Edict *ne quis eum qui in ius vocabitur vi eximat*

Summary. The edict *ne quis eum qui in ius vocabitur vi eximat* punished a person who had hindered a *vocatus* from appearing *in iure*. The merits of the underlying lawsuit did not affect either the actionability of the *exemptio* or the calculation of the penalty. The successful claimant received from the *exemptor* a sum reflecting the amount sought in the underlying lawsuit. ¶1

An edict of the urban praetor offered the plaintiff a penal *actio in factum* against a person who had hindered (*eximere*) the *vocatus* from appearing *in iure*.[1] The edict recited two (alternative) grounds for liability: *Ne quis eum qui in ius vocabitur vi eximat neve faciat dolo malo quo magis eximeretur*.[2] The dominant view is that these two grounds distinguished a direct hindering, accomplished by force, from an indirect hindering, accomplished when one person induces another to hinder the *vocatus* by force.[3] The texts, however, are not unanimous that an actionable *exemptio* was always accompanied by force; commentary by Pomponius in Paul describes offending acts, notably *moram facere*, in which force is apparently absent.[4] Because this is a penal action, multiple offenders are individually liable, and payment does not release the *vocatus*.[5] ¶2

The character of the interrupted summons restricts the actionability of the *exemptio*. Thus juristic opinion would disregard an *exemptio* if the *vocatus* is one who may not be summoned without permission, or is summoned to a place he is not obliged to appear.[6] Juristic opinion would also disregard the *exemptio* of a slave, who may not be *vocatus* under the law.[7] The *exemptio* must, moreover, effectively hinder the appearance of the *vocatus*; if the summons is nevertheless successful, there is no action.[8] On the other hand, the merits of the underlying lawsuit are wholly ¶3

[1] Gai. inst. 4.46; Ulp. 5 ed. D. 2.7.1,3,5; Paul 4 ed. D. 2.7.2,4; Ulp. 35 ed. D. 2.7.6; Ner. 1 resp. D. 15.1.55; Gai. 1 ed. prov. D. 50.17.107; Inst. Iust. 4.6.12; Theophil. inst. Iust. 4.6.12b. Literature: Lenel (1904) 249 n.2; Lenel (1927) 73-74; Kaser (1935) 163-164, 191-192; Schmidlin (1963) 57-59; Fernández Barreiro (1972) 15-48; Raber (1972) 206-209; Tafaro (1980) 188-191; Buti (1984) 337-350; Gómez-Iglesias Casal (1984) 104-114; Gómez-Iglesias Casal (1989/1990) 29-33; Reichard (1993) 49-51; Grzimek (2001) 127-130; Stolfi (2001) 96-101; Gröschler (2002) 48-52. Possible errors in ascription: for Paul 4 ed. D. 2.7.4 pr. i.f. and the remaining texts in the fragment, perhaps Ulp. 5 ed.: Honoré (2010) 140-142; for Ulp. 35 ed. D. 2.7.6, perhaps Ulp. 5 ed.: Lenel (1889) ad h.l.

[2] The edict is in the older, bipartite, form: Dernburg (1873) 105-106; Kaser (1951) 32-33. Therefore the proscription will have been followed, in a separate sentence, by *qui adversus ea fecerit, in eum in factum iudicium dabo* or similar words, as suggested in Ulp. 5 ed. D. 2.7.5.1: Kaser (1951) 33; Gröschler (2002) 48. Cf. Selb (1986) 269-270 (the edict expressed the remedy via a draft formula in the redacted edict).

[3] See Lenel (1904) 249 n.2; Fernández Barreiro (1972) 17-18; Buti (1984) 337-338; Gómez-Iglesias Casal (1984) 108-109; Gröschler (2002) 48-49. Cf. Pugliese (1963) 395; Reichard (1993) 49-50; Honoré (2010) 140. That the second clause contemplates, at least in part, cases of indirect hindering, is clear: Ulp. 5 ed. D. 2.7.5 pr. (*si per alium*); Inst. Iust. 4.6.12 (*cuiusve dolo alius exemerit*).

[4] Pomp. in Paul 4 ed. [Ulp. 5 ed. *Honoré*] D. 2.7.4 pr.

[5] Ulp. 5 ed. D. 2.7.5.3; D. 2.7.6; Kaser (1935) 163. A hypothesis that the action was tried before *recuperatores*: Schmidlin (1963) 53-62.

[6] Ofilius in Ulp. 5 ed. D. 2.7.1.2; Paul 4 ed. D. 2.7.2; Pugliese (1963) 395-396; Fernández Barreiro (1972) 29-33; Buti (1984) 340-341. The restriction on persons applies to those who may not be summoned *sine permissu*, a class comprising parents, patrons, and the children of a parent or patron: Lenel (1927) 68-71. The same restriction *a fortiori* ought to apply also to those whose summons is barred unconditionally, such as *furiosi*, *infantes*, and the holders of higher magistracies: Ulp. 5 ed. D. 2.4.2,4; Pugliese (1963) 371-372. The restriction on place, as commonly remarked in the literature, is perhaps at odds with the rule that demanded obedience even when a person was summoned to the wrong tribunal: Paul 1 ed. D. 2.5.2; Ulp. 5 ed. D. 5.1.5.

[7] Pedius in Ulp. 5 ed. D. 2.7.3 pr. The point was perhaps disputed: Biscardi (1975) 147. On the capacity of a slave to be *vocatus*, see the literature cited in Sciortino (2010) 101 n.245.

[8] Ulp. 5 ed. D. 2.7.5.2.

Ernest Metzger, 'Edict *ne quis eum qui in ius vocabitur vi eximat*', Reference entries on Roman civil procedure, University of Glasgow, 3 September 2018.

ignored: even if the *vocatus* is summoned *per calumniam*, the plaintiff may sue and recover from the *exemptor*.[9]

The underlying lawsuit therefore plays a diminished role in determining the specific *poena* against the *exemptor*. The claimant does not receive *quod in veritate est*, an expression which denotes the plaintiff's interest, or what he might have expected to obtain, in the underlying lawsuit.[10] Instead, the *poena* is measured thus: *quanti ea res est ab actore aestimata de qua controversia est*.[11] This broadly denotes the *quantitas*, i.e. the amount the plaintiff had sought in the underlying lawsuit.[12] To some, however, the words *ab actore aestimata* are inaccurate (insofar as an *aestimatio* approaches the *veritas*) or redundant (insofar as an *aestimatio* mirrors the amount claimed in the underlying lawsuit), and are therefore suspected as a post-classical gloss.[13] Yet clearly some assessment is needed whenever the underlying lawsuit seeks something other than *certa pecunia*,[14] and the mere prospect of an *aestimatio* by the plaintiff would be useful in dissuading a person from attempting an *exemptio*.[15] Modern opinion accordingly favours the view that the disputed words are genuine, though the details of the *aestimatio* (*in iure*? *in litem*? *taxatio*?) remain obscure.[16] ¶4

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[9] Paul 4 ed. [Ulp. 5 ed. *Honoré*] D. 2.7.4.1; Ulp. 5 ed. D. 2.7.5.1. Paul's words *constat eum hoc edicto teneri* suggest a juristic dispute once existed on this point: Tafaro (1980) 191.

[10] A similar conflict, concerning the measure of damages in a frustrated lawsuit and its remedial successor, arises in suits against a false tutor (Ulp. 12 ed. D. 27.6.7.2) and against a *vindex* who fails to exhibit the *vocatus* (Ulp. 5 ed. D. 2.8.2.5): Kaser (1935) 190-192.

[11] Ulp. 5 ed. D. 2.7.5.1.

[12] So Kaser (1935) 163-164, 191-192; Pugliese (1963) 396-397. See also Theophil. inst. Iust. 4.6.12b, who speaks directly of an *actio in factum* valued by the claim in the underlying lawsuit: καταδικασθήσεται τῇ in factum τοσοῦτον ἀπαιτούμενος ὅσου ἐγὼ τὸν καλούμενον ἐπὶ τὸ δικαστήριον ἀπῄτουν. Whether Theophilus is, in fact, revealing a historical detail of the classical action is unclear: Fernández Barreiro (1972) 42-43.

[13] Lenel (1927) 74; Kaser (1935) 163 n.32; Fernández Barreiro (1972) 44-45 & nn.118-119; Reichard (1993) 51 n.31. The interpolation (cf. gloss) of a single detail, unrelated to Byzantine law, is unlikely; an interpolation is perhaps conceivable only on the hypothesis that the compilers omitted specific instances where an *aestimatio* was necessary.

[14] See Fernández Barreiro (1972) 42-43 (nevertheless rejecting *ab actore aestimata* as a gloss); Buti (1984) 346; Tafaro (1980) 189 n.120; Gröschler (2002) 50 & n.39. Neratius gives special significance to the very moment of *exemptio* in valuing a *peculium*, but his concern is the value of the *actio de peculio*, not that of the action arising from the *exemptio*: Ner. 1 resp. D. 15.1.55; Buti (1984) 347 n.39; Gröschler (2002) 50 n.40; cf. Fernández Barreiro (1972) 43-44.

[15] Schmidlin (1963) 61-62; Raber (1972) 209; Buti (1984) 348.

[16] See Raber (1972) 209; Tafaro (1980) 189-190 & n.120; Gröschler (2002) 50-51. See also Fernández Barreiro (1972) 44-45 (*poena* set by the judge, not the plaintiff); cf. Buti (1984) 346-348. On the possible use of a *iusiurandum in litem*: Gröschler (2002) 50. On the possible use of an estimate *in iure*, followed by a formula with a *taxatio*: Buti (1984) 347-348; Grzimek (2001) 130; cf. Fernández Barreiro (1972) 44-45; Schmidlin (1963) 57-58.

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