

PUBLICIANA RESCISSORIA

or is Papinian 'zu spitz'?

D. 17, 1, 57

Idem (sc. Papinianus) libro decimo responsorum.

Mandatum distrahendorum servorum defuncto qui mandatum suscepit intercidisse constitit. quoniam tamen heredes eius errore lapsi non animo furandi, sed exsequendi, quod defunctus suae curae fecerat, servos vendiderant, eos ab emptoribus usucaptos videri placuit. sed venalicium ex provincia reversum Publiciana actione non inutiliter acturum, cum exceptio iusti domini causa cognita detur neque oporteat eum, qui certi hominis fidem elegit, ob errorem aut imperitiam heredum adfici damno.

(Papinian, *Replies*, book 10:

It was established that a mandate to sell off slaves had lapsed with the death of the person who undertook the mandate. However, because his heirs had fallen into error and, with the intention not of theft but of carrying out the duty which the deceased had assumed, had sold the slaves, it was agreed that those [slaves] appeared to have been usucapted by their buyers. [It was also agreed,] however, that the slave-dealer on his return from the province would have a competent *actio Publiciana*, since the defense of ownership is [only] granted after investigation of the facts and it is not right for someone who chose a particular man for his trustworthiness to suffer loss because of the mistake or inexperience of his heirs.)¹

§ 1: Introduction

'Mir ist er zu spitz', Pernice once said about Papinian.² 'Ihm war der Papinianismus widerwärtig und so griff er nach dem Labeo', Mommsen even remarks about Pernice.³ And after reading D. 17, 1, 57 many will agree with the words of Schulz, who calls the *Responsa* of Papinian 'difficult reading: often one is obliged to begin by making up one's mind as to the facts underlying the decision. They are correctly and completely stated by the author, but with extreme brevity. Papinian is evidently aiming at the laconic lapidary style of the jurists of old, at which long ago Horace had laughed, and which in the time of the Severi was something of an archaistic affectation. The legend portraying Papinian as meeting death like a true Roman is faithful to an essential characteristic of this exceptional man.'⁴

1 Transl. by A. Watson a.o., Philadelphia 1985.

2 Cit. by F. Schulz, *Geschichte der römischen Rechtswissenschaft (Geschichte)*, Weimar 1961, p. 299 n. 2 (cf. *History of Roman Legal Science (History)*, Oxford 1946, p. 236 n. 6: 'For me Papinian is too subtle').

3 *Gesammelte Schriften*, 3. Bd., 1908, p. 579 (cf. *History*, p. 236 n. 6: 'to him Papinianism was repugnant, and so he caught at Labeo').

4 *History*, p. 237 (cf. *Geschichte*, p. 299). About this legend there is a 'Trauerspiel' by Andreas Gryphius, called 'Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus' (1659; repr. Reclam, Stuttgart 1983 nr. 8935), in which the magnanimous lawyer is portrayed as virtuousness incarnate.

D. 17, 1, 57 is one of these texts of Papinian that put the reader to much trouble in understanding its meaning. 'In der Stelle, die hier erklärt werden soll, ist fast Alles Gegenstand von Zweifeln und Streitigkeiten geworden: der Text, die Bildung des Rechtsfalles, der entschieden werden soll, die Personen, von welchen die Rede ist, die Entscheidung selbst', thus Savigny begins his 'Beilage XIX' which deals entirely with D. 17, 1, 57.⁵ But not even Savigny could end all differences of opinion about D. 17, 1, 57 with his 'Beilage XIX'. After him the battle broke out in all its intensity and is being fought until the present day. The last one to deal with this subject in detail was Wubbe.⁶

§ 2: The text of D. 17, 1, 57

The difficulties which D. 17, 1, 57 has given rise to concern in the first place the text itself and in the second place its meaning. However, there seems to be agreement about the text itself since Savigny.⁷ He also gave a detailed and clear exegesis, which I will first recapitulate up until the point where the text poses a difficulty.

According to Savigny this was the case. A slave-dealer (*venaliciarius*) travels to a province of the Empire, probably to buy new slaves. He gives someone he thinks he can rely upon (*certi hominis fidem elegit*) a mandate to sell the slaves still in stock in Rome. But while the slave-dealer is away his agent dies. Here Papinian begins his *responsum* by observing that of course the mandate has expired because of the agent's death. The agent's heirs, however, are ignorant of this law and think that they are bound to perform the mandate. Therefore they sell the slaves and, because the slave-dealer tries to recover the slaves after his return, the proceeds are probably small. Because the mandate to sell the slaves in reality no longer existed the buyers obtained the slaves from persons unable to transfer ownership to them. Therefore they could only become owners by *usucapio*. However, *usucapio* of so-called *res furtivae* is impossible in Roman law. These *res furtivae* are not only goods obtained by larceny, but also goods obtained by fraudulent conversion.⁸ Therefore the question is if in this case there is fraudulent conversion of the slaves by the heirs of the agent. Papinian holds that this is not a case of fraudulent conversion. He argues that the heirs sold the slaves not to convert them (*non animo furandi*), but because they erred (*errore lapsi*) and thought they had to perform the mandate. Nothing therefore prevented the *usucapio* of the buyers and meanwhile it is completed, as he notices. Next the slave-dealer returns home from his journey. He is

5 *System des heutigen Römischen Rechts*, 7. Bd. (1848), p. 292-309.

6 F. Wubbe, *Res aliena pignori data*, Leiden 1960, i.a. p. 32, p. 65.

7 See e.g. Wubbe, p. 32 n. 62.

8 In English law since 1968 larceny, embezzlement and fraudulent conversion are brought under one statutory offence called theft, so perhaps *res furtivae* now could be best translated simply by 'stolen goods'.

not satisfied with the selling of the slaves and wants to bring the *Publiciana* against the buyers. Papinian now is asked if this claim could succeed, despite the buyers' *usucapio*.

Exactly in the following part of the Digest-text, in which Papinian gives his answer, the correct version of the text is not clear at once. According to the Codex Florentinus the slave dealer's *actio Publiciana* will be brought *non inutiliter*, that is without success. From the Basilica, however, it appears that three sixth-century lawyers read *non inutiliter*, that is with success, in their Digest-copy. Thus the Anonymus gives the slave-dealer a successful *actio Publiciana*: καλῶς κινεῖ τὴν Πουβλικιανήν (BT 757-1; 'he brings the Publiciana rightly'), just as Stephanus: ἔστιν δὲ αὐτῷ οὐκ ἄχρηστος ἡ Πουβλικιανή (BS 792-7; 'and for him the Publiciana is not without profit'). Dorotheus even remarks that the text should read *non inutiliter*, though some of the manuscripts read *non utiliter*:

BS 792-19

Δωροθέου. Πουβλικιανὴν ῥεσκισσορίαν. Τοῦτο δὲ τὸ ῥητὸν *non inutiliter* θέλει, εἰ καὶ τινα τῶν ἀντιγραφῶν οὐκ ἔχουσιν οὕτω ...

(Of Dorotheus. *Publicianam rescissoriam*. This [Digest] text requires *non inutiliter*, although some of the manuscripts do not have it thus ...)

The meaning of Dorotheus' remarkable statement remained unnoticed until recently, because Heimbach gave a wrong version in his edition of the Basilica: he gives ἀντιπαγραφῶν where it should read ἀντιγράφων⁹, that is to say *replicationes* where it should be copies.¹⁰ Dorotheus - who was one of the compilers of the Digest - therefore remarks that there are different versions of the text of this law, but that it requires one specific version (τὸ ῥητὸν ... θέλει, 'the text requires ...'). He does not say that the text of the law reads like this, but that it should read like this. He seems to be arguing from the subject-matter itself and not from some authentic copy of the law. For when he says that some manuscripts do not read *non inutiliter*, he implies that other manuscripts do read that, and if one of these had been some kind of official copy he certainly would have mentioned it. So apparently not even one of the lawmakers himself was able to use an authentic copy of the law. Therefore it seems probable that already the first Digest-copies circulated by Justinian were not quite similar in every detail, while not one of them could be referred to as the official copy. If this is true the Codex Florentinus could well be one of these first copies of the Digest.¹¹

Non inutiliter therefore seems to be the better version, as the aforementioned

9 Not: ἀντιγραφῶν (BS 792-20).

10 Hb II, 138.

11 Cf. e.g. H.J. Scheltema, 'Les sources du droit de Justinien dans l'Empire d'Orient', *Revue historique de droit français et étranger* 4me S. 30 (1952) p. 1-17; B.H. Stolte, 'The Partes of the Digest in the Codex Florentinus', *SG I* (1984), p. 88 and 78.

sixth-century testimonies show, better than the version of the Codex Florentinus (F hereafter). As we learn from Dorotheus, there were sixth-century manuscripts which read like that. Interesting in this respect is also the version which one of the Vulgate-manuscripts gives. The *Parisinus n. 4450 Digesti veteris* reads *non inutiliter* too. Now this Vulgate-manuscript is called by Mommsen 'liber antiquissimus et optimus omnium.'¹² It descends directly from the so-called *Codex Secundus*, which in its turn is based on F and another sixth-century Digest text.¹³ It is therefore probable that the reading of the *Parisinus* goes back to one of the sixth-century manuscripts which Dorotheus mentions. This would mean another instance in which a connection between the Vulgate-manuscripts and sixth-century Digest texts apart from F has been established.

Mommsen included *non inutiliter* in the text of his *editio maior* (I, 495, l. 35). This version, however, need not only be based on these testimonies, but is also consistent with the subject matter of the text. The argument D. 17, 1, 57 gives for its ruling seems to be in agreement only with the *non inutiliter* version and not with F.

He who selects a person for his reliability should not suffer any damage because of the error or ignorance of this person's heirs, is Papinian's argument for his reply. The one that should not suffer any damage cannot be anyone other than the slave-dealer: he is the one that selected a reliable agent and is now suffering damage because of this agent's heirs. The claim of the slave-dealer should therefore be successful, that is to say *non inutiliter*, even though the buyers of the slaves were already their owners by *usucapio*. The buyers' defense of ownership is only granted after a brief inquiry (*cum exceptio iusti dominii causa cognita detur*). In this case there is sufficient ground not to grant this defense against the slave-dealer.

§ 3: The meaning of D. 17, 1, 57

About the text of D. 17, 1, 57, as interpreted above, there seems to be no more disagreement since Savigny, but not about the basis of its decision: what exactly is the basis of the successful *actio Publiciana* in this text? This question has received a lot of different answers: almost everyone who wrote about the *actio Publiciana* had to form his opinion about the justification of the *Publiciana* in the case of D. 17, 1, 57. Buckland states the question briefly but to the point: 'It might happen that a bonitary owner or *bona fide possessor* lost possession and the new possessor acquired the *res* by lapse of time, *usucapio*. Was the *actio Publiciana* still available?'¹⁴ Or to say it with Appleton in a few more words:¹⁵ 'Lorsqu' une personne est propriétaire

12 *Praefatio* p. LII. Cf. p. XXXXVIII.

13 Cf. e.g. F. Schulz, *Einführung in das Studium der Digesten*, Tübingen 1916, p. 7-11.

14 W.W. Buckland, *A Textbook of Roman law from Augustus to Justinian*. Third ed. revised by P. Stein, Cambridge 1966, ch. LXXI, p. 195.

15 Cf. Wubbe, p. 65.

selon le droit civil, et jouit par conséquent de l'action en revendication en cas de dépossession, tout fait extinctif de son droit entraîne nécessairement l'extinction de son action. Par exemple, lorsqu'un tiers usucap ma chose, la base de mon action en revendication disparaît; je ne puis plus dire: *rem meam esse ex jure quiritium*. En est-il de même de la Publicienne, qui compète ... non seulement à l'acquéreur *a non domino* en voie d'usucaper et au propriétaire bonitaire, mais encore au propriétaire quiritaire lui-même, s'il réunit les conditions nécessaires pour intenter la Publicienne en cas de dépossession? Supposons qu'un tiers usucap la chose, la Publicienne que j'intenterais contre lui sera-t-elle *de plano* irrecevable, comme le serait en pareil cas la revendication, ou bien au contraire ma Publicienne restera-t-elle recevable, sauf à l'adversaire à invoquer quelque exception qui pourra rendre mon action inefficace?"¹⁶ This question can be answered in two different ways and of course both answers are given in books on this subject. Wubbe for instance holds that 'de eiser in het Publiciana-proces niet een recht, maar feiten moet bewijzen, en aangezien feiten, eenmaal waar, altijd waar blijven, duurt de legitimatie tot de actio Publiciana eeuwig. Wie vandaag naar waarheid kan beweren, dat hem de zaak is verkocht en geleverd, kan dit *altijd* naar waarheid beweren.'¹⁷ In this manner particularly a former owner could bring the *actio Publiciana* against a *possessor* who has no title, without the latter being able to object that the plaintiff lost his ownership.¹⁸ 'Diese Auffassungen sind unhaltbar. Auch der *actio Publiciana* liegt eine Rechtsbeziehung zu Grunde; hört diese auf, so erlischt das Klagerecht. Wie sollte auch gewesenes Eigentum gegenwärtigen Besitz überwinden! ein todes das lebendige! ...' says Dernburg for instance, equally positively defending an opinion contrary to the one Wubbe holds.¹⁹

So the question is: can someone bring an *actio Publiciana* even when someone else has since become owner? In other words, does the possibility to bring an *actio Publiciana* last forever, if someone once possessed a thing and was therefore entitled to this action? Or should his claim be denied forthwith when someone else has become owner after he lost possession of the thing? Is the *Publiciana* only based on facts: the fact that someone once possessed a thing? Or is the *Publiciana* based on a right: the right to become owner of a thing by *usucapio*? A right which does not exist anymore when someone else in the meantime has become owner of the thing, for instance by *usucapio*?

This question is in the first place a procedural one. If the *Publiciana* is purely based on facts, which remain true forever, the only way to counter this action is by

16 H. Appleton, *Histoire de la propriété prétorienne et de l'action Publicienne*, t. II (Paris 1889), p. 74. Cf. about the owner's possibility to bring the *Publiciana* e.g. Kaser, *Das römische Privatrecht* I (2nd Munich 1971) § 104 I; Girard, *Manuel élémentaire de droit romain*, Paris 1918, p. 358; Buckland, *Textbook*, p. 197.

17 p. 64.

18 Cf. Wubbe p. 70.

19 *Pandekten* I (Berlin 1884) § 228 n. 17.

way of an exception, *exceptionis ope*. If someone has become owner meanwhile, he will have to use the *exceptio dominii*. The plaintiff would always be entitled to the *Publiciana*, notwithstanding possible defenses by way of *exceptio*. On the other hand, when the *Publiciana* is based on some kind of right, this right can become extinct and so the claim will have to be denied *ipso iure*. The new owner could then claim that the plaintiff is not any longer entitled to the *Publiciana*.

§ 4: The formula of the *Publiciana*

These statements about the foundation of the *actio Publiciana* - is it based on facts or a right? - could almost be called principles and are therefore hard to test. Only one datum could possibly guide us here and that is the *formula* of the *actio Publiciana*. This formula of the *actio Publiciana* is handed down to us by Gaius' Institutes, which give in G. 4, 36:

G. 4, 36:

SI QUEM HOMINEM A. AGERIUS EMIT <ET> IS EI TRADITUS EST, ANNO POSSEDISSET, TUM SI EUM HOMINEM, DE QUO AGITUR, EIUS EX IURE QUIRITUM ESSE OPORTERET et reliqua.²⁰

(‘If Aulus Agerius bought a slave and the same had been delivered to him and he had had a year’s possession, then, if the slave who is the subject of the action ought to be his by quiritary right’ and so forth.)²¹

The formula contains a fiction and a condition. The fiction is that the plaintiff who has lost possession of the thing he is claiming has had possession of it during one (or two) year(s). If the plaintiff would have had possession during this period in reality, he would have become owner by *usucapio*. He then could have claimed his property by *reivindicatio*. But since he has lost possession before completing the *usucapio* he would be without any right to claim, were it not for the fiction the *Publiciana* provides him with: the *Publiciana* is based on a fictitious right - the right of a would-be owner - one could almost say.

The condition, however, to which the plaintiff’s claim is subject, is that he would have been owner in reality at the time he brings his claim if he had then completed the term of the *usucapio*: TUM SI EUM HOMINEM EIUS EX IURE QUIRITUM ESSE OPORTERET! ‘If in that case the slave would have legally belonged to Aulus Agerius by the law of the Quirites.’ But if he would not have been owner at the time he brings his claim, even though he may feign the term of the *usucapio* to be completed, he will not succeed.²²

When could this occur? Generally, when someone is entitled to the *Publiciana*,

20 Ed. M. David (ed. minor), Leiden 1964, p. 130. Cf. Kaser, *RP I* (1971) § 104 I and n. 7.

21 Transl. by W.M. Gordon and O.F. Robinson, London 1988, p. 431.

22 Cf. Girard, *Manuel*, p. 358 n. 4.

someone else is owner. This owner normally acquired his right before another person became Publician possessor. For instance, if the owner loses possession of the thing and someone obtains it in good faith, the person last-mentioned is called a *bona fide possessor* and is entitled to the Publiciana. Or, if the owner himself delivers a *res Mancipi* not in the correct way, by *mancipatio*, but by *traditio*, he remains owner and the possessor is called a bonitary owner, who is entitled to the Publiciana. In both cases the owner has a right which is older than that of the Publician possessor. This means that the Publician possessor can acquire ownership at the expense of the present owner if he is able to complete the term of the *usucapio*. But if he brings the Publiciana he is allowed to feign this term to be completed. So he would succeed in bringing this claim even against the owner. To avoid this the owner has to use the *exceptio dominii*. He cannot fight the claim itself, because the plaintiff is allowed to feign that he has become owner at the expense of the real owner. This is of course justified when the plaintiff is claiming the thing from someone other than the real owner. But the real owner should be able to oppose this claim. Real ownership should overcome fictitious ownership. So that is why this owner needs an *exceptio* against the plaintiff's claim, which in itself is justified.²³

But the plaintiff cannot claim he would have become owner by *usucapio*, when in the meantime someone else has become owner. His fictitious ownership is frustrated by real ownership. He should not become owner by a fictitious *usucapio* when someone else has since become owner in reality. *Usucapio* is possible against a previous owner, but not against a subsequent owner. So how could a fictitious *usucapio* be possible against a subsequent owner? Or in the words of the formula: 'then, the slave who is the subject of the action ought not to be his by quiritary right.'²⁴ The formula compels the judge to investigate if the plaintiff should have been owner at the moment of the claim, had the year of usucapion been completed. As Daube points out, *oportere* in the formula of the Publician has to be translated as 'it is correct in view of the legal position', or 'it would be the correct decision.'²⁵ So the judge can and has to take into account events which would have frustrated the plaintiff's usucapion even if the term could have been completed. Or in the words of Girard: 'Les termes de la formule disent de donner raison au demandeur, si, en supposant le délai de l'usucapion accompli, il eût été propriétaire au moment du procès et ils prescrivent donc de le repousser si, malgré l'expiration du délai, il n'eût pas été propriétaire à ce moment, ainsi que ce fut arrivé quand la chose a été aliénée.'²⁶

So the *intentio* cannot be maintained if someone else has become owner

23 Of course the bonitary owner in his turn has a counterclaim: the *replicatio rei venditae* (e.g.) *et traditae*. But that does not concern us here.

24 Transl. by W.M. Gordon and O.F. Robinson, London 1988.

25 *Forms of Roman legislation*, Oxford 1956 (repr. 1979) p. 15.

26 *Manuel*, p. 358 n. 4.

meanwhile. If for instance the defendant proves that he has become owner by *usucapio* after the plaintiff obtained his bonitary possession, the plaintiff's claim would not be true and therefore rejected. The defendant would not even have to use an *exceptio*. For he could say that the plaintiff, in spite of his fictitious *usucapio*, would not have been owner at the time he brings his claim, because he, the defendant, meanwhile has become owner by real *usucapio*, without any fiction. Therefore the plaintiff should not be owner at the time he brings his claim and since his claim, his *intentio*, is that he should be owner at this time and not somewhere in the past, it is not true.²⁷ The plaintiff's *intentio* will thus be rejected on its own account, without the defendant needing an *exceptio*.²⁸

In general: a defendant who claims an older title than the plaintiff needs an *exceptio*, because the plaintiff is allowed to feign a younger title, which would otherwise neutralize his title; a defendant who claims a younger title, on the contrary, fights the claim of the plaintiff itself, because a younger title neutralizes an older one.²⁹

Perhaps the following controversy about an almost analogous case can provide us with a further indication. The question concerns a case in which both the plaintiff and the defendant are *usucapientes*. Both have bought the same thing in good faith *a non domino* from different persons. Which one of the two is entitled to the *Publiciana*? Neratius would give the *Publiciana* to the person who first received possession of the thing.

D. 19, 1, 31, 2:

Neratius libro tertio membranarum

Uterque nostrum eandem rem emit a non domino, cum emptio venditioque sine dolo malo fieret, traditaque est: sive ab eodem emimus sive ab alio atque alio, is ex nobis tuendus est, qui prior ius eius adprehendit, hoc est, cui primum tradita est...

(Neratius, *Parchments*, book 3:

Each of us bought the same object from a non-owner, with no bad faith in the making of the contract of sale, and the object was delivered. Whether we bought from the same person or from different persons, whichever of us first acquired rights over it is to be protected, that is, the one to whom it was first delivered...)³⁰

But Ulpian and Julian prefer the one who is presently in possession of the thing, that

27 *Tum si eius esse OPORTERET* (at present) and not ... *OPORTUISSET* (in the past); Appleton II, p. 77.

28 Cf. besides Appleton, Erman and Audibert (*infra* n. 34, 35 and 37).

29 Wubbe does not mention the *formula* and its interpretation explicitly in this context, but remarks (p. 65), 'dat de gedaagde, die zich tegenover de stelling des eisers slechts op een jongere titel kan beroepen, altijd op een *exceptio* is aangewezen, wil hij zijn vrijspraak kunnen bewerken. Alleen wanneer de gedaagde zich op een oudere titel kan beroepen, tast hij het betoog van den eiser rechtstreeks aan: eiser had tegenover hem, gedaagde, niet eigenaar moeten worden ...' But how can Wubbe's remark be reconciled with the fact that especially those defendants normally have to use the *exceptio iusti dominii* who claim an older title?

30 Transl. by Watson (*supra* n. 1).

is the one who last received possession, the second buyer.

D. 6, 2, 9, 4:

Ulpianus libro sexto decimo ad edictum

Si duobus quis separatim vendiderit bona fide ementibus, videamus, quis magis Publiciana uti possit, utrum is cui priori res tradita est an is qui tantum emit. et Iulianus libro septimo digestorum scripsit, ut, si quidem ab eodem non domino emerint, potior sit cui priori res tradita est, quod si a diversis non dominis, melior causa sit possidentis quam petentis. quae sententia vera est.

(Ulpian, *Edict*, book 16:

If separate sales [of the same thing] have been made to two parties, each of whom bought in good faith, which of them has the better right to the Publician, the one to whom the thing was first delivered or the one who merely bought it first? Julian, in the seventh book of his *Digest*, writes that if the two buy from the same non-owner, the one to whom the thing is first delivered has the stronger claim. But if they buy from different non-owners, the one in possession is in a better position than the one who sues, and this is the correct view.)³¹

So, if we compare this with our case, we find that had our defendants, the slave-buyers, not already become owners by usucapion, but were still *usucapietes*, they probably would have won their case. For if two people have subsequently bought the same thing from different not-owners and have both acquired possession, one after the other, then, according to Ulpian and Julian, not the one who first started to usucap, the one who has the older title, but the one who is now in possession, the one who has the younger title, is entitled to the Publiciana.³² So the first *usucapiens* loses his possibility to bring the *Publiciana*, according to some, when someone else becomes *usucapiens* by receiving possession from a different not-owner, as is the case with our slave-buyers who bought and received the slaves from the heirs of the deceased *mandatarius*. Even though this was apparently controversial, as Neratius' opinion shows, we may argue from this case that the possibility to bring the *Publiciana* is all the more excluded, when someone else not only becomes *usucapiens*, but also completes the *usucapio* and becomes owner.

So I would like to conclude that the words of the formula of the *actio Publiciana* seem to exclude unequivocally the possibility that this claim could still be brought successfully if someone other than the plaintiff becomes owner of the thing, after the plaintiff lost his (Publician) possession of it.

31 Transl. by Watson (*supra* n. 1).

32 Cf. Kaser, *SZ* 78 (1961) p. 188-189. Wubbe, p. 104ff., strikes the relevant phrases of Julian (and Ulpian): [*si quidem-emerint*] and [*quod-petentis*], and replaces *est* by *sit*; and so arrives at Neratius' opinion that the older title is always the better one. Ehrhardt, *Iusta causa traditionis*, Berlin 1930, p. 19ff., follows a like course, but in the opposite direction, by striking the relevant phrases of Neratius: [*sive ab eodem-tradita est*], and thereby arrives at the opinion of Ulpian and Julian.

§ 5: The *Publiciana*-formula and D. 17, 1, 57

How can this meaning of the *Publiciana*-formula be reconciled with D. 17, 1, 57? For in this text the plaintiff is given the *actio Publiciana*, notwithstanding that the defendant has become owner by *usucapio* after the plaintiff lost possession. The defendant turns out to be needing the *exceptio iusti dominii* for his defense. This seeming contradiction between the words of the *formula* and Papinian's response has caused some intellectual efforts, which are not to be neglected.³³

Appleton offered us the most astonishing hypothesis in his voluminous work about the *Publiciana*.³⁴ For he thinks that the fictitious completion of the *usucapio* should be counted **backward** from the moment the *litis contestatio* took place, but not - as one would expect - forward from the moment the possession has been obtained! In this way Papinian's response could easily be accounted for. The judge would be forced to suppose that the plaintiff - in this case the slave-dealer - had held the thing during one or two years prior to the law-suit. The fictitious *usucapio* would therefore be completed at the moment the law-suit was brought. The defendant's real *usucapio* would in this case be prior to the plaintiff's fictitious *usucapio*: it would in reality be completed before the plaintiff's *usucapio* was fictitiously completed. The defendant's *usucapio* therefore could not intercept the plaintiff's *usucapio*. On the contrary, the defendant's *usucapio* was intercepted by the plaintiff's *usucapio*, which was assumed to be completed **after that**. The plaintiff's *usucapio* was thus in any case more recent than every other *usucapio*. The defendant who, in spite of all this, wants to claim his *usucapio*, will have to use the *exceptio iusti dominii*, as he tried to in D. 17, 1, 57 without success. 'Ainsi s'explique que la Publicienne reste recevable malgré l'usucapion accomplie par le défendeur', as Appleton concludes.

Practically nobody, however, endorses Appleton's hypothesis. Especially Audibert suggests a powerful counter-argument in his review of Appleton's work.³⁵ He remarks that not a single text confirms Appleton's view. Nor do the words of the *Publiciana*-formula imply in any way that the fictitious term of the *usucapio* should be counted backwards. The *praetor* just instructs the *iudex* to suppose that the plaintiff has completed his *usucapio*: *si anno possedisset*. The plaintiff who has obtained possession is therefore supposed to have **kept** it during the term needed for completing the *usucapio*. The *iudex* then has to examine - among other things - if the plaintiff has obtained possession in good faith. This good faith is therefore required at the moment the plaintiff obtains possession. Now when the *praetor* feigns this possession to have lasted throughout the term required for *usucapio*, should not the *iudex* assume this possession to date from the moment the plaintiff claims to have received the thing of someone he thought to be the owner? Suppose for a moment a plaintiff bringing the *Publiciana* after he has lost possession longer

33 Cf. the brief summary Buckland gives at p. 195.

34 II, p. 77.

35 *Nouvelle revue historique de droit français et étranger* 14 (1890), p. 275.

than the term required for *usucapio*, for instance after a year and a half. In Appleton's view then there would be a difference in time between the moment the plaintiff really obtained possession and the moment his fictitious possession starts. For if we count a year back from the moment the claim is brought, the fictitious possession starts six months after the real possession was obtained. The plaintiff then would have no use in proving his real acquisition to be in good faith. For his fictitious possession, the one leading to *usucapio*, would have been obtained at a later date, a date at which he can be expected not to be in good faith anymore. 'Il me paraît donc impossible de séparer le temps pendant lequel le demandeur est réputé avoir possédé du fait réel de la tradition ou de l'entrée en possession', according to Audibert.

This argument has met with general support and, therefore, caused Appleton's imaginative hypothesis to be rejected.³⁶ But how does Audibert explain the seeming contradiction between the words of the *formula* and D. 17, 1, 57?³⁷ Audibert chooses the view which explains D. 17, 1, 57 as a case of *in integrum restitutio*.³⁸ Thus, he thinks, could be easily explained the *praetor*'s denial to give the *exceptio iusti dominii* to the buyers of the slaves who had become their owners by *usucapio*. For the *praetor* annuls the *usucapio* which is completed while the owner was absent. He therefore should refuse to take into account the defendant's ownership. The defendant is not allowed to claim his obtaining ownership in order to fight the plaintiff's *intentio* directly. He also cannot claim this obtainment of ownership to get the *praetor* to insert the *exceptio iusti dominii* in the *formula*. 'La loi 57, *Mandati*, vise donc une hypothèse d'*in integrum restitutio*. S'il en est ainsi, n'est-on pas autorisé à soutenir que c'est seulement dans les hypothèses de ce genre que l'action publicienne pouvait, après une aliénation consommée, être encore exercée par l'ancien propriétaire?', according to Audibert who ends his argument with this rhetorical question.

36 Cf. e.g. Girard, *Manuel*, p. 358 n. 4 and Buckland, *Textbook*, p. 197: 'But the better view appears to be that the possession feigned for the purpose of the action is a continuation of the actual possession.'

37 I just mention Erman's view (*Revue générale du droit, de la législation et de la jurisprudence en France et à l'étranger* 15 (1891) p. 316; cf. the same in: *SZ* 13 (1892) p. 193) who points at the 'normal' case in which the defendant claims to be owner in answer to the *actio Publiciana*. In this case the defendant was already owner before the plaintiff got his bonitary possession. This defendant has to use the *exceptio iusti dominii*. From this 'normal' case the Romans would have laid down the rule that every defendant who claims to be owner should use this exception against the *actio Publiciana*, even though he really could rebutt the plaintiff's *intentio* for not being true. This hypothesis, however, cannot be based on any other text but the one it tries to explain (D. 17, 1, 57).

38 Audibert, p. 296 n. 1.

§ 6: D. 17, 1, 57: a case of *in integrum restitutio*?

But already Huschke had whetted his sword against the *in integrum restitutio* as a possible explanation of D. 17, 1, 57.³⁹ He remarks that, in the Institutes of Justinian, such a *restitutio* is only given to a former owner against someone whose *usucapio* he could not interrupt, because this *usucapiens* was away, out of public interest or in enemy captivity. Huschke points at the *actio* of Inst. 4, 6, 5, which he calls ‘die rescissorische Publiciana’:

Inst. 4, 6, 5:

Rursus ex diverso si quis, cum rei publicae causa abesset vel in hostium potestate esset, rem eius qui in civitate esset usu ceperit, permittitur domino, si possessor rei publicae causa abesse desiderit, tunc intra annum rescissa usucapione eam petere, id est ita petere, ut dicat possessorem usu non cepisse et ob id suam esse rem. quod genus actionis et aliis quibusdam simili aequitate motus praetor accomodat, sicut ex latiore digestorum seu pandectarum volumine intellegere licet.

(But again, on the contrary, if someone, now away on state business or in the hands of the enemy, has usucaped the property of one in the city, it is open to the owner, when the possessor ceases to be away on state business, within a year to claim the thing, the usucapion being revoked; i.e. his claim is in the form of an assertion that the possessor did not usucape and that, therefore, the thing is his. This type of action is afforded also to certain others, for similar equitable considerations, by the praetor as can be learned from the greater volume of the Digest or Pandects.)⁴⁰

As this paragraph of the Institutes shows, the *praetor* gave restitution in other cases as well, for instance where the person against whom *usucapio* had taken place, was himself absent. This was the case with the slave-dealer of D. 17, 1, 57 who had been away while his slaves were being usucaped by someone else. According to Huschke, however, these Digest-cases would only present themselves if the *restituendus* was away in the interest of the state, or in captivity. These cases of restitution would not present themselves where our slave-dealer is concerned, who presumably was away on private business.⁴¹ But apart from these cases specifically mentioned in the Edict, the *praetor* also promised to give restitution in general ‘*si qua alia mihi iusta causa videbitur*’ (‘if some other just cause appears to me’).⁴² This general restitution-clause enabled the *praetor* to help for instance someone who was away ‘*studiorum causa, forte procuratore suo defuncto*’ (‘to study, just while his solicitor died’).⁴³ Would the slave-dealer not be eligible for restitution, who had also taken care of his business by appointing an agent during his absence, an agent who had also died?

Huschke’s second argument, however, goes to the heart of the matter and runs like this: ‘bei der rescissorischen Publiciana konnte von einer *exceptio dominii* des

39 *Das Recht der Publicianischen Klage*, 1874, p. 86.

40 Transl. by J.A.C. Thomas, Amsterdam - Oxford 1975, p. 283.

41 n. 172.

42 D. 4, 6, 26, 9. Cf. Lenel, *Das Edictum Perpetuum*,³ Leipzig 1927, § 44.

43 D. 4, 6, 28 pr.

Beklagten, das ja durch sie gerade entkräftet wird, doch wohl überhaupt nicht die Rede sein.⁴⁴ Why does Huschke speak of a *Publiciana rescissoria* and what should this be?

The *in integrum restitutio* can for instance take place by restoring the action of someone who lost the possibility of bringing it, but who can claim grounds for restitution. In this way the paragraph of the Institutes quoted above helps a former owner. This owner lost the possibility of bringing the *reivindicatio* because someone else had obtained ownership by *usucapio*. The help given consists of the former owner's possibility to institute an action claiming the thing as if there never had been a *usucapio*. In other words, the former owner gets an action restored. But which action exactly does he get restored? The only name our sources give to this restored action is that of the so-called *actio rescissoria*.⁴⁵ But this only tells us that there has been an action restored, by annulling a completed *usucapio*. The Institutes-paragraph seems to indicate a restored *reivindicatio*: the former owner claims the thing to be his ('*suam esse rem*') as if there had been no *usucapio*. The context, however, suggests the possibility of a restored *Publiciana*: Inst. 4, 6, 5 follows after the account of the *actio Publiciana* in § 4 and is, as it were, connected with it by the opening words '*rursus ex diverso ...*' ('again on the contrary ...'). That is why Huschke calls the action of Inst. 4, 6, 5 the *Publiciana rescissoria*. As the plaintiff of an 'ordinary' *Publiciana* feigns an uncompleted *usucapio* to be completed, so the plaintiff of a *Publiciana rescissoria* would on the contrary (*rursus ex diverso*) feign a completed *usucapio* to be uncompleted.⁴⁶ In the formula of this rescissory action, be it the *reivindicatio* or the *Publiciana*, the defendant's *usucapio* would be annulled by the fiction of it's being uncompleted.⁴⁷ The defense based on ownership by *usucapio* would in this way be frustrated and could therefore not come up for discussion again as an *exceptio iusti dominii*. According to Huschke, D. 17, 1, 57 could thus not be seen as a case of the *Publiciana rescissoria*, because in it the *exceptio* is being raised.

Dorotheus, however, does call the *actio Publiciana* in D. 17, 1, 57 the *Publiciana rescissoria*.

BS 792-19

Δωροθέου. Πουβλικιανήν ρεσκισσόριαν...

(Of Dorotheus. *Publicianam rescissoriam*...)

So at least the lawyers of Justinian's age saw D. 17, 1, 57 as a case of *restitutio in integrum*.⁴⁸ Can it be that they were mistaken? Or is there a way to meet Huschke's

44 p. 86.

45 Cf. D. 4, 6, 28, 5/6.

46 Cf. e.g. G. May, *Éléments de droit romain*, Paris 1932, p. 697 n. 6: '... c'est précisément le contraire de la fiction sur le fondement de laquelle est donnée l'action publicienne. De là le nom d'action contre-publicienne donné par les interprètes à l'action ainsi restituée...'

47 Cf. Lenel, *EP* § 44.

48 Cf. also Stephanus (BS 792-23), *infra* p. 56.

objections?⁴⁹

The action of Inst. 4, 6, 5 can indeed not be the same as the one of D. 17, 1, 57. For the action of Inst. 4, 6, 5 feigns the *usucapio* not to have taken place,⁵⁰ whereas in D. 17, 1, 57 the *usucapio* still exists and poses the question if the *exceptio iusti dominii* should be given. But does this also mean that D. 17, 1, 57 cannot be seen as a case of *restitutio in integrum*? The plaintiff of D. 17, 1, 57 gets the *actio Publiciana*, while the defendant is denied his defense of ownership through *usucapio*, by an express refusal to insert the *exceptio iusti dominii* in the *formula*. ‘... Die vielverhandelte l. 57 D. mand. 17, 1, ... macht sich ... dadurch auffallend, daß sie die in dem gegebenen Falle eintretende Gewährung der Klage aus der Gewährung der *exceptio* rechtfertigt. U.E. hat Papinian die *datio actionis* aus der *denegatio exceptionis* gerechtfertigt’, according to Brinz.⁵¹ He continues: ‘Die Gewährung einer rescissorischen *in rem actio* (r.v. oder P.) braucht nicht immerfort auf Gewährung einer Fiktion ausgelaufen zu sein; rescissorisch war die Klage auch, wenn der Praetor die z.B. einer *Publiciana* zufolge eingetretener Usucapion entgegenstehende ediktale *exceptio iusti dominii causa cognita* denegirte. Einen solchen fall enthält nach obiger Vermuthung ... die l. 57 D. mand. 17, 1.’⁵² That is to say the *actio Publiciana* in D. 17, 1, 57 can be explained as a case of *restitutio in integrum*. And this restitution has the result of annulling the defendant’s *usucapio*. This result is achieved, not by feigning that the *usucapio* did not happen, but by excluding explicitly in the *formula* the defense of *usucapio*. For the *praetor* states in the *formula* his refusal to insert the *exceptio iusti dominii*. The *iudex* then will be obliged to observe this negative directive of the *praetor*.⁵³

I would like to develop this view of D. 17, 1, 57 in such a way that this text offers us only a special case of *restitutio in integrum*. The *actio Publiciana* is being restored in this case by the refusal to accept the defendant’s claim of *usucapio*. Because there are grounds for restitution, the plaintiff brings a restored *actio Publiciana*. He uses however the *formula* of the normal *actio Publiciana*. This action is successful, because the *praetor* refuses to insert the *exceptio iusti dominii*. Suppose there were no grounds for restitution, but in spite of that the plaintiff tried to bring the *actio Publiciana*. In that case his claim would be rejected, because the defendant, without needing an *exceptio*, could directly have made the plaintiff’s *intentio* ineffective. In other words, except for a case of restitution, the *actio Publiciana* would be denied the plaintiff by the *praetor* or the defendant would be absolved by the *iudex* on

49 Cf. Appleton, ch. XIX ‘De la prétendue Publicienne rescisoire’, who records the different views given until then (1889).

50 But cf. *infra* n. 62.

51 *Pandekten I* (Erlangen 1873) § 178, no. 7a i.f. Brinz even supposes (with ‘Hrn Dr. Schreiber, bei seiner Promotion in Bern ...’ (Anm. 61)) that Papinian would have written *cum exceptio iusti dominii causa cognita denegetur* instead of *detur*.

52 No. 8 i.f.

53 Cf. Erman, p. 316.

account of a successful defeat of the plaintiff's *intentio*. As I see it there can be no survival of the *actio Publiciana* after a third person has become owner of the thing, for instance by *usucapio*. There is no longer a possibility to bring the *Publiciana* in this case. It can only revive if there are grounds for restitution. This restitution can take place in the special way I described above. So the plaintiff of D. 17, 1, 57 brings - as Dorotheus puts it - the *Publiciana rescissoria*, which is in fact the restored *Publiciana*.⁵⁴

§ 7: The *Publiciana rescissoria*

Perhaps D. 44, 7, 35pr. can provide us with a further indication of what I have just said.

D. 44, 7, 35pr.

Idem (sc. Paulus) libro primo ad edictum praetoris.

In honorariis actionibus sic esse definiendum Cassius ait, ut quae rei persecutionem habeant, hae etiam post annum darentur, ceterae intra annum... illae autem rei persecutionem continent, quibus persequimur quod ex patrimonio nobis abest, ut cum agimus cum bonorum possessore debitoris nostri, item Publiciana, quae ad exemplum vindicationis datur. sed cum rescissa usucapione redditur, anno finitur, quia contra ius civile datur.

(Paul, *Praetorian Edict*, book 1:

Cassius said that in praetorian actions the following must be laid down, namely, that those which involve recovery of the thing, should be allowed even after a year, and the others only within a year... Moreover, those actions by which we recover what is missing from our patrimony involve recovery of a thing, as when we bring an action against the *bonorum possessor* of our debtor, likewise a *Publician* action which is given on the model of the *vindicatio*. But when action is granted after usucapion has been set aside, it is terminated within a year, because it is granted contrary to civil law.)⁵⁵

This text explains that praetorian actions should be brought within a year, unless they have as object a *rei persecutionem*. The *Publician* action is such a praetorian action which has as object a *rei persecutionem*. So the *Publician* action can be brought even after a year. But when the action is granted by annulling a completed usucapion, it can be brought only within a year.

So normally there is no limit to the period in which the *Publician* action can be brought. But there is when in the mean time a usucapion is completed. Then the

54 Cf. Bekker, *Die Aktionen des römischen Privatrechts*, II (Berlin 1873), p. 93: 'Ebenso kann dem Restituierten auch mit einer zweckmässig gestalteten *a. Publiciana* geholfen werden ...' and n. 33: '... Dass die Formeländerung bei der *Publiciana* zu diesem Zweck sehr einfach sein konnte, blosse Fortlassung der *exc. iusti dominii*, ist aus fr. 57 *mandati* 17, 1 bekannt ...' Cf. on the contrary Savigny, *System* VII, p. 188: 'Will man also genau reden, so muß man sagen, daß in einem solchen Fall die Restitution dazu dient, nicht sowohl um eine verlorene Klage herzustellen, als um eine stets gültig gebliebene Klage von der ihr entgegen stehenden Einrede zu befreien.'

55 Transl. by Watson (*supra* n. 1).

action should be brought within a year. But which action precisely should be brought within a year? It is the action by which the completed usucapion is being annulled. So the action should be brought within a year from the completion of the usucapion. This all looks like a case of restitution. The Publician action, which in itself was terminated by the completion of the usucapion, is being restored, within a year, only when there are grounds for restitution.

That this Publician action which is given *rescissa usucapione* is an action which is being restored, not an action which in itself was still possible, can, I think, be deduced from the careful wording of the fragment. Whereas the normal actions, whether possible within a year or even after a year, are being given, *dantur*, the *Publiciana rescissa usucapione* is being restored, *redditur*. Of course, *reddere* can be used also as a synonym to *dare*, to give, and is far from being a technical term in the sense of *restituere*, but the way in which these terms are being used here alternatively, *dare* in case of all the other actions (*darentur*, *dantur*, *dandae sunt*, *datur*) and *reddere* only in case of the *Publiciana rescissa usucapione*, seems to be chosen deliberately rather than to be based on pure coincidence.⁵⁶ And when an action is being restored which would otherwise not be possible, we have a case of *in integrum restitutio*.

So D. 44, 7, 35pr. also provides us with a further indication of what I said above about the formula of the Publician action in general: the Publician action would normally not be possible anymore when someone else has become owner since the Publician possessor lost his possession; only in some cases would restitution of the action be possible.

The possibility to get restitution which D. 17, 1, 57 offers, that is restitution by refusing to insert the *exceptio iusti dominii*, however, does not seem to conform with the method Inst. 4, 6, 5 gives us, that is the restitution by feigning the defendant's *usucapio* not to have happened. The name *Publiciana rescissoria* which only Dorotheus mentions, and only in the case of D. 17, 1, 57, can therefore not simply be connected with the action of Inst. 4, 6, 5. Lenel, however, thinks that Stephanus is calling this action of Inst. 4, 6, 5 the *Publiciana (rescissoria)*.⁵⁷ But Stephanus writes about D. 17, 1, 57 and he only describes what happens in this text.

BS 792-23

Στεφάνου. Ἡ γὰρ Πουβλικιανὴ οὐ μόνον τῷ πρὸ οὐσουκαπίου ἐκπεσόντι τῆς τοῦ πράγματος νομῆς παρέχεται, ἀλλὰ καὶ τῷ πάλαι δεσπότῃ ἑτέρου τὸ πρᾶγμα οὐσουκαπιτεύσαντος δίδεται τὴν γενομένην ἀνασχίζουσα οὐσουκαπίου.

(Of Stephanus. For the *Publiciana* is given not only to him who loses possession of the thing before [having completed] *usucapio*, but also to the former owner after someone else has become

56 That it is being said of the same *Publiciana rescissa usucapione* that it is *contra ius civile datur* should be no objection. *Datur* is probably used here in a more general sense and chosen to avoid repetition.

57 EP § 44 (p. 123 & n. 5).

owner of the thing by *usucapio*, to undo the *usucapio* that has taken place.)

He does not mention the words *Publiciana rescissoria*. The name *Publiciana rescissoria* is given us by Dorotheus, but only in the special case of D. 17, 1, 57.⁵⁸ In Inst. 4, 6, 5 there is a plaintiff who claims his ownership (*dicat suam esse rem*), while the defendant's *usucapio* is feigned not to have taken place (*possessorem rem usu non cepisse*).⁵⁹

This action is nowhere called *Publiciana* and it looks more like a *vindicatio*, especially its *intentio* (*suam esse rem*). It seems to be a restored *vindicatio*: the *vindicatio rescissoria*. Apart from this, for instance D. 17, 1, 57 shows us that restitution could also be obtained by a *Publiciana rescissoria*.⁶⁰ In this last case the *Publiciana* was by way of exception given on grounds for restitution against a later owner. This was expressed in the *formula* simply by a refusal to insert the *exceptio iusti dominii*.⁶¹ There seems to be no identification of the *vindicatio rescissoria* with the *Publiciana rescissoria*.⁶²

This does raise the question why the slave-dealer of D. 17, 1, 57 brings the *Publiciana rescissoria* and not the *vindicatio rescissoria*. Dorotheus supposes the slave-dealer to have bought the slaves from a non-owner and, therefore, only to have been Publician possessor and thus only to be able to bring the *Publiciana*.

BS 792-19

Δωροθέου... Ὑπόθου γὰρ τὸν σωματέμπορον ἀπὸ μὴ δεσπότη ἀγοράσαι καὶ διὰ τοῦτο τὴν Πουβλικιανὴν αὐτὸν ἔχειν.

58 Cf. *supra* p. 43.

59 Lenel (*EP* § 44) bases his version of the fiction (p. 123 n. 2) on Theophilus (ὥσπερ (read: ὥσπερ) μὴ οὐσοῦκαπίτευσεν ὁ ἀντίδικος; as if the opponent had not usucaped). But it is not impossible that the quotation Theophilus gives from the *formula* only begins after this sentence. Cf. ed. Reitz II (The Hague 1751) p. 793, instead of ed. Ferrini (Berlin 1884) p. 419 which Lenel used.

60 Cf. also D. 44, 7, 35 pr. (*cum rescissa usucapione redditur*) and Stephanus on D. 17, 1, 57, quoted above (δίδεται τὴν γενομένην ἀνασχίζουσα οὐσοῦκαπίονα).

61 Cf. Bekker n. 33, who does not exclude the possibility of other ways of expressing the restitution.

62 It seems that Lenel's wavering attempt of identification - he recognizes that the action of Inst. 4, 6, 5 'ihrem Wesen nach eigentlich eine *vindicatio rescissoria* ist' - will have to be rejected. Cf. Kupisch, *In integrum restitutio und vindicatio utilis* (1974) p. 76 n. 71. In later Byzantine sources this identification does take place. Cf. M.Th. Fögen, 'Das Lexikon zur Hexabiblos aucta', *FM VIII* (1990): *Lexica Iuridica Byzantina*, ed. Burgmann, Fögen, Meijering, Stolte, p. 183, I 75. As for the Roman-Dutch law, to take one example from the later West-European tradition of the *ius commune*, Voet also identifies both actions (*Commentarius ad Pandectas*, Lib. V. Tit. II, n. 2 (ed. 1731, I p. 369)): 'Ex iure etenim dominii non tantum rei vindicatio competit, ... sed & actio Publiciana rescissoria usucapionis, de qua §. rursus ex 5. *Inst. de action. & tit. ff. ex quib. causis maiores*. ubi dum praetor fingit, necdum usucaptum esse quod vere usucaptum erat, rei vindicationem ex iure dominii, velut nondum amissi, concedit.' ('And from the right of ownership not only the *rei vindicatio* is due, ... but also the *actio Publiciana* that is rescissory of a *usucapio*, about which Inst. 4, 6, 5 and D. 4, 6. So where the *praetor* feigns that that is not yet usucaped which really was usucaped, he concedes the *rei vindicatio* on account of ownership, as if it were not yet lost.')

(Of Dorotheus... For suppose that the slave-dealer has bought from someone who is not an owner and that he therefore has the *Publiciana*.)

This hypothesis can in itself not be objected to, but does not seem necessary.⁶³ Stephanus, therefore, says, as we have seen, that a former owner can also bring this action, that is to say against someone who meanwhile has become owner by *usucapio*.⁶⁴ Why should a former owner not be able to do what a non-owner can do, that is obtaining *restitutio in integrum* by way of the *Publiciana rescissoria*?⁶⁵

§ 8: Conclusion

In summing up I would like to state that D. 17, 1, 57 can best be seen as a case of *restitutio in integrum*. Technically this restitution takes place by an explicit refusal to allow the defendant to claim his ownership. So the Publician action is restored to the plaintiff by taking away from the defendant his claim of ownership, and this is done by an explicit refusal to insert the *exceptio dominii* in the formula. This instructs the judge to neglect any claim of ownership by the defendant, which would otherwise have made it impossible to bring the Publician action. The grounds for restoring this action are none other than the usual grounds for restitution. The testimonies of Dorotheus and Stephanus are helpful in this respect, as we have seen. From Dorotheus we learn the name of this restored Publician action: it is the *Publiciana rescissoria*, because it rescinds at the same time the defendant's ownership, in our case a completed usucapion.⁶⁶

I therefore think it is not necessary to assume because of just one Digest text⁶⁷ that the possibility to bring the *actio Publiciana* would remain forever, even if someone else obtains the ownership afterwards.⁶⁸ Should such a far-reaching principle not have left behind more traces? I prefer the more restricted sense of D. 17, 1, 57 which I have explained above, 'nach dem Princip, daß ohne Noth keine Singularität, und nicht statt einer kleinere die größere angenommen werden soll'.⁶⁹ But if the reader should find my explanation of D. 17, 1, 57 'zu Spitz', he should

63 Cf. Savigny, *System* VII, p. 304.

64 See BS 792-23, quoted above. The possibility for an owner to bring the *actio Publiciana* by only stating that he is Publician possessor is widely accepted. Cf. e.g. Kaser, *RP*, I § 104 I.

65 Cf. Savigny, *System* VII, p. 306 who calls the opposite view of Cujacius (*In Lib. X. Respons. Papin., ad L. LVII. Mandati, Opera Omnia* (1758) t. IV, col. 1261) an 'Irrthum fast unglaublich'. Cujacius argues: plus potest fictio juris quam veritas. But why should a former owner not also be able to invoke the fiction instead of the *veritas*?

66 Cf. Heimbach, *Prolegomena*, p. 47: 'Praeterea ex indice Dorothei nonnulla explicari possunt hactenus dubitationi obnoxia. Sic nomen *actionis Publicianae rescissoriae* antiquissimum est, utpote iam a Dorotheo usurpatum.'

67 Cf. Girard, *Manuel*, p. 358 n. 4.

68 This is the view Wubbe in particular holds, though he thinks of D. 17, 1, 57 also as a case of *restitutio in integrum*, but only as a refusal of the *exceptio* against a still existing *Publiciana*.

69 Windscheid, *Lehrbuch des Pandektenrechts* I (Frankfurt a.M. 1900) § 174 n.9 (in another context).

remember that it is Papinian who I am trying to explain; then perhaps he will agree with Pernice and turn to some Labeo.

F. BRANDSMA

