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# Obligations in Classical Procedure

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Abstract—The civil law gave the praetor relatively few rules of procedure with which to manage a tribunal. Accordingly many rules of procedure were the product of the praetor’s own active lawmaking. His lawmaking frequently took the form of actions and stipulations, which is to say, obligations. This essay describes a selection of law reforms where this was the case. The essay concludes with the suggestion that the praetor turned to more effective methods of enforcement, not because the older methods were poor, but because parties were more frequently turning to litigation for the adjudication of claims, and less frequently for simple arbitration.

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Roman civil procedure developed and evolved like any other body of law, with perhaps one unique difference: the pressures for reform regularly took place under the very gaze of the praetor. He was witness to the wasted time, the over-eager plaintiffs, the reluctant defendants, and the shameless airing of private affairs. He was uniquely placed to see, understand, and respond to problems. His responses took the form of various tools or “devices,” such as stipulations, actions, defenses, and oaths. With such devices he could enforce or encourage appropriate behavior towards his tribunal.

This essay discusses the use of obligations as a device to reform civil procedure. The thesis is a very simple one. First, the civil law equipped the praetor with relatively few rules of procedure. He made up the deficiency in the civil law by actively creating rules of procedure himself. Second, the praetor’s lawmaking frequently took the form of actions and stipulations, which is to say, obligations. Accordingly the discussion below offers a selection of examples in which the law of procedure was reformed with the aid of obligations. Given the scarcity of evidence on procedure, the examples offered are some of the few

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in which both the earlier state of the law, and the “remedial” obligation, are discernible to us. The discussion closes with a few comments on the usefulness of obligations as against other devices.

*Foreword on the law of procedure*

This exercise — isolating obligations within the law of procedure — rests on the mild anachronism that classical Roman law contained a “law of procedure.” In the modern day we speak of a law of procedure simply because it suits us to set apart rules that deal with litigation. We do so for the benefit of practitioners, or as an aid to law reform, or for developing principles.<sup>1</sup> None of these were priorities for the Romans.<sup>2</sup> We are also more comfortable, than the classics at least, with the notion of abstract rights that exist separately from the machinery of justice;<sup>3</sup> wherever the two are still engaged, it is harder to find a law of procedure.

Yet even without a law of procedure, the praetor knew perfectly well that tribunals needed to be managed, that litigants misbehaved, and that rules and devices could help to avoid disruption. This is why it makes sense to discuss how the praetor responded to procedural problems, notwithstanding the absence of a law of procedure. Admittedly, using modern categories tends to make discussions like the present one somewhat artificial. For example, the penal stipulations described by Gaius in *Institutes* 4.171 are treated below as procedural, because they were intended to discourage vexatious litigation. These stipulations are not so different in formulation from the (non-procedural) *actio depensi*, which gave an *actio in duplum* to a surety who was not reimbursed by the principal debtor within six months.<sup>4</sup> But there is no error of anachronism in calling the one procedural and the other non-procedural, unless we allow ourself to believe that the praetor, in carrying out his reforms, was prompted to do so by peculiarly modern motives or priorities.<sup>5</sup> It would be wrong, for

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<sup>1</sup> On the last of these, see Kaser 1996, 8-11; Seidl 1971, 162-67.

<sup>2</sup> The Romans themselves did not cultivate a law of procedure. Book 4 of Gaius’ *Institutes*, though lucid and informative on procedure, is not a systematic work. It was not until the twelfth century that systematic study of procedure based on Roman law began. Van Caenegem 1973, 11, 16-17.

<sup>3</sup> See Metzger 1998, 214-17, and more thoughtfully, Donahue 2001, 1:506-35; Jolowicz 1957, 66-81.

<sup>4</sup> G.3.127; 4.9; *Pauli Sententiae* 1.19.1.

<sup>5</sup> See Hoetink 1955, 10. See also note 41 below and accompanying text.

example, to assume that the praetor reformed the law in order to make it more systematic, or to champion some principle of modern procedural law. But there is none of this sort of anachronism in this essay. To the contrary, this essay suggests that the praetor reformed the law in response to the changing character of Roman litigation.

### *Summons*

From at least the time of the Twelve Tables, and through the period of the classical law, a plaintiff brought his opponent to the praetor by *in ius vocatio*. Generally speaking, it served as the commencement of the lawsuit, though in practice a defendant might first learn of the suit through *editio actionis*,<sup>6</sup> and stubborn defendants might require more than one *vocatio*.<sup>7</sup> The civil law machinery was very rudimentary.<sup>8</sup> The summons itself was a purely private affair; a person who had a grievance against another person was responsible for bringing that person to the praetor. Force could be used, but there are doubts whether any amount of force could ensure the defendant's presence in every case.<sup>9</sup> The law required the defendant either to come immediately, or to offer a so-called *vindex* in his place. If he offered a *vindex*, then the *vindex* was responsible for bringing him before the magistrate at some time in the future.<sup>10</sup>

The main shortcoming in the summons procedure is the lack of any means, in the last resort, for compelling a defendant to come *in ius*. Loosely speaking, a defendant's participation at this stage was voluntary.<sup>11</sup> Hence the praetor stepped in to innovate,

<sup>6</sup> See Kaser 1996, 220.

<sup>7</sup> See Horace, *Satire* 1.9; Cic. *Quinct.* 61. The second is a somewhat more involved example, where the plaintiff has changed his strategy after the lawsuit had been alive for some time; he summons the defendant's procurator *in ius* in order to lodge a different claim. See Metzger 2005, 36-43.

<sup>8</sup> XII Tab. 1.1-4. The full sources for modern reconstructions of these provisions are given in Crawford 1996, 2:584-90.

<sup>9</sup> See the extended discussion in Kelly 1966, 6-12.

<sup>10</sup> This, at least, is believed to be the duty of the *vindex*. See Kaser 1996, 66, 224, and the literature cited in Domingo 1993, 56 n.140. The difficult text is D.2.4.22.1 (Gaius 1 *leg. duo. tab.*), which suggests a wider role for the *vindex*. On the other hand, the sources make it clear that certain defendants were obliged to put forward a sufficiently wealthy *vindex*. See XII Tab. 1.4 and the authorities cited in Crawford 1996, 2:588-89; D.2.6.1 (Paul 1 *ed.*) (interpolated).

<sup>11</sup> In the classical procedure, there was a threat of *missio* and bankruptcy against any defendant who hid himself away or who was

and did so with the help of obligations. He created an *actio in factum*, a so-called action on the facts, which he offered to grant against a defendant who neither came when summoned, nor gave a *vindex* to vouch for his future appearance. If the action were successful, the defendant would pay the plaintiff under some unknown formula. Our source is Gaius:

Gaius, *Institutes* 4.46. *Ceterae quoque formulae quae sub titulo “de in ius vocando” propositae sunt, in factum conceptae sunt, velut adversus eum qui in ius vocatus neque venerit neque vindicem dederit.*

The other *formulae* published under the title “de in ius vocando” are also framed on the facts, as for instance the formula granted against one who, summoned *in ius*, neither comes nor gives a *vindex*.

The action achieved two goals. The first is the rather obvious, procedural goal of encouraging appropriate behavior towards the tribunal. The second is remedial: the action created a debt between the plaintiff and the defendant. This was an acknowledgment that, if the defendant did not come when summoned, the plaintiff was the one who directly suffered. In this respect it was superior to a remedy that would punish the recalcitrant party without recognizing the plaintiff’s loss in the matter.<sup>12</sup>

This remedial goal is worth remarking, particularly because this action has been criticized as ineffective, requiring as it does a second *in ius vocatio* with no more guarantee of success than the

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adjudged “absent and undefended.” See D.42.4.7.1 (Ulpian 59 *ed.*); G.3.78; Lenel 1927, tit. 38. Kaser is confident on the point that this edict (or edicts) applied to a defendant resisting summons. See Kaser 1996, 222; cf. Kelly 1966, 10–11. This interpretation rests very substantially on a series of events recounted in Cicero, *pro Quintio*, where Cicero’s client has himself had his goods seized and where, according to a widely held view, the “absence” took place before any proceedings had been initiated. I have argued, to the contrary, that *missio* there took place after a compulsory order to reappear had been ignored by Cicero’s client or his client’s erstwhile procurator. Metzger 2005, 30–38, 163–66. With this essential piece of evidence removed, there is a serious question whether these remedies were available against defendants who resisted summons. On the powers of municipal magistrates to exact a fine for failing to appear when summoned, see below note 12.

<sup>12</sup> See D.2.5.2.1 (Paul 1 *ed.*): *Si quis in ius vocatus non ierit, ex causa a competenti iudice multa pro iurisdictione iudicis damnabitur: rusticitati enim hominis parcendum erit: item si nihil intersit actoris eo tempore in ius adversarium venisse, remittit praetor poenam, puta quia feriatius dies fuit.* Ignoring interpolations, the text describes the powers of municipal magistrates to fine certain *vocati*, at least where real harm is done by their delays.

first.<sup>13</sup> Yet there is a significant advantage in creating a debt between plaintiff and defendant in circumstances like these. Some defendants, we suppose, are motivated by a specific desire to “run out the clock” or otherwise gain a permanent victory by delaying an action until it can no longer be brought. For example, there were advantages to a would-be usucaptor in delaying an action; some delictual actions did not survive the death of the wrongdoer; and rules on limitations of actions might rob the plaintiff of any opportunity to sue.<sup>14</sup> Hence to create a debt between plaintiff and defendant may have given the plaintiff a recovery that was not otherwise possible. It would serve (roughly speaking) as a kind of restitutionary remedy.

The broader point is that the praetor innovated in order to make up for the shortcomings of the civil law in getting defendants to court. His innovation took the form of a threat to create a debt between the plaintiff and the defendant. He hoped to persuade the defendant to behave in the proper way.

#### *Postponement*

In early Roman procedure, under the so-called *legis actio* procedure, it was sometimes necessary to postpone the proceedings before the praetor. A plaintiff would bring his defendant *in iure*, but they did not necessarily finish all their business on that day. Shortness of time was sometimes the cause; postponement was also an intrinsic feature of certain forms of action which observed periods of delay. In either event, the postponement created a problem: a defendant might be reluctant to return. To give some degree of security to the plaintiff, the defendant was sometimes required to provide a surety, called a *vas*, for his return. The sources are spotty, but it seems that the procedure operated as follows: the defendant put forward a person who would promise to produce the defendant at the necessary time. If that person, the *vas*, failed to produce the defendant, the plaintiff could proceed against the *vas*, and the *vas* could absolve himself by paying a sum.<sup>15</sup>

Varro, *de Lingua Latina* 6.74. *Vas appellatus, qui pro altero vadimonium promittebat. Consuetudo erit, cum reus parum esset idoneus inceptis rebus, ut pro se alium daret.*

The so-called *vas* was one who promised a bond for another person. It was

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<sup>13</sup> See the discussion in Buti 1984, 296–98.

<sup>14</sup> See the authorities cited in Metzger 2005, 117–18.

<sup>15</sup> See generally Kaser 1996, 68–69.

the custom for a defendant to give another for himself when he was not sufficiently capable of managing his affairs.

There was also the person of the *subvas*; Aulus Gellius describes how, in his own time, both *vades* and *subvades* were unimportant as subjects of study. The observations are given through a supposed friend, one *ius civile callens*:

Aulus Gellius, *Noctes Atticae* 16.10.8. Sed enim cum . . . “vades” et “subvades” . . . evanuerint omnisque illa Duodecim Tabularum antiquitas, nisi in legis actionibus centumviralium causarum lege Aebutia lata consopita sit, studium scientiamque ego praestare debeo iuris et legum vocumque earum quibus utimur.

But frankly since “vades” and “subvades” have disappeared and all those fossils of the Twelve Tables have been laid to rest (except for the *legis actiones* which the *lex Aebutia* preserved for centumviral cases), I ought to apply my attention and knowledge to the law and statutes (and their terms) still in use.

The role of the *subvas* is unknown. Livy’s description of multiple *vades*, each bound to a fixed sum,<sup>16</sup> suggests the possibility that some *vades* were reliable sureties only up to some (assessed?) ceiling; these may be the *subvades* Gellius speaks of. Therefore some defendants were perhaps obliged to put forward several *subvades* in order to cover their liability fully.<sup>17</sup>

It is difficult to criticize this institution confidently as we know so little about it, though one particular shortcoming is clear enough: security for reappearance required the participation of a third party, and this was undoubtedly awkward at times. The defendant had to find one or more individuals under pressures of time. Those individuals whom he found might be challenged as persons without sufficient property. It could be time consuming to discover the true state of affairs and, if necessary, locate another individual.

The reform of the law on postponements was effected by both statute (as Gellius notes) and praetorian intervention. At some unknown time, the praetor adopted the practice of ordering litigants to perform stipulations-and-promises with one another. These were the so-called praetorian stipulations. They were a diverse group of transactions, including *vadimonium* (a stipulation to appear), *cautio damni infecti* (a stipulation against impending damage), *operis novi nuntiatio* (a stipulation for

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<sup>16</sup> Livy 3.13.8: *Vades dari placuit; unum vadem tribus milibus aëris obligarunt.*

<sup>17</sup> This is of course guesswork. Other suggestion are offered in Kaser (note 1), 68 n.39.

assurance from a neighbor who contemplates a threatening work), and others. The meaning of “*stipulatio praetoria*” and its classifications are disputed, for what the matter is worth.<sup>18</sup> So far as postponements are concerned, the introduction of praetorian stipulations, and the disappearance of *vades* with the *lex Aebutia* (late 2nd century BC), were enormous improvements: it was no longer necessary for a defendant to find suitable *vades*. He could serve as his own surety by using *vadimonium*.<sup>19</sup>

The substance (though not the words) of the praetorian edict on *vadimonium* is preserved in Gaius.<sup>20</sup> At the center of every *vadimonium* was a simple stipulation-and-promise to reappear (e.g., *Spondesne [in diem loco hora] te sisti? Spondeo*), but the edict specified various cases in which the transaction could be enhanced to give additional assurance to the plaintiff. Most of the alternatives offered in the edict did not require a surety, and indeed the examples that survive to us in documents have no surety.<sup>21</sup> The typical stipulation was “double-barreled”: the plaintiff demanded, first, an unconditional promise to appear, and second, a conditional promise to pay a sum of money to him in the event the promisor (the defendant or his representative<sup>22</sup>) did not appear as promised. The sting was in the debt, but only if the promisor failed to appear.

The advantages of the new procedure over the use of *vades* are quite clear. No third person had to be found; the person from whom the plaintiff needed assurances was already present. Also, there was very little to argue about on the day of postponement: the new procedure put off most opportunities for disagreement until the defendant’s absence actually put those disagreements in

<sup>18</sup> See especially Giomaro 1983, 4:413-440. Two groups of texts classify the stipulations in different ways, D.45.1.5 pr. (Pomponius 26 *Sab.*) and J.3.18 pr. on the one hand, and D.46.5.1 (Ulpian 70 *ed.*) on the other.

<sup>19</sup> D.46.5.1 pr., 3 (Ulpian 70 *ed.*): *Praetoriarum stipulationum tres videntur esse species, iudiciales cautionales communes. . . . 3. Communes sunt stipulationes quae fiunt iudicio sistendi [sc. vadimonii] causa.*

<sup>20</sup> G.4.184–187. The contents of the edict are considered in detail in Metzger 2005, 68–94.

<sup>21</sup> The documents are listed as numbers 9 to 27 and 33 to 37 in Metzger 2005, appendix.

<sup>22</sup> The promisor might be the defendant himself, his *procurator*, or his *cognitor*. Cicero’s speech for Publius Quinctius gives an example of a promise by a *procurator*. See Cic. *Quinct.* 57 with the discussion in Metzger 2005, 33–34. A settlement agreement from Puteoli, dated AD 48, gives an example of a promise by a *cognitor*: TPSulp. 27. One suspects that the use of representatives, allowed in the new formulary procedure, was a strong inducement to abandon the use of *vades*.



issue.<sup>23</sup> Last, the breach of a duty to appear — formerly resolved in a roundabout way through the *vades* — was reduced to a simple action for debt. There is a strong resemblance to the *actio in factum* described above, brought against a defendant who failed to come or give a *vindex*. Here again, the praetor threatened to create a debt between the parties in the event one party did not obey, and hoped that the threat alone would persuade the defendant to behave in the proper way.

### *Vexatious litigation*

The third example concerns claims for *certa pecunia* and, in particular, vexatious litigation over *certa pecunia*.<sup>24</sup> There are times when a defendant clearly has no warrant denying that he owes the debt, and similarly there are times when a plaintiff clearly has no warrant demanding the debt. For such cases there were two early and not wholly effective remedies. One was found in the *legis actio per condictionem*, from the third century BC.<sup>25</sup> This form of action, established by two statutes, for *certa pecunia* and *certa res* respectively,<sup>26</sup> created a thirty-day period of reflection between the defendant's denial of the debt and the trial. A second remedy, perhaps introduced at the same time, gave the parties the opportunity to avoid litigation by using oaths. There are a few references in Plautus that serve to show how these oaths were used near to the time of their introduction.<sup>27</sup> We are better informed about the uses of these oaths in the late classical law, and there is some danger in projecting the rules backwards, but the following appears to be the usual course of events in Plautus' time.<sup>28</sup>

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<sup>23</sup> One opportunity for disagreement remained: the amount of the sum to be paid as a penalty if the promisor does not return. Ulpian describes how the praetor deals with the charge of *calumniā* in putting the stipulation. D.46.5.1.9 (Ulpian 77 ed.): *Quod si sit aliqua controversia, ut puta si dicatur per calumniā desiderari, ut stipulatio interponatur, ipse praetor debet super ea re summatim cognoscere et cautum iubere aut denegare*. In other words, the reforms brought by praetorian stipulations streamlined the process of postponements, but the problem of the plaintiff's "exposure" remained.

<sup>24</sup> For the discussion immediately below, see Liebs 1986, 164–65.

<sup>25</sup> G.4.17b.

<sup>26</sup> The *leges Silia* and *Calpurnia*: G.4.19.

<sup>27</sup> See note 29 below.

<sup>28</sup> Digest 12.2 treats several categories of oath, most pertinently the voluntary *iusiurandum*, treated in Ulpian 22 and Paul 18, *ad edictum*, and the compulsory *iusiurandum*, treated in Ulpian 26 and Paul 28, *ad edictum*. The compulsory oath, permitted in a restricted number of

The defendant is in court before the praetor. If the defendant denies that he owes the debt to the plaintiff, the plaintiff may elect to ask the defendant whether he would deny the debt on oath. If the defendant denies the debt on oath, the debt is absolved. If the defendant declines to deny on oath, he is condemned. The defendant also had the further choice of asking the plaintiff to affirm the debt on oath. A plaintiff who affirms on oath would obtain a condemnation against the defendant. A plaintiff who declines to take the oath is nonsuited.

The oath procedure puts the matter of vexatious suits squarely into the hands of the parties, and in particular the plaintiff. A plaintiff could choose to end the litigation, one way or the other, by electing to put the defendant to an oath. If he trusted the defendant to act with propriety, he would give the defendant that choice. But if he misjudged the honesty of the defendant, he lost the action. The figure of the defendant who abjures dishonestly was familiar to Plautus' audience.<sup>29</sup>

Plautus, *Rudens* 13-20. [Arcturus:] Qui falsas litis falsis testimoniis / petunt quique in iure abiurant pecuniam, / eorum referimus nomina exscripta ad Iovem; / cotidie ille scit quis hic quaerat malum: / qui hic litem apisci postulant peiurio / mali, res falsas qui impetrant apud iudicem, / iterum ille eam rem iudicatam iudicat; / maiore multa multat quam litem auferunt.

Those who use false witnesses to bring false cases, those who swear away what they owe: their names are taken down and brought to Jupiter; He has a daily update on those who do evil here: when those here expect to win a case by perjury or get a trial on a false claim, he reopens the case; he exacts a penalty greater than the spoils of litigation.

The oath system, as this passage suggests, did not solve the problem of vexatious litigation in debt actions, doubtless because debtors had nothing to lose by denying the debt on oath, at least so far as liability was concerned. This was therefore an area ripe for innovation. At some unknown time, and the time is very much disputed,<sup>30</sup> the praetor innovated with the help of so-called penal stipulations. There are a generous number of sources for the practice, some recently discovered,<sup>31</sup> but Gaius gives a textbook

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actions including actions for *certa pecunia*, is the more probable successor to the early practice of oath-tendering attested in Plautus. For details of the compulsory oath, with literature, see Kaser 1996, 268–69.

<sup>29</sup> See also *Persa* 478; *Curculio* 496.

<sup>30</sup> See Liebs 1986, 165 n.9.

<sup>31</sup> The outstanding item of recent evidence is a document from Puteoli recording a formula seeking a debt and an additional one-third of the debt: TPSulp. 31. Two *vadimonia* from Puteoli, recently discovered,

description:

Gaius, *Institutes* 4.171. [Adversus infitiantes] ex quibusdam causis sponsorshipem facere permittitur, velut de pecunia certa credita et pecunia constituta, sed certae quidem creditae pecuniae tertiae partis, constitutae vero pecuniae partis dimidiae.

In certain cases an opponent is permitted to make a *sponsio* against those who deny liability, such as cases for *certa pecunia* and *pecunia constituta*, though in *certa pecunia* the *sponsio* is for one-third, while in *pecunia constituta* the *sponsio* is for one-half.

What Gaius describes are somewhat ruthless but effective devices for keeping meritless debt cases out of litigation.<sup>32</sup> A meritless defense in a suit for *certa pecunia* would be discouraged by the so-called *sponsio tertiae partis*. The praetor would allow the plaintiff to stipulate to the defendant in words something like the following:<sup>33</sup>

Spondesne si secundum me iudicatum erit, tertiam partem pecuniae quae petetur dare?

If judgment [in the debt action] is in my favor, do you promise to give me an additional one-third of what I am seeking?

There was also a companion stipulation, the *restipulatio tertiae partis*, with which the defendant made a corresponding challenge to the plaintiff.<sup>34</sup> A wise litigant would know better than to press or contest a claim vexatiously in a suit where a penal stipulation had been permitted.

This final example, on vexatious litigation, is similar to the two examples discussed above. The praetor lacked the means to force the litigants behave, and therefore created a procedural device that encouraged the behavior he desired. The device he chose was the threat to impose a debt on the misbehaving litigant.

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record promises to pay two sums, the first sum being one-third of the second: TPSulp. 1 bis and 7, both from AD 40. It is possible that the defendants in those lawsuit were reluctant to appear on earlier occasions, and the plaintiff has now secured a penalty, to be paid if the defendant again does not appear, and refuses also to pay the judgment debt. Other sources: *lex Col. Gen. Iul.* c. 21; *Cic. Q. Rosc.* 10, 14.

<sup>32</sup> Gaius speaks of suits both for *certa pecunia* and for *pecunia constituta*; the present discussion is concerned only with *certa pecunia*. Where the parties had agreed by stipulation to confirm an existing debt (*pecunia constituta*), to raise a meritless defense was a greater outrage and attracted a greater penalty.

<sup>33</sup> See Lenel 1927, 238; Mantovani 1999, 103.

<sup>34</sup> G.4.13, 4.180.

*The novelty of using obligations in procedure*

To us, obligations might seem to be an easy and obvious choice of device for a praetor seeking to encourage appropriate behaviour. But there is reason to think it was a more novel choice than it seems. In private affairs, obligations are created with certain expectations. One or both parties actively hopes the obligation will come into existence and, if the obligation is conditional, one or both parties actively hopes the condition will be satisfied. Procedural obligations of the kind described above carry very different expectations: the obligation is not actively sought, and the satisfaction of the condition is usually something to be avoided.

There is a rule of conditions that highlights this difference of expectations. If a condition fails as a result of the conduct of the party who would lose or be bound were the condition satisfied, the condition is treated as satisfied.<sup>35</sup> This is the so-called “fictitious satisfaction rule.” There is the well-known case of the seller who will sell his library to a certain buyer on the condition that the buyer secure from the local council a place to put the books. When the buyer fails to pursue the matter with the local council, Ulpian gives the opinion that the seller may sue “as if the condition were satisfied.”<sup>36</sup> This is an example from sale, but the rule operated in conditional stipulations as well;<sup>37</sup> apparently the *stricti iuris* nature of the contract was no hindrance. The point, however, is that the fictitious satisfaction rule could not possibly operate in any of the procedural obligations described above. No disapproval attaches to the frustration of a condition which, it was hoped, would not be satisfied in the first place.<sup>38</sup> Even in the case of penal stipulations for vexatious litigation, which very nearly fall within the letter of rule (“when through the act of the

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<sup>35</sup> D.35.1.24 (Julian 55 *dig.*); D.50.17.161 (Ulpian 77 *ed.*). See Daube 1960, 271-96; Thomas 1966, 116-27; Zimmermann 1996, 729-31.

<sup>36</sup> D.18.1.50 (Ulpian 11 *ed.*).

<sup>37</sup> See the passages cited in note 35. Daube argues that, so far as stipulations were concerned, the classical rule was confined to the case described by Julian and Ulpian: the promisor hinders the promisee from fulfilling the condition. Daube 1960, 274-76.

<sup>38</sup> Oddly, the principal passages for the rule, cited in note 35, are apparently part of a discussion of *vadimonium*. Daube argues that the fictitious satisfaction rule must have been brought in by way of contrast, since “helping a defendant to appear” could not possibly trigger the rule. Daube 1960, 280.

promissor the promisee does not comply with the condition”<sup>39</sup>), application of the rule is unthinkable.

These differences in character between the procedural obligations and their private equivalents suggest that the praetor’s decision to use obligations was a less obvious choice than it might seem to us. Whether their introduction shocked or surprised litigants we can only guess.<sup>40</sup>

### *Reforming civil procedure*

The praetor actively reformed the law of procedure with the aid of several devices: obligations (in the form of stipulations and actions), but other devices as well, for example oaths, popular actions, and defenses. To understand the role of obligations in procedure, it would be desirable to know why, in some instances, obligations were chosen as an instrument of reform in preference to other devices. We can avoid an overambitious answer, but still chip away at the question, by citing the features that made obligations attractive to the praetor. First, it is very simple, as a matter of formulation, to attach a condition to an obligation. If the praetor’s aim is to persuade a litigant to behave in a certain way, a conditional obligation gives him the behavior he desires, with the sting of the obligation being felt only if the litigant is foolish enough to satisfy the condition. Second, where the condition is satisfied, the remedy goes directly to the party who was injured by his opponent’s misbehavior, rather than to the public treasury.

Obligations were therefore used as a means of compulsion, but there is a risk here of oversimplifying the development of praetorian reforms. We could easily conclude that the early law did a poor job of compelling litigants to behave, and that the praetor rose to the occasion and found for himself the means to do so. But this conclusion has, at its root, a narrow and possibly anachronistic<sup>41</sup> view of the early law. It is a view that was

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<sup>39</sup> These are the words of both D.35.1.24 (Julian 55 *dig.*) and D.50.17.161 (Ulpian 77 *ed.*).

<sup>40</sup> Gaius in fact happens to mention the similarity between the wager created by penal stipulations in his own day, and the wager created by certain early forms of action: Gaius, *Inst.* 4.13. The praetor’s introduction of risks and wagers would, in any event, have shocked no one at all.

<sup>41</sup> Following Hoetink, I would call this view genuinely anachronistic, because it attributes modern motives or states-of-mind to the ancient actors. See note 5 above.

championed some years ago by John Kelly.<sup>42</sup> Very briefly, Kelly argued that state sanctions against reluctant litigants were noticeably weak from the time of the Twelve Tables through most of the classical law. Its weakness was especially evident in cases of summons and execution, where the outcome could depend substantially on the relative strengths of the contending parties. “[T]he average Roman lawsuit up to the mid-second century A.D. was one in which the plaintiff either commanded physical superiority over the defendant, or at least was a good match for him.”<sup>43</sup> If Kelly is right, then praetorian reforms in the law of procedure will reduce to a simple story: the praetor perceived the weakness of the law and actively sought out new means of compulsion, among them conditional obligations. Is this the right story?

Some years ago Geoffrey MacCormack criticized Kelly’s account for reasons that are especially relevant to this essay.<sup>44</sup> MacCormack argued that, in early Roman procedure, the praetor was less concerned with compelling obedience to rules, and more concerned with mediating and bringing about the settlement of disputes. This is not a thesis unique to MacCormack; his contribution is in showing how the system of dispute resolution evident in the Twelve Tables was peculiarly suited to the nature of early Roman society. At the time of the Twelve Tables, MacCormack says, a typical litigant would have had a whole series of ongoing connections and relationships with the person he was suing. The litigants might be connected by family or other kinship, and also be neighbors, and also be participants in various private and commercial transactions. So when a litigant presents himself to the praetor, the praetor’s immediate and most pressing worry is not “how to resolve the claims in accordance with the law.” It is instead, “how to avoid the disruption to the community which might be caused by these two parties falling out with one another.” MacCormack is led to this conclusion by comparing early Rome with certain modern African communities. These modern communities and their systems of dispute resolution, in his opinion, resemble the communities of early Rome and the system of dispute resolution one finds in the Twelve Tables.<sup>45</sup>

We can expand what MacCormack is saying. The central

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<sup>42</sup> Kelly 1966, ch. 1 (“The Underlying Sanctions of Roman Litigation”), especially 4-20.

<sup>43</sup> *Id.* at 20.

<sup>44</sup> MacCormack 1971, 221-55.

<sup>45</sup> *Id.* at 225-54.

mistake in Kelly's reading of the sources is his assumption that the praetor's first instinct, when presented with a dispute, was to parse the dispute into claims. From this, adjudication becomes important as a matter of course, leading Kelly to observe how the rules failed to funnel litigants efficiently through an adjudicative process. But in fact, to parse a dispute into claims is not a habit shared by all peoples at all times, and MacCormack is suggesting that in the early law the praetor, faced with a dispute, perceived instead a kind of "general falling out" on perhaps one or more indistinct matters. This is why his aim was to mediate and reconcile rather than compel one side to perform. If this was the true state of affairs in the early law, then what Kelly observed is true but not remarkable.

We know that, in time, the praetor was moved to innovate, and he equipped himself with better rules of procedure, rules that the civil law had not provided. In equipping himself with rules of procedure, he turned repeatedly to obligations. In contrast to what came before, these obligations did an excellent job in funneling litigants through an adjudicative process. Kelly would say that the praetor was waking up to the realities of litigation. We might read it instead as a sign that Roman procedure was adjusting itself to a new, more adjudicative role.

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