciat*"*: nam id egit litigator, ne secum agatur, dum [iudicem] <magistratum> corrumpit*.
>
> The praetor says: "or if it is alleged that his action has been lost through the magistrates without his deliberate act." What is the point of

> this? So that restitution may be made where it happens that an action is lost through a magistrate's delays. Again even if the magistrate fails to provide assistance Labeo holds that restitution is to be given. For it is accepted that something is done "through the magistrates" if he did not give a hearing: on the other hand if, after considering the matter, he refuses an action, there is no restitution: and so it seemed to Servius. Again it seems to be done "through the magistrates" if by favour or bribery the magistrate has not given a hearing: and this part of the edict applies as well as the earlier "or had not provided the means to sue him": for the defendant acted so that he would not be sued, when he bribed the magistrate.

The proceedings are a *vindicatio* to establish the claimant's existing title and to be effective must be brought before the defendant is able to establish a new title by *usucapio.* If we look closely at the wording of the edict we can observe that it only mentions the magistrate and not also the judge. It is the interpretation of the words "*per magistratus*" which grounds the discussion by Labeo, Servius and Ulpian. The discussion preserved in the *Digest* varies the terms "judge" and "magistrate". A delay by the magistrate, says the praetor or other jurisdictional magistrate, whether by not granting a remedy or not proceeding quickly enough to *litis contestatio,* may gravely prejudice the plaintiff. By contrast a delay by the judge subsequent to *litis contestatio* may be a nuisance but it cannot fundamentally threaten the plaintiff's legal position for the reasons given by Gaius in *Digest* 6.1.18. This edict is not therefore directed at the judge but only at the magistrate. Seckel[11] indeed proposed to read *duumviri* for *iudicis,* but I have here preferred the broader term magistrate. There is little doubt that the original edict covered the actions of the urban praetor himself: *Digest* 4.6.26.7 refers to a provision inserted in his edict by the praetor Gaius Cassius to cover the case of restitution made necessary by the occurrence of some unforeseeable holiday because here too the delay was occasioned "*per praetorem*"; see also *Digest* 4.6.26.6.

Where the defendant bribes the magistrate to delay granting a remedy, both defendant and magistrate may be open to a charge that their action has caused a loss for which restitution will lie: The defendant for not providing the means to sue, the magistrate for depriving the plaintiff of his remedy. If the magistrate acts properly, however, a refusal, and any delay occasioned by a proper investigation of the circumstances (*causa cognita*), will not trigger such a claim, even if the result is that the plaintiff loses his action. (This could

happen if, for example, the magistrate concludes after enquiry to allow the claim, but uselessly only after the *usucapio* period has expired.) If the magistrate acts properly it by no means follows, however, that the defendant has done so and an improper request for an adjournment, though properly granted, may still ground a charge that the plaintiff's conduct amounts to that for which restitution may be claimed: not providing the means by which he might be sued.

In the second case put by Ulpian in *Digest* 4.6.23.4, of one who is not in hiding, the parties are still *in iure* and *litis contestatio* has not yet taken place. A delay occasioned by the request for an *advocatio* is sufficient to postpone, quite properly, the reaching of *litis contestatio* before the period of *usucapio* elapses. But Ulpian contemplates a claim that, though properly granted, the *advocatio* was improperly requested for the sole purpose of frustrating the plaintiff's action and that therefore the defendant is guilty of not providing the means by which he could be sued. It follows that the granting of an *advocatio* is not an act of grace by the magistrate but must be something to which the defendant, and perhaps both parties, were entitled in some or all circumstances. Only so can it be possible to ascribe the effects of postponement to the defendant's improper application.

Advocationes therefore are postponements available *in iure*, granted by the magistrate but generally available on application. Can we learn more of their nature and availability?

Who were the *interreges* and what powers did they have?

If there were no consuls, if, for example both died in office as in 81 and again in 43, or if there had been no elections as in 53, then the senate, strictly the *patres*, chose a patrician to be *interrex*, literally between-king.[12] He held office for five days only and nominated his successor. The first *interrex* was held incapable of holding elections, perhaps as Magdelain suggests because he lacked the necessary auspices.[13] Each successive *interrex* would nominate his successor, from amongst the patricians, for a further five day period and so on until a consul or consuls were elected. In 54 the consular and other elections for 53 were interrupted and there was no one to take office at the beginning of January when the consuls for 54 laid it down. As a consequence the senate

11 *Index Interpolationum, ad loc*.

12 It appears from Cicero, *Ad Brut*. 9,4 (1,5) of 5 May 43 that the senate, that is the *patres*, could only appoint an *interrex* if there were no surviving patrician magistrate. Any such magistrate would have the capacity to take the auspices and hold elections.

13 A. Magdelain, "*Auspicia ad Patres redeunt*", *Hommages à J. Bayet* (Brussels 1964), 427

nominated a patrician as *interrex*. Violence, stirred up by Clodius and Milo, continued to prevent consular elections and the elections for the new praetors, normally presided over by the incoming consuls, could not be held either. In the absence of praetors the consuls retained *imperium* to do justice. In the absence of consuls this duty, together with all other functions of state, lay theoretically in the hands of the *interrex*. Some apparently argued that the *interrex* had power only to call consular elections. But this Cicero passage indicates that, at least in the extreme circumstances of 53, they did more. It must be questionable whether, in the absence of a valid magisterial edict, they could do much, but for Cicero's jest to have any substance it must have been at least conceivable that a plaintiff might try to commence (or perhaps only continue) legal proceedings which the defendant could then postpone by an application for an *advocatio*.[14]

What is an *advocatio*?

An *advocatio* is an interruption in the proceedings *in iure* which had to be applied for (*postulare*) by one of the parties.[15] We know neither how long an *advocatio* could last nor how many could be applied for. However it is tolerably clear from Cicero that it was not usual to be able to postpone a suit indefinitely in this way. It is only the anomalous regime of *interreges* which creates the possibility of a suit's being continually postponed so as to minimise the need for lawyers. Moreover, it seems that no technical argument was required to support an application for that would have required the professional skills of a lawyer. This also fits the conclusion that *advocationes* were a matter of course. We would expect, however, a limit on the duration of any *advocatio* and, in addition, some limit on the number which could be awarded by any one magistrate.

= *Jus Imperium Auctoritas* (Rome 1990), 341 at 358.

14 A slight puzzle is the fact that Cicero apparently attributes the lack of judicial business to the prevalence of *advocationes*. More likely is the absence of praetors. But perhaps this is too obvious. Cicero's point is that what little legal business is attempted can easily be scotched by an application for adjournment so that lawyers have nothing to do even in these cases.

15 In the trial scene at the end of Seneca's *Apocolocyntosis*, 14, the deceased emperor Claudius is summoned under the *lex Cornelia de sicariis* and is asked whether anyone will defend him. After a pause P. Petronius comes forward and asks for an *advocatio*: *advocationem postulat*. The request is refused out of hand: *non datur*. Although this source can hardly be relied upon accurately to portray contemporary legal procedure the basic outline must have been recognisable for the satire to have force. Particularly striking is the fact that context supposes that the advocate here has had no previous opportunity to confer with his client, a situation in which an application for an *advocatio* seems ready made. During discussion following the presentation of an earlier version of this paper at the *SIHDA* held in Exeter in September 1999 I recall our honorand coming to my rescue in correctly pronouncing the title in Greek of this Seneca farce of which an English translation is *The Pumpkinification of Claudius*. For this and his support and friendship I am profoundly grateful.

The fact that *interreges* hold office for only five days and that during their regime *advocationes* can be applied for so as to bar all proceedings indefinitely permits us to draw some further information. The table below sets out some possibilities beginning with the case in which an *advocatio* lasts for one day – in other words postpones the case from the day of application until the morrow. This, it can be seen, will not fit Cicero's meaning. Cicero says that two *advocationes* need to be applied for from each *interrex*. But if each *advocatio* only lasts one day this is insufficient to postpone the suit because the first *interrex* is still in office when the second *advocatio* expires on Day 3 and the case should commence or continue then. A similar difficulty seems to beset an *advocatio* of two days' duration since the first *interrex* will still be in office and able to hear the case on Day 5.

Length of duration of *advocatio*

		One day	Two days	Three days
Interrex A	Day 1	*Advocatio* I to Day 2	*Advocatio* I to Day 3	*Advocatio* I to Day 4
	Day 2	*Advocatio* II to Day 3		
	Day 3	Proceedings begin?	*Advocatio* II to Day 5	
	Day 4			*Advocatio* II to Day 7
	Day 5		Proceedings begin?	Office expires
Interrex B	Day 1/6			*Advocatio* I to Day 4/9
	Day 2/7			*[Advocatio I to Day 10]*
	Day 3/8			
	Day 4/9			*Advocatio* II to Day 7/12
	Day 5/10			*[Advocatio II to Day 13]*
Interrex C	Day 1/11			*Advocatio* I to Day 4
	Day 2/12			
	Day 3/13			*[Advocatio to Day 16]*
	Day 4/14			*Advocatio* II to Day 7
	Day 5/15			
Interrex D	Day 1/16			*Advocatio* to Day 4

Only an *advocatio* of three days (four inclusive days) would seem to fit Cicero's meaning. *Interrex* A gives an *advocatio* on Day 1 postponing the case until Day 4 and on Day 4 grants a second *advocatio* which expires notionally on Day 7.[16]

16 Note that *interrex* A is not necessarily the first *interrex* but rather the first before whom proceedings can be brought.

We may assume that on the first *interrex*'s office expiring so does the effect of his grant so that the case can come on again on Day 6, the first day of *interrex* B's term of office. *Interrex* B likewise grants *advocationes* to Days 4 and 7 and so the cycle continues, with the case never making progress.[17]

One may note that an *advocatio* lasting four days (five inclusive days) is also possible on this construction. *Interrex* A's first grant lasts until day 5 when it is renewed for the last day of his office. No longer or shorter interval than one of three or four fixed days will fit Cicero's jest. If an *advocatio* of any length up to four days could be applied for then Cicero would have needed to have specified for what period the *advocationes* in his example were to last. There was seemingly in addition a rule that a magistrate could only grant two *advocationes*. Although not express in Cicero's jest this is surely the nub of it. If jurisdictional magistrates could normally grant a whole succession of *advocationes* for four inclusive days then it would be no novelty that during a period of *interreges* it was possible to postpone a hearing indefinitely. It is precisely the point of the jest that a restriction to two *advocationes* is, in the unusual circumstances of a succession of short magistracies, able to produce this professionally undesirable result.

Some support for this understanding of *advocatio* can be derived from Seneca the elder, in the preface to his third book of *Controversiae* (*Controv*. 3, *praef*. 17). He tells a story of the orator Cassius Severus as it were in his own words. Cassius had crossed swords with a more senior orator Cestius when the latter boasted about his speech against Milo, whom Cicero had defended when he was indicted for killing Clodius in March 53. Severus first tried humour to puncture Cestius' self-opinion and then resolved to expose him in the courts. Part of the point of the story is to illustrate the claim that those who are accustomed to the safe surroundings of the declamation would not do as well in the rough and tumble of the law courts (3,13-14).

> *Deinde libuit Ciceroni de Cestio in foro satis facere. subinde nanctus eum in ius ad praetorem voco et, cum quantum volebam iocorum conviciorumque effudissem, postulavi ut praetor nomen eius reciperet lege inscripti maleficii. tanta illius perturbatio fuit ut advocationem peteret. deinde ad alterum praetorem eduxi et ingrati postulavi. iam apud praetorem urbanum curatorem ei petebam; intervenientibus*

17 Were it the case that an *interrex's* grant of a postponement remained in force so that the case came on or continued not on *interrex* B's first but on his second day (Day 7) then it can be seen that *interrex* C will only have to grant a single *advocatio* (from Day 13 to Day 16) to maintain the sequence. Since this construction is contrary to normal principle and

> *amicis, qui ad hoc spectaculum concurrerant, et rogantibus dixi molestum me amplius non futurum si iurasset disertiorem esse Ciceronem quam se. nec hoc ut faceret vel ioco vel serio effici potuit.*

Cestius is brought to defend himself for real – but it does not follow that the proceedings are to be taken entirely seriously, despite the express contrast *vel ioco vel serio.* There is, for a start, the grave difficulty of having to suppose that criminal proceedings could be begun *lege inscripti maleficii*, and suspicion is aroused by the fact that this is a standard basis for *controversiae*.[18] However, there is sufficient circumstantial detail in the passage for us to place some weight even upon its inessentials.

Cassius Severus begins three separate proceedings. First he summons Cestius *ad praetorem* on the law against unspecified offences. This is a criminal matter before one of the standing courts established under a praetor's chairmanship. This is met by an application for an *advocatio*, which clearly means "an adjournment". Next he sues him for ingratitude *ad alterum praetorem,* "before the other praetor" which may be a reference to the *praetor peregrinus*, the second praetor. Thirdly he summons him before the *praetor urbanus* to have a *curator furiosi* appointed for him.

One clear conclusion to be drawn from this passage is that an *advocatio* operates *in iure* and this confirms our earlier deductions from the Ulpian text. Perhaps we can go further and assume from the passage that the proceedings against Cestius occurred over a short space of time on successive days. If so then perhaps we can conclude that the second and third proceedings were brought within the period during which the first proceeding was held over by the adjournment: in other words that the first proceeding beginning on Day 1 was adjourned to Day 4 and that the two intervening days were used to begin the other proceedings. We saw earlier that the evidence from Cicero is compatible with an *advocatio* lasting either three or four days and this then is weak authority for three days being the more likely period.

Conclusion on *advocatio*

An *advocatio* was a grant of an adjournment, ostensibly for consultation with a lawyer or other representative. It was granted by a magistrate in respect of legal proceedings, whether criminal or civil, commenced before himself and applied to the proceedings *in iure*. It was seemingly granted automatically

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also undermines the simplicity of Cicero's jest it should be rejected.

18 See, for another example, Seneca, *Controv*. 5,1.

without argument.[19] It lasted for three (or possibly four) days causing the parties to re-appear before the same magistrate on the fourth (or fifth) day after the adjournment was granted. Applications for a maximum of two such *advocationes* could be made by the one party during proceedings *in iure*. It seems likely, but we have no evidence, that both sides would be allowed two such adjournments.

Comparison with *intertium* and a hypothesis

An *intertium* is an interruption of a lawsuit *in iure*, and probably also an interval between the *in iure* stage and the commencement *apud iudicem*. We do not know whether *apud iudicem* it could be granted by the judge or whether in all cases it could only be granted by the magistrate: There may well have been differences between Roman and provincial law. The *intertium* lasted in principle for two days causing the parties to appear before the same magistrate on the third day after the grant. We do not know if there could be more than one *intertium* in the course of a single suit but it seems very likely. We do not know whether, if there could be more than one, either side was entitled to ask for one.

In view of the similarity between *advocatio* and *intertium* it may be as well to reconsider the possibility that an *advocatio* might last for only two days (three inclusive days – in effect an *intertium*). As we have seen this construction is seemingly excluded by Cicero's claiming that *binae advocationes* will be sufficient to postpone business before an *interrex* who holds office for five days. But we might hazard a guess that on the first day of appointment the *interrex* would not sit for practical or religious reasons.

Alternatively we might allow a day within the five for the arranging of the elections which it was the *interrex*'s purpose to hold. In this event only four days would be available *in iure* and two postponements to the day-after-next would suffice to keep the suit from coming to a conclusion. In this case an ad*vocatio* may be another form of *intertium*.[20]

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19 Though there is weak evidence, n. 15 above, that an application might be refused: *non datur*.

20 If such a connexion can be made then Macrobius *Sat*. 1,16.13-14, defining *comperendini* as days on which a magistrate may not conduct a lawsuit but may issue a notice of postponement, may be relevant. The *interrex* may not in principle let alone in practice be in a position to conduct proceedings *in iure* but he is able to grant postponements so that the suit may be kept alive. See Metzger, *Litigation in Roman Law*, 118-122. Earlier versions of this paper were presented at the University of Edinburgh Roman Law Group and at the session of the *SIHDA* at Exeter in 1999 and I am grateful to participants for discussion.