

Editio (actionis; instrumentorum; rationum)

Summary. A plaintiff who wished to bring a civil lawsuit under the formulary procedure was required by edict to give the defendant notice of the action he intended to bring and the evidence he intended to present. A related edict allowed either a plaintiff or defendant to compel the production of a banker's accounts. ¶1

The edict of the Urban Praetor required the plaintiff in civil proceedings to inform his opponent of the action he intended to bring (*editio actionis*) and the evidence he intended to present (*editio instrumentorum*).¹ The rule was a complement to the selection of a formula, which proceeded by consent, and the same or a similar rule probably governed in formulary proceedings elsewhere in Italy and in the provinces.² Notice was largely informal³ and performed without the participation of the magistrate. ¶2

Opinion once favoured the view that the intended action was announced twice: first, an extrajudicial ('vorbereitende') *editio actionis*, and second, a formal ('endgültige') *edere iudicium*, the latter serving as a species of contractual offer for *litis contestatio*.⁴ There are reasons to doubt that *editio actionis* was ever divided in this fashion.⁵ Modern opinion favours the view that, in the *negotium*⁶ that took place between the parties before *litis contestatio*, notice (of both the action and the evidence) could become a protracted event, allowing the parties substantial latitude as they gradually shaped their claims and defences, up to the moment of *litis* ¶3

¹ Ulp. 4 ed. D. 2.13.1,4,6,8,13; Paul. 3 ed. D. 2.13.2,5,7,9; Paul. 2 sent. D. 22.4.1 (= Paul. sent. 2.17.13); Gai. 1 ed. prov. D. 2.13.10; Ulp. 70 ed. D. 5.1.21; Tab. cer. Pomp. Camodeca 2, 3; Tab. cer. Herculaneum. 16-20, 23, 24. The principal work is Bürge (1995). See also Lenel (1927) 59-34; Pugliese (1963) 366-369; Simon (1969) 39-62, 271-282; Buti (1984) 191-220; Gómez-Iglesias Casal (1984) 26-28; Gröschler (2002) 60-62; Babusiaux (2006) 7-10, 38-44, 117-124; Babusiaux (2009) 23-41. A suggestion of continued vitality of the edict on *editio actionis* in the *cognitio* procedure: Sept. Sev./Antonin. C. 2.1.3, 3.9.1 (202); Buti (1984) 216 n.95; Bürge (1995) 22-23. However, the diminishing typology of classical actions in postclassical procedure left the classical *editio actionis* unrecognisable: Simon (1969) 39-62; Kaser/Hackl (1996) 485 n.3, 577-578. Similarly, the classical *editio instrumentorum*, attested in *cognitio* proceedings in the third century, thereafter existed only as general prescriptions: Simon (1969) 271-281.

² The evidence is incomplete. The relevant portion of Gaius' commentary on the provincial edict (Gai. 1 ed. prov. D. 2.13.10) addresses only *editio* by the *argentarius* and, in any event, the existence of a single 'provincial edict' and the reach of the edicts treated by Gaius are contested. Bürge cautiously identifies two *vadimonia* from Puteoli, Tab. cer. Pomp. Camodeca 2, 3 (both AD 48), as notable for reciting the anticipated actions: Bürge (1995) 4-5. He also suggests that the various *testationes* in the Petronia Iusta archive from Herculaneum (undated, but from the 70s AD) were perhaps offered as an *editio instrumentorum*: Tab. cer. Herculaneum. 16-20, 23, 24; Bürge (1995) 29-31. A local magistrate in Italy or elsewhere often lacked jurisdiction to impose a sanction allowable at Rome, particularly a sanction that required *causae cognitio*: Ulp. 1 ed. D. 39.2.4.4; Paul. 1 ed. D. 50.1.26 pr., D. 50.17.105. However, our knowledge of the sanctions in the present context is incomplete: see ¶5.

³ On certain formal rules for the *editio* of a stipulation: Ulp. 4 ed. D. 2.13.1.2,4; Babusiaux (2006) 38-44. For possible epigraphic evidence of stipulations prepared to fulfill the injunction *totam ed[ere]*: Tab. cer. Pomp. Camodeca 22, 27; AnnEpigr 2000, 344; Babusiaux (2009) 31-37.

⁴ See Lenel (1894) 377-391; Wlassak (1924) 72-104; Cannata (1982) 1:143; Buti (1984) 193-194; Fernández Barreiro (1999) 37-38; cf. Jahr (1960) 165-206.

⁵ See Bürge (1995) 1-4.

⁶ Cic. Quinct. 60 ('*Qui fraudationis causa latitarit'. Non est is Quinctius, nisi si latitant, qui ad negotium suum relicto procuratore proficiscuntur*); Hor. sat. 2.6.32-34 (*at simul atras ventum est Esquillas, aliena negotia centum per caput et circa saliunt latus*); Gai. inst. 4.184 (*cum autem in ius vocatus fuerit adversarius neque eo die finiri potuerit negotium*).

contestatio.⁷ Modern opinion has also silently dispatched the older, incompatible view that *editio actionis* was the first event in any civil lawsuit, preceding even *in ius vocare*.⁸

The main purposes of *editio actionis* were to avoid litigation and, barring that, to prepare the defendant.⁹ No single form of *editio actionis* was prescribed: it was enough for the plaintiff to make the intended action known to the defendant by speaking, writing, or indicating the relevant part of the edict.¹⁰ The *instrumenta* to be disclosed were not limited to documents, but included all evidence needed for trial, including witnesses.¹¹ Whether a defendant — with or without an *exceptio* in contemplation — had a corresponding duty to perform *editio* is unknown: an affirmative answer requires either bold inferences from general statements, or a very narrow reading of the central texts of Digest 2.13.1.¹²

The sanction for failing to give either form of notice is imperfectly known and must be surmised; only traces remain in the edictal commentaries. The principal text states that persons who failed to perform *editio (actionis? instrumentorum?)*, but were under certain disabilities (age, rusticity, sex), were aided in some fashion, suggesting that others were held to account.¹³ A penal action of the kind faced by the non-producing *argentarius*¹⁴ is difficult to conceive in this context, and modern opinion favours instead the view that one who failed to perform, or did so in an incomplete fashion, if unaided by the praetor, faced *denegatio actionis* and its preclusive effects.¹⁵

Of an entirely different character is the Urban Praetor's edict on the production of accounts (*rationes*). A party in litigation, presently or formerly the client of a banker (*argentarius*) and with an interest in the production of that banker's accounts, might ask the magistrate to order production.¹⁶ The banker who intentionally failed to produce the accounts faced a penal *actio in factum* for the party's *interesse* in the non-disclosure.¹⁷

⁷ See Cic. part. 99; Cic. Quinct. 22; Cic. Caec. 8; Bürge (1995) 4-17; Kaser/Hackl (1996) 220. The sequence: summons — negotiation — *litis contestatio* is perhaps reflected in Gai. 1 l. XII tab. D. 2.4.22.1: *Qui in ius vocatus est, duobus casibus dimittendus est: si quis eius personam defendet, et si, dum in ius venit, de re transactum fuerit.*

⁸ Lenel (1894) 385-388; Lenel (1927) 31. This view is refuted by Lemosse (1975) 47-49, and incompatible with the now dominant thesis put forward by Bürge. For the hypothesis that protracted *negotium* rendered the *in ius vocare* less important to process: Metzger (2016) 254.

⁹ Ulp. 4 ed. D. 2.13.1 pr.

¹⁰ Ulp. 4 ed. 2.13.1.1: *Edere est etiam copiam describendi facere: vel in libello complecti et dare: vel dictare. Eum quoque edere Labeo ait, qui producat adversarium suum ad album et demonstret quod dictaturus est vel id dicendo, quo uti velit.*

¹¹ Paul. 2 sent. D. 22.4.1 (= Paul. sent. 2.17.13a); Bürge (1995) 26f. For the restrictions on the production of stipulations, see note 3.

¹² Ulp. 4 ed. D. 44.1.1 (*de edendo?*): *agere etiam is videtur qui exceptione utitur, nam reus in exceptione actor est.* Cels. 1 dig. D. 22.3.9 (on burden of proof): *qui excipit probare debeat quod excipitur.* Further texts in Bürge (1995) 31-32; cf. Babusiaux (2006) 119-121.

¹³ Ulp. 4 ed. D. 2.13.1.5.

¹⁴ See ¶6.

¹⁵ Pugliese (1963) 366-369; Bürge (1995) 23-24, 35-37; Babusiaux (2009) 38-39 (*stipulatio* not fully presented). For the proposition that evidence at trial was usually limited to evidence presented *in iure*: Ulp. 4 ed. D. 2.13.1.3; Bürge (1995) 35-37.

¹⁶ Ulp. 4 ed. D. 2.13.4 pr.; D.2.13.6.5; Paul 3 ed. D. 2.13.9.3; Lenel (1927) 62-64; Andreau (1987) 617-619; Bürge (1987) 509-519.

¹⁷ Ulp. 4 ed. D. 2.13.6.4; D. 2.13.8.1; Paul. 3 ed. D. 2.13.9 pr.; Gai. 1 ed. prov. D. 2.13.10.3; Bürge (1995) 36-40; Gröschler (2002) 60-62. Formula: Mantovani (1999) no. 78.

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