

THE EPISTULA AD SALVIUM, APPENDED TO A LETTER OF SULPICIUS SEVERUS TO PAULINUS

Observations on a recent analysis by C. Lepelley

There exist, appended to a collection of the Histories of Orosius and a subsequently copied letter of Sulpicius Severus (c.360-c.420), three letters of which the authorship is uncertain. One of these is addressed to an otherwise unknown Salvius, once trained and practising as a lawyer in Rome at the same time as the author of the letter, and afterwards landowner in Africa. Dealing mainly with the recall of fugitive farmers, it is of interest to legal historians. Recently the eminent ancient historian C. Lepelley has bestowed an ample and erudite study upon these letters.¹ However, as regards the legal-historical aspects, his study, in spite of his flat rejection of my former legal analysis,² shows grave shortcomings which justify this contribution.

- 1 C. Lepelley, *Trois documents méconnus retrouvés parmi les spuria de Sulpice Sévère*, *Antiquités Africaines* 25, 1989, p. 235-262. The last critical edition was by C. Halm, CSEL 1, Wien 1866, p. 251-256.
- 2 A.J.B. Sirks, *Sulpicius' Severus Letter to Salvius*, BIDR 85, 1982, p. 143-170. After rightly observing the lack of references to the manuscript evidence (which, however, was not the main object of the article), Lepelley (note 1) p. 240 n. 17 continues: "Le commentaire historique n'est pas plus heureux. A.J.B. Sirks pense que l'auteur (selon lui Sulpice Sévère) serait le propriétaire de la terre de vingt jugères, et que Salvius posséderait le *fundus Volusianus*, alors que l'argument essentiel, toujours répété par l'auteur, est que Salvius n'a pas le droit sur les colons puisqu'il n'est pas le propriétaire du *fundus* (cf *infra*, n. 38). L'hypothèse selon laquelle la *turricula* de l'auteur serait un monastère possédé en Afrique par Sulpice Sévère est surprenante. Suit une érudition de seconde main sur les naviculaires et le colonat, à peu près sans rapport avec le texte. En bref, on ne peut rien retenir de cette étude." The designation "historique" is unfortunately chosen, since my article basically concerned the legal aspects, and I fear it is indicative of the complete lack of understanding Lepelley has as to the legal aspects of the text. It is striking in Lepelley's commentary that no legal-historical works are ever cited, except the above, and this also certainly accounts for the legal deficiencies. As to Lepelley's other observations, the reader must judge for himself from the text. I only want to say here, that *nowhere* in my article did I state that Salvius was the owner of the *fundus*: on the contrary (p. 149: "A certain Salvius behaved now as if he were the owner of both the *fundus* and the plot."; p. 150: "Salvius pretended to be the owner", p. 158: "Salvius pretended he was the owner"; p. 160: "If Salvius pretended to be the owner", "whether Salvius derived his pretended right") and it shows that Lepelley apparently did not read my article or lacks sufficient knowledge of English. For Sulpicius'/X's ownership of the plot, see note 38. For the *navicularii* and *praedia navicularia* in Africa, and the colonate, see A.J.B. Sirks, *Qui annonae urbis serviunt*, Amsterdam 1984, in general resp. p. 330-348 (for this letter p. 329 note 22, p. 347 note 8), B. Sirks, *Food for Rome*, Amsterdam 1991, in general resp. p. 180-192 (for this letter p. 178 note 95), and A.J.B. Sirks, *Reconsidering the colonate*, ZSS 110, 1993, 331ff. Actually, on these specific points nothing was to be found in existing works and therefore the BIDR article contained much new analysis. As to the *turricula*, I merely

The letter is in itself an example of epistolary style, and consequently has its share of courtesies and embellishments. The legal case is essentially stated in paragraphs 2-4 (part.) of the letter (we follow Lepelley's edition):

2. Ac tibi cur cordi sit terrificare miseros aratores, non plane intellego, et uricolos meos cur velis exhibitionis urgere formidine, non agnosco; quasi vero illos nesciam consolari, et a pavore retrahere, et docere non tantum esse timoris quantum ipse practendis. Fateor, dum nos campus exciperet, me saepe armis eloquentiae tuae fuisse conterritum, sed frequenter, ut poteram, recidiva vulnera reponebam. Tecum sane condidici quo iure coloni quoque ordine repetantur, cui competat actio, cui non competat exitus actionis. Volusianenses ais te velle reducem,³ ac frequenter iratus ingeminas te rusticos ex mea turricula retracturum; et is qui, ut ego spero adque desidero, mihi antiqua necessitudine sis copulatus, correpturum te homines meos, conventionem neglecta, temere minitaris. Quaero de insigni prudentia tua utrum ius aliud habeant advocati, alius ex togatis, an aliud aequum Romae sit, aliud Mactari.

3. Te interim nescio Volusiani fundi umquam fuisse dominum, si quidem Dionysius fertur eius possessionis iura servasse, neque heredes illius defecisse, qui dum viveret rei navalis in plurimos venales aculeos intendebat. Fuit ea tempestate Porphyrius quidam Zibberino satus, neque tamen recte Zibberini filius nominatus. Idem generis quaestionem militia convelabat, et ut nubem a fronte repelleret, officiosa gratia et lactis obsequiis fungebatur. Multum mecum fuit et domi et in foro, cum me et apud patrem defensore et apud iudicem patrono saepius uteretur. Aliquando etiam Dionysium comprimebam, quod Porphyrio non deberet viginti iugerum causa navicularia iurgia commovere.

4. En causa est cur insigni prudentia tua meis minitetur actoribus ut, cum dominus loci non sis, passim colonorum meorum facias mentionem. Et si te Porphyrii denuntias successorem, viginti iugerum noris angustias ne ab uno quidem cultore posse tractari; aut si te, memorem custodemque propriae dignitatis, piget heredem nominare Porphyrii, certum manifestumque est illum posse proponere qui proponendi habeat facultatem, ut adversum eos experiatur qui nihil ex eadem terra possideant. Ceterum, si diligenter inspicias, mihi potissimum deferri potest intentio repetendi. (...)

2. Why you want to scare poor farmers I do not know at all, and why you want to press upon my farmers the irritation of a production in court I fail to understand. As if I could not comfort them, release them from fear, tell them there is less to fear than you claim. I concede I was often frightened by the weapons of your eloquence, in the days when we fought each other in the courts, but often I returned the blows. Indeed, together with you I have learned by which right and according to which procedure⁴ *coloni* are reclaimed, who is entitled to an action, who is not entitled to the result of an action. You say you want to recall the Volusianenses and you assiduously and angrily proclaim you will fetch the peasants with force from my turret.⁵ And

wrote (p. 159): "Was Sulpicius' cloister meant by this? It is not clear." Manifestly this was suggested as no more than a hypothesis (and certainly one which retains a higher degree of plausibility than a pigeonier).

3 Lepelley (note 1): *reduces*.

4 *iure*: the legal basis of the claim; *ordine*: the *formula* procedure or the *cognitio extra ordinem*.

5 Lepelley (note 1) p. 245 explains this as a reference, first to the towers we often see on the depictions of African estates as a metaphor for such an estate, then as "le pigeonier" of the author. But the latter would be a remarkable comparison, since such pigeon houses were used to collect droppings. (See for this use A.K. Bowman, *Egypt after the Pharaohs, 332 BC – AD 642*, Berkeley and Los Angeles 1986, p. 150.) The use of *turricula* in this sense is not attested elsewhere. I also was puzzled

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you lightly threaten that you - tied to me in old friendship,⁶ as I hope and wish - will drag my people into court without a summons.⁷ I am asking you, a noted proficient man, whether advocates use one law and retired advocates another, whether there is one kind of equity in Rome and another in Mactaris.

3. Meanwhile I do not know whether you have ever been the owner (*dominus*) of the *fundus Volusianus*, when it is related that Dionysius maintained (or: recovered)⁸ the rights on his land⁹ and that he, who when alive directed through summoning the corrupt¹⁰ stings¹¹ of the *res navalis* against many persons, was not lacking heirs. In that period there was a certain Porphyrius, issue of Zibberinus but not properly named as the son of Zibberinus. He concealed the question into his descent by the (army or imperial) service, and in order to dispel anybody's doubts, he performed a solicitous gratitude and cheerful attentions. He has been a lot with me, at home and in the courts, because he needed my services often as advocate with his father and as patron with the judge. Once I also exercised pressure on Dionysius, since he should not start proceedings against Porphyrius on account of the *functio navicularia* with regard to twenty *iugera* of land.

4. So that is the reason why you, a noted proficient man, use threats against my managers, that you may make mention without distinction of my *coloni* although you are not the owner of the place. And if you declare yourself Porphyrius' successor, you should know that the small surface of twenty *iugera* could not be ploughed even by one farmer. Or, if you regret calling yourself Porphyrius' heir, remembering your dignity and being careful for it, [you should know] that it is certain and clear that only he can put in a claim who has the qualification/allowance to claim, so that he can proceed against those who do not possess any part of the same land.¹² Apart from this, if you carefully consider [the case], the claim for recall can be brought before all against me.¹³ (...)

by the expression. Upon inquiring, I was, when writing my BIDR article, advised by a Late Latin philologist that the expression occurred as reference to monasteries; wrongly, as I learn now from Lepelley. Nevertheless, if estates in Africa did have such turrets, why could monasteries in Africa not have had them?

- 6 Lepelley apparently interprets this as reference to an agreement between Dionysius and Porphyrius, see notes 24 and 25. Yet I think it merely refers to the intimacy created by studying together and exercising the same profession in the same place.
- 7 *conventionone neglecta*: Lepelley interprets this as referring to an agreement between Dionysius and Salvius. However, *conventio* can also mean summons (H. Heumann- E. Seckel, *Handlexikon zu den Quellen des römischen Rechts*, Jena 1907, s.v.: "gerichtliche Belangung"; M. Kaser/K. Hackl, *Das römische Zivilprozessrecht*, München 1996, § 84.IV.1, 86 ("Ladung"), 87.I. The context of an *exhibitio*, namely by an *interdictum*, makes the latter meaning more probable.
- 8 For *servare* in these meanings see Heumann/Seckel (note 7) s.v.
- 9 Lepelley (note 1) p. 246 has "le droit de possession", but it seems that Dionysius had more, and *possessio* may also mean "land".
- 10 Venal, corrupt: meant is, probably, that Dionysius was prepared to drop the summons when paid a sum; as will also follow from the circumstances in which he dropped the case against Porphyrius.
- 11 For *aculei* with this connotation see Heumann/Seckel (note 7) s.v.
- 12 Lepelley (note 1) p. 242 note 27 interprets *proponere* as "engager une action judiciaire" and *experiri* as "fournir en justice la preuve requise pour la demande." But for *experiri* Heumann/Seckel (note 7) do not give such a meaning, only (next to the expected "to experience") "gerichtlich verfahren, einen Anspruch verfolgen".
- 13 Lepelley (note 1) p. 242 note 27bis assumes that X threatens here to start proceedings himself on account of the old conflict ("c'est plutôt à moi que peut être accordé un motif de revendication en justice." Yet the phrase merely says that when it comes to dispute the ownership of Porphyrius' twenty *iugera*, X should be summoned, since the *coloni* are in his "possession", not that of his

The first publisher of the three letters, which follow one letter by Sulpicius to Paulinus appended to a text of Orosius, Luc d'Achéry, put forward the possibility that their author might be Sulpicius Severus; but subsequent editors have rejected this.¹⁴ Lepelley thinks such an attribution is impossible. He bases himself on the style of the three letters, different from the one letter identifiable, their subject (so alien to the author of the Life of St. Martin), and thirdly on a codicological argument: the letter of Sulpicius Severus is preceded by a precise mention of its author, whereas the first of the three letters merely has *incipit epistulae*, suggesting that the name of the author has been dropped in the process of copying but apparently differed from that of the preceding letter. He assumes that the letters, written by an African author, were considered valuable as literary models and for that reason appended.¹⁵

Although the question of authorship is not directly important for the legal aspects of the letter to Salvius, some observations must be made. The author, whom we shall call, for convenience's sake, X, was a lawyer who had studied and practised in Rome, together with the addressee.¹⁶ We may therefore expect legal terms in his letter, particularly since it concerns a legal problem. It is very likely from the reference to Mactar that it deals with lands and *coloni* in the province of Proconsular Africa, perhaps near Mactar. Yet their owner X might well have resided elsewhere, and the fact that he speaks of his representatives (*actores*) is a good indication of this. Where exactly he did reside, we do not know. It will not have been at a distance too inconvenient for Salvius to travel, since X invites him for a private discussion of the matter (4: ... *ad priuatum* ... *uenire conloquium*). So if Salvius resided in Mactar, then X may have lived nearby, or for example in Carthage; but Rome, or Gaul, would in this case have been too far away. This argument could really rule out Sulpicius Severus as author, assuming that he already lived at that time in Gaul, unless he (or X) was temporarily over in Africa: and why not? People did travel in Antiquity. Lepelley's arguments against Sulpicius Severus' authorship are impressive, but certainly not cogent.¹⁷

representatives. Perhaps X tries to convey here as well, that with him as adversary in court, Salvius' chances to persuade the judge are much less. Lepelley thinks the phrase is so elliptic, that words must have fallen out in the manuscriptal transmission.

14 See for this and in general a wide codicological survey Lepelley (note 1) p. 236-238.

15 Lepelley (note 1) p. 238-239.

16 This follows unquestionably from the first paragraph, not rendered here.

17 Unfortunately Lepelley does not mention the argument of the invitation. As to the arguments proposed by him, they are not convincing. Sulpicius Severus came from a leading Aquitaine family, but there is no reason why he could not have also owned land in Africa, nor why he should not have been used to deal with the subject-matter of the three letters: both as lawyer and landowner he will have dealt with similar questions. He got a good education, was trained as a lawyer and practised in Rome (some ten years), as did X, and there is consequently no reason to think that he could not adapt his epistolary style. The codicological argument is also questionable: the *incipit* may have derived from the original separate collection, and precisely that they were also written by Sulpicius may have

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Lepelley dates the text to the beginning of the fifth century.¹⁸ The references to the litigation on account of the *functio navicularia* puts the *terminus post quem* at 367-372 (see below). If the importance attached to the recognition of Porphyrius by Zibberinus was inspired by the possibility to escape the *condicio originaria* in this way, then the episode with Porphyrius would date from before 419.¹⁹ The use of *navalis* for *navicularius* is encountered in two constitutions, of 417 and 423, for Africa (CTh 13.6.9 and 10). This could put the date of the letter in the second decade of the fifth century. There are no references to the Vandal rule of Proconsular Africa from 439 onwards, but since the Romans continued to live under Roman law, this does not constitute a sound argument to put the *terminus ante quem* at 439.

The situation is to some extent clear. Salvius, who apparently resides in Mactaris in Africa, has tried to remove *coloni* (called the *Volusianenses* after the *fundus* they came from) who stay on the lands of X,²⁰ claiming that they are his. He has threatened to start summary proceedings. X poses the question, who owns the *fundus Volusianus*?²¹ at present, stating that at one time it was Dionysius, who had heirs. Next to this he refers to a Porphyrius, illegitimate son of Zibberinus, who during his life owned twenty *iugera* of land. Apparently there was some connection between these *iugera* and the *fundus*, since Salvius' claim could also be said to be connected with these *iugera*, Salvius claiming then to be Porphyrius' heir.

According to Lepelley the situation is as follows. The farmers (*coloni*) it concerns are the *Volusianenses*, who live on the *fundus Volusianus*, certainly now X's property, whereas just as certainly Salvius was never owner of it. Dionysius once owned the *fundus Volusianus*. His heirs sold this to X.²² Between Dionysius and Porphyrius there had been a disagreement about the *functio navicularia* regarding the twenty *iugera*, but X persuaded

caused the dropping of his name, since they now followed a letter with his name as author. An *alia* would suffice now, as letters nos. 2 and 4 have. Moreover, Lepelley has not taken into account the reference by Gennadius (c.495 AD) to other letters by Sulpicius dealing also with profane matters (*in aliquibus etiam familiaris necessitas inserta est*). The copier of Pal. 829 may have united two sources, but did the other one for that reason alone derive from a different author? And even if the scribe appended letters of an otherwise unknown author, he still might have done this because he thought he was dealing with some of these letters *ad familiares*, which underlines the importance of Gennadius' remark. In the end, Sulpicius cannot definitely be ruled out as author.

- 18 Lepelley (note 1) p. 239; probably on account of the second letter, which deals with the conversion of peasants to the true faith. Lepelley thinks of the liquidation of Donatism after 411. Yet, how does it follow that the letters were written at the same time or within a short period? Lepelley apparently assumes a single authorship on the basis of a stylistic unity. But is this sufficient?
- 19 See CTh 5.10(18).1.4 (= CJ 11.48.18), of 419, which declares that the children born from a *colona originaria* and a free man are all subjected to this *condicio*. On this argument, see Sirks, *Sulpicius' Letter* (note 2) 161-165.
- 20 There are many references to *coloni originarii* leaving their domicile (*origo*); for example, CJ 11.48.8 of 371.
- 21 For a *fundus Volusianus* in Africa and the name Volusianus, see Sirks (note 2) p. 150, at n. 25.
- 22 Lepelley (note 1) p. 246-247.

Dionysius to drop his claim and they made a settlement (“règlement à l’amiable”). After the deaths of Dionysius and Porphyrius, X and Salvius acquired respectively the *fundus* and the twenty *iugera*. Salvius claims the *coloni*, pretending their *origo* was on his lands. Lepelley thinks that X wants to make a deal on the number of *coloni* Salvius may take with him from the *fundus Volusianus*. viz. as much as the plot may sustain.²³ As a means of pressure X subtly threatens to institute proceedings himself. X had agreed to confirm the agreement between Dionysius and Porphyrius, but this bound Salvius as well when he acquired the land.²⁴ Now if Salvius thought he could claim the *coloni*, then X was free to claim the twenty *iugera* again (which Dionysius, on the advice of X, had renounced), since Salvius disregarded the agreement.

This reconstruction, however, is not as obvious as it may seem, above all since, according to it, Salvius is in no position at all to claim the *coloni*: he is neither the owner of the *fundus* nor, as a result of the disregard of the agreement, of the twenty *iugera*. Nor do we find a clue in the text that Salvius did claim that the *coloni* had moved their domicile to his lands (if they had, the case would have been lost for them). Unless he claimed possession of the *fundus* or the *iugera*, he could not claim the *coloni* attached to these lands. There is no other reason why X would want to surrender any *colonus* at all to him. Another obstacle is the assumption that X agreed to take over the supposed agreement between Dionysius and Salvius. If there had been an agreement, it is likely that it was about the contribution to the *corpus naviculariorum*, not about *coloni* (see below for the nature of Dionysius’ lawsuits). But there is no mention at all of an agreement in the text: Dionysius merely dropped his case against Porphyrius. The *conventio neglecta* which Lepelley bases this idea of an agreement upon, is the summons Salvius should have issued but did not (see note 7). Lepelley leaves us in the dark about how X could take over the agreement, but that was impossible.²⁵ And how could Salvius have been bound to the agreement, if he had not acquired ownership in the quality of heir of Porphyrius? But Lepelley thinks he bought it.

Besides, it is doubtful whether such an agreement to divide *coloni* was possible, if it is not *coloni* ascribed to the plot who are meant. In 357 Constantius forbade all deals on the occasion of sale or donation of land which took *coloni* away from the land they were ascribed to. They were to remain, to cultivate it (CTh 13.10.3 = CJ 11.48.8; the same rule in CJ 11.48.7 of 371). Also fugitive *coloni* were always to be returned to their *origo* (for

23 Lepelley (note 1) p. 249.

24 Lepelley (note 1) p. 249: ... Salvius, qui avait ainsi contracté une obligation (*necessitudo*) ...

25 Dionysius could have concluded an agreement (*transactio*) with Porphyrius regarding the 20 *iugera*, if the dispute was over the property. Dionysius’ heirs could then have transferred to X only the *fundus* without these *iugera* (*nemo plus*-rule). X could not take over the *transactio*, nor could Salvius in a case of purchase be bound (intransmissibility of obligations). If the *transactio* became invalid (if this was possible!) and the claim for the 20 *iugera* revived, only the heirs could reclaim, not X. X could claim only from the heirs, and only if he had expressly agreed so with them, and they could transfer the *iugera* to him, after having got hold of these.

example, CTh 5.17.1, of 332, and CJ 11.48.6, of 366). One can see the interest the fisc had in a continuous exploitation of land. But perhaps there were ways to get around this.

Yet let us analyse the various aspects of the case: first the ownership of the *fundus Volusianus*, which was, according to Lepelley, certainly X's. However, he nowhere proves or even argues this, although it is not expressly stated in the text; neither does he argue why Dionysius' heirs should have sold the estate to X.²⁶ Dionysius had been the owner and his ownership had, apparently, been established or confirmed in a law suit. According to X he had had heirs, to whom, as X implies, the *fundus* devolved. It is, he implies, now up to Salvius to prove the contrary.²⁷ Had X been owner, he should have claimed here his ownership, as successor of Dionysius' heirs; but he does not, and it is therefore highly improbable, if not impossible, that X was its owner now. Further, ownership of the land the fugitive *coloni* were ascribed to was fundamental to the claim for them.²⁸ That is why X brings up this question, suggesting that Salvius could not be the owner: after his arguments, it would be up to Salvius to prove his ownership (which could be difficult).²⁹ Had X been the owner of the *fundus Volusianus*, then it would have been only natural to state that he had bought it from the heirs and was its lawful owner. Also, if he had been the owner of the *fundus Volusianus*, a claim by somebody else for the *coloni* belonging to it (and that is what we may conclude from the word *Volusianenses* and the importance attached in the letter to the possession of the *fundus Volusianus*) would have been premature: the *fundus* should be vindicated first. Thirdly, in section 3 X mentions that Salvius threatens to make no distinction between his *coloni* when claiming the *Volusianenses*: in other words, to claim all the present *coloni* as if *Volusianenses*. This means that next to the *Volusianenses* other *coloni*, namely those who belonged to X's land, were residing on these lands. Thus X's lands cannot have comprised the *fundus Volusianus*.³⁰ Moreover, if he had been the owner, there hardly would have been a case for Salvius.

26 Lepelley (note 1) p. 246: "assurément la propriété de l'auteur de la lettre."; Lepelley's "Il [Dionysius] laissa des héritiers, mais ceux-ci n'intervinrent aucunement dans le débat; ils avaient donc vendu le *fundus*, évidemment à l'auteur de la lettre." (p. 246/7) does not prove anything (donc?), except that the purport of X's argument apparently escapes him. See further note 25.

27 So already in Sirks (note 2) p. 152.

28 See CJ 11.48.15 (E, 414): *tunc causam originis et proprietatis agitari*.

29 So already Sirks (note 2) p. 152.

30 Lepelley's arguments as expounded on p. 246 note 38 are only valuable as regards Salvius' non-ownership; they do not provide any ground for an ownership by X, if meant as such. The first argument, § 3 l. 18 (*te interim nescio Volusiani fundi unquam fuisse dominum*) does not prove that X was its owner (it would be a very weak reply for an owner!). The second argument, § 4 l. 25 (*cum dominus loci non sis*) again does not prove X's ownership of the *fundus*. Salvius threatens the *actores* and the *coloni Volusiani*, but it does not say they were residing on the *fundus Volusianus* (on the contrary: they would have been unclaimable then). Also the third argument, § 4 l. 29 (*qui nihil ex eadem terra possideant*) does not hold. It concerns the twenty *iugera* once owned by Porphyrius, and these were separated from the *fundus*. Had X been the owner he would certainly have said so, being a lawyer: it would have been up to Salvius to disprove it, X being in possession (according to Lepelley)

We do not know the contents of the letter or of the relation of events X responds to, but apparently Salvius in claiming the *coloni* had based himself on the (pretended) possession or ownership of the *fundus Volusianus*, and subsidiarily on possession or ownership of the twenty *iugera* which once belonged to Porphyrius. This would explain the sudden digression on the person of Porphyrius.

There must have been a connection between these twenty *iugera* and the *fundus Volusianus*, or else the claim for the *coloni* could not have been based on the twenty *iugera* as well; thus, rightly, Lepelley, who, however, does not give any reasons for this.³¹ He assumes that through (pretended) ownership of the twenty *iugera* Salvius could claim the *coloni*, as long as they had been settled on this not too large plot of land.³² X puts forward the argument that this surface is too small for even one farmer to plough. This has - in any case here - nothing to do with the size of rented farmland in general,³³ but implies that since there must be a relation between the number of *coloni* and the size of land, Salvius cannot claim even one *colonus* on this basis.

As to the relation between the *coloni* and the twenty *iugera*, according to Lepelley Salvius stated that some of the *coloni Volusianenses* had made this land their *origo*, residence, and for that reason, claiming to be the owner of it now as heir of Porphyrius, he called for their return.³⁴ Yet the text does not say that some *coloni* had changed domicile. It is more likely that the twenty *iugera* once formed part of the *fundus Volusianus*, and that this was the reason behind Dionysius' planned action against Porphyrius.³⁵ Perhaps we see here a case of the fraud, combated by CJ 11.48.7 of probably 371. To evade the prohibition of removing *coloni* from their land, sellers divided an estate into a big and a small part. They then sold the small part with all the *coloni* on it, leaving the greater part without cultivation (*ut parva portione terrae emptori tradita omnis integri fundi cultura adimatur*). X's remark, that the twenty *iugera* were too small to feed only one farmer would refer to this, implying that analogously to such a sale, any claim for *coloni* on the basis of ownership of a plot of land, could not exceed the maximum number of persons necessary to cultivate this plot (the apparent basis of the *adscriptio*). The text suggests that Salvius indeed claimed to be Porphyrius' heir. X suggests that it was not thought proper for a person of Salvius' standing to claim to be the heir of somebody like Porphyrius.³⁶ Why

of the *fundus* and so in the better procedural position. As it is, the text proves that X was not the owner, and had to bring doubts about Salvius' claim: that would force Salvius to prove his claim.

31 Lepelley (note 1) 248; see for arguments Sirks (note 2) p. 152.

32 Lepelley (note 1) p. 248; so already Sirks (note 2) p. 152.

33 As Lepelley (note 1) p. 248 at note 45 suggests.

34 Lepelley (note 1) p. 248.

35 See Sirks (note 2) p. 152.

36 Which makes Lepelley's suggestion, that X had recognised Salvius' possession (Lepelley [note 1] p. 247 note 27bis) unlikely.

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Salvius could have done so is not clear.³⁷ Porphyrius apparently had had no testament. If he had been the son of a slave woman attached to the *fundus Volusianus*, Salvius could have said that the twenty *iugera* belonged to him as *peculium* (see CJ 1.3.20 of 434 for the inheritance right). In case of a fraudulent sale of the plot, he would have to have been the son of a rather important person, which is possible. On the other hand, X does not say who inherited the plot from Porphyrius,³⁸ so it is possible that it had become *bona vacantia*. As such Salvius might have claimed to have occupied it. After a period of four years he would have gained possession as if heir.³⁹ He would have become liable for the taxes on the land and entitled to reclaim fugitive *coloni*, if any were ascribed to this land. If this were the case, then X implies that such a thing would have been rather ridiculous in view of the social difference between Porphyrius and Salvius; but he does not say that it was legally impossible, which, we may expect, he otherwise would have done.

After that, X reminds Salvius that if Salvius' claim is not based on this, only he who has a *facultas* to institute proceedings may do so, and that he must proceed against those who have not got any part in the same land. Which same land? Since it concerns *coloni*, we may assume the land the claimed *coloni* were ascribed to. What is meant by *facultas*? It was possible to claim slaves, ascribed to deserted lands, and transfer them to one's own land for cultivation. Imperial permission had to be granted for this (CJ 11.48.3, of 365). Since this law is included in CJ 11.48, it is likely that it applied to *coloni adscripticii* as well. *Facultas* might refer to this. Salvius would have to produce such a permission. If, on the other hand, *facultas* refers to the ownership of the twenty *iugera*, then it is a reminder that only the owner of those *iugera* could institute proceedings.

Since there is no reference to the lawful owners of the *fundus Volusianus*, it is likely that these were unknown and that X had taken up the *coloni* of that estate. It would make him a "bona fide possessor" (after all, *coloni adscripticii* were still free people),⁴⁰ and the summons for their return should be directed against him (follows from, for example, CTh 5.17.1).⁴¹

37 In Sirks (note 2) p. 150-151 I also mentioned the possibility of Salvius' using a *peraequatio* as pretext.

38 In Sirks (note 2) p. 160 at n. 54 I suggested the possibility that Sulpicius Severus/X was the owner, basing myself on the references to *meos ruricolos*, *colonorum meorum*, and again on p. 168, where I discerned the confirmation of this in X saying that Salvius' claim should be directed to him. It is also possible, however, that X had received these *coloni* into his patronage and consequently spoke of them as "his" *coloni*, although he had to wait till the time of prescription had lapsed and the enrollment had taken place, before he would have had a legal claim on them. Any claim by a pretended owner meanwhile had to be directed to him. To assume that X had acquired ownership of the plot is, consequently, no longer necessary.

39 See R. Delmaire, *Largesses sacrées et res privata. L'aerarium impérial et son administration du IVe au VIe siècle*, Paris 1989, p. 610. The pure *usucapio pro herede* was of course only possible with Italic land, but the effect was the same.

40 Sirks (note 2) p. 150.

41 See also note 38.

Salvius threatened to have the *coloni* produced in court (he speaks of “his *coloni*”, but, although X reproaches him for it, it may well be explained by his expectation that in court it would be clarified which *coloni* were Volusianenses and which were not; until then he might have played safe). As Lepelley observes,⁴² this concerns the *exhibitio*, but here one can be more precise. We must think of an *interdictum* (since there is no summons) against *coloni adscripticii*, probably one analogous to the *interdictum de liberto exhibendo*, by which a patron could get hold of a freedman who had to render services to him.⁴³ The *coloni* were of course not property and a subsequent *reivindicatio* is impossible.

Dionysius litigated on account of the *res navalis* or *navicularia*. Lepelley sums up two possible explanations. One is, that Dionysius was a rich shipowner and that *iurgia navicularia* (“procès de naviculaire”) refers, perhaps, to litigation involving great expenses incommensurate to the limited value of the object of litigation.⁴⁴ The other, already suggested, is that Dionysius, subjected to the *functio navicularia*, tried to exact as much as possible from those who held parts of the original *fundus Volusianus* by claiming the contributions related to these parts.⁴⁵ The second explanation is indeed the better. In the years 367-372 the prescription on lands belonging to members of the *corpus naviculariorum* in Africa or the *corpus* itself had been lifted (CTh 13.6.3, 4 and 6). Dionysius as an heir of such a member may have claimed, after establishing his ownership or being established as owner of the *fundus Volusianus*, plots of land, once forming part of the *fundus*. Those detaining it had the choice between returning the land or acknowledging the inherent contribution to the *corpus*. Dionysius may have agreed to drop the case if paid handsomely.

Porphyrius was apparently afraid of being thrown out of the imperial service. This means that Porphyrius was either a slave or a *colonus originarius*, since the *militia* was forbidden only to these categories (CJ 11.48.18, of 426).⁴⁶ It is one of many points which Lepelley’s commentary does not enter upon. As a *colonus originarius* he would be returned to his homestead (CJ 11.48.11, of 396). Zibberinus was a free man (i.e., no *colonus originarius*), and it seems that his acknowledgment (for example, by arrogation) would have solved the problems.⁴⁷ There is no indication of manumission by Zibberinus,

42 Lepelley (note 1) p. 245 at n. 35. This is the only instance that Lepelley actually adds something to the existing legal analysis of the case.

43 A. Berger, s.v. *interdictum*, RE 9, 1916, 1643: *ut exhibetur libertus cui patronus operas indicere vellet*. For *indicere operas* see D. 38.1.13, 2.24; 45.1.73.pr.

44 This explanation is not corroborated by the use of the words *navicularius* or *navalis* elsewhere.

45 Lepelley (note 1) p. 247-248, already advanced, with ample references, by Sirks (note 2) p. 153-158, without being mentioned, however, by Lepelley.

46 Sirks (note 2) p. 161-165.

47 See M. Kuryłowicz, *L'adrogation de ses propres enfants illégitimes dans le droit romain post-classique et justinien*, *Czasopismo prawnno-hist.* (Warszawa Akad.) XXVI,2, 1974, p. 25-35 (in Polish, with a French summary); G. Luchetti, *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustiniane*, Milano 1990; cf. C. van de Wiel, *Légitimation par mariage subséquent, de Constantin à Justinien. Sa réception sporadique dans le droit byzantin*, RIDA 25, 1978, p. 307-350.

nor would acknowledgment of another man's slave have been feasible. Thus we must assume that Porphyrius' mother was a *colona originaria*, and that by being illegitimate he acquired this status likewise.⁴⁸ Lepelley states that this involved also the paternal tribunal,⁴⁹ but that is impossible: a father did have this faculty only over legitimate children, and that was the problem here.

To summarise the case: A certain Salvius claimed *coloni* of the *fundus Volusianus*, who were residing on the estate or estates of the writer of the letter, X, threatening to have all residing *coloni* (including those not from the *fundus Volusianus*) produced in court by, probably, an *interdictum*. Salvius based his claim on the (pretended) ownership of the *fundus*, once owned by Dionysius and then devolved upon his heirs, and in the second instance on the (pretended) ownership or possession of a former part of this *fundus*. This part had been in the hands of a Porphyrius, who died without a testament. His estate was, probably, *bona vacantia*, and perhaps Salvius claimed to have obtained possession by occupation. Dionysius must have been in the position to revindicate land subjected to the *functio navicularia*. Porphyrius most likely was the illegitimate son of a *colona originaria*. As such the letter gives us an interesting insight into the realities of life and of the application of the laws in the province of Proconsular Africa in the last quarter of the fourth, or the first quarter of the fifth century.

The discussion by Lepelley of the letter to Salvius is another illustration of the increasing interest in the law among ancient historians in the last decade, for which legal historians may be thankful: we can learn much from each other. Nevertheless, Lepelley's basic assumption about the ownership of the *fundus Volusianensis* and thus about the *Sachverhalt* proves to be wrong, and, consequently, his conclusions as to the legal aspects of the letter. Other (potentially) relevant legal aspects of the case (the *praescriptio* regarding fugitive *coloni adscripticii*, the naviculariate, the reason why Dionysius harassed people and then did not press his case against Porphyrius, the relation between Zibberinus and Porphyrius)⁵⁰ are ignored, although they are mentioned by X, without providing any good argument why they were irrelevant. That is a perilous thing to do, particularly when one repeatedly refers to the legal aspects of the texts,⁵¹ pretends to analyse them and forcefully rejects other legal-historical research, since it suggests a thorough legal analysis whereas it actually remains legal-historically very superficial and even basically wrong. Interdisciplinary excursions are certainly sensible, yet only if based on a thorough training in legal history (and vice versa, in ancient history). But excursions like these do not further

48 For the question of the descent of a *colona* and the transmission of the status see A.J.B. Sirks, *Did the Late Roman government try to tie people to their status or profession?* TYCHE 8, 1993, p. 168-171.

49 Lepelley (note 1) p. 247.

50 See Sirks (note 2) resp. p. 150, 153-157, 157-158, 161-167.

51 Lepelley (note 1) p. 251: "L'auteur de la lettre est un juriste ... Vu la qualité de l'auteur, ces termes juridiques n'étaient pas utilisés hors de propos."

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research. On the contrary: Lepelley's *érudition de première main* has simply set the clock back.

A.J.B. Sirks