Papinian on the Interdict *unde vi*

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D. 43.16.18 pr. (Papinian, 26 *Quaest.*) :

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 (1).

The situation can be briefly summarized: a landlord has sold his farm and ordered the buyer to take exclusive possession (2); the tenant, presumably fearing for his own position, denies entry to the buyer, who subsequently expels the tenant by force at the seller-landlord's behest. Papinian, in his only contribution to the Digest's chapter on *de vi et de vi armata*, holds that the tenant is liable to the seller under the interdict *unde vi*, and that the buyer is liable to the tenant under the same interdict. Since the inability of lessees to avail themselves of possessory interdicts is treated as axiomatic by most commentators on Roman law (3), the second part of Papinian's holding is of particular interest, for it plainly makes the interdict *unde vi* available to the tenant against the buyer who ejected him: *emptorem quoque, qui postea vim adhibuit, et ipsum interdicto colono teneri.* Moreover, the

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1) Commentators have proposed the excision of *quia ... prohibuerit, quia ... fuisset*, and *non enim ... ablata*, as well as the emendation *si voluntate venditoris colonum postea vi <armata> expulisset. Index Interpolationum* (Weimar 1929-35), III 294. I treat the entire passage as genuine, in the absence of any compelling reason not to do so.

2) W. BUCKLAND, *A Text-book of Roman Law from Augustus to Justinian* (3rd ed. Cambridge 1963), 488, defines *vacua possessio* as "exclusive possession, not defeasible by interdict, and free from burdens interfering with it except such as had been agreed on".

3) M. KASER, *Das römische Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht* (2d ed. Munich 1971), 390; B. FRIER, *Landlords and Tenants in Imperial Rome* (Princeton 1980), 65-66. The doctrine is asserted by Ulpian, D. 43.16.1.10 (69 *ad Ed.*): *denique et si maritus uxori donavit eaque deiecta sit, poterit interdicto uti: non tamen si colonus.*

availability of the same possessory interdict to both the *locator* and the tenant raises the question of simultaneous possession. Before attempting to answer this question, however, it will be expedient to consider the purpose of Papinian's argument and his assessment of the relationship between the parties under the interdict.

The first issue to be resolved is whether Papinian's argument envisions an actual problem that litigants might face, or whether it is primarily an analytical exercise. At first glance, the situation depicted in the text is plausible enough, but Papinian's rather schematic presentation would not adequately describe the complex events of a real-life case, and for practical purposes his solution seems bizarre. It makes good sense, though, as an elaboration of a problem posed earlier by Marcellus in D. 43.16.12 pr. (19 *Dig.*) :

> *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 prohibuissset 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.*

Here the tenant, having refused to admit the buyer whom the seller has sent, is subsequently expelled not by the buyer, but by

a fourth party. The correspondences between the two texts are striking: not only are the situations similar, but the structure of Papinian's argument is closely parallel to that of Marcellus. For example, the central doctrine that the refusal of entry to the buyer is equivalent to an ejection of the *locator* is introduced in both texts by the *nihil interesse* formula. Other elements of Papinian's text also look much like deliberate amplifications of Marcellus. Where Marcellus' buyer is simply *missus in possessionem*, Papinian's is *iuss[us] in vacuam possessionem ire* (4). Papinian also makes clear, where Marcellus does not, why the tenant is liable to the landlord, not to the buyer: the mere sale of the property does not involve transfer of possession, and the *locator* retains possession until the property is delivered to the buyer (5). Further, so long as the tenant remains on the property, the possession is not *vacua*; rather, the *locator* continues to exercise possession through the tenant. Papinian's greatest innovation, however, is to eliminate one of the parties from Marcellus' case. Marcellus' tenant is ejected by someone who has otherwise played no role in the transactions; Papinian places the buyer in the role of this party and has him act at the *locator*'s direction. This, along with the highly stylized *responsum* form of Papinian's argument, in which hypothesis, question, and opinion

4) In the words of T. MAYER-MALY, *Locatio Conductio* (Wiener rechtsgeschichtliche Arbeiten n° 4, Vienna 1956), 53, Papinian's formulation is "weniger mißverständlich".

5) Marcellus does, however, helpfully refer to the seller as *dominus*. Papinian's text never uses this term, but it is crucial to keep in mind that his *locator* exercises both *possessio* and *dominium*.

follow each other in perfect sequence, argues powerfully for the proposition that the case originates not in real life, but in the tradition of juristic writing. Papinian's text is essentially an exegesis of Marcellus, and his reformulation of the problem enables him to analyze the relationship between *locator*, tenant, and buyer under the interdict.

As to the relationship between *locator* and buyer, Papinian offers the following explanation for the fact that possession does not transfer upon sale, but only upon delivery: *quia nemo eo animo esset, ut possessionem omitteret propter emptorem, quam emptor adeptus non fuisset.* The precise function of *animus* in this comment is best understood in light of another passage from Papinian:

D. 41.2.44.2 (23 *Quaest.*) :

> *cum de amittenda possessione quaeratur, multum interesse dicam, per nosmet ipsos an per alios possideremus: nam eius quidem, quod corpore nostro teneremus, possessionem amitti vel animo vel etiam corpore, si modo eo animo inde digressi fuissemus, ne possideremus: eius vero, quod servi vel etiam coloni corpore possidetur, non aliter amitti possessionem, quam eam alius ingressus fuisset, eamque amitti nobis quoque ignorantibus.*

In the ejection case, it is not, as it might at first appear, a question of whether or not possession can be lost *animo*: as the above passage indicates, when possession is exercised through a tenant, it can be lost only through the physical intervention of another; conversely, loss of physical control alone suffices, since

it can cause possession to be lost even without the possessor's knowledge, to say nothing of his *animus*. The crucial element in the transfer of such a possession is therefore not *animus*, but *corpus*. The *locator* has no desire to retain possession, but at the same time he cannot intend that possession be relinquished to the buyer before the physical transfer. His intention, his *animus*, is to preserve the natural sequence of events, in which possession would pass to the buyer upon delivery.

The question of the buyer's liability to the tenant is more difficult. Unless the tenant is protected by the interdict in his capacity as mere *detentor* (which is most unlikely, given that the interdict is specifically designed to protect possession), it is necessary to regard him as a possessor in fact (6) — that is, as having acquired real, though unjust, possession from the *locator* by *deiectio*. The interdict is uninterested in how possession comes about, except that the person availing himself of this remedy must not have taken by force (or stealth or *precarium*) from the one against whom he asserts it: *unde tu illum vi deiecisti ... cum ille possideret quod nec vi nec clam nec precario a te possideret* (7). It is plainly available if the ejected person

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6) MAYER-MALY, 53-54, argues that either of these alternatives would constitute evidence of postclassical tinkering.

7) The text of the interdict in its Hadrianic form is reconstructed by O. LENEL, *Das Edictum Perpetuum* (3rd ed. Leipzig 1927), 465: *unde in hoc anno tu illum vi deiecisti aut familia tua deiecit, cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo illum quaeque tunc ibi habuit restituas.* The republican form of the interdict is attested in Cicero (esp. *Tull.* 19.44), while a late version, much adulterated by the compilators, appears at D. 43.16.1 pr. LENEL, 462.

acquired possession by ejecting someone else: *qui a me vi possidebat, si ab alio deicietur, habet interdictum* (8). Thus the tenant, though an unjust possessor, is protected by the interdict against third-party incursions (9), but not against the *locator*, who may use force to recover his property from the tenant (10).

Papinian, at any rate, leaves no doubt as to the possessory status of the tenant after the buyer's ejection: *emptorem quoque, qui postea vim adhibuit, et ipsum interdicto colono teneri: non enim ab ipso, sed a venditore per vim fundum esse possessum.* This sentence has been widely misunderstood by modern commentators, who often take *ab ipso* and *a venditore* as agent constructions with the passive *esse possessum*. Thus RODRIGUEZ DE FONSECA's Spanish translation of the Digest renders *ipso* and *venditore* as subjects of *possidere*: "Pero el comprador que despues cometió violencia, se obliga al colono por este interdicto; porque él no posee el fundo violamente, sino el vendedor á quien se le quitó la posesión" (11). The most recent English version commits a similar error: "The buyer who subsequently applied force is also liable himself under the

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8) D. 43.16.1.30 (Ulpian, 69 *ad Ed.*).

9) J.A.C. THOMAS, "The Sitting Tenant", *TR* 41 (1973) 35-44, at 37.

10) Alternatively, one might derive the *locator*'s right to use force from his status as original possessor: thus, if A ejects B, and B immediately ejects A, and A ejects B again, where B is the original possessor, B has the interdict against A; according to Julian (D. 43.16.17 pr. [48 *Dig.*]), B has not possessed by force in ejecting A, but rather regained his original status (*in pristinam causam reverti potius quam vi possidere intellegendus est*).

11) B. RODRIGUEZ DE FONSECA, *El Digesto del Emperador Justiniano*, edd. M. GÓMEZ MARÍN and P. GIL Y GÓMEZ (Madrid 1872-74), III 380.

interdict to the tenant; for it was possessed not by him but by the seller, who had been deprived of possession" (12), and even omits *per vim*, a phrase which of course makes no sense if *ipso* and *venditore* are understood as agents. The true construction is *possidere ab aliquo*: *a/ab* here means "from", not "by". The construction is paralleled in the language of the interdict itself (*a te possideret*), and correctly interpreted by the scholia to the Basilica: οὐδὲ γὰρ πρὸς τὸν ἀγοραστήν, ἀλλὰ πρὸς τὸν πράτην ἐδόκει ἀντέχεσθαι τῆς νομῆς τοῦ ἀγροῦ ὁ κολωνός (13). The sense of the passage is that the tenant has stripped the seller, not the buyer, of possession (14); hence, although the seller may resort to self-help, the buyer may not, inasmuch as self-help would restore to the former the possession that was rightfully his as *locator*, while the latter has never had possession. The phrase *cui possessio esset ablata* also provides an important clarification by indicating that possession has passed from the *locator* to the tenant as a result of the first *deiectio* (15). *Deiectio* always involves loss of possession (16);

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12) *The Digest of Justinian*, Eng. trans. ed. A. WATSON (Philadelphia 1985), IV 588.

13) B. 60.17.24 (sch. 5 SCHELTEMA et al.).

14) Rightly understood by THOMAS, *loc. cit.*, and by F. VON SAVIGNY, *Das Recht des Besitzes* (7th ed. Vienna 1865), 449.

15) The scholia to the Basilica are once again illuminating: ἰδιοποιούμενος τὸ μισθωθέν (sch. 2), referring to the tenant, unambiguously states that he has appropriated possession.

16) D. 43.16.1.26: *deicitur enim qui amittit possessionem.* See also SAVIGNY, 448.

thus, when the buyer ejects the tenant, he is not liable to the seller, but to the tenant as new possessor.

But if denying entry to the buyer is tantamount to ejecting the seller, symmetry would seem to require that the seller be able to order the buyer to expel the ejector: how, then, do we explain Papinian's assertion *non esse iuvandum, qui mandatum illicitum susceperit*? There should be no difference between ejection by proxy and ejection by one's own hand: *deiecisse autem is videretur, qui mandavit vel iussit, ut aliquis deiceretur: parvi enim referre visum est, suis manibus quis deiciat an vero per alium* (17). If so, the reverse should hold true: the original possessor should, either himself or by proxy, be able to eject by force one who forcibly ejected him. This is, however, not the case here: the seller has ordered the buyer to expel the tenant so that the latter can take possession himself, not in order to restore the seller. Even though it executes the seller's wish, the order to expel the tenant is *illicitum* because it calls for force as the means not for regaining possession, but for intially acquiring it.

The question of simultaneous possession remains to be addressed. Trebatius had admitted the possibility that the same thing could have two possessors, one just, the other unjust (but not two just or two unjust possessors); for this he was castigated by Labeo, who held it to be of little relevance (*non multum interest*) whether a possessor was just or unjust. The dispute is summarized by Paul in D. 41.2.3.5 (54 *ad Ed.*), who goes on to

17) D. 43.16.1.12.

state that the same thing can no more have two possessors than two people can be held to stand or sit in the same place. Labeo's view, then, appears to have prevailed, no doubt because it accorded with the generally factual conception of possession: as distinct from, say, title, possession of a thing denotes exclusive control of it (18); however freely such control can pass from one person to another, at any given moment it can reside only with one possessor. Thus, the concept of simultaneous possession, though Roman jurists had toyed with it, is inadmissible in classical doctrine, and a number of scholars have become quite exercised by what they take to be a reflection of it in Papinian's text (19).

On closer examination, the problem of simultaneous possession turns out to be illusory. Papinian's case involves successive transfers of possession; hence, the simultaneous availability of a possessory interdict to two persons does not mean that they are both possessors. Moreover, the intrinsically restitutory nature of the interdict *unde vi* makes Trebatius' resurrection unnecessary. At the end of Papinian's text, the current possessor in fact is the buyer; the tenant, from whom he

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18) BUCKLAND, 196.

19) THOMAS, *loc. cit.*, provides a brief but valuable survey of the scholarship on this question, noting that a number of critics have gone so far as to question the authenticity of the argument that the tenant may avail himself of the interdict, e.g. MAYER-MALY, 53 ff.; M. PAMPALONI, "Osservazioni esegetiche alle ll. 3, § 9; 12; 18 pr. *de vi* 43.16", *Studi Senesi* 5 (1888), 154-161, at 159-60; and E. COSTA, *La locazione di cose nel diritto romano* (Turin 1915), 71 ff. I might add that COSTA's four-volume study, *Papiniano: studio di storia interna del diritto romano* (Bologna 1894), contains no analysis of the passage under discussion here.

has possessed by force, has against him the *interdictum unde vi*, and the *locator* has the same interdict against the tenant for the same reason (20). The buyer, presumably, would have the interdict against anyone (except the tenant) who subsequently ejected him. If one extends Papinian's reasoning to Marcellus' fact situation, then the ejecting fourth party would have the interdict if he were to be ejected himself. Moreover, once the tenant is ejected, the *locator* cannot recover from the ejector, since the tenant lost his status as the *locator*'s proxy when he ejected the *locator*, and was himself a possessor at the time of his ejection. Thus, the interdict *unde vi* follows the sequence of possession, irrespective of whether possession is just or unjust. If the interdict were used to remedy a succession of *deiectiones* from a single landholding, possession would have to be restored to the various ejected parties in reverse order of their ejection, and all but the initial possessor would be restored to possession only to be immediately deprived of it. The interdict *unde vi* creates, therefore, not an absurd circularity, but a potentially endless chain (21), (22).

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20) Unwilling to contemplate this possibility, PAMPALONI (159) implausibly hypothesizes that the fourth party in Marcellus and the buyer in Papinian employ armed force to expel the tenant, which would make two different interdicts operative here, *de vi* (in favor of the *locator*) and *de vi armata* (in favor of the tenant).

21) Unless, of course, one of the parties decides not to use it. If, for example, the tenant does not assert the interdict against the buyer, then the buyer retains possession.

22) My thanks to Professor Bruce W. FRIER, whose criticisms of an earlier draft of this paper have greatly improved my argument. I am of course fully responsible for all remaining defects.