Could the interdictum unde vi be brought by a tenant? D. 43,16,18pr. and Dorotheus, a Subsecivum Groninganum

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COULD THE *INTERDICTUM UNDE VI* BE BROUGHT BY A TENANT?
D. 43,16,18pr. and Dorotheus, a *Subsecivum Groninganum*

One of the eternal questions of Roman law, which can be debated to the delight of generation after generation of lawyers, concerns the question whether detentors were able to bring the interdict *unde vi* or *de vi armata*. The first one to suggest the possibility a detentor could bring the interdict *de vi armata* was Cicero. In his plea on behalf of Caecina, who was a detentor, he compared the wording of the interdict *unde vi* with the wording of the interdict *de vi armata* and concluded possession was not a requirement to bring the interdict *de vi armata*, because it's wording did not contain the clause which required possession as did the interdict *unde vi*. The interdict *de vi armata* was brand-new when Cicero tried to give it this interpretation. Cicero pleaded on behalf of Caecina probably in 69 BC, whereas the interdict *de vi armata* probably was introduced in 71 BC.[1] Of course, Cicero needed this interpretation to secure a victory for Caecina, so the question remained whether his partisan interpretation was right.[2] But still nowadays one finds the suggestion detentors, or at least tenants, could bring the interdict *de vi armata* and even *unde vi* in Romanistic legal literature.[3]

Kaser, for instance, in his *Handbuch*, mentions the possibility and refers to Mayer-Maly for further details.[4] Mayer-Maly discusses two Digest-texts from title 43,16, dealing with the interdicts *unde vi* and *de vi armata*. These texts are fragment 12 and fragment 18. The first one is by Marcellus and the second one by Papinian. They treat of the same case. In this article I will deal with the text written by Papinian. It is a bit more extensive and the Byzantine text dealing with it is more interesting.

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1 Cf. e.g. B.W. Frier, *The rise of the Roman jurists*, Princeton 1985, 45ff. and 52ff.; O.E. Tellegen-Couperus, 'C. Aquilius Gallus dans le discours *Pro Caecina* de Cicéron', *TRG* 59 (1991), 37ff., 43 n. 20; G. Falcone, *Ricerche sull'origine dell'interdetto Uti possidetis*, Palermo 1996, 21 n. 41.

2 On 'Ciceros Interesse für juristische Studien', cf. H.L.W. Nelson, in: M. Tullius Cicero, *De Oratore Libri III*. Kommentar von A.D. Leeman, H. Pinkster, H.L.W. Nelson, 2. Bd., Heidelberg 1985, 22ff.

3 Otherwise already e.g. W. Stroh, *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*, Stuttgart 1975, 82f., with references.

4 M. Kaser, *Das römische Privatrecht*, I, München 1971, 390 n. 40; Th. Mayer-Maly, *Locatio conductio. Eine Untersuchung zum klassischen römischen Recht*, Wien 1956, 53ff.

D. 43,16,18pr. reads like this:

> (PAPINIANUS libro vicensimo sexto quaestionum.)
> Cum fundum qui locaverat vendidisset, iussit emptorem in vacuam possessionem ire, quem colonus intrare prohibuit: postea emptor vi colonum expulit: de interdictis unde vi quaesitum est. placebat colonum interdicto venditori teneri, quia nihil interesset, ipsum an alium ex voluntate eius missum intrare prohibuerit: neque enim ante omissam possessionem videri, quam si tradita fuisset emptori, quia nemo eo animo esset, ut possessionem omitteret propter emptorem, quam emptor adeptus non fuisset. emptorem quoque, qui postea vim adhibuit, et ipsum interdicto colono teneri: non enim ab ipso, sed a venditore per vim fundum esse possessum, cui possessio esset ablata. quaesitum est, an emptori succurri debeat, si voluntate venditoris colonum postea vi expulisset. dixi non esse iuvandum, qui mandatum illicitum susceperit.

It is translated by Watson et al. like this:

> (PAPINIAN, Questions, book 26:)
> The landlord of a farm sold it and directed the buyer to take up the vacant possession. His tenant prevented the buyer from entering. Afterward the buyer forcibly expelled the tenant. The question was about interdicts "where by force". It was held that the tenant was liable to the seller under the interdict, because it made no difference whether he prevented the seller himself or someone else sent by his wish from entering. For possession was not held to have been lost before it was delivered to the buyer, since no one is minded to lose on account of a buyer a possession which the buyer has not taken over. The buyer who subsequently applied force is also liable himself under the interdict to the tenant; for it was possessed not by him but by the seller, who had been deprived of possession. The question was, whether one should come to the buyer's aid, if it was by the wish of the seller that he afterward forcibly expelled the tenant. I said that one should not come to the aid of anyone who had carried out an illegal mandate.

The case is a rather straight-forward one.[5] The legal questions are less so. Someone has rented out his farm and then sells his farm to someone else. The seller instructs his buyer

5 The most recent discussions of the text, if one can call them that, I could find are O. Behrends, 'Selbstbehauptung und Vergeltung und das Gewaltverbot im geordneten bürgerlichen Zustand nach klassischem römischen Recht', *SZ* 119 (2002), 74 n. 64 (I am not sure what he thinks) and G. Deppenkemper, *SZ* 118 (2001), 627, discussing H. Wieling's Referat über 'Besitzschutz und Rechtsschutz des Mieters und Pächters vom römischen Recht bis zum deutschen Bürgerlichen Gesetzbuch', at the symposium of Catanzaro and Messina called ' Diritto Romano e terzo millennio –

to take possession of the farm, but the tenant refuses to admit the buyer. The buyer then expels the tenant by force. The legal question is: who gets to bring the interdict *unde vi*? The answer given here by Papinian is, first of all the seller is able to bring the interdict against the tenant. He gives as a reason for this conclusion it makes no difference whether the tenant refuses to admit the buyer, or whether the tenant refuses to admit the seller. Secondly, the tenant is able to bring the interdict against the buyer, who expelled him. It is this second conclusion, especially, which raises eyebrows by many.

Because the interdict *unde vi* is given here to the tenant, Mayer-Maly concludes 'Damit wird ein materielles Recht des Pächters auf uti frui während der vollen Pachtzeit possessorisch geschützt' and 'so wurde durch ein Interdiktenverfahren die Regel "Kauf bricht Miete" von den Byzantinern entwertet'.[6] Of course, the Byzantines did it once again. Mayer-Maly wrote those words in 1956. Whether he would have written them nowadays, had he still been alive, is a matter of speculation. The tendency to rant against the Byzantines was alive and kicking back then. It led to suspicions of interpolation in almost any text. Some passages in this fragment were also bracketed by Mayer-Maly in his book on *locatio-conductio*. I will pass by these suggestions for the moment and try and see whether it is possible to explain the text without them.

The first question Papinian answers is whether the seller is able to bring the interdict against the tenant. He says it is possible. It is possible, because it makes no difference whether the buyer is prevented from entering the farm or the seller himself is prevented from doing so. The seller remains in possession, he goes on to say, as long as the buyer has not gotten possession. What does this mean? Papinian appears to have meant it was the seller's possession which was taken away by the refusal of the tenant to let the buyer enter upon the premises. The buyer would have become possessor when he had been able to enter the farm with the consent of the seller. The buyer, however, had been prevented from doing so by the tenant. The buyer could not bring the interdict. The seller could. Why? Because he was the one in possession at the moment the tenant refused to admit the buyer. Did this lead to loss of possession by the seller? Papinian appears to have thought so, because of his reasoning, equating the refusal of the tenant to let the buyer enter with the refusal of the tenant to let the seller, the tenant's landlord, enter. That leaves the question whether the refusal of a tenant to let his landlord enter the premises he rents amounts to the taking of possession by the tenant? Obviously, Papinian thought so.

Radici e prospettive dell'esperienza giuridica contemporanea', where Wieling appears to have concluded our text gave the tenant the interdict *unde vi*. The discussion is an old one; cf. e.g. F.C. von Savigny, *Das Recht des Besitzes*, Wien 1865[7] (repr. Aalen 1990), 424ff.

6 Mayer-Maly, *Locatio conductio* (note 4 above), 55. Cf. in a comparable sense G. Wesenberg, *Verträge zugunsten Dritter. Rechtsgeschichtliches und Rechtsvergleichendes*, Weimar 1949, 47.

More or less the same thought is found in fragment 12 by Marcellus. The text reads like this:

> D. 43,16,12
> (MARCELLUS libro nono decimo digestorum)
> Colonus eum, cui locator fundum vendiderat, cum is in possessionem missus esset, non admisit: deinde colonus vi ab alio deiectus est: quaerebatur, quis haberet interdictum unde vi. Dixi nihil interesse, colonus dominum ingredi volentem prohibuisset an emptorem, cui iussisset dominus tradi possessionem, non admisit. Igitur interdictum unde vi colono competiturum ipsumque simili interdicto locatori obstrictum fore, quem deiecisse tunc videretur, cum emptori possessionem non tradidit, nisi forte propter iustam et probabilem causam id fecisset.

The translation by Watson et al. gives the following:

> A tenant did not admit someone to whom the landlord had sold the farm, when sent to take possession. Afterward the tenant was forcibly ejected by someone else. The question was: Who could avail himself of the interdict 'where by force'? I said it makes no difference whether the tenant had prevented the owner when he wished to enter, or the buyer to whom the owner had ordered the possession to be delivered. Therefore, an interdict 'where by force' would lie in favor of the tenant, and the tenant would be liable under a similar interdict to the landlord, whom he would be held to have ejected at the time when he did not deliver possession to the buyer, unless it should be that he did this for a good and justifiable reason.

Perhaps the situation with regard to the buyer is even more clear in this fragment. There Marcellus states a case where the seller instructs the tenant to deliver possession to the buyer. The tenant then does not let the buyer enter into possession. In Papinian's case it is not clear whether the tenant knew of the sale or had been instructed to let the buyer enter into possession. But Marcellus also equates the prohibition to let the buyer enter into possession with the prohibition to let the seller, or owner as he is called there, enter the premises.

That still leaves us with the question whether it is really the same thing to prevent a buyer from entering into possession of the farm he bought, or to prevent an owner from entering the farm he rented out? Is the owner allowed to enter the farm he rented out when he wants to? Does the refusal to let him enter amount to loss of possession for the owner under all circumstances? At least Marcellus seems to think there may be circumstances where the tenant is allowed to refuse his landlord to enter the farm, for he makes an exception in case the tenant has a good and justifiable reason to refuse entry to the buyer

and, so we may conclude, to the owner as well. So perhaps we should suppose, in Papinian's text as well, the tenant was obliged to let the owner enter the premises and by refusing to do so acted in a way opposed to the way a tenant should act. By doing so the tenant made himself from a detentor into a possessor and took away the possession of the owner. He did so by acting publicly. So he did not change the cause of his possession all by himself, in contravention of the maxim *nemo causam possessionis sibi ipse mutare potest*.[7]

But does this behavior amount to *vis*? There are two possible answers to this question. Either Papinian supposes the refusal to let the buyer enter to have been accompanied by such force, or the refusal itself is supposed to be force. There is a lot to be said for either supposition, but the second one is the one more appealing. Why? Because in the first explanation the text has to be read according to an unspecified supposition: there was force, but is not mentioned in the text. In the second explanation the facts mentioned in the text themselves, the prohibition to let the buyer enter, constitute force. At least Cujas seems to think so.[8] One could find help of a lesser kind.

So the explanation for the interdict of the owner or seller against the tenant is explained by the taking of possession by the tenant from the owner. That also explains why the tenant is able to bring the interdict against the buyer, when the buyer evicts the tenant by force. It is not the tenant as detentor who is evicted. It is the tenant who has become possessor who is evicted by the buyer. So the buyer takes possession by force from the tenant. The tenant has his interdict, not as a tenant, but as a possessor.

This is the second question answered in Papinian's text. The text appears to be not entirely flawless in the Codex Florentinus. In the sentence explaining why the tenant can bring the interdict against the buyer it says *cui* instead of *cuius*. The sentence reads *non enim ab ipso, sed a venditore per vim fundum esse possessum, cui possessio esset ablata*, which in translation reads: 'for it was possessed not by him but by the seller, who had been deprived of possession'. This appears to translate *cui* and not *cuius*, which would lead to the translation 'whose possession had been taken away'. Mommsen suggested to read *cuius* and explained this reading palaeographically by supposing the original could have read *cui* with a stroke indicating it was an abbreviation of *cuius*. I am not quite sure whether abbreviations of this kind were allowed to be used in the originals of Justinian's

7 J. Cujas already explained all of this: Ad l. cum fundum 18, de vi et vi armata, In Libro XXVI Quaestionum Papiniani, in: *Opera Postuma* t. I, Paris 1658, col. 671ff.

8 Cujas, Ad l. cum fundum 18, de vi et vi armata (note 7 above), col. 671ff.

law codes. Perhaps *cui* could be seen as a *lectio difficilior* and should be preferred on that account. Anyhow, I do not see why *cui* should be opposed.[9]

The fact that the tenant is able to bring the interdict against the buyer, according to Papinian, is also a clue for the fact that the refusal to let the buyer enter the land he bought is not depriving the buyer of his possession, but deprives the seller, the landlord of the tenant, of possession. Would the buyer have been deprived of possession by the tenant and subsequently have taken possession of the tenant by force, the tenant would have gotten into possession by force as against the buyer, which would have meant the tenant could not successfully have brought the interdict against the buyer. The *exceptio quod vi aut clam aut precario* could have been taken against him by the buyer, as the preceding fragment, D. 43,16,17, explains.[10]

Where do the Byzantines come into all this? There is a scholion to be found in the Basilica which translates Papinian's text in a quite explicit and therefor enlightening way. As it is a translation of text taken from that part of Justinian's Digest which was not on the curriculum of the law schools of Justinian's days, it has to be the antecessor Dorotheus, law professor Dorotheus, who translated this text.[11] The text reads like this:

> BS 3514/18-32 (sch. Pe 8* ad B. 60,17,24 = D. 43,16,18)
> Ὃν ἐμίσθωσέ τις ἀγρόν, τοῦτον ἐπώλησε καὶ ἐκέλευσε τῆς νομῆς αὐτοῦ ἐπιβῆναι τὸν ἀγοραστήν. Ὁ δὲ κολωνὸς ἐκώλυσεν αὐτὸν ἐπιβῆναι καὶ μετὰ ταῦτα ὁ ἀγοραστὴς ἐβιάσατο τὸν κολωνόν. Καὶ ζητεῖται περὶ τοῦ οὐνδεβὶ ἰντερδίκτου. Καὶ ἤρεσε τὸν μὲν κολωνὸν τῷ πράτῃ κατέχεσθαι. Οὐδεμία γὰρ διαφορά, πότερον αὐτὸν ἀπήλασε τῆς νομῆς ἢ τὸν κατὰ βουλὴν αὐτοῦ πεμφθέντα ἀγοραστὴν οὐ συνεχώρησεν ἐπιβῆναι τῆς νομῆς. Οὐδὲ γὰρ ἐκπίπτειν δοκεῖ τῆς νομῆς ὁ πωλήσας τὸν ἀγρόν, εἰ καὶ ἐκέλευσεν αὐτὸν παραδοθῆναι τῷ ἀγοραστῇ, πρὶν κατὰ ἀλήθειαν παραδοθῇ τῷ ἀγοραστῇ. Οὐδεὶς γὰρ τοιαύτην ἔχει προαίρεσιν, ὥστε ἐκπεσεῖν τῆς νομῆς διὰ τὸν ἀγοραστήν, ἧς ὁ ἀγοραστὴς οὐκ ἐπελάβετο. Καὶ αὐτὸς δὲ ὁ ἀγοραστὴς ὁ μετὰ ταῦτα βιασάμενος τὸν κολωνὸν κατέχεται αὐτῷ τῷ ἰντερδίκτῳ. Οὐδὲ γὰρ πρὸς τὸν ἀγοραστήν, ἀλλὰ πρὸς τὸν πράτην ἐδόκει ἀντέχεσθαι τῆς νομῆς τοῦ ἀγροῦ ὁ κολωνός. Εἰ δὲ κατὰ γνώμην τοῦ πράτου ὁ ἀγοραστὴς τὸν κολωνὸν ἐβιάσατο, ζητεῖται μέν, εἰ ὀφείλει βοηθεῖσθαι ὁ ἀγοραστὴς ὡς γνώμῃ τοῦ πράτου ἀπωθησάμενος τὸν κολωνόν. Ἤρεσε δὲ μὴ βοηθεῖσθαι αὐτόν· παρανόμῳ γὰρ μανδάτῳ τοῦ πράτου ὑπούργησεν.

9 The Dutch translation of the Corpus Iuris Civilis, edited by Spruit, Feenstra and Bongenaar, vol. 6, (J.E. Spruit/R. Feenstra/F.B.J. Wubbe, [red.], *Corpus iuris civilis. Tekst en Vertaling*. VI: Digesta XLIII – L, Zutphen/'s-Gravenhage 2001) prefers Mommsen's emendation.

10 Cf. again Cujas, Ad l. cum fundum 18, de vi et vi armata (note 7 above), col. 671ff.

11 Cf. F. Brandsma, *Dorotheus and his Digest Translation*, Groningen 1996, 43ff.

In translation this would mean the following:

> Someone who had rented out farmland, sold it, and ordered the buyer to enter upon the possession of it. The tenant, however, prevented him from entering, and later on the buyer ejected the tenant by force. The question about the *interdictum unde vi* was raised. And the answer was that, on the one hand, the tenant was liable to the seller. For it makes no difference, whether the tenant expelled the seller from the possession, or he did not suffer the buyer to enter upon the possession, the buyer being sent in accordance with the seller's will. For it is held that the seller of the farmland does not lose the possession, even if he ordered it to be handed over to the buyer, before it was handed over to the buyer in reality. For no one is of that intention that because of the buyer he loses the possession, which the buyer did not get hold of. But also the buyer himself, who later on expelled the tenant, is liable to the tenant under the interdict. For it is held that the tenant is holding the possession of the farmland by force, not against the buyer, but against the seller. But if the buyer ejected the tenant by force in accordance with the will of the seller, the question arises whether the buyer has to be helped, because he expelled the tenant in accordance with the will of the seller. The answer was, however, that he should not be helped, because he rendered service to an illegal mandate of the seller.

The key sentence is the following. 'For it is held that the tenant is holding the possession of the farmland by force, not against the buyer, but against the seller'. That is more clear than the original by Papinian: *non enim ab ipso, sed a venditore per vim fundum esse possessum, cui possessio esset ablata*; 'for it was possessed not by him but by the seller, who had been deprived of possession'.[12]

What does it mean some Byzantine law professor translated our text like this? Well, first of all we know how this text was explained in Justinian's days. Next, we can deduce from the fact even a Byzantine lawyer thought it well advised to state the meaning of the text more clearly than the original did, that no alterations were made to the text Papinian left behind. For if these alterations were thought necessary, the wretched Byzantines could have made them. Dorotheus was one of the members of the committee who drafted the Digest on behalf of Justinian. He need not have bothered to make the clarifications he thought necessary only in his translation. The fact that clarifications were thought necessary by one of the committee-members, points to the inclination of the lawyers who made Justinian's codes to stick to the texts of the classical lawyers as preserved as much

12 See for a comparable exposition of the text already e.g. J.A.C. Thomas, 'The sitting tenant', *TRG* 41 (1973), 37 with references.

as possible. So the conclusion must be that the possibility for a tenant to bring the interdict *unde vi* cannot be based on the texts discussed here.[13]

Papinian's text, it must be admitted, presents a lawyers' paradise. The buyer has to give the land back to the tenant, who has to give the land back to the seller, who has to hand over the land to the buyer. The tenant can bring the interdict *unde vi* against the buyer. The seller can bring the same interdict against the buyer. The buyer can, of course, bring the *actio empti* against the seller. It is all about bringing the right action by the right person. Whether we have an actual case here at hand, is not quite sure. That it is a case which delights lawyers throughout the ages is an indisputable fact. Where would we be without the possibility to discuss cases like this? In a world where legal realism states that the answer to questions like this one is given by the person who gets to decide them. Do we want to live in a world like that? I don't think so.

Of course, the seller and owner of the farm himself could have taken back the possession of it from the tenant successfully, because the tenant's interdict could be opposed by him on the basis of the *exceptio quod vi aut clam aut precario*. Could he not have delegated the task of expelling the tenant to the buyer? No, the text says quite unequivocally. He cannot have his dirty work be done by someone else.

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13 O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927[3] (repr. Amsterdam & Aalen 2010), 463f., already clearly denied this possibility, even under the interdict *de vi armata*.