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קובץ הרצאות
בהיסטוריה של המשפט היווני וההלניסטי
תל אביב, 20-23 באוגוסט 2017

Vorträge zur
griechischen und hellenistischen Rechtsgeschichte
(Tel Aviv, 20.–23. August 2017)

עורכים
גרהרד תו׳ר
אורי יפתח
רחל צלניק-אברמוביץ

herausgegeben von

Gerhard Thür
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IN MEMORIAM
JOSEPH MÉLÈZE
MODRZEJEWSKI

תוכן העניינים — INHALT

מושב לזכר יוסף מלז מודז'ייבסקי
Joseph Mélèze Modrzejewski zum Gedenken

חקיקה
Gesetzgebung

סדר הדין
Prozess

תעודות בחיי המשפט
Dokumente im Rechtsleben

עבדים
Sklaven

משפט וספרות
Recht und Literatur

פתח דבר

לראשונה מאז היווסדו ב-1971, התקיים ה"סימפוזיון" בישראל. המארגנים, אורי יפתח ורחל צלניק-אברמוביץ, ניצלו את ההזדמנות לסקירה היסטורית. תרומתם המחקרית של מלומדים ואינטלקטואלים ממוצא יהודי באירופה שלפני מלחמת העולם השניה אינה זקוקה להוכחה. קביעה זו תקפה גם ביחס לחקר המשפט בעולם היווני וההלניסטי. בתחום זה, "הפיתרון הסופי" לא היווה שבר מוחלט. שלושה מלומדים, פריץ פרינגסהיים, רפאל טאובנשלאג והנס-יוליוס וולף, שגלו לבריטניה ולארצות הברית בזמן השלטון הנאצי, שבו לאחר 1945 לארצות מוצאם, שם תרמו תרומה מכרעת לתחייתו של חקר המשפט היווני. ה"סימפוזיון" הוא אחד הביטויים המרכזיים לפעולתם של חוקרים אלה: היו אלה הנס-יוליוס וולף ותלמידו של טאובנשלאג, יוזף מלז מודז'יבסקי, גם הוא ממוצא יהודי, אשר יסדו ב-1971 את "סימפוזיון: האגודה לחקר ההיסטוריה של המשפט בעולם היווני וההלניסטי". מסיבה זאת, מארגני הסימפוזיון, אשר נערך בשנת 2017 לראשונה בישראל, ראו חובה לעצמם להקדיש מושב מיוחד לציון תרומתם המדעית של המלומדים האלה, מושב שבו מלז-מודז'יבסקי התכוון לסקור את תורתו של מורהו טאובנשלג. למרבה הצער, התוכנית האמורה לא באה לכדי מימוש, עקב מותו של מלז מודז'יבסקי ב-30 בינואר 2017. מושב היסטוריוגרפי התקיים בכל זאת, אולם הוא הוקדש לציון חצי מאה של פעילות מדעית של חוקר דגול זה שהטביע את חותמו על חקר המשפט היווני בדורות האחרונים.

הכנס ה-21 להיסטוריה של המשפט בעולם היווני וההלניסטי – "סימפוזיון 2017" – התקיים באוניברסיטת תל אביב בין ה-20 ל-23 באוגוסט 2017. בשישה מושבים, על פני שלושה ימים ומחצה, נישאו שש-עשרה הרצאות (הרצאה נוספת כלולה עתה בספר; ואחת ההרצאות שנישאו לא נמסרה לפרסום), שכל אחת מהן לוותה, כנהוג ב"סימפוזיון", בהערות של מגיב (אחת הוצגה in absentia). חוקרים מעשר מדינות, מאירופה, מהמזרח התיכון ומצפון אמריקה השתתפו בכנס. כנהוג ב"סימפוזיון", לא הוגדר נושא כללי, אלא כל דובר/ת היה חופשי/ת להעלות לדיון נושא מתחום המחקר העכשווי שלו/ה. ההרצאות אורגנו על פי תחומיהן (חקיקה, סדר הדין, תעודות בחיי המשפט, עבדים, משפט וספרות), וביניהן שולב מושב לזכרו של מלז מודז'יבסקי, שנזכר לעיל. סיור לירושלים היווה אתנחתא מרתקת לתכנית המדעית.

קיומו של הכנס "סימפוזיון 2017" התאפשר הודות לתרומותיהם הנדיבות של האקדמיה הלאומית הישראלית למדעים; ומאוניברסיטת תל אביב – הפקולטה למדעי הרוח ע"ש לסטר וסאלי אנטין, קרן סגן הנשיא למחקר ופיתוח, סגן הרקטור, ביה"ס להיסטוריה ע"ש צבי יעבץ, מכון ברג למשפט והיסטוריה, ומכון מינרבה להיסטוריה גרמנית. כמו כן תרמה למימון הכנס קרן אמריקנית, אשר מייסדה ביקש להישאר בעילום שם. לכל אלה נתונות תודותינו.

פרסום הספר לא היה מתאפשר ללא תמיכתה הכספית של האקדמיה הלאומית הישראלית למדעים וללא עבודתה המסורה של סוזנה לורנץ, שבתמיכת המכון להיסטוריה תרבותית של העולם העתיק באקדמיה האוסטרית למדעים עימדה את המאמרים והתקינה אותם לדפוס. תרומה רבה הרים גם רוברט פורינגר, מהוצאת האקדמיה האוסטרית למדעים. לבסוף, אנו מבקשים להודות לשני השופטים האנונימיים על הערותיהם המועילות.

גרהרד ת'ור, אורי יפתח, רחל צלניק-אברמוביץ

תל אביב ו-וינה, דצמבר 2018

VORWORT

Erstmals seit seiner Gründung im Jahre 1971 fand das "Symposion" in Israel statt. Die Veranstalter, Uri Yiftach und Rachel Zelnick-Abramovitz, nahmen die Gelegenheit wahr, Teilnehmer zu einem Rückblick zu inspirieren. Die wissenschaftliche Leistung europäischer Gelehrter und Intellektueller jüdischer Abstammung vor dem zweitem Weltkrieg bedarf keiner Ausführung. Das gilt auch im Bereich der Erforschung des antiken griechischen und hellenistischen Rechts. In diesem Bereich bildete die 'Endlösung' auch keinen völligen Bruch. Es waren drei Gelehrte, nämlich Fritz Pringsheim, Raphal Taubenschlag und Hans-Julius Wolff, die bald nach 1945 in ihre jeweiligen Heimatsländer zurückkehrten. Sie leisteten dort einen bedeutenden Beitrag zur Neubelebung und Anerkennung der Erforschung des Rechts des griechischen Kulturkreises im Rahmen der antiken Rechtsgeschichte. Dies hat auch zur Begründung des "Symposion" geführt. Es waren Wolff und ein Schüler Taubenschlags, Joseph Mélèze Modrzejewski, selbst jüdischer Abstammung, die mit dem "Symposion 1971" die "Gesellschaft für griechische und hellenistische Rechtsgeschichte" gründeten. Aus diesem Grunde sahen sich die Organisatoren des "Symposion 2017" veranlasst, eine eigene Sektion der wissenschaftlichen Würdigung den oben genannten Gelehrten zu widmen, worin auch Mélèze Modrzejewski einen Beitrag zu seinem Lehrer Taubenschlag liefern wollte. Traurigerweise konnte er dieses Vorhaben nicht mehr umsetzen, da er am 30. Januar 2017 verstarb. Die historiographische Sektion fand dennoch statt, wurde aber der Diskussion und Würdigung von Mélèze Modrzejewskis sich über mehrere Jahrzehnte hinweg erstreckendes Œuvre gewidmet.

Die 21. "Tagung für griechische und hellenistische Rechtsgeschichte" — Symposion 2017 — fand an der Universität Tel Aviv vom 20. bis 23. September 2017 statt. In sechs Sitzungen wurden, verteilt über dreieinhalb Tage, sechzehn Vorträge gehalten (ein weiterer Beitrag kommt nun in der Publikation hinzu, einer wurde nicht abgeliefert); fünfzehn "Antworten" (eine *in absentia*) wurden dazu vorgetragen. Vertreten waren Gelehrte aus zehn Ländern Europas, des Nahen Ostens und Nordamerikas. Wie in den "Symposia" üblich, war kein Generalthema vorgegeben, sondern es war jedem Sprecher bzw. jeder Sprecherin freigestellt, ein spezielles Thema aus dem jeweils aktuellen Arbeitsgebiet zur Diskussion zu stellen. Die angebotenen Vorträge wurden, sachlich gegliedert (Gesetzgebung, Prozess, Dokumente im Rechtsleben, Sklaven, Recht und Literatur), im Anschluss an die oben genannte Sektion zum Gedächtnis Mélèze Modrzejewskis gehalten. Das wissenschaftliche Programm wurde ergänzt und aufgelockert durch einen intensiven und anregenden Ausflug nach Jerusalem.

Beiträge zu den Kosten der Tagung leisteten in großzügiger Weise The Israel Academy of Sciences and Humanities; an der Universität Tel Aviv: The Lester and

Sally Antin Faculty of Humanities, The Berg Foundation Institute for Law and History, the Vice President of Research and Development, the Vice Rector, The Zvi Yavetz School of Historical Studies, und The Minerva Institute for German History. Wir danken auch einer amerikanischen Stiftung, deren Identität (den Wünschen des Stifters gemäß) ungenannt bleiben soll.

Die Publikation des Bandes wäre ohne die finanzielle Hilfe seitens der Israelischen Akademie der Wissenschaften kaum möglich gewesen, ebenso wenig ohne die vorzügliche Arbeit von Susanne Lorenz, die unterstützt vom Institut für die Kulturgeschichte der Antike an der Österreichischen Akademie der Wissenschaft, die Beiträge druckreif formatiert hat; Helmut Lotz erstellte das Register. Bewährte Hilfe leistete wieder Robert Püringer, Verlag der Akademie. Ihnen allen sei hier gedankt. Schließlich danken wir auch den beiden anonymen Gutachtern, die wertvolle Hinweise gaben.

Gerhard Thür, Uri Yiftach, Rachel Zelnick-Abramovitz

Tel Aviv und Wien, im Dezember 2018

JOSÉ LUIS ALONSO (ZÜRICH)

THE ORIGINS OF THE SO-CALLED LIBELLARY PROCEDURE — A HYPOTHESIS: RESPONSE TO BERNHARD PALME

1. Papyrology and Roman Law

Bernhard Palme has presented a thought provoking overview of a group of documents that are crucial for our understanding of the later Roman procedure. His analysis of the evidence results in a proto-history of the so-called 'libellary' procedure ('Libellprozess')[1] that differs quite strikingly from the one commonly accepted in the Romanistic community, where much of the evidence studied by Palme has been hitherto ignored.

Max Kaser, for example, in his 'Römisches Zivilprozeßrecht', published in 1996, sets the transition from the so-called *litis denuntiatio* procedure ('Litisdenuntiationsprozess') to the libellary procedure in the mid fifth century.[2] And yet, if Palme is right in his evaluation of the papyrological evidence, two documents at least would show that the libellary procedure was in place a whole century earlier, in the mid fourth century: one of them, P. Oxy. lxiii 4381 (375 CE) was first published in the same year of 1996, and could not possibly have been considered by Kaser. The other, though, SB xviii 13769 (345-352 CE), had been published by Sijpesteijn and Worp in 1986 in the first number of Tyche,[3] ten years before Kaser's book.

A tighter cooperation between papyrologists and romanists, as was the rule in the earlier decades of the twentieth century, is necessary if we wish to avoid that the new materials lead to completely different reconstructions of the same phenomenon, juristic papyrology and Roman law becoming increasingly separate universes.[4]

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1 On the pre-Justinianic 'Libellprozess', cf. the lit. in Palme, nn. 41, 42 and 43. Add (also in Palme, n. 30) Benaissa 2010: 278-281.

2 Kaser / Hackl 1996: 570-572, particularly n. 1, where P. Oxy. xvi 1881 (427 CE) is presented as the earliest attestation.

3 Sijpesteijn / Worp 1996.

4 Unfortunately justified, in this sense, the sharply critical remarks in Haensch (ed.) 2016: xvi-xviii and n. 24.

2. The ‘Libellpapyri’

The protocols of the libellary procedure are easily recognisable: those that have arrived to us follow quite consistently a stereotype formula:

(a) As in general all trial records since Diocletian,[5] the document starts with the date, always in Latin, the Latin highlighted as always in these bilingual protocols by a strikingly large and florid script: “p̣o̱s̱t c̣ons(ulatum) d(omini) n(ostri) Gratiani per(petui) Aug(usti) iii et Equitio v(iri) c(larissimi) coṃ(itis) die iii non(as) Aug(ustas) Alex(andreae) in secretario” (P. Oxy. lxiii 4381, 375 CE, l. 1; cf. P. Oxy. xvi 1879, 434 CE, l. 1).

(b) Then, in a new line, “ex offic(io)” (P. Oxy. xvi 1878, 461 CE, l. 2) or “ex offic(io) d(ictum) est” (P. Oxy. lxiii 4381, 375 CE, l. 2; P. Thomas 25, 437 CE, l. 2), followed by the formula “cuiusmodi libellum Pelion duc(enarius) publice magnitudine tuae obtulerit prae manibus habentes [reci]tamus, si praecipis” (P. Oxy. lxiii 4381, 375 CE, l. 2), vel sim.: this formula is most often protocolised as having been pronounced in Greek, thus: “ὁποῖον λίβελλον Φιλόξενος ἀπὸ τῆς Ὀξυρυγχιτῶν | ἐπιδέδωκεν τῇ σῇ ἐξουσίᾳ ἔχων μετὰ χεῖρας ἀναγνωσό̣μ̣ε̣θ̣ᾳ̣, εἰ προστάξ(ε)ιέν σου τὸ μέγεθος” (P. Oxy. xvi 1878, 461 CE, ll. 2-3), vel sim. (cf. P. Oxy. xvi 1876, 480 CE, ll. 2-3; P. Oxy. xvi 1877, 488 CE, ll. 2-3).

(c) In separate line, the protocoll proceeds: “F̣ḷ(avius) Mauricius, u(ir) c(larissimus), com(es) ord(inis) prim(i) et dux, d(ixit), 'legatur et actis indatur’” (P. Oxy. lxiii 4381, 375 CE, l. 3). Again, the protocolisation is, as preceptive since Diocletian, in Latin, but the order ‘legatur’ is most often protocolised as having been pronounced in Greek, ‘ἀνάγνωθι’ (P. Oxy. xvi 1879, 434 CE, l. 3; SB xxviii 17147, mid-5th cent. CE, l. 3; P. Oxy. xvi 1878, 461 CE, l. 4; P. Oxy. xvi 1876, 480 CE, l. 3).

(d) Then, often after a vacat, “et recita(vit)” (SB xviii 13769, 345-352 CE, l. 10; P. Oxy. xvi 1879, 434 CE, l. 3; P. Oxy. xvi 1878, 461 CE, l. 4; P. Oxy. xvi 1876, 480 CE, l. 3) or “ex offic(io) rec(itatum) est” (P. Oxy. lxiii 4381, 375 CE, l. 3) followed by the transcription of the Greek libellus as read.

(e) The protocol ends with the decision of the judge, usually in Greek but introduced as preceptive in Latin in separate line: “Fl(avius) Mauricius, v(ir) c(larissimus) com(es) ord(inis) prim(i) et dux, d(ixit)” (P. Oxy. lxiii 4381, 375 CE, l. 11; cf. P. Oxy. xvi 1879, 434 CE, l. 9; P. Thomas 25, 437 CE, l. 10; SB xxviii 17147, mid-5th cent. CE, l. 17; P. Oxy. xvi 1877, 488 CE, l. 11).

This is a preliminary decision, in Roman legal parlance an interlocutory verdict. Unfortunately, this part is lost or extremely fragmentary in most of the examples published so far. In the slightly better preserved P. Oxy. xvi 1877 (488 CE), we read that the officium shall call upon the defendants to either discharge their debt before the case is taken or, if they contest it, become part of a lawsuit

[5] On the bilingual trial records in Late Antiquity, cf. in general Palme 2014 with Yiftach 2014, and Haensch 2016, with further lit.

submitting a libellus (*contradictorius*) as counterplea (ll. 11-13: . .ο[- ca.36 -] | ο[.] ἡ τάξις ὑπομνήσει ἢ πρὸ δί̣κ̣ης τ̣ὰς τοῦ χρησαμένου τῇ διδασκαλίᾳ .[- ca.25 - ἢ ἀντιλέγον]|τας δικάσασθαι βιβλίον ἐπισ̣τ̣ε̣λ̣λ̣ομένους).[6]

The whole act, in fact, takes place without any indication of the parties being present, with the sole intervention of the official who received the libellus, typically the governor of the province, and his staff. *Recitare*, ἀναγιγνώσκω, is here the crucial term for a procedure that essentially consists, as we have seen, in an interlocutory decision pronounced by the presiding official upon the reading of the libellus by his staff *in secretario*.

With this preliminary procedure, a bipartition arises that might bring to mind the old division between trial *in iure* and trial *apud iudicem*,[7] but in truth has little in common with it. The central feature of the old division –the distinction between magistrate and (private) judge– and the control of the magistrate over the law itself inherent to it, do not exist here any more.

One might be tempted to imagine in the new preliminary procedure the possibility of a *denegatio actionis*, the most drastic faculty of the magistrate under the formulary procedure. And yet, even though a theoretical faculty to simply dismiss a petition deemed undeserving of protection cannot be excluded, this is not likely to have been a common occurrence,[8] let alone the raison d'être of the pre-trial that these documents attest. All this, leaving aside the central role that the proper handling of petitions and the correlative display of accessible justice had for the Roman provincial policy:[9] a mere written petition, in fact, would usually not suffice to justify its outright dismissal.

3. Libellary procedure?

In truth, one should not speak of 'Libellprozess' or 'Litisdenuntiationsprozess'.[10] These are not different types of procedure: they are only, as Palme rightly underlines, different forms of initiating a trial under the procedure of the *cognitio*. The so called Libellprozess, in fact, is not yet a trial, but just a pre-trial act where

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6 An example of such counterplea (self labelled in ll. 20 and 22 as ἀντίρρησις), in P. Oxy. xvi 1881 (427 CE).

7 Kaser / Hackl 1996: 32-34, 44-48, 172.

8 A *denegatio actionis* would be an appropriate answer, though, if the plaintiff in P. Oxy. xvi 1880 (427 CE) presented a new petition despite having notified to the officium of the prefect the renounce to his claim upon satisfaction: Steinwenter 1925: 48-49.

9 Cf. the much quoted Ulp. D. 1.16.9.4-5 (*Observare itaque eum oportet, ut sit ordo aliquis postulationum, scilicet ut omnium desideria audiantur*, etc.), and the edict of the prefect (Sulpicius Similis) regarding the *conventus* in P. Oxy. xxxvi 2754 (111 CE) ll. 10-12: οἱ δ' ἄλλοι πρὸς τοὺς τῶν προτεθέντων τοῦ διαλογισμοῦ ἐξή|κ̣[ο]ντος μὴ φθάσῃ ἀκουσθῆναι δυνήσεται ἐπὶ τοῦ κατὰ νομου (l. νομὸν) στρατηγοῦ | κριθῆναι. On this crucial aspect of the Roman provincial administration, cf. among others Kelly 2011, and Bryen 2012, with further lit.

10 The term 'Libellprozess' goes back to Wieding 1865.

the judge decides *intra portas*, on the basis of a petition presented in writing, as a *libellus*, and read by an official, whether summons should be served or not to the adversaries of the petitioner. Arangio-Ruiz used for this type of document the label ‚*gesta praesidis de libello recipiendo*'.[11]

The change from the old *litis denuntiatio* into this new *libellus* system might seem insignificant: in both cases the plaintiff needs to present in court a written document, and it is the court that serves it to the defendant. But the summons is in the old system an act of the plaintiff authorised by the judge; in the new system, it is an act of the judge himself, and the decision is left to his discretion.[12] The tradition of private, or semiprivate, summons goes back in Roman law at least to the time of the Twelve Tables.[13] The new system ends thus a tradition of eight hundred years.

And yet, despite the relevance of all this, there is no reason whatsoever – in the documents or in the legislation or in procedural logic itself – to assume that this change in the summons brought about any further change in the rest of the trial. Even if the terms 'Libellprozess' and 'Litisdenuntiationsprozess' are relatively harmless when used in the awareness of this, it would be perhaps better to simply speak about cognitory procedure introduced per *litis denuntiationem* or per *libellum*.

4. Origins

A crucial question here, also addressed by Bernhard Palme, is the origin of the new form. He speaks of a 'Verdrängung', a superseding, of the old form by the new, and suggests that the new form may have arisen from the old practice of solving petitions through subscription.

The documents that have come down to us show a procedure that is extremely consistent, extremely formalised: the words used by the official to introduce the

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[11] Fontes Iuris Romani Antejustiniani iii Nr. 176 (p. 549) (= P. Oxy xvi 1876, ca. 480 CE).

[12] The earliest 'Libellpapyri' to come to light, those in P. Oxy. xvi, published by Grenfell and Hunt in 1924, attracted the attention of the Romanists above all as illuminating the transition from private to public summons: cf. Wenger 1925.

[13] Kaser / Hackl 1996: 64-66. For the semiprivate ('halbamtlich') nature of the summons through *litis denuntiatio*, 566-567. This was not different in Roman Egypt as far as the *conventus* was concerned: the summons, attested always in the form of παραγγελία, were private in nature, even when the notice was served through public officials: cf. Foti Talamanca 1979. Misleading, in this sense, the accent on the 'foreignness' of the merely half-public *litis denuntiatio* in Egypt in Kaser / Hackl 1996: 567 n. 7: it is true that P. Oxy. i 67 (338 CE), mentioned by Kaser in this respect, is not formulated as summons (παραγγελία) but as a mere petition to the prefect (ll. 12-22), as if the plaintiff took for granted that the defendant would be officially summoned through *evocatio*. Yet, whatever the plaintiff may have assumed, the striking aspect of this document, as already underlined by Mitteis 1912: 63, is that the prefect orders the proper παραγγελία to be made (ll. 10-11: cf. infra in text).

libellus and those used by the judge are always the same no matter in which province we are – whether the Arcadia, to which most of the material belongs, the Thebaid (SB xviii 13769, SB xxviii 17147), or the new province of Egypt (P. Oxy. lxiii 4381).

A procedure so strongly formalised, so consistent irrespective of the province, can hardly be a spontaneous creation. More decisively: the jurisdictional authorities were not free to depart in this way from the old *litis denuntiatio*. The new procedure must have been introduced by Imperial legislation. True, we do not have the Imperial constitution in question, but this does not make the assumption less plausible: also the *litis denuntiatio* must have been introduced by the Emperor, and with it the term of four months that we know the parties had in order to present themselves in court, and yet also these Imperial constitutions are lost for us, not preserved in the Theodosian nor the Justinian code – because they were no longer relevant.

A good illustration of how implausible it is to imagine that the local jurisdiction could depart on its own from the old requisite of the *litis denuntiatio* is P. Oxy. i 67 (= P. Lond. iii 754 descr. = MChr. 56 = FIRA iii 173, 338 CE): the prefect has received a petition requesting him to institute a trial and to appoint a certain ex-magistrate as judge; the petition does not take the form of a *litis denuntiatio* (παραγγελία): it is not formulated as summons, as if the petitioner took public summons (*evocatio*) through the judge for granted. What the prefect does is enlightening. He instructs the judge to ensure that the proper παραγγελία is made: φρόντισον τὰς κατὰ νό|μους αὐτοὺς παραγγελίας ὑποδέξασθαι ποιῆσαι ἔνν[ο]μόν τε τυπωθῆν[αι] τὴν [το]ῦ δικαστηρίου προκάταρξιν (ll. 10-11). In sum: even if the prefect consents to the petition, he underlines the necessity of the old semiprivate *litis denuntiatio*, refraining from ordering a court summons through *evocatio*: the plaintiff himself has to present written summons to be approved by the judge. This was for Mitteis so remarkable that he labelled the document, in the Chrestomathie, as ‘Konversion einer Postulatio in eine Litis denuntiatio’.[14]

5. Earlier Forms?

This happened in 338 CE. The date raises an intriguing question in view of the new evidence. The old *litis denuntiatio* seems to be fully in force in 338. And yet, Palme's list starts with SB xviii 13769 = ChLA xlv 1337, dated between 345 and 352. Not only: Palme sees the same procedure, the reading of a claim ('Klageschrift') *in secretario*, in three earlier documents, even if these do not follow the same stereotype form of the later ‘Libellpapyri’: P. Ryl. iv 654 = ChLA iv 255 (302-309 CE Oxyrhynchos), P. Sakaon 34 = P. Thead. 13 = ChLA xli 1204 (321 CE Ptolemais Evergetis), and P. Harrauer 46 = SB xxviii 17038 (332 CE Antinoopolis). These three documents might have been, he suggests, older forms

[14] Mitteis 1912: 63

('Vorformen') of the same libellary procedure. A fourth document, dated between 318 and 320, P. Sakaon 33 = P. Ryl. iv 653 = ChLA iv 254 = CPL Annexe 2, is still added (n. 40) as a possible additional early occurrence of the new procedure.

Are these truly earlier forms of the libellary procedure? In my opinion, this is clearly not the case. Even their cautious characterisation by Palme as 'Vorformen' is unwarranted, when one compares them with the later documents, starting with SB xviii 13769. In in these later documents, as we have seen, the presiding official makes an interlocutory decision upon the reading of the *libellus* by his staff. The reading (*recitare*, ἀναγιγνώσκειν) of the *libellus* is the core of the procedure: the parties are not present, nor are any advocates on their behalf. We have before us the protocolisation of a purely bureaucratic proceeding.

If now we consider these earlier documents, what we find is quite different from this:

(a) In the earliest, P. Ryl. iv 654 (= ChLA iv 255, 302-309 CE Oxyrhynchos), the narration of the facts is not introduced by the preceptive *recitavit*, but, significantly, by *dix(it)* (l. 2). What follows has, in fact, all the traits of an oral discourse, pronounced by a certain Apolinarius, who directly addresses the judge (the *iuridicus Aegypti*): καὶ σὺ οὑμὸς (l. ὁ ἐμὸς) δεσπότης (l. 6). The document refers to a certain Paulus, apprentice of the plaintiff in his trade as linen weaver, as being present in court (τυγχάνων), and it is not a petition by the plaintiff in first person, as a *libellus* would be, but by someone on his behalf. This is clearly the oral pleading of an advocate for his client. Some traits are indeed common with the 'Libellpapyri': there seems to be no audience for the defendants, hence no contradiction; the proceedings are therefore summary; they do not lead to a verdict, but to an interlocutory decision, merely determining who will decide the case and under what criterion.[15] But it seems unjustified to characterise as an earlier form of the *libellus* procedure a hearing that does not consist in the reading of a *libellus*: where, in fact, as far as we can see, no *libellus* is even mentioned.

(b) The second document, P. Sakaon 34 (= P.Thead. 13 = ChLA xli 1204, 321 CE Ptolemais Evergetis), begins, after the date, with *'e praesentibus Sotarion et Horion dixerunt*'. They do not plead for themselves, but for a man whose wife and father in law have died, and who protests against harassment suffered at the hands of the *praktores* due to some land left by the deceased. Sotarion and Horion are, again, advocates, speaking in court on behalf of their client (cf. συνηγορούμενος in l. 3), who is also present (Ἥρων πενθερὸς αὐτῷ, l. 2; ἐνόχλησιν αὐτῷ

[15] Ll. 15-18: Maximianụ[s] v(ir) p(erfectissimus) iuridicus Aeg(ypti) dix(it): | ὁ λογιστὴς καὶ σ̣[τ]ρατηγὸς προνοήσονται εἰς τὰ ὑπ[ὸ τού]τ[ων κατηγορημένα εἰ τὴν] | τέχνην ἐκμημάθηκ̣ε̣ν̣ κ̣αὶ ἤδη ἐν ταύ̣τ̣ῃ τῇ ἐργασίᾳ ἐσ̣τ̣ὶν εἰς ἑτέραν μὴ | μεταφέρεσθαι τέχνην. (Maximianus, vir perfectissimus, iuridicus Aegypti, said: "The logistes and the strategos will take care that in regard to these persons' charges, if he has learned this craft and is actively engaged in this trade, he is not to be transferred to another"). On the document: d'Ors 1956, Zucker 1957, Youtie 1958: 397-401, Thomas 1998.

προσαγαγόν|των τῶν πρ[α]κτόρων, ll. 4-5; δεόμεθα ... | ... τὴν ἐνόχλησιν τὴν κατ᾽ αὐτοῦ γιγνομένην | κωλύεσθ[αι], ll. 9-11). This is no libellary procedure, but, again, an oral hearing. The reason why instead of a contradictory trial we have a summary procedure is simple: the *praktores*, we read, have failed to produce anyone in court (ll. 7-8: ἀλλ᾽ οὐδὲν ἧττον ἐκεῖνοι οὔτε τῆς | ἐνοχλήσεω[ς] ἀπέστησαν οὔτε οὐδένα παρέστησαν). The hearing ends, therefore, without a trial proper: not with a verdict, though, but with an administrative order of Quintus Iper, *praeses* of the Aegyptus Herculia: 'Let your client point out the individuals responsible, and the *exactor civitatis* shall not suffer the said client of yours to be subjected to any unjust harassment by the said individuals'.[16]

(c) Quite similar, and before the same Quintus Iper, is P. Sakaon 33 (= P. Ryl. iv 653 = ChLA iv 254 = CPL Annexe 2) (318-320 CE Ptolemais Evergetis), concerning two irrigation conflicts between the inhabitants of Theadelphia and those of Andromachis, and between the same Theadelphians and a certain Manus.[17] Again, no *libellus* is read. The complaints of the Theadelphians are formulated orally by a certain Arion, present in court. The session is thus, once more, no *libellus* procedure, but an ordinary oral hearing, even if it does not take place *pro tribunali* –that is, in a freely accessible place– but *in secretario* (l. 1; also P. Sakaon 34, l. 1) –that is, in a closed room– as is the rule in the 4th century.[18] Once more, the defendants are absent: despite this fact, the decision of the praeses in both cases is no mere *interlocutio*, but a final order in favour of the Theadelphians, to be carried away by the *praepositus pagus*.

(d) The last document, P. Harrauer 46 = SB xxviii 17038 (332 CE Antinoopolis) begins, after the date, with a reference to a woman, Demetria, who is brought to the present of the judge –*inducta* (l. 3)–, and a Theofanes who speaks for her, his speech again introduced by *d(ixit)* (l. 3). Even if the proceedings take place once more *in secretario* (l. 2), they unequivocally consist in an oral hearing, not in the *recitatio* of a *libellus*. The hearing shares a common trait with all the others we have considered here: it is not a adversarial proceeding. In the previous cases, this fact was circumstantial, due to the absence of the defendants and of anyone representing them. Here, it is consubstantial to the case: there are no defendants, and in truth no plaintiff, because the purpose of the petitioner is to obtain a tutor or

[16] Ll. 11-13: demonstrantae suscepto tuo obnoxias personas exactor ciuitatis | nullam inq[uiet]udinem contra iustitiae rationem ex persona eorundem eundem | susceptu[m tu]ụṃ sustinere patietur. The decision is then translated to Greek in separate column. First edition and analysis of the text: Collinet / Jouguet 1906.

[17] On the text and its interpretation, Youtie 1958: 394-396.

[18] Kaser / Hackl 1996: 555, lit. and sources in nn. 5-8.

curator for the children of a certain Besodoros (whose relation to her the rather fragmentary state of the papyrus does not allow to reconstruct).[19]

In sum: these earliest documents are not cases of procedure *per libellum*. They are protocols of an actual hearing, all of them for different reasons in absence of the defendants: the summary character of the proceedings is very likely due to this absence. This leaves SB xviii 13769 as the earliest attestation of the new form, dated between 345 and 352.

6. Procedural overlapping

With this, the problem posed by P. Oxy i 67 (338 CE) (supra sub 4) is resolved. Yet, some overlapping still subsists between the libellary procedure, which in Palme's list would be first attested between 345 and 352 (SB xviii 13769) and the *litis denuntiatio* procedure. One of the best known examples of *litis denuntiatio*, in fact, P. Lips. i 33 (= MChr. 55 = ChLA xii 525 = FIRA iii 175) is dated to 368 CE: this would imply a survival of the old procedure fifteen years after the first example of the new one.

How can we explain this coexistence?

The constitutions on the *litis denuntiatio* that have survived in the Theodosian Code help build a plausible hypothesis:

The *litis denuntiatio* forced a term of four months for the beginning of the trial. The term was likely intended as a maximum, but it also meant that nobody could force a defendant to appear in court sooner than that: and in this way the intended maximum became an irritating, unnecessary dilation of four months in every trial.[20] So irritating that the Emperors started dispensing for the necessity of *denuntiatio* in cases where the delay was perceived as particularly unacceptable: loans, debts attested in writing in general, *fideicommissa*, *interdicta*, *querellae inofficiosi testamenti*, cases of guardianship and *negotiorum gestio*, all those inferior to 100 solidi ...

A list of these cases is contained in a constitution of Arcadius, Honorius and Theodosius dated to 406 CE, CTh. 2.4.6: a constitution that shows, on the other hand, that beyond the date of P. Lips. 33, until at least the early fifth century, a *litis denuntiatio* was still required as the ordinary way to start a procedure. But many of the exceptions are older than this date – loans attested in *chirographum* had already been excepted more than thirty years earlier, as we know from CTh. 2.4.3 (371 CE).

Artur Steinwenter suggested that the first cases of summons per libellum could have been precisely these, where a *litis denuntiatio* was not required.[21] In fact, the

[19] On the document, cf. the commentary of Ursula and Dieter Hagedorn in the edition. Unlikely is any connection to SB xviii 13295 = P. Cair. cat. 10268 = ChLA xli 1187 (298-300 CE)

[20] Kaser / Hackl 1996: 568 and nn. 18-22.

[21] Steinwenter 1925: 38-39. Cf. also Steinwenter 1935.

list soon became so wide that most actual trials would fall under one exception or the other. It is likely that it was precisely for these cases that the new procedure was introduced by an Imperial decision unfortunately lost to us.

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