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MUNICIPAL FUNDS IN THE LIGHT OF CHAPTER 69 OF THE LEX IRNITANA

aus: Zeitschrift für Papyrologie und Epigraphik 111 (1996) 199–207

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1. Introduction

The lex Iritana supplies a full text of chapter 69 of the Flavian law, the beginning of which was already known from the lex Malacitana. The rubric of the chapter is *de iudicio pecuniae communis*, ‘on a court – or an action (?) – for common funds’, but curiously no further reference to *pecunia communis* appears in the chapter. Nor is very much said about when this court or procedure might be competent; the chapter is mostly concerned with details about how many judges there must be in cases where it does act. Much therefore requires to be reconstructed from other sources. The central uncertainties could hardly be more fundamental: why such a tribunal or procedure was needed and for what cases.¹ Views on these questions have already been expressed: that this *iudicium* was the proper forum for the recovery of all fines imposed by the lex (of which there are many);² more broadly still, that it was available for any default by a citizen or *incola* of the municipality, not necessarily connected with *pecunia communis*.³ This paper suggests a narrower approach to its competence; but certain doubts inevitably remain.

Municipalities, represented by their *actores*, were no strangers to the ordinary courts, in which they regularly sued for such things as payment of debts. The main questions which arise are therefore the relationship between chapter 69 and ordinary procedure; and whether chapter 69 procedure was available to a municipality concurrently with ordinary procedure or only for specific concerns not addressed or redressed by the ordinary courts. Such questions are difficult, because municipal issues fall into a curious no man’s land between public and private. We are told by the jurist Ulpian that the property of a *civitas* can be called ‘public’ only by an abuse of language;⁴ Gaius says that the term *publicus* regularly applies to the Roman people and that *civitates* are treated as private individuals (*privatorum loco habentur*).⁵ But these remarks should not be taken to be the whole truth. At the very least Gaius’s text fails to recognize that special legal rules and remedies were developed in Roman law to deal with questions of municipal property. While we cannot suppose that the public-law remedies available to the *populus Romanus* or the *aerarium* were extended by analogy to municipalities, no more should we be tempted to take the analogy with private individuals too seriously. If we did we should not expect to find any such thing as the *iudicium pecuniae communis*.

2. Chapter 69

The version of chapter 69 supplied by the lex Malacitana contained only the beginning of the chapter and broke off before revealing any details.⁶ The lex Iritana shows that it was the local council which

* I am greatly indebted to John Crook and Alan Rodger, and to Professor W. D. Lebek of the Editorial Committee, as a result of whose comments on an earlier draft this paper has been much improved. None of them necessarily agrees with the interpretation set out here.

¹ J. M. Ribas Alba, ‘La naturaleza jurídica del iudicium pecuniae communis’, RIDA 37 (1990) 335–45 does not go into such matters.

² R. Mentxaka, ‘Algunas consideraciones sobre el crimen de residuis a la luz de la legislación municipal’, RIDA 37 (1990) 247–334 at 312, 328.

³ F. Lamberti, *Tabulae irnitanae* (Naples, 1993) – henceforth cited as ‘Lamberti’ – 119.

⁴ Ulp. 10 ed. D. 50.16.15.

⁵ Gai. 3 ad ed. prov. D. 50.16.16. It may be noted that the lex Iritana itself is inconsistent in its usage, referring to payments ‘in commune’ in chs. 60 and 64; ‘in publicum’ in chs. 66, 67, 72.

⁶ The restoration given for the end of this chapter by Mommsen and reproduced in standard editions such as FIRA is entirely wrong, since it supposes that it was the provincial governor who had jurisdiction.

was competent in such cases: in cases valued between HS 500 and HS 1000, it would hear the case in plenary session; cases valued at less than HS 500 would be decided by five decurions selected by a process of *reiectio* similar to that provided later in the statute for the selection of judges for ordinary cases.⁷ The decurions have *cognitio iudicatio* and *litis aestimatio* and a majority decision after swearing an oath is to determine the case.⁸ Nothing is said about what is to happen if the value of the matter exceeds HS 1000.

(i) The nature of the procedure

The procedure outlined by chapter 69 is certainly not orthodox private procedure. None the less, it is suggested that the chapter 84 jurisdictional provisions extended to it. Those provisions granted the duumvir jurisdiction in matters of private law up to HS 1000; beyond that sum he had jurisdiction only if both parties to the action consented to it.⁹ The principal reason for believing that these provisions applied also to chapter 69 is that it explains why nothing is said there about actions for sums in excess of HS 1000. Since those sums are in any event in excess of the jurisdiction of the duumvir, his activity would be restricted to the making of a *vadimonium* to the provincial governor.¹⁰

The proposition that the term *iurisdictio* might apply to a procedure which is not that of private law requires some defence. Three reasons suggest themselves. First, chapter 69 does not involve an independent grant of *iurisdictio* to the decurions: what they are given is *cognitio*. In chapter 88 the duumvir is empowered to compel the *recuperatores* appointed under that chapter *uti cognoscant iudicent*; in the same way, in chapter 69 it may be thought that the *cognitio* carried on by this tribunal would depend ultimately on the inherent jurisdiction of the duumvir.¹¹ Second, the expression *iurisdictio*, although its core meaning is jurisdiction over private-law matters, does appear in connexion with matters of an administrative nature: for example in chapter 65 of this law on the selling up of securities,¹² as well as in a number of other Roman statutes.¹³ Accordingly, although this is an unusual procedure, it need not be said that it could not be governed by the duumvir's *iurisdictio*. Third, if (as is suggested in (ii) below) it is correct that chapter 69 procedure may have come into play where the defendant had declined to submit to ordinary procedure, the claim made must have been admissible in ordinary procedure, and its nature cannot have been altered by the fact that a different procedure was actually followed. If the claim could be raised *privatim* in ordinary procedure, there seems no reason why it should not fall (regardless of the procedure ultimately adopted) within the *iurisdictio* conferred on the duumvir in chapter 84.¹⁴ It is therefore suggested that the limits imposed by chapter 84 did apply to the present procedure. What is, of course, not suggested is that chapter 69 and ordinary private-law procedure are similar: the differ-

⁷ Chs. 87 and 88.

⁸ The form of the oath the decurions took is rather remarkable: they had to swear by a number of deified emperors that they would deliver their verdict according to what was 'aequum bonumque et maxime e re communi eius municipi'. It is surprising, for cases in which the municipality itself must have been interested, that this form of oath should have been thought appropriate, rather than one that proclaimed that the tribunal would do its judicial duty impartially.

⁹ See ch. 84 esp. ll. 1–4, 17–20, 23–25.

¹⁰ See, e.g., A. Rodger, 'The jurisdiction of local magistrates: chapter 84 of the lex Irnitana', ZPE 84 (1990) 147–161.

¹¹ Ch. 88 l. 10 (although the term *cognoscere* does not appear in ll. 11 and 12); on 'cognoscere' used of the judge rather than the magistrate, see M. Kaser, *Das römische Zivilprozeßrecht* (Munich, 1966) 284 n. 5.

¹² Ch. 65 ll. 5–6 (*ius dicit*): it is plain that this is not a private-law procedure since it is assimilated to the practice of the *aerarium* in the preceding chapter: ch. 64 ll. 27–28, 40–41; and cf. n. 36.

¹³ *Lex Urs.* ch. 105 (exclusion of decurion from *ordo*); *lex Mamilia Roscia* ch. 5 (boundary determinations); cf. *Lex Ant. de Termessus* col. II ll. 1–; *edictum Venafranum* l. 65; *lex agraria* ch. 35 (with A. Lintott, *Judicial reform and land reform in the Roman republic* (Cambridge, 1992) 238–); in general, M. Lauria, 'Iurisdictio', *Studi Bonfante* (Milan, 1930) II 481–538 at 501 ff.

¹⁴ See ch. 84 ll. 1 ff. This would of course be a case of an action '*alterius nomine*'. Note that the words '*si privatim ageretur*' in line 12 take the argument no further: they mean 'if the action were pursued privately', but are equally consistent with that being possible and with its being impossible.

ences are significant. The point is rather that the chapter 69 tribunal dealt with matters which fell within the duumvir's ordinary jurisdiction.

If the chapter 69 procedure is not orthodox private procedure, it is equally unorthodox in other respects. It has (it will be recalled) been suggested that chapter 69 procedure was the one used for the recovery of fines. But the very features which distinguish chapter 69 procedure from ordinary procedure also distinguish it from the procedure normally used for recovery of fines: the many fines imposed by the statute¹⁵ are stated to be recoverable for the community by any citizen who chooses to sue (*quavis e populo*). The procedure for recovery of these fines is essentially a private one, onto which are grafted elements of public procedure.¹⁶ Their essential characteristics, however, are private: there are the usual two stages, *in iure* and *apud iudicem*, and it is merely incidental features of the process, such as the right to summons witnesses, which are derived from public procedure. But this is not the sort of procedure outlined by chapter 69. The body having jurisdiction is neither a *iudex* nor *recuperatores*, as in the normal processes for recovery of fines; nor, at least in cases involving sums in excess of HS 500, do the parties have any say in the appointment of the judges. This seems to be a procedure apart.

(ii) The limits of the chapter 69 procedure

There is a difficulty concerning the procedural limits in chapter 69. The relevant part of the chapter reads: [10] 'Quod municip[i]um municipi Flavi Irnitani nomine petetur ab eo, qui [11] eius municipi munic<eps> incola[e]ve erit, quodve cum eo agetur, quod [12] pluris HS (sestertium) D (quingentorum) sit neque tanti sit ut de eo, si privatim ageretur, ibi invito [13] alterutro actio non esset, et iis quocum agetur ibi agi nolet, de [14] eo decurionum conscriptorumve cognitio iudicatio litisque aestu[15]matio esto ...'. The full council is competent to hear claims for sums between HS 500 and the amount above which the action, if it were a private action, could not be heard in Irni if either party were unwilling *et iis quocum agetur ibi agi nolet*. The upper limit if either party in a private action were unwilling is stated in chapter 84 to be HS 1000. The difficulty arises from the words in line 13 just quoted: they appear to mean that for an action of this kind to be heard in Irni it is necessary that the defendant must not want it to be heard there. That seems improbable. Two possible emendations have therefore been proposed: (i) the emendation of *et iis* to *etsi is* is proposed in the original publication of the *lex* by González: on that view the case would have to proceed at Irni although the defendant did not wish it to;¹⁷ (ii) the emendation of *nolet* to *volet* was put forward but rejected in the original publication, but has recently been revived *con brio* by Laffi:¹⁸ on this view the defendant's consent would be required to have a case valued between HS 500 and HS 1000 heard at Irni. More recently, Laffi has pointed out a difficulty with González's proposal: not only, as is well known, does the word *iis* (for *is*) appear elsewhere in the *lex*; but in the corresponding place in the *lex Villonensis* it is the word *is* itself which does appear.¹⁹

¹⁵ E.g. in chs. 26, G (= 45: Lamberti), J (= 48: Lamberti), 61, 74, 75, 90, 96.

¹⁶ This is expressed well by the title of G. Pugliese's article 'Figure processuali ai confini tra iudicia privata e iudicia publica', *Studi Solazzi* (Naples, 1948) 391–417; W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich, 1962) 12 n. 15; Kaser, *op. cit.* (n. 11) 118–119.

¹⁷ J. González, 'The *lex Irnitana*: a new copy of the Flavian municipal law', *JRS* 76 (1986) 147–243 at 221.

¹⁸ González, *ibid.*; U. Laffi, 'Le funzioni giudiziarie dei senati locali nel mondo romano' in J. González (ed.), *Estudios sobre Urso* (Seville, 1989) 23–40 at 34–36; see also his 'I limiti della competenza giurisdizionale dei magistrati locali', *Estudios sobre la tabula Siarensis: Anejos de Archivo Español de Arqueología* 9 (Madrid, 1988) 141–56; also the article cited in the next note.

¹⁹ U. Laffi, 'Osservazioni sul testo del inizio del capitolo <LXIX> della *lex Irnitana*, alla luce di un nuovo frammento della *lex Villonensis*', *ZPE* 103 (1994) 147–153. It may be noted that, where the *Lex Irnitana* preserves the word 'nolet', the *lex Villonensis* preserves only the letters 'NSET'; this of course scarcely supports an emendation to 'volet'. The fragments of the *lex Villonensis* are conveniently edited in Lamberti pp. 379–382.

Perhaps the matter can be taken a little further. It is worth paying closer attention to the words dealing with claims for sums which are in excess of HS 500 ‘neque tanti sit ut de eo, si privatim ageretur, ibi invito alterutro actio non esset, et iis quocum agetur ibi agi nolet’.²⁰ This clearly refers to the limit of HS 1000 established in chapter 84, beyond which the duumvir had jurisdiction only if the parties consented to it. It follows that the first mention of *ibi* (in line 12) is a reference to the duumvir’s court, for it is there that there is no jurisdiction in the absence of agreement. If that is so, then the second *ibi* (in line 13) in the clause quoted above should most naturally be read in the same way, so that the defendant is unwilling to be sued *ibi*, in the duumvir’s court. On this view, chapter 69 procedure is contingent, among other things, on a refusal by the defendant to submit to the ordinary jurisdiction of the duumvir. If he refuses, the special procedure comes into play. For this category of cases, therefore, the defendant can still be required to proceed at Irni, but not in the ordinary court.

This interpretation places a good deal of weight on the word *ibi*. It may be thought that the weight is greater than that short word can possibly bear.²¹ It is certainly true that (in spite of the express reference to chapter 84), if a cross reference is intended it is very obscure. Equally, to derive from *ibi* a reference to a place, when the lex itself tends to speak not of places (courts) but of persons (duumviri) presents certain difficulties. One other possible interpretation is therefore worth considering: that is the emendation of *et {i}is* to *et <nisi> {i}is*. This has essentially the same effect as Laffi’s conjecture, namely that it requires the defendant’s consent for a case valued at between HS 500 and HS 1000 to be heard at Irni. It appears, however, to be epigraphically superior, given the lack of support for an emendation to *volet* (in particular owing to *NSET* now being attested by the lex Villonensis) and may be preferable too as a matter of Latin grammar. On this view, the defendant in the chapter 69 procedure has one more layer of protection than the ordinary defendant, namely that, in cases between HS 500 and HS 1000, he cannot be compelled to proceed at Irni. On the other hand, the difficulty with this view is that, if it is correct that the chapter 84 jurisdictional provisions applied in the present case, and that claims of this nature could be brought *privatim*, it is hard to see why a plaintiff should ever choose to proceed under chapter 69. That would be tantamount to offering the defendant an additional opportunity to prevent the case proceeding at the local level. For the present, it appears to be necessary to accept that certainty on this question is beyond reach.

(iii) The identity of the plaintiff

Actions for fines can be raised by anyone. That does not appear to be the case here. It is true that it is not evident from chapter 69 itself whether the municipality is represented by someone it has itself appointed (an *actor*) or by an eager individual willing to bring an *actio popularis*. But chapter 71 is concerned with the plaintiff’s right, when suing *de pecunia communi*, to summons witnesses, and it describes the plaintiff as whoever sues on behalf of the *municipes ex hac lege* or *ex decurionum conscriptorumve decreto*.²² It therefore suggests that there are two possible procedures for appointment of such a plaintiff, under the law itself or by decree of the decurions. This does not fit with the more relaxed means by which individuals were legitimated to sue for fines.²³ But it does fit with the evidence on appointment of *actores*: chapter 70 of this law provides for appointment as *actor* of someone eligible under the provincial edict, by a meeting of decurions at which at least two thirds are present.²⁴ In the Digest, Ulpian reports two methods for appointment of an *actor municipum*: under a lex or, where the lex makes no provision, by decree of the decurions.²⁵ All this suggests that the person who brought the

²⁰ I owe this argument to Alan Rodger.

²¹ The argument which follows, and in particular the conjecture, I owe to Professor Lebek.

²² Ch. 71 ll. 49–50.

²³ On which see Kaser, *op. cit.* (n. 11) 118; M. Kaser, *Das römische Privatrecht I* (2nd. ed. Munich, 1971) 610.

²⁴ Ch. 70 ll. 38–41.

²⁵ Ulp 9 ed. D. 3.4.3.

action on behalf of the municipality in matters of *pecunia communis* would be a specially appointed *actor*. At this historical period, it was normal for a community to appoint an *actor* for each individual case.²⁶ Accordingly, in chapter 69 procedure the plaintiff would be an *actor* appointed by the council or under the provisions of the statute to raise action before the council or five of its members.

(iv) The subject matter of the action

Chapter 69 begins with very general wording: ‘quod municipum municipi Flavi Irnitani nomine petetur ab eo qui eius municipi municeps incolave erit quodve cum eo agetur . . .’ This generality (as already noted) has been interpreted in various ways. First, to suggest that this is a procedure available for all *actiones populares*.²⁷ But this seems unlikely, since in the first place it is not clear why money due as a fine should be described as *pecunia communis*; and in the second place, the amounts of fines imposed by the *lex* almost invariably exceed the limit established in chapter 69 for this procedure. Second, it has been suggested that the procedure can be invoked in respect of any violation by a citizen or *incola* of the municipality, whether or not involving the retention of municipal funds.²⁸ But that gives no weight at all to the rubric of the chapter.²⁹ It seems improbable that a special tribunal such as this might have to be convened in circumstances so broad and ill-defined, and the weight of other evidence speaks against this. The proper starting point, given the rubric, ought surely to be that this is a procedure concerned with municipal funds (*pecunia communis*). But it remains a question what precisely, for the purposes of this chapter, *pecunia communis* is.

If one asks whether this *iudicium* is the procedure for recovery of money owed to the municipality, for example, in contract, the answer must be that it is not. The edict itself made provision for the appointment of a representative to sue *municipum nomine*,³⁰ which would be surprising and superfluous if the municipality invariably sued for payment or performance in some special procedure; and the similarities between central and local civil procedure suggest that the same point would apply both centrally and locally.³¹ Various texts in the Digest deal with *municipia* attempting to recover their property or enforce the performance of obligations in their favour, or simply being affected by the ordinary rules of civil procedure: none suggests that there was any procedural peculiarity involved other than that the *municipium* was represented by an *actor*; none suggests anything other than a normal *actio* in normal civil process before a normal tribunal.³² It appears therefore that, for the purposes of the chapter 69 procedure, *pecunia communis* is not just any money owed to the town.

That conclusion is supported by two more considerations. First, the *fiscus* itself regularly sued using private-law procedures;³³ indeed Pomponius refers to the appointment by Nerva of a praetor ‘qui inter fiscum et privatos ius diceret.’³⁴ That makes it considerably less likely that the municipalities themselves invariably resorted to a procedure having special characteristics. Second (and more unusually),

²⁶ Paul 9 ed. D. 3.4.6.1 (the last sentence is interpolated).

²⁷ Mentxaka, loc. cit. (n. 2).

²⁸ Lamberti 119, 123, 127.

²⁹ Lamberti 119 n. 119 notes this point, but the other discrepancies she cites – chs. 22 and 45 – for a lack of correspondence between rubric and content of chapters in the *lex* seem less remarkable than this one would be.

³⁰ O. Lenel, *Das Edictum perpetuum* (3rd. ed., Leipzig, 1927) 97–98.

³¹ For some of these similarities, see e.g. D. Johnston, ‘Three thoughts on Roman private law and the *lex Irnitana*’, *JRS* 77 (1987) 62–77 at 62–66.

³² Paul 1 man. D. 3.4.10 (taking various procedural stipulations); Ulp. 27 ed. D. 13.5.5.7–9 (*pecunia constituta*); Ulp. 75 ed. D. 44.2.11.7 (*exc. rei iudicatae*); Ulp. 39 ed. 37.1.3.4 (claim for *bonorum possessio*); cf. Jul. 40 dig. D. 36.1.28 pr. (transfer of actions in connexion with *fideicommissum hereditatis*).

³³ See e.g. Pliny, ep. 4.12.3–4; Pan. 36; Tac., Ann. 4.6; with J. A. Crook, *Legal advocacy in the Roman world* (London, 1995) 52–53.

³⁴ D. 1.2.2.32.

common sense suggests that a tribunal of this sort, potentially occupying the whole of the local council, would not be convened except in a more limited class of case.

What class of case might that be? The other references to *pecunia communis* in the lex provide little by way of assistance; and in its ordinary dealings with its funds, it is hard to see why the municipality would require any special procedure.³⁵ Before returning to this question, it is necessary to look at other chapters of the lex.

3. Other relevant chapters of the lex Irnitana

Finding a purpose for the *iudicium pecuniae communis* when none is revealed by chapter 69 itself is not unproblematic. A natural reading of the rubric suggests that it is the procedure for recovery of municipal funds. But other chapters of the lex also appear to cover similar ground; it seems appropriate to give a brief outline of them here.

(i) Chapter 60 provides for securities (*praedes*) to be given in relation to public funds by those seeking election to the duumvirate or quaestorship. Where a magistrate or former magistrate had withheld municipal funds, the municipality would therefore have the option of making good the deficiency by proceeding against the securities. It will be noted that the application of this remedy is confined to magistrates or former magistrates.³⁶

(ii) Chapter 67 – to which we come in more detail almost immediately – imposes an obligation on a person in possession of public funds to repay them within 30 days, and an obligation on a person who has carried on public accounts or public business to render accounts within 30 days. It also provides a remedy for breach of either of these obligations. The difficulty is whether this is part of the same procedure as, or a different procedure from, the one set out in chapter 69.

(iii) Chapter 68 provides that when accounts are rendered, in the presence of two thirds of the decurions the duumvir is to ask them to swear an oath and elect three persons to examine the case and raise proceedings. The link between this chapter and chapters 67 and 69 is not plain. What is clear is that it applies only where accounts are rendered (*cum rationes reddentur*), so that where money had been withheld and accounts had not been rendered (as might often be the case), chapter 68 could not apply. In such circumstances another procedure must have applied.

It has been asserted that chapters 67, 68 and 69 are parts of a whole.³⁷ That view is not quite unproblematic;³⁸ but the main concern of this paper is the relationship between chapters 67 and 69.

4. The relationship between chapters 67 and 69

Chapter 67 provides for two duties. They are not confined to those who have held magistracies. First, a duty on those who are in possession of public funds to return them within 30 days of receipt. Second, a duty on anyone who has administered municipal accounts or business to render accounts of transactions with public funds within 30 days of ceasing to administer. This account must be made to a meeting of the decurions, and discharge can be granted only at a meeting at which two thirds of the council is

³⁵ See e.g. chs. G (= 45), 60, 73, 79.

³⁶ Cf. also ch. 64. The procedure outlined here is not that of Roman private law: chapter 64 specifically compares giving security to the aerarium. The nature of the liability of the securities (*praedes*) is disputed. It appears, however, from other public-law sources that to stand praes for someone involved undertaking sole liability. This is incompatible with the Digest texts, which establish an order for proceeding against magistrates and their securities. It may be that under the influence of the *fiscus*, which typically made use of private-law remedies, by the time of the evidence preserved in the Digest the harsh regime of *praedes* had been superseded by the normal regime of personal securities.

³⁷ E.g. by Lamberti 116; Laffi, *op. cit.*, 1989, (n. 18) 26.

³⁸ If it is right, then chapter 71 (on the plaintiff's right when suing for *pecunia communis* to summons witnesses) should belong to the same whole; but chapter 70 appears to be a quite general statement about appointing an actor municipum.

present. A failure in one or other of these duties might arise if no accounts were rendered at all (and could therefore not be scrutinised under chapter 68) or if accounts were rendered, were scrutinised under chapter 68, and disclosed that a sum of money was outstanding. Failure in either of the duties outlined in this chapter gives rise to a liability to repay the sum at issue plus the same amount again (*quanti ea res est tantum et alterum tantum*) to the *municipes* of the city.³⁹

The details given in this chapter do not square with the ordinary rules on recovery of fines. It is stated that the money may be recovered for the municipality by any *municeps* who wishes and is eligible under the law; and it is true that this is phrased in absolutely standard form – *qui volet cuique per hanc legem licebit* –, in the same way, for example, that fines for failure to give the magistrate's oath (ch. 26) or for infringement of building regulations (ch. 62) are said to be recoverable in an action at the instance of any *municeps* who is both eligible and willing. But for two reasons this chapter appears to be concerned with a rather different procedure.

First, the chapter (unlike others concerned with finable acts or defaults) is actually concerned with the withholding of money, so that there appears to be a reipersecutory as well as a penal element in the obligation it imposes. Second, the action outlined in chapter 67 is said to lie against the heirs of the person holding the public funds. But actions for fines did not transmit against heirs in Roman law. We are told this expressly for the true *actio popularis* by Ulpian: 'omnes populares actiones neque in heredes dantur neque supra annum extenduntur'.⁴⁰ The same is true of the actions for fines. We therefore have to do with an action which in at least one critical respect differs from that known for recovery of fines. It may be noted that the same exceptional rule applied to the criminal *iudicia* for *peculatus* and *de residuis*: they too lay against the heir of the wrongdoer, and we are told by Papinian that this is because the concern was principally with the money embezzled.⁴¹ That statement is scarcely a model of clarity, but it seems to be referring to the fact that the heir has been enriched by the deceased's peculations. There remains the difficulty that the present action lies for payment of double and not simply for enrichment in the hands of the heir.⁴² Whatever the origin of this exceptional rule, it is certainly one which does not apply to ordinary *actiones populares* for recovery of fines.

On the other hand, it is equally clear that the duties which are here sanctioned by fines are not duties of private law. It cannot be supposed, for example, that a person who borrowed money from a municipality came under an immediate and continuing obligation to repay it within 30 days and would be liable to a fine of double if he failed to do so.⁴³ Accordingly, the chapter does not seem to be concerned with establishing a general duty in relation to *pecunia communis* which extended into the sphere of private law too.

The language used in chapter 67 may support a narrower view: 'at quem pecunia communis municipum eius municipi pervenerit . . . in publicum municipum eius municipi eam referto'. The word *pervenerit* is far from the obvious choice for describing (for example) a loan made by the municipality to somebody. Although *pervenerit* appears in the most various contexts in the Digest, which allow little scope for drawing conclusions,⁴⁴ its most notorious appearance elsewhere in Roman statutes is in the context of *repetundae*. The *lex Servilia* introduced by Q. Servilius Glaucia is said to have added to the *lex repetundarum* the clause 'quo ea pecunia pervenerit' in order to extend the ambit of that statute to

³⁹ Note the difficulty of quantifying the amount to be paid if the default consisted in failure to render accounts. (But Roman private law was prepared to deal with quantification of damages in similarly awkward situations.)

⁴⁰ Ulp. 1 ed. D. 47.23.8.

⁴¹ Pap. 36 quaest D. 48.13.16: 'cum quaestio principalis ablatae pecuniae moveatur'.

⁴² Cf. Lamberti 118 n. 113; note too that in cases *de residuis* the liability was not restricted purely to enrichment: Marci. 14 inst. D. 48.13.5.2.

⁴³ On municipal lending, see e.g. Pliny, ep. 10.54–55.

⁴⁴ *Vocabularium iurisprudentiae romanae* s.h.v.

gains in the hands of third parties.⁴⁵ There is nothing in the present context to suggest that criminal procedure is in question, so the analogy has to be treated with caution. But it deserves emphasis that chapter 67 requires to be interpreted more narrowly than its words may at first sight suggest, since they make no sense for private-law relations. It may well be that we should interpret chapter 67 as being concerned with (i) failure to provide accounts, and (ii) unwarranted retention of municipal funds either by their immediate, or by any subsequent, recipient.

The obligations set out in this chapter fit neither within the framework of actions for fines nor within that of ordinary private-law borrowing. The same, as we saw, had to be said for the procedure set out in chapter 69. That seems to be a remarkable coincidence. Rather than multiply procedural entities beyond what is necessary, it may not be unreasonable to think that the two chapters are to be read together: chapter 67 sets out the terms on which the chapter 69 procedure can be called into action.

That suggestion gains some support from a passage elsewhere in the *lex Irnitana*: chapter G (also known as chapter 45) deals with municipal *legationes* or embassies and gives a list of people ineligible to be sent on them. The list includes a person who has been *duumvir*, *aedile* or *quaestor* and has not rendered and had approved the accounts of that office; a person who had *pecunia communis* in his possession and has not returned it; a person who carried on the accounts or the business of the municipality and has not rendered and had approved those accounts.⁴⁶ Restrictions on going on embassies reappear in the Digest in the report of a rescript of Antoninus Pius: it is stated generally that a *debitor rei publicae* may not carry out an embassy.⁴⁷ That prompts the question: what is a *debitor rei publicae*? To this Ulpian conveniently provides an answer: *debitores rerum publicarum* are those who are indebted because of public administration (*ex administratione*), and not those who have merely borrowed money from the city.⁴⁸ It is clear that the defaults set out in chapter G, which prevent participation in embassies, and the defaults set out in chapter 67 are the same.⁴⁹ To use the terms of the Digest: these defaults make the defaulting party a *debitor rei publicae*.

In this context too there is some resemblance between the municipal rules and those attested for the *lex Iulia peculatus*.⁵⁰ Whether interference with municipal funds itself amounted to *peculatus* was disputed, at least among late jurists: we are told by Marcian that constitutions of Trajan and Hadrian ruled that this was so, and *hoc iure utimur*, says Marcian; but Papinian says just as plainly that this is not *peculatus* but theft, *furtum*.⁵¹ It is notable that the present *lex* says nothing about *peculatus* in the narrow sense.⁵² None the less, in dealing with the action *de residuis* Labeo is reported as having distinguished between the provincial official who had not rendered accounts and the one who had: the one who had done so was not liable to the action for *residua pecunia* as he was regarded as a private debtor.⁵³ This is not the same distinction as we find in the present context, but what is more important is the broad distinction the sources attest between ordinary and public debtors.

These fragments of evidence indicate that the jurists sometimes saw reason to distinguish ordinary debts from those arising from administration or by reason of wrongful withholding of money. If that

⁴⁵ I owe the point and the reference to John Crook. See Cicero, *pro Rab. post.* 9; see recently Lintott, (op. cit., n. 13) 28–, 167–. For ‘pervenire’ in the present *lex*, cf. ch. J (= 48) l. 18 (enrichment derived by certain officials from public contracts; a penalty of double is prescribed here too).

⁴⁶ Ch. G ll. 18–25.

⁴⁷ Marci. 12 inst. D. 50.7.5 pr.

⁴⁸ Ulp. 4 de off. procos. D. 50.4.6.1.

⁴⁹ Except that ch. 67 does not deal separately with the case of the defaulting magistrate.

⁵⁰ Cf. Lamberti 116.

⁵¹ Marci. 14 inst. D. 48.13.5.4; Pap. 1 resp. D. 47.2.82.

⁵² By contrast, for example, the *lex Tarentina* ll. 1–5 establishes rules for *pecunia publica sacra* and *religiosa* and authorizes their recovery by the magistrate. These fall within the core definition of *peculatus*.

⁵³ Pap. D. 48.13.16; Labeo ap. Paul D. 48.13.11.6.

distinction can be generalized, it is likely that in the municipal context too the substantive distinction is paralleled by a procedural one: debts due from ordinary debtors could only be recovered by normal civil procedure; for money which was owing *ex administratione*, or – to use the terms of the present *lex* – owing by reason of a default in terms of chapter 67, the special procedure was additionally available. That procedure was the *iudicium pecuniae communis*. If this is correct, then the words *qui volet cuique per hanc legem licebit* in chapter 67 must be taken as a cross reference to chapter 71 and its special provisions on suing for *pecunia communis*: accordingly, they are a reference to the *actor* who was appointed to pursue the *iudicium pecuniae communis*.

5. Conclusions and inconclusions

To begin negatively: the general argument advanced here is that both chapters 67 and 69 contain anomalies, whether viewed from the perspective of private-law actions or that of actions for recovery of fines. More positively, it is suggested that chapters 67 and 69 must be read closely together; and that the defendant facing an action for a default set out in chapter 67 might request the procedure set out in chapter 69, always provided that the sum involved was within the appropriate limits. This account appears to accord with the evidence, although difficulties remain. The chief of these is that the obligation to pay double for default in a duty imposed by chapter 67 remains anomalous, whether treated as a fine recoverable from an heir or as the potential subject of a private-law action. More generally, an important question posed at the outset remains unanswered: what was the purpose of this special procedure? It is hard to suppose that it was devised in order to meet a defendant's concern about prejudice from the judge in ordinary procedure, since he was after all closely involved in the judge's selection. It may be that the procedure offered advantages of speed which the ordinary courts could not match. But on the present state of evidence this remains no more than a speculation. Equally uncertain is the extent to which this procedure may have been applied in practice. There is some evidence of the exercise by municipal senates of the functions of a court, and Cicero reports that 'decuriones universi iudicaverunt' in a case of falsification of public records.⁵⁴ But the volume of evidence is very modest. It is at least possible that, with the *fiscus* taking the lead in making use of ordinary private-law remedies,⁵⁵ the municipalities may have followed – leaving the *iudicium pecuniae communis* unemployed.

Be that as it may, the following conclusions emerge from this discussion. The *iudicium pecuniae communis* was not a procedure of private law and had nothing to do with the recovery of sums due to the municipality under relationships governed by private law. The procedure was not open to unauthorized plaintiffs in the manner of the *actio popularis*, but was initiated by an *actor* appointed under the *lex*. It was available whenever there had been a default by the defendant under chapter 67 of the *lex*: a failure to produce accounts of dealings with municipal funds or a failure to return municipal funds. It was not restricted to claims against magistrates or former magistrates. Chapters 67 and 69 of the *lex* require to be read closely together: chapter 67 set out the circumstances in which a remedy for *pecunia communis* required to be provided; chapter 68 an accounting procedure which might disclose that there had been a breach of chapter 67; while chapter 69 set out the rules for setting up a tribunal to deal with cases arising in those circumstances, which was competent where the local jurisdiction was not excluded and where the defendant was unwilling to submit to the jurisdiction of the ordinary courts.

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⁵⁴ Laffi, *op cit.*, 1989, (n. 18), *passim*; Cicero, *pro Cluentio* 41.

⁵⁵ Mommsen, *Juristische Schriften* (Berlin, 1905) I 369.