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SYMPOSION 2017

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EVA CANTARELLA
MICHAEL GAGARIN
GERHARD THÜR
JULIE VELISSAROPOULOS

in Verbindung mit
Athina Dimopoulou, Martin Dreher,
Adriaan Lanni, Alberto Maffi

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תל אביב, 20-23 באוגוסט 2017

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

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IN MEMORIAM
JOSEPH MÉLÈZE
MODRZEJEWSKI

תוכן העניינים — INHALT

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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

GERHARD THÜR (VIENNA)

FORMAL PROPOSALS IN ATHENIAN LAW: RESPONSE TO MICHAEL GAGARIN

The juristic significance of *proklēsis* (challenge, Aufforderung) in ancient Greek litigation and its main scope of application, *basanos* (interrogation of slaves under torture) and *horkos* (oath) is well investigated.[1] In his paper Gagarin goes far beyond this topic. He aims at any kind of proposal (beyond the strict form of *proklēsis*) to any kind of dispute resolution and evidence. And his focus switches from juristic interpretation to a question belonging to the field of rhetoric: were the proposals offered with the expectation that they really would be accepted or did the proposers from the outset expect them to be rejected and to use the rejection for their own rhetorical advantage in court. I appreciate this approach. Nevertheless, the question of seriousness cannot be answered without resolving the juristic one first.

First, fortunately Gagarin abandoned the dramatic, antiquated translation of *proklēsis* "challenge" (Herausforderung) in favor of "proposal" (neutral: Vorschlag). However, when dealing with the juristic aspect I would suggest "formal proposal" (förmliche Aufforderung; or "summons" but this term can easily be mistaken for a court order). Even vigorously disputed by Gagarin (above, n. 6), formality will be the main point of my response. Only formal proposals directed to the adversary could back the speaker's conclusion that the opponent is perverting the course of justice. These proposals had to be formulated in clear words, regularly drafted in a document, in front of witnesses, who had to testify to the exact wording and how the opponent reacted. Proposals just vaguely narrated in the speeches might give interesting insights how Athenians conducted their cases, but they are unsuitable even for rhetorical evaluation.

Second, the eight types of proposals Gagarin specifies seem to be the most common in Athenian judicial practice. So it makes sense investigating whether they were issued seriously or not. Four of them, (1) proposals concerning the whole case, (2) a specific issue, (3) arbitration, and (4) producing a document, are still common today. However, this fact is in no way an argument that they generally were put forward with greater expectation that they really would be accepted. Each reference needs a case study of the special circumstances whether it was a formal proposal and whether the proposer was serious about it, and finally what

[1] Glotz 1907, Thür 1977, Gagarin 1996, 1997.

conclusions the speaker draws in court from not accepting his proposal. Nevertheless dividing the proposals into those that are common and uncommon today will prove unexpectedly fruitful. Uncommon today and specifically Athenian are (5) oath and (6) *basanos* proposals[2], or to have someone (7) testify in court and to undertake (8) *antidosis*, exchange of property.

I should start with the proposals that are said to be 'still common today.' One would expect that the fourth type "produce documents" doesn't give any opportunity for foul tricks. As Gagarin concedes, today this type follows completely different rules: the court can order a litigant under sanctions to produce documents. This was unimaginable in ancient Athenian litigation where only the litigants took active parts. So, in the first speech against Stephanos, (Dem.) 45.8, concerning Dem. 36 (for Phormion) 7 we have an example of an unserious—formal—proposal to open a will and produce it in court. Phormion summoned Apollodoros to acknowledge the authenticity of a copy of Pasion's will or open the original that was furnished to the *diaitētēs*. Since both litigants were seriously interested that the whole content of Pasion's will not be disclosed to the public, Phormion could be quite sure that his *proklēsis* would be rejected. Only a few items of the will were relevant in Phormion's *paragraphē* against Apollodoros' claim. They are quoted in (Dem.) 45.28. Furthermore, and typically for Athenian litigation, Stephanos, who had testified only to the *proklēsis* concerning the authenticity of the copy, was sued by Apollodoros for false testimony concerning the truth of the will itself.[3] One cannot achieve results on seriousness even of a *proklēsis* only by counting and classifying the cases but rather by close interpretation.

On the type "proposing private arbitration" one should note that it is not the informal proposal or the—scarcely used—*proklēsis* that determined the arbitration procedure but rather a different special agreement called *epitropē*, *epitrepein*. And from Phormion's—allegedly—most unscrupulous behavior during the arbitration that he proposed one can conclude that this proposal was unreliable.[4] On the other hand, in the so-called "whole-case" and "specific-issue proposals" the proposers determined exactly the proceedings how to find the solutions and the consequences the opponents had to bear. Often the proceedings were swearing an oath or questioning a slave under torture. So, again the borderlines between serious and unsound proposals must be found by case studies. Even the borderline between "whole-case" and "specific-issue" is blurred: in Dem. 56 (against Dionysidorus) 40 the formal proposal to bring the ship back to Athens, allegedly to proof its sailing condition, does in no way concern only a special issue. Since the ship was pawned

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[2] Despite the title "Beyond" oath and *basanos* approximately one third of the paper is dealing with both of them, and with good reason.

[3] Thür 1977, 144 n. 54.

[4] At least the speaker tries to direct the judges to this conclusion: in addition to Dem. 34.18 (against Phormion, quoted in the Appendix) one should read also §§ 21, 44–5.

to him, the proposing plaintiff Dareius would not only examine the ship when it arrived in Athens, but also seize it to enforce his claim. The defendant, Dionysidorus, would thus have lost his whole case. Of course he prevented this situation by rejecting the *proklēsis*. To sum up this section, also in the four proposal types 'still common today' there were more strategic and rhetoric calculations than one could expect.

Following the line of the paper I switch over to the four proposals concerning practices and institutions 'not existing today': *basanos, horkos, marturia* (especially *exōmosia*) and *antidosis*. The rhetorical use of the *proklēseis eis basanon* and *eis horkon* needs no more comment. These topics are quite sufficiently dealt with[5] and are more or less "beyond the paper." However, the type "proposals to testify" needs some discussion. Until now all other types of proposals took place between the litigants. In this type a litigant doesn't summon his opponent but rather a third person to do something. Furthermore, witness depositions were subject to special rules. For summoning a witness either to testify (*marturein*, confirm the written deposition prepared by one of the litigants) or to swear himself exempt (*exomnusthai*) the verb (*pros*)*kalein*—not *prokalein*—was used, technically the same word as for summoning the defendant to appear at court. Furthermore, special summons (*klēteuein*) and sanctions (*dikē lipomarturiou*) did exist, all different from *proklēsis* proposals which entail no sanctions. Only the pretended uncertainty, whether in front of the court a witness will or will not confirm his *exōmosia* sworn out of court was similar to the rhetorical strategy with unserious proposals.[6]

The paper correctly excludes the *proklēseis eis antidosin*, the proposal to undertake an exchange of property. By this means a citizen aimed at evading a liturgy alleging that a fellow citizen was financially better of. For this type of proposals Gagarin notes that it was subject to special rules and that it was a step necessary to open a new dispute and not to settle an existing one—nevertheless one may question whether the proposal was serious or not. Why did the otherwise used *prosklēsis* (the summons to appear at court) not work for that purpose? In this case, I think, the opponent committed neither a private nor a public act of wrongdoing, so the proposer was not entitled to claim or prosecute. Therefore the Athenians created a kind of summoning that even a noninvolved opponent couldn't resist. A parallel to this kind of summons could be the *proklēsis* used in the Achaian League to start international arbitration: by a formal *proklēsis* document a member state of the League could summon another member to engage in an "obligatory" arbitration;

[5] Gagarin seems to accept the findings in Thür 1977, 233–61 that all the 42 *proklēseis eis basanon* mentioned in the court speeches were unserious. On the 24 instances of oath proposals (8 *proklēseis*) no systematic study on sincerity exists; for some arguments see Gagarin 1997, 128–30.

[6] For more details about the *exōmosia* texts see Thür 2005, 160–61. 167–9.

obligatory means that in case of disobedience the League could impose a fine. A summons by *proskalein* between sovereign states was impossible.[7]

To sum up my comment on "Challenges in Athenian Law"—so the title of the paper—I generally agree with the results concerning *proklēseis*, 'formal' proposals. For the 'informal' ones a first step is done, collecting the sources to open the juristic discussion. Of course, different access to the sources produces different results. Historical-statistical access and a juristic-casuistic one have to complement each other.

Finally, nevertheless, I have to express serious disagreements with the part that attempts to reconstruct the historical development of proposals. On the one hand, Nestor's suggestion that Agamemnon and Achilles settle their dispute (Hom. *Il.* 1.254–84) is far from any legal impact.[8] On the other hand, Menelaus' proposition that Antilochus swear an oath of purgation (Hom. *Il.* 23.581–85) surmounts any kind of a simple proposal. The verb *dikazein*, the scepter and the herald point to a kind of proposing a judgment (imposing the oath on Antilochus). Also one cannot say whether the *dikazein* pronouncements of the *gerontes* in the shield scene (Hom. *Il.* 18.506) and those of the *hēgētores* addressed by Menelaus just before his own *dikazein* pronouncement (Hom. *Il.* 23.573) are formal or informal proposals comparable with those in classical Athens. None of these persons are parties in the present litigations (Menelaus' situation is twofold as I explained elsewhere). The texts belong to the discussion about judgment.[9] If we look for a forerunner scene of an Athenian *proklēsis* we can find one a few verses before Menelaus' speech, in Hom. *Il.* 23.553–4 where Antilochus challenges to a duel any person, who will take away the mare he carried off as second prize.

The shape of the archaic Greek judgment might also explain some characteristics of three proposals 'not existing today' concerning *horkos*, *marturia* and *basanos*. Gagarin has noticed that all three are numbered under *atechnoi pisteis*. Beyond that, all three are usually formulated in the same way: containing a single statement, mostly introduced by *eidenai* (oath swearers, witnesses and tortured slaves "know" the crucial fact).[10] In Athenian courts all three are formal guaranties, which the judges are not able to scrutinize—apart from the litigants' arguments. In my opinion this formalism stems from the 'conditional verdict'

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7 See the new inscription from Messene (after 182 BC, Thür 2012) and Thuc. 1.34.2. Now, I think the *proklēseis* mentioned in the judgment of Knidos (*IvKnidos* = *IK* 41, 221, 43–45, ca. 300 BC; s. Thür 2005, 148 n. 8) are such summonses and not proposals concerning the issue of the litigation. In contrast, those *proklēseis* mentioned together with the *ekhinoi* in *AthPol* 53.2, 3 belong to the latter type.

8 Neither the word *proklēsis* nor a verb of *kaleō* is used: it is only a friendly advice. In the same way, in Athens, no third person interfered by directing a formal proposal to the litigants; Dem. 59.45 (Gagarin, above, note 6) is an example of litigation atmosphere and not of a legal institution, and the rhetorical argument is rather poor.

9 Thür 2015, 162 (with further references); dissenting Gagrin, above, note 13.

10 Thür 1977, 131; 2015, 152–5.

rendered by the archaic leaders (after failing to reconcile the litigants): imposing an oath on one litigant, to be sworn sometimes together with a certain number of witnesses; maybe also ordering one of the litigants to have a slave tortured.[11] Already under Draco conditional verdicts vanished since secretly voting law courts operated, and judgments were delivered in substance and under free deliberation. Nevertheless the framework of court procedure preserved some archaic structures, often misused by clever litigants or logographers.

To understand the legal background of a formal proposal, *proklēsis*, in Athens a short glance at a possible earlier stage might be helpful. We find this in the law codes of Gortyn.[12] In the "Little Code," now G 41, from the North wall in the second column about "animals injuring animals" the lines 6–16 run: "But if it is dead or cannot be led, then (the injured animal's owner) is to summon (the other) in the presence of two witnesses within five days in order to display it, wherever it is; and the summoner and his witnesses are to be the ones who swear as to whether he led or brought it or summoned him so as to display it." The editors translate the word *kalēn* (ll. 9, 15) with summon. The "Gortyn Code" (now G 72) has in the first column (ll. 41, 45) a similar provision using *kalēn* for summon in the presence of witnesses and in the second column another provision about an adulterer who is caught. Here, in l. 28 the captor has to "declare (*proFeipátō*) before three witnesses" to the relatives that the adulterer is to be ransomed within five days. Already Glotz[13] has interpreted these texts as an instance of *proklēseis*. There, one can realize all features of the Athenian *proklēsis*: one litigant summons his opponent to perform an activity concerning the existing dispute. The act of declaration is public and formalized. In Gortyn a certain number of witnesses was necessary to effectuate the legal consequences. In fourth century Athens no fixed numbers of witnesses were stipulated, but in addition to the witnesses it became usual to draft a document for presenting the *proklēsis* at court. In the Athenian system of sovereign *dikastēria* also the statutorily fixed consequences vanished. Legal consequences were stipulated individually by the parties. This was the juristic nucleus of the *proklēsis* in its broad field of practical use that never will be systemized in a completely satisfying way. Its formal character was the basis for the strong rhetorical argument against an opponent who declined this kind of proposal, and equally it was a strong temptation to abuse it. Looking the Athenian court speeches over Gagarin found 173 proposals, of which 86 explicitly used *proklēsis* or *prokaleō*. A large field of work is still open to expound whether these proposals, formal or not, were made seriously, what consequences their acceptance involved and what rhetorical use the litigants made when the opponents refused them.

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[11] With all cautions conjectured by Thür 1977, 307.

[12] I use Gagarin, Perlman 2016 and their translations.

[13] Glotz 1907, 680.

BIBLIOGRAPHY

Gagarin, Michael. 1996. “The Torture of Slaves in Classical Athens,” *CP* 91: 1–18.

Gagarin, Michael. 1997. “Oath and Oath-Challenges in Greek Law,” in G. Thür, J. Velissaropoulos Karakostas (eds.), *Symposion 1995*. Köln: 125–34.

Gagarin, Michael and Paula Perlman. 2016, *The Laws of Ancient Crete c. 650–400 BCE*, Oxford.

Glotz, Gustave. 1907. “Proklèsis,” in: Ch. Daremberg, E. Saglio, *Dictionaire des Antiquités* 4, Paris: 676–680.

Thür, Gerhard. 1977. *Beweisführung vor den Schwurgerichtshöfen Athens. Die Proklesis zur Basanos*. Wien.

Thür, Gerhard. 2005. “The Role of the Wittness in Athenian Law,” in M. Gagarin, D. Cohen (eds.), *The Cambridge Companion to Ancient Greek Law*. Cambridge: 146–69.

Thür, Gerhard. 2012. “Dispute over Ownership in Greek Law: Preliminary Thoughts about a New Inscription from Messene (*SEG* LVIII 370),” in B. Legras, G. Thür (eds.), Symposion 2011. Wien: 293–316.

Thür, Gerhard. 2015. “Prozesseide im Gesetz Drakons und ihr Nachleben im klassischen Athen,” in H. Barta, M. Lang, R. Rollinger (eds.), *Prozessrecht und Eid* I. Wiesbaden: 153–78.

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