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The tale of rhetorical trickery in Cicero's *pro Caecina*

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Abstract
The prevailing scholarly view on *pro Caecina* opines that the speech is a striking example of Cicero's resort to rhetorical deception. This paper posits, to the contrary, that there are plausible reasons to rely on the orator's plea. Therefore, it is not warranted to accuse Cicero of deceit. The controversy about the speech is a paradigm example of misconceptions about the intimate relationship between Roman law and rhetoric.

Keywords
Cicero, *pro Caecina*, rhetoric, interdicts, law of possession

Summary: 1. A poisoned discourse, 2. Introduction to *pro Caecina*, 3. Cicero's argumentation, 4. The critique against Cicero's assumption, 5. Analysis, 5.1 Literal and systematic approach, 5.1.1. References in the institutes and the digests, 5.1.2. Comparison to the *lex agraria*, 5.1.3. Interim conclusion, 5.2 Teleological considerations, 5.2.1. Protection of the possessor, 5.2.2. Protection of the person with the better right to possession, 5.2.3. Protection of the public order, 5.3. Interim Conclusion, 6. Conclusion. Bibliography

1. A poisoned discourse

No doubt, a feeling of unease persists among jurists about rhetoric in general[1] and its most prominent representative in particular: Cicero[2]. Ridiculed as a charlatan[3], his performance did not gain much applause from most Romanists. An illustrative case of this dysphoria is the discourse regarding Cicero's advocacy on behalf of Caecina. It is one of his lesser-known pleas but has nonetheless sparked vigorous debates in legal history studies about the Roman law of possession in the ides of the Late Republic. No more than four paragraphs sufficed to give birth to a heated discussion about an alleged misrepresentation of the law that Cicero was accused

* I am indebted to Prof. Dr. Sebastian Lohsse and Prof. Dr. Stefan Arnold, LL.M. (Cambridge) for valuable comments. All remaining errors are mine, of course.

[1] In German scholarship, one can identify two separate discourses that reflect this rampant anxiety of jurists about rhetoric. The first concerns the heated debate over Viehweg, T., *Topik und Jurisprudenz*, München, 1953 (published with a noteworthy annex in 5. edit., München, 1974) claims on "topical-rhetorical thinking" in jurisprudence. The other, a particular Romanist controversy, deals with the contention of Stroux, J., *Summum ius summa iniuria, Ein Kapitel aus der Geschichte der interpretatio iuris*, Leipzig, Berlin, 1926, who claimed a substantial influence of rhetorical methods on the development of Roman law.

[2] See for example the appendix to Watson, A., *The Spirit of Roman Law*, Athens, London, 1995, pp. 195-200 titled "Cicero the Outsider".

[3] Philippi, J.E., C*icero, Ein grosser Wind-Beutel, Rabulist, und Charletan: Zur Probe aus Dessen übersetzter Schutz-Rede, Die er Vor den Quintius gegen den Nervius gehalten*, Halle, 1735; see as well the impressive recital of *ad hominem* indignities against Cicero by Mommsen, T., *Römische Geschichte*, Volume 3, 7. edit., Berlin, 1882, 619-621.

of, eventually culminating in STROH'S polemic that "[i]t is obvious: Cicero distorts the meaning of the *interdictum de vi armata* to distract from the question of whether Caecina was possessor"[4].

Thankfully, TELLEGEN has drawn our attention to the circumstance that this discourse became heavily one-sided after VON SAVIGNY[5] took sides against Cicero[6]. KÖNCZÖL seconded and contextualised TELLEGEN'S findings by mentioning and criticising the still virulent assumption of an antinomy between law and rhetoric[7].

This paper follows in these footsteps. I claim that Cicero's reasoning was at least arguable. Thus, one is not warranted to claim that the orator resorted to rhetorical trickery – a common verdict though[8]. In the following, I will, firstly, introduce the relevant case facts of the *Caeciniana* (**2.**) and provide an overview of Cicero's main line of argumentation (**3.**). Secondly, I will deal with the leading arguments raised against Cicero (**4.**). In the main part (**5.**), I will analyse the Roman law on the *interdictum de vi armata* regarding its genesis in the Republican age, its evolution in the classic, and its reception in post-Roman times. Ultimately, I will provide a broader context for my key findings by reflecting on the intimate relationship between Roman law and rhetoric (**6.**).

2. Introduction to *pro Caecina*

The speech *pro Caecina* concerns a conflict between Cicero's client Caecina and his counterpart Aebutius. The facts of their judicial dispute are described amply by Cicero. This paper just briefly recalls the very essentials:

The conflict concerns the possession of a premise called *fundus fulcianus*. Ownership of the *fundus* is unsettled and therefore disputed between the parties leading to an agreement to conduct the procedure *vis ac deductio moribus* (20), a symbolic act of violence, which in the Late Republic supposedly marked the beginning of a formal procedure to determine ownership

[4] Stroh, W., *Taxis und Taktik, Die advokatische Dispositionskunst in Ciceros Gerichtsreden*, Stuttgart, 1975, p. 83; see also Mommsen, T., „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", *Gesammelte Schriften*, (T. Mommsen, ed.), Volume III, Berlin, 1907, pp. 546-566, 563: "eloquence triumphed in a regrettable way over the good law". Both translated from German by the author.

[5] von Savigny, F.C., *Das Recht des Besitzes: Eine civilistische Abhandlung*, Gießen, 1803, 367-401 (reference in accordance with the 1st reprint by the Philipps-Universität Marburg, Baden-Baden, 2011).

[6] Tellegen, J.W., "Savigny's System and Cicero's Pro Caecina", *Orbis Iuris Romani* II (1996), pp. 91-112, 91-101 and 107; concurring Bílý, J., "Some Notes on Cicero's Plea on Behalf of Caecina, Conclusions and Ways out", *Journal on European History of Law* 9 (2018), pp. 181-184, 184.

[7] Könczöl, M., "The Relevance of Roman Law: A Look at its Roles and Ideologies", *Revista Crítica de Ciências Sociais* 112 (2017), pp. 99-114, 101-103.

[8] See fn. 4 and Wesel, U., "Zur Deutung und Bedeutung des Status scriptum et sententia", *Tijdschrift voor Rechtsgeschiedenis* 38 (1970), pp. 343-366, 355-356; von Savigny, *Das Recht des Besitzes*, p. 370, Roby, H.J., *Roman private law in the times of Cicero and of the Antonines*, Volume II, Cambridge, 1902, p. 523-524; Bögli, H., *Ueber Ciceros Rede für A. Caecina*, Burgdorf, 1906, p. 56-57; Boulanger, A., *Cicéron, Discours, pour M. Fonteius, pour A. Cécina, sur les pouvoirs de pompée*, Volume VII, Paris, 1929, p. 71-73; Ruhstrat, E., "Ein Besitzproceß", *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (C.F. von Gerber, R. Jhering eds.), Volume VII, Jena, 1881, pp. 131-153, 150; Ciferri, L.V., "The spectre of contradiction in Cicero's orations. A study based on his conception of *iurisprudentia* and some other speeches", *Révue Internationale des Droits de l'Antiquité* XXXIX (1992), pp. 85-125, 91-92 and 124-125; Watson, A., *The law of property in the later Roman Republic*, Oxford, 1968, p. 89.

and/or possession of property[9]. Unfortunately, this symbolic act of violence leads to actual violence as Aebutius occupies the premise with armed men and slaves. Caecina is denied access and has to take flight (20-22).

Caecina then applies for an *interdictum de vi armata*, with which he hopes to (re-)gain possession over the fundus (23). In a potentially following ownership procedure, he would enjoy a better position as a defendant because the *onus probandi* is on the plaintiff. Unsurprisingly – and for Caecina unfortunately –, Aebutius contests Caecina's application for the interdict. The controversy comes to a court where a body of *recuperatores* holds proceedings.

The decisive question of law that impedes Caecina from winning the case pertains to the proviso of possession. Cicero argues that possession is not a precondition for applying the interdict. This point is crucial for the trial's outcome. Cicero admittedly tries to prove Caecina's possession but this position is unfounded[10]. The decision in this case thus depends on the question, whether the interdict presupposes the possession of the applicant.

3. Cicero's argumentation

Cicero's contention that possession is not a condition for the applicability of the interdict is based on an *argumentum e silentio*. He compares the *interdictum de vi armata* with the *interdictum unde vi*[11]:

> *interdictum unde vi:*
> *unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi deiecisti, cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo restituas.*
> *interdictum de vi armata:*
> *unde tu aut familia aut procurator tuus illum vi hominibus coactis armatisve deiecisti, eo restituas.*

The *interdictum unde vi* is the ordinary resort (*illud cotidianum interdictum*) to regain possession over a premise in the event that the applicant was forced from the contested land by (unarmed) violence (*vi deiecisti*). Compared with this, the *interdictum de vi armata* is a

[9] Little is known about this procedure; for informed guesses see Frier, B.W., *The Rise of the Roman Jurists, Studies in Cicero's pro Caecina*, New Jersey, 1985, pp. 78-92; Mühlhölzl, D., *Cicero „pro A. Caecina"*, München, 1992, pp. 37-49; Platschek, J., "Bemerkungen zu Ciceros Rede für Caecina", *Antike-Recht-Geschichte, Symposium zu Ehren von Peter E. Pieler* (N. Benke, F.-S. Meissel eds.), Frankfurt, 2009, pp. 127-138, 127-129.

[10] In that regard, the dominant opinion is almost unequivocal, just see Mühlhölzl, *Cicero „pro A. Caecina"*, pp. 114-127; Mommsen, „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", pp. 560-561; Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 526-530; Greenidge, A.H.J, *The legal procedure of Cicero's time*, Book 1, Oxford, 1901, pp. 565-566, Saleilles, R., "La controversia possessionis et la vis ex conventu, A propos de l'interdit uti possidetis", *Nouvelle revue historique de droit français et étranger* 16 (1892), pp. 245-313, 286-287, von Keller, F.L., *Semestrium ad M. Tullium Ciceronem*, Volume I, Turici, 1842, pp. 342-375; de Caqueray, G.M.T., *Explication des passages de droit privé contenus dans les œuvres de Cicéron*, Paris, 1857, pp. 281-283; Frier, *The Rise of the Roman Jurists*, p. 181; Pflüger, H.H., *Die sogenannten Besitzklagen des roemischen Rechts*, Leipzig, 1890, pp. 40-41; but see von Bethmann-Hollweg, M.A., *Der römische Civilprozeß*, *Formulae*, Volume II, Bonn, 1865, pp. 840-841, Tellegen, "Savigny's System and Cicero's Pro Caecina", pp. 98-99 and Rau, R., "Zu Ciceros Rede für A. Caecina", *Silvae, Festschrift für Ernst Zinn zum 60. Geburtstag* (M. von Albrecht, E. Heck eds.), Tübingen, 1970, pp. 173-181, 180.

[11] Both interdicts in accordance with Watson, *The law of property in the later Roman Republic*, p. 88.

particular, much sharper version.[12] It can be invoked when the applicant was expelled from a premise by armed force (*vi hominibus coactis armatisve deiecisti*).

Whereas the *interdictum unde vi* contains the *exceptio vitiosae possessionis* (*cum ille possideret, quod nec vi nec clam nec precario a te possideret*), the *interdictum de vi armata* does not include an exception clause. Due to this difference – the absence of *cum ille possideret* – Cicero concludes that possession is not a mandatory precondition for the *interdictum de vi armata* (90-92). In his view, the *interdictum de vi armata* does not embody any reference to possession[13].

> 91:
> *Cur ergo aut in illud quotidianum interdictum UNDE ILLE ME VI DEIECIT ADDITUR QUUM additur QUUM EGO POSSIDEREM, si deiici nemo potest qui non possidet; aut in hoc interdictum de hominibus armatis non additur, si oportet quaeri, possederit necne?* [..]
> Why, then, in the ordinary form of the injunction beginning "Whence he has driven me out by force, "are the words added, "I being in possession at the time, "if no one can be driven out unless in possession? And why are they not added in the case of the present injunction "concerning armed men, "if the question of possession is relevant? [..]

> 92:
> *Dupliciter homines deiiciuntur, aut sine coactis armatisve hominibus aut per eiusmodi rationem atque vim. Ad duas dissimiles res duo diiuncta interdicta sunt. In illa vi quotidiana non satis est posse docere se deiectum, nisi ostendere possit quum possideret tum deiectum. Ne id quidem satis est, nisi docet ita se possedisse, ut nec vi nec clam nec precario possederit.* [..]
> There are two ways in which people are driven out, either without the employment of men collected together and armed or by the employment of force in some such way. To meet the two different cases, two separate injunctions have been framed. In the case of the ordinary employment of force, it is not enough for a claimant to show that he has been driven out unless he can prove that he was in possession at the time he was driven out. And even that is not sufficient unless he can show that his possession arose neither from force, fraud, or favour. [..]

> 93:
> *Videtisne quot defensionibus eum, qui sine armis ac multitudine vim fecerit, uti posse maiores voluerint? hunc vero, qui ab iure, officio, bonis moribus ad ferrum, ad arma, ad caedem confugerit, nudum in caussa destitutum videtis, ut, qui armatus de possessione contendisset, inermus plane de sponsione certaret.* [..]
> Do you see how many lines of defence our forefathers placed at the disposal of a man who uses force but without recourse to arms or a multitude? But as for my opponent who, forgetful of law, duty and decency, betook himself to the sword, to

[12] Lintott, A., *Violence in Republican Rome*, Oxford, 1999, pp. 28-29 and 127; Sokolowski, P., *Die Philosophie im Privatrecht, Der Besitz im klassischen Recht und dem deutschen Bürgerlichen Recht*, Volume II, Halle, 1907, p. 100; Jackson, B.S., "Some Comparative Legal History: Robbery and Brigandage", *Georgia Journal of International and Comparative Law* 1 (1970), pp. 45-104, 64-65.

[13] All direct quotes from the speech adopted from the English translation by Grose-Hodge, H., *Cicero, The Speeches, Pro lege Manila, Pro Caecina, Pro Cluentio, Pro Rabirio, Perduellionis*, Volume 9, London, Cambridge, 1966, pp. 86-205.

> arms, and to murder, you see that they left him to plead his cause naked and defenceless, in order to show that one who had armed himself to contend for possession must come disarmed to settle a wager-at-law. [..]

4. The critique against Cicero's assumption

Now we are at the very core of the debate that arose from Cicero's heritage. Many, not to say virtually all scholars since VON SAVIGNY, castigated his argument as a fallacy[14]. To better understand this resistance against Cicero's reading, one has to explain the function of the *exceptio vitiosae possessionis*.

The clause in the *interdictum unde vi* intends to alleviate the situation for a person with the better right *to* possession[15]. If the current possession of the opponent is imperfect (*possessio vitiosa*), the former possessor can legitimately resort to self-redress and recapture possession.[16] Grounds for imperfect possession were the apprehension of possession by violence (*vi*), furtiveness (*clam*), or loan (*precario*)[17].

To give an example: Numerius Negidius was originally the possessor of a premise. He gave the premise to Aulus Agerius by loan (*precario*). Later, in despise of a request by NN, AA refuses to give back the premise. NN can now help himself and take back violently (but unarmed!) the premise. If AA subsequently applies for an *interdictum unde vi*, he will be unsuccessful due to the *exceptio vitiosae possessionis*. His possession by loan was imperfect. As a result, he does not enjoy protection towards the former possessor NN.

Returning to Cicero's argument, one has to admit that against this background, his reasoning loses some of its plausibility. The *exceptio vitiosae possessionis* is an excuse for self-help in case of imperfect possession of the current possessor. Thus, it is only related to the *quality* of possession. It does not necessarily imply a meaning concerning the question of the *existence* of possession.

Cicero's argument might just originate from an impermissible word division. His reading would have only been compelling if the exception ran *cum ille possideret* <***et ita possideret***> *ut nec vi nec clam nec precario possideret*[18].

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[14] von Savigny, *Das Recht des Besitzes*, pp. 369-370; Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 521-524; Stroh, *Taxis und Taktik*, pp. 82-83; Mommsen, „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", pp. 562-563; Mühlhölzl, *Cicero „pro A. Caecina"*, p. 107; van Wetter, P.A.H., *Traité de la possession en droit romain*, Gand, 1868, pp. 269-270; Cornil, G., *Traité de la possession dans le droit romain*, Paris, 1905, pp. 408-409; Fuhrmann, M., *Die Prozessreden, Lateinisch - Deutsch*, Volume 1, Zürich, 1997, p. 853.

[15] Lehne-Gstreinthaler, C., "Schiedsgerichtsbarkeit und außergerichtliche Konfliktbereinigung im klassischen römischen Recht", *Außergerichtliche Konfliktlösung in der Antike, Beispiele aus drei Jahrtausenden* (G. Pfeifer, N. Grotkamp eds.), Frankfurt, 2017, pp. 141-168, 141-142; Müller, T., *Besitzschutz in Europa, Eine rechtsvergleichende Untersuchung über den zivilrechtlichen Schutz der tatsächlichen Sachherrschaft*, Tübingen, 2010, p. 13.

[16] Jackson, "Some Comparative Legal History: Robbery and Brigandage", pp. 64-65; Schmidlin, *Das Rekuperatorenverfahren*, p. 49.

[17] Kaser, M., *Das römische Privatrecht, Das altrömische, das vorklassische und klassische Recht*, Part 1, München, 1971, § 36. II.3; Dedek, H., "Der Besitzschutz im römischen, deutschen und französischen Recht – gesellschaftliche Gründe dogmatischen Wandels", *Zeitschrift für Europäisches Privatrecht* 5 (1997), pp. 342-365, 343-344.

[18] Bögli, *Ueber Ciceros Rede für A. Caecina*, pp. 47-52; Nicosia, G., *Studi sulla "deiectio"*, Milano, 1965, pp. 47, 50; Mühlhölzl, *Cicero „pro A. Caecina"*, p. 107; Stroh, *Taxis und Taktik*, p. 83.

The prevailing opinion in Roman legal science opines – against Cicero – that the condition of possession is a consequence of the term *deicere*[19]. *Deicere* means to throw or drive someone out of something. In the context of the interdicts, the prevailing opinion equates "something" with "possession". Both interdicts use the term *deicere*. Moreover, the *interdictum de vi armata* is usually classified as a possessory interdict[20]. It seems absurd to deprive such an *interdictum recuperandae possessionis* of its vital condition, i.e. possession[21]. Against this background, Cicero's argument seems to collapse like a house of cards: The *interdictum de vi armata* contains the word *deicere*, consequently, the applicability of the interdict must depend on the former possession of the plaintiff as well. Now, is it so easily justified to blame his line of reasoning as sheer rhetorical quackery?

5. Analysis

To raise this question is to deny it. The case is trickier and demands a thorough analysis of the Roman law of possession as regards *interdictum de vi armata*.

5.1. Literal and systematic approach

Some ambiguity apropos this problem is due to the double meaning inherent in the term *deicere*. The dominant opinion supposes that *deicere* regularly means ejection from possession. But, there are also indications that it can be translated more generally as mere expulsion without equating the term to possession in the strict legal sense[22]. Thence, it is not unequivocally clear that the proviso of possession results from the use of the term *deicere*.

5.1.1. References in the institutes and the digests

Many proposals to solve this problem refer back to the text of Justinian's C*orpus Iuris*. It is vital to remember that the Roman law at some point in time ceased to differentiate between the *interdictum unde vi* and the *interdictum de vi armata*. The compilers thus presented a merged version of the interdict by deleting the *exceptio vitiosae possessionis*[23]. The dominant

[19] von Savigny, *Das Recht des Besitzes*, pp. 369-370; Stroh, *Taxis und Taktik*, pp. 82-83; Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 521; Broggini G., "Nicosia, "Studi sulla 'deiectio' I. Università di Catania, Pubblicazioni della Facoltà di Giurisprudenza, vol. 54", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* LXXXIII (1966), pp. 450-461, 453; da Nóbrega, V.L., "Herméneutique juridique appliquée à l''interdictum unde vi coactis armatisve' dans le Pro Caecina de Cicéron", *Révue Internationale des Droits de l'Antiquité* VII (1960), pp. 507-519, 514; Cornil, *Traité de la possession dans le droit romain*, p. 409.

[20] Buckland, W.W., *A Manual of Roman Private Law*, 2. edit., Cambridge, 1939, § 174; Kaser, M., *Das römische Privatrecht*, Part 1, München, 1971, § 96 IV 3.-4.; Marky, T., *Curso Elementar de Direito Romano*, 8. edit., São Paulo, 1995, p. 91.

[21] Mommsen, „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", pp. 563; Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 525-526.

[22] Klotz, R., *Handwörterbuch der lateinischen Sprache*, Volume 1, Graz, 1963, dejico; Merguet, H., *Handlexikon zu Cicero*, Hildesheim, 1964, deicio.

[23] Lenel, O., *Das Edictum perpetuum, Ein Versuch zu dessen Wiederherstellung*, Leipzig, 1883, pp. 370-372; von Savigny, *Das Recht des Besitzes*, pp. 365-367; Roby, *Roman private law in the times of Cicero and of*

opinion grounds their objections against Cicero's reading of the interdict on passages of the institutes and the digests concerning this (merged) interdict from the *Corpus Iuris*[24]:

> Gai. Inst. 4, 154-155
> *Recuperandae possessionis causa solet interdici, si quis ex possessione fundi vel sedium vi dejectus fuerit; nam ei proponitur interdictum unde vi, per quod is qui dejecit, cogitur si restituere possessionem, licet is ab eo qui dejecit vi vel vlam cel precario possidebat.*
> To recover possession an interdict is given in case any one has been expelled by violence from the possession of land or a building. He has then given him the interdict *unde vi*, by which he who has expelled him is forced to restore to him the possession, although the person to whom the interdict is given has himself taken by force, clandestinely, or as a concession, the possession from the person who has expelled him.

This excerpt from the *Institutiones Justiniani* demonstrates the combination of the *interdictum de vi armata* and the *interdictum unde vi* in the post-Republican age because it does not matter whether the applicant of the interdict was in imperfect possession. It sufficed when the applicant of the interdict was driven out of his *possessio* by force (*vi dejectus*). However, what kind of *possessio* was necessary to apply successfully for the interdict? To answer this question many studies refer to Ulpian's remarks in the Digests:

> Ulp. D. 43, 16, 1, 23:
> *Interdictum autem hoc nulli competit nisi ei, qui tunc cum deiceretur possidebat, nec alius deici visus est quam qui possidet.*
> This interdict lies in favor of no one but the person who was in possession at the time of his ejection, and no one is held to be ejected except the person in possession.
> Ulp. D. 43, 16, 1, 26:
> *Eum, qui neque animo neque corpore possidebat, ingredi autem et incipere possidere prohibeatur, non videri deiectum verius est: deicitur enim qui amittit possessionem, non qui non accipitur.*
> Someone who held no possession either in mind or physically, but who is prevented from entering and taking possession, is not held to have been ejected, according to the better opinion. For ejection means losing possession, not non-admission.

Prima vista, Ulpian's remarks seem to be compelling proof of the prevailing point of view. The interdict cannot be applied in favour of someone who had no *possessio* at the moment of being expelled. WATSON uses the modern term of possession in his English translation. Yet, it is not crystal-clear what kind of *possessio* Ulpian has in mind. Does Ulpian use the term *possessio* in the way we understand possession nowadays or as Cicero employed the term around 70 B.C.[25]? The ambiguity results from another section of the Digests:

> Ulp. D. 43, 16, 1, 9:
> *Deicitur is qui possidet, sive civiliter sive naturaliter possideat: nam et naturalis possessio ad hoc interdictum pertinet.*

the Antonines, p. 520; de Caqueray, *Explication des passages de droit privé contenus dans les œuvres de Cicéron*, p. 234; Buckland, *A Manual of Roman Private Law*, § 174.

[24] Latin and English version of the institutes in accordance with Sandars, T.C., Hammond, W.G., *The Institutes of Justinian; with English introduction, translation, and notes*, Chicago, 1876. Latin version of the digests from Mommsen, T., Krueger, P., *Digesta Iustiani Augusti*, Volume I, Berolini, 1870. English translation adopted from Watson, A., *The Digest of Justinian*, Volume IV, Philadelphia, 1985.

[25] There is scholarly disagreement on the exact year of *pro Caecina*. Nicosia, *Studi sulla "deiectio"*, pp. 147-153 proposes 71 B.C., whereas Frier, *The Rise of the Roman Jurists*, pp. 45-46 favours 69 B.C.

> To be ejected, a person must be a possessor under either civil or natural law; for natural possession offers grounds for this interdict also.

When the interdict refers to *possessio*, this *possessio* encompasses two types: *possessio civilis* and *possessio naturalis*. Only the former, *possessio civilis*, can be equated with possession in the modern sense. It means *possessio bona fide* and *ex iusta causa*, necessary for acquisition by *usucapio*[26]. The term *possessio naturalis*, on the other hand, only connotes factual control over an object (*in possessione esse*; later referred to as detention).[27] This mere factual control must not be confounded with such possession in the strict legal sense.[28]

Having this in mind, Ulp. D. 43, 16, 1, 23 and 26 cannot be quoted as compelling arguments against Cicero's reading because *possessio* could also encompass mere factual control and hence might not be strictly linked to possession in the legal sense[29]. Interestingly, this seems to have been *communis opinio* in the early, medieval reception of the Roman law[30].

Of course, many scholars tried to reconcile Ulp. D. 43, 16, 1, 9 with their critique of Cicero. They argue that *possessio naturalis* in the spirit of Ulp. D. 43, 16, 1, 9 does not mean factual control. Rather, *possessio naturalis* represents the counterpart to *possessio civilis*. For that reason, *possessio naturalis* must be read in contrast to *possessio civilis*. Thus, it is opined that *possessio naturalis* denotes *possessio ex iniusta causa*, meaning possession without being entitled to possess[31]. Following this reasoning, the use of the term *possessio* in Ulp. D. 43, 16, 1, 23 and 26 would refer to the concept of possession in the strict legal sense. This reading would speak in favour of the prevailing opinion's assumption.

In favour of Cicero, on the other hand, TELLEGEN-COUPERUS argues that the passages from Ulpian do not even refer to Cicero's *argumentum e contrario*. Even if Ulpian originally mentioned Cicero's argument, this would have been of no interest to the compilers. Due to the amalgamation of the interdicts[32] and, ergo, the absence of the *exceptio vitiosa possessionis*, a statement referring hereto was not relevant for the digests[33].

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[26] Kaser, M., Knütel, R., Lohsse, S., *Römisches Privatrecht*, 21. edit., München, 2017, § 19 paragraphs 5 and 8.

[27] Riccobono, S., "Zur Terminologie der Besitzverhältnisse, Naturalis possessio, civilis possessio, possessio ad interdicta", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* XXI (1910), pp. 321-371, 325-326.

[28] Kaser, M., *Das römische Privatrecht*, Part 1, München, 1971, § 94 IV.

[29] Wieling, H., "Die historischen Voraussetzungen des modernen Besitzschutzes", *Hundert Jahre japanisches Zivilgesetzbuch* (R. Knütel, S. Nishimura eds.), Köln, 2004, pp. 361-386, 374-375; Sokolowski, *Die Philosophie im Privatrecht*, p. 116; see as well Ubbelohde, A., *Ausführliche Erläuterung der Pandecten nach Hellfeld, ein Commentar, Serie der Bücher 43 und 44*, Part 5, Erlangen, 1896, p. 156, whose reasoning is quite vague though. It seems to be that he believes the passages from the Digests relate to *cum ille possideret* (and do not refer to *deicere*). From this assumption, he concludes that Ulpian deduces the proviso of possession from "cum ille possideret". This interpretation supports Cicero's argument, though it is not very convincing.

[30] Especially Cujas is cited repeatedly as a representative of the view that regarded Cicero's argumentation as authentic and valid, see von Savigny, *Das Recht des Besitzes*, p. 370 fn. 1; Wetter, *Traité de la possession en droit romain*, p. 269 fn. 2; Gasquy, A., *Cicéron jurisconsulte*, Paris, 1886, 233.

[31] Cornil, *Traité de la possession dans le droit romain*, pp. 409-410; Machelard, E., *Théorie générale des interdits en droit romain, Exposition détaillée des interdits possessoires*, Paris, 1864, p. 237; Warnkönig, L.A., "On the Law of Possession - Analysis of Savigny's Treatise on the Law of Possession", *American Jurist and Law Magazine* 19 (1838), pp. 257-291, 278; see also Wetter, *Traité de la possession en droit romain*, p. 269 fn. 5; but see Wieling, "Die historischen Voraussetzungen des modernen Besitzschutzes", p. 375 fn. 47.

[32] *Supra* p. 6 and fn. 23.

[33] Tellegen-Couperus, O., "Cicero and Ulpian, Two Paragons of Legal Practice", *Révue Internationale des Droits de l'Antiquité* LV (2008), pp. 485-497, 493-494. Even though I share Tellegen-Couperus motif, I have

But even if we accept the apologetic explanation that *possessio naturalis* denotes *possessio ex iniusta causa*, there remain doubts deriving from Ulp. D. 43, 16, 3, 13-14. These paragraphs treat the praetorian edict for the protection of a usufructuary[34]:

> Ulp. D. 43, 16, 3, 13:
> *Interdictum necessarium fuisse fructuario apparet "Si prohibeatur uti frui usu fructu fundi".*
> It is evident that an interdict will be necessary for the holder of a usufruct "if he is prevented from using and enjoying the usufruct of a farm."
> Ulp. D. 43, 16, 3, 14:
> *Uti frui autem prohibuisse is videtur, qui vi deiecit utentem et fruentem aut non admisit, cum ex fundo exisset non usus fructus deserendi causa. Ceterum si quis ab initio volentem incipere uti frui prohibuit, hoc interdictum locum non habet. Quid ergo est? Debet fructuarius usum fructum vindicare.*
> Preventing someone from using and enjoying is held to be ejecting him forcibly from the usufruct, or not admitting him back when he has left the farm with no intention of abandoning the usufruct. But if someone stopped him from the outset when he wished to take up the usufruct, this interdict has no scope. What then? The usufructuary must vindicate the usufruct.

According to Ulp. D. 43, 16, 3, 13, the usufructuary enjoys a level of protection equivalent to the protection under the ordinary interdict. This protection applies when the holder is prevented from using and enjoying his usufruct. Such a "prevention" can be affirmed when the usufructuary is ejected forcibly (*vi deiecit*) from the premise. However, according to classical Roman law, the usufructuary is no possessor. He is merely in factual control (*in possessione esse*)[35]. Nonetheless, Ulp. D. 43, 16, 3, 14 uses the term *deicere* to describe this ejection from quasi-possession.

Comparing Ulp. D. 43, 16, 3, 13-14 with Ulp. D. 43, 16, 1, 9 allows arguing in different ways: One could say that Ulp. D. 43, 16, 3, 13 (the usufructuary passage) even confirms the dominant argumentation that *possessio naturalis* in the sense of Ulp. D. 43, 16, 1, 9 means *possessio ex iniusta causa* because it would have been superfluous for Ulpian to recall the protection of the usufructuary if *possessio naturalis* meant mere factual control as it is exercised by a usufructuary. In this reading, Ulp. D. 43, 16, 3, 13 would expand – as an exception to the general rule of Ulp. D. 43, 16, 1, 9 – the protection of a usufructuary over the ordinary scope of protection (*possessio ex iusta causa + possessio ex iniusta causa*) to factual control (*in possessione esse*) as well.

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my doubts about her argument. Just because the compilers deleted the *exceptio vitiosae possessionis*, one cannot compellingly conclude that they omitted Ulpian's statements concerning *cum ille possideret*. It can be plausibly supposed that Ulpian intended to prevent misconceptions about the absence of *cum ille possideret* just by explicitly stating *deicitur is qui possidet*; for the last aspect see Lenel, *Das Edictum perpetuum, Ein Versuch zu dessen Wiederherstellung*, p. 372 and Roby, *Roman private law in the times of Cicero and of the Antonines*, p. 521; see as well her previous, more convincing view that Ulpian's statement was a direct comment on *pro Caecina* in Tellegen-Couperus, O., "C. Aquilius Gallus Dans Le Discours Pro Caecina De Cicéron", *Tijdschrift voor Rechtsgeschiedenis* 59 (1991), pp. 37-46, 45-46.

[34] Cited in accordance with the sources mentioned in fn. 24.

[35] Dias, R.W.M., "A Reconsideration of *Possessio*", *Cambridge Law Journal* 14 (1956), pp. 235-247, 245-246; Kaser, Knütel, Lohsse, *Römisches Privatrecht*, § 19 paragraph 20; Wieling, "Die historischen Voraussetzungen des modernen Besitzschutzes", p. 373; but see Keller, *Semestrium ad M. Tullium Ciceronem*, pp. 342-350 who argues that at least in preclassical law there was no such thing like quasi possessio. To the contrary, according to Keller, even a usufructuary enjoyed *corporis possessionis*.

On the other hand, Ulpian explicitly adds that the equivalence of protection is evident (*apparet*). That might be a hint that Ulpian is very much aware of his (somehow superfluous) repetition but recognizes the necessity to recall it once again. Even further, one could argue that Ulp. D. 43, 16, 3, 13 does not primarily intend to establish the *rule* that a usufructuary enjoys protection by the interdict. The passage rather presupposes this rule and primarily concerns the *conditions* for its application emphasising *si prohibeatur uti frui usu fructu fundi*. Following this line of reasoning, the usufructuary passage supports Cicero's reasoning.

In a similar manner, FRIER believes that the existence of such "quasi-possessory" protection of the usufructuary indicates that a mere legitimate property interest sufficed for the applicability of an interdict[36]. This thought somehow resembles KELLER'S argumentation. KELLER assumes that the *interdictum de vi armata* was applied in favour of anyone who had a stronger possessory relationship to the premise he was expelled from than an ordinary *advena* (guest/stranger)[37]. In conclusion, the use of *deicere* in Ulp. D. 43, 16 does not necessarily refer to the ejection of a possessor as the prevailing view assumes[38].

All these considerations lead to the conclusion that it is impossible to distract an undisputable meaning from the digests. The perspective on Cicero's speech through the eyes of late-Classicist Ulpian, whose writings might have been interpolated by the compilers, adds too many clogging layers to a problem that originated in Republican times.[39] This argument weighs even heavier considering that even in Republican times the wording of the interdict was far from being stable. On the contrary, it is mentioned as one of the interdicts that changed considerably even in short periods of time.[40] This is a cautious pleading to take Cicero's arguments more seriously and to take a closer look at the texts and circumstances of this period.

5.1.2. Comparison to the *lex agraria*

Another hint to solve this question from Republican times is the *lex agraria*, a legal reform from 111 B.C., with which public land (*ager publicus*) was allocated to private citizens[41].

> *lex agraria*[42]:
> *sei quis eorum, quorum ager supra scriptus est, ex possessione vi eiectus est, quod eius is quei eiectus est possederit, quod neque vi neque clam neque precario possederit ab eo, quei eum ea possessione vi eiecit …*

This protection clause explicitly mentions the condition of possession (*ex possessione vi eiectus est*). Hence, one may conclude that at least in Republican times the proviso of

[36] Frier, *The Rise of the Roman Jurists*, p. 180; see as well Holtius, A.C., *Abhandlungen civilistischen und handelsrechtlichen Inhalts* (S. Sutro trans.), Part 1, Utrecht, 1852, pp. 64-65.

[37] Keller, *Semestrium ad M. Tullium Ciceronem*, pp. 376-400; see as well Ubbelohde, *Ausführliche Erläuterung der Pandecten nach Hellfeld*, p.171; but see Mommsen, „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", pp. 561-562, Ruhstrat, "Ein Besitzproceß", pp. 151-152 and Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 522-525.

[38] But see Nicosia, *Studi sulla "deiectio"*, pp. 63-64 who suspects an interpolation.

[39] Holtius, *Abhandlungen civilistischen und handelsrechtlichen Inhalts*, pp. 72-73.

[40] Watson, A., "The Development of the Praetor's Edict", *The Journal of Roman Studies* 60 (1970), pp. 105-119, 106.

[41] Beggio, T., "lex Agraria, 111 bce", *Oxford Classical Dictionary* (Whitmarsh, T., Goldmarsh, S., eds), Oxford, 2019.

[42] Cited in accordance with Crawford, M.H., *Roman Statutes*, Volume I, London, 1996, p. 115 nr. 18.

possession was not implied in *deicere/eicio*[43]. This supports Cicero's position, but only prima vista. We remember, Cicero brings forward that the condition of possession is expressed in the *exceptio vitiosae possessionis* (c*um ille possideret*). The *lex agraria* though contains this *exceptio vitiosae possessionis*. Accordingly, one cannot convincingly deduce the proviso of possession from *cum ille possideret* because it is already explicitly included in *ex possessione vi eiectus est*[44]. Thus, the *lex agraria* does not confirm either of the two possible readings of the *interdictum de vi armata*.

5.1.3. Interim conclusion

All in all, it is impossible to reach an apparent, indubitable answer only by literal and systematic interpretation.

5.2. Teleological considerations

Do considerations on the *telos* of the interdict help to overcome this uncertainty? Regrettably, the historic school was altogether terribly undecided about the rationale of the interdicts[45]. This undecidedness presents a great challenge, even to modern-day legal history, because the writings of 19th-century Pandectists still play an important role in present jurisprudence.

5.2.1. Protection of the possessor

von Savigny and his followers reduce the function of the *interdictum de vi armata* to mere protection of the possessor against unlawful interference[46]. This narrow interpretation is supported by a *reductio ad absurdum*: Presupposed the applicability of the *interdictum de vi armata* does not require possession, even an unauthorised intruder without any former possession or title could legitimately claim restitution into the premise against the legitimate possessor. How? By applying for the *interdictum de vi armata*, if he was forced out of the premise with armed force while trying to enter it. That would undermine the right to self-defence of the legitimate possessor because every expulsion with armed men of somebody else would result in an obligation to restore the possession in favour of the expellee[47].

[43] Mühlhölzl, *Cicero „pro A. Caecina"*, p. 106; Lintott, A., *Cicero as Evidence: A Historian's Companion*, Oxford, 2008, p. 78.

[44] Bögli, *Ueber Ciceros Rede für A. Caecina*, pp. 48-49.

[45] Müller, *Besitzschutz in Europa*, p. 325; Sosnitza, O., *Besitz und Besitzschutz, Sachherrschaft zwischen faktischem Verhältnis, schuldrechtlicher Befugnis und dinglichem Recht*, Tübingen, 2004, pp. 32-38.

[46] von Savigny, *Das Recht des Besitzes*, pp. 367-371.

[47] Roby, *Roman private law in the times of Cicero and of the Antonines*, pp. 525-526: „But to say that an actual occupant, if he used arms against a mere intruder, who without any tittle [sic] of right tried to force his way into the other's land, should be bound to give him up the possession, is not at all in harmony with the good sense and practical character either of Roman legislation or of the praetor's action" (S. 525); similarly, Mommsen, „Keller, Frid. Lud., antecessor Turicensis, Semestrium in M. Tullium Ciceronem libri sex Vol. I (cont. Lib. 1. 2) Turici 1842", pp. 562-563: "it makes sense that someone who lost his possession, regains it, but it is unreasonable to give possession to someone, who was just asked to leave the house" [Translation M.S.]; see as well Birks, "The Rise of the Roman Jurists", p. 452 and Kappeyne van de Coppello, *Die Comitien*, pp. 138 and 147.

This argument was repeated so often in legal history[48] that it is tempting believe it to be decisive. Be that as it may, there exist considerable doubts against this assumption. To verify these doubts, it is vital to also consider other teleological approaches to the interdicts.

5.2.2. Protection of the person with the better right to possession

Whereas von Savigny advances a narrow interpretation, JHERING emphasises the function of interdicts as an instrument to prepare the vindication of property[49]. It is well-known that the burden of proof regularly is on the plaintiff. Thus, in a proceeding concerning property, the person in possession of the premise is in a superior position just due to this procedural rule on the *onus probandi*. In a case where none of the parties can submit convincing proof for their claims to property, the problem is solved finally by recourse to the contingent fact of possession. That was very much the case with Caecina and his opponent Aebutius. Unfortunately for the former, the latter was in possession of the premise.

For that reason, the rationale of the system of interdicts – or at least the one of the *interdictum de vi armata* – might have been to allocate adequate roles to the parties of the proceeding. Consequently, one may argue that the interdicts are not remedies *arising out of* possession. Conversely, they are remedies *to gain* possession. Otherwise, it would be a great temptation to violently occupy a premise in situations of unclear ownership in order to gain the preferable position of the defendant in the upcoming lawsuit. It would not be convincing to prefer this armed occupant over the one who had never been in possession[50]. By that, one would only reward armed violence. Following JHERING'S reading, the *interdictum de vi armata* would at least disadvantage the armed occupant: He would not be heard with his defence that his opponent was no possessor at all.

This position is supported by the circumstance that in pre-classical Roman law *possessio* was not regarded as an institute of exclusive dominion as it is implied with the modern term of possession. Rather, *possessio* meant a social relationship defined by the right to use things[51]. Thus, conflicts about these rights to use things required legal solutions. But, the protection of *possessio* emerged as a public, administrative procedure. It intended to safeguard the individual rights to exploit public land (*ager publicus*)[52]. In this function, these remedies were of public character[53].

[48] Bögli, *Ueber Ciceros Rede für A. Caecina*, pp. 44-45, Mühlhölzl, *Cicero „pro A. Caecina"*, p. 109, Stroh, *Taxis und Taktik*, p. 83 fn. 14; Nicosia, *Studi sulla "deiectio"*, pp. 54-55; Boulanger, *Cicéron, Discours*, p. 72, Fuhrman, *Die Prozessreden*, p. 853; but see Frier, *The Rise of the Roman Jurists*, pp. 181-182.

[49] von Jhering, R., *Ueber den Grund des Besitzesschutzes. Eine Revision der Lehre vom Besitz*, 2. edit., Jena, 1869, pp. 45-71; for further adherents to this popular opinion in the Historical School see Sosnitza, *Besitz und Besitzschutz*, pp. 33-34 fn. 18-21.

[50] Gasquy, *Cicéron jurisconsulte*, p. 236.

[51] Behrends, O., "Selbstbehauptung und Vergeltung und das Gewaltverbot im geordneten bürgerlichen Zustand nach klassischem römischem Recht", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* CXIX (2002), pp. 44-142, 100-101.

[52] Kaser, M., *Eigentum und Besitz im älteren römischen Recht*, 2. edit., Köln/Graz 1956, pp. 239-245; Dernburg, H., *Entwicklung und Begriff des juristischen Besitzes des Römischen Rechts, Festschrift zum fünfzigjährigen Stiftungsfest der Universität Zürich*, Halle, 1883, pp. 5-12; Dedek, "Der Besitzschutz im römischen, deutschen und französischen Recht – gesellschaftliche Gründe dogmatischen Wandels", pp. 345-346.

[53] Wenger, L., *Institutionen des römischen Zivilprozessrechts*, München, 1925, § 24. I.

Only by analogy, this system was later applied to private disputes concerning possession[54]. In conclusion, the system of interdicts dealt with the protection of the right to use land in the first place. Thus, one may argue that the interdicts might have concerned the better right to possession, but were not rigorously linked to possession in the strict legal sense[55].

Having this in mind, the *argumentum ad absurdum*[56] introduced above loses its cogency. If the interdicts in Cicero's times were concerned with the better right to possession, simple self-defence against an intruder without any right to enter the premise simply did not fulfil the conditions of the *interdictum de vi armata*, presupposed that the defender at least had a right to possession of the premise.

5.2.3. Protection of the public order

Cicero's line of argumentation is based on a comparison between the two interdicts. We remember, the *interdictum de vi armata* is a stricter version of the customary *interdictum unde vi*.[57] According to Cicero, a possessor who gained possession with the help of armed men should be in an inferior position compared to someone who gained possession employing nothing but *vi cotidiana*. In conclusion, the violent possessor should have fewer means of defence against the petition of the applicant of an *interdictum de vi armata*. E contrario, the violent possessor should be obliged to restore possession to the applicant, no matter whether the applicant was a former possessor (92-93). Such a strict understanding would help to protect the public order against violent raids by armed men[58].

Historical evidence proves that devastating outbreaks of violence were an urgent and pressing problem in the late Roman Republic. The times were characterised by fragile governmental structures and a disrupted socio-political order[59]. The fragmentary monopoly on the use of force invited many *patres* to employ armed gangs in order to illegally occupy foreign premises. The rightful owners found themselves in a defenceless state against these dangerous developments[60]. The introduction of the *interdictum de vi armata* was supposedly a consequence of and a remedy against these rampages[61]. Especially, the deletion of the *exceptio vitiosa*

[54] With further references Kaser, M., Hackl, K., *Das Römische Zivilprozessrecht*, § 62. II.; Wieacker, F., *Römische Rechtsgeschichte, Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*, Part 1, München, 1988, § 12. II. 4. c).

[55] Loyal, F., "Petitorische Widerklage gegen eine Besitzklage? Dogmengeschichtliche Untersuchung zum Verhältnis von Besitz und Berechtigung", *Zeitschrift für die gesamte Privatrechtswissenschaft* 5 (2019), pp. 356-384, 359-360.

[56] *Supra* p. 10-11.

[57] *Supra* p. 3-4 and fn. 12.

[58] Sokolowski, *Die Philosophie im Privatrecht*, p. 116; Mühlhölzl, *Cicero „pro A. Caecina"*, p. 104; Lintott, *Cicero as Evidence*, p. 78; Birks, P., "The Rise of the Roman Jurists", *Oxford Journal of Legal Studies* 7 (1987), pp. 444-453, 452; Kappeyne van de Coppello, J., *Die Comitien, Das vim facere beim Interdictum Uti Possidetis, Über constituta pecunia* (M. Conrat trans.), Berlin, 1891, pp. 138-139 and 148.

[59] Lintott, A., "The crisis of the Republic: Sources and source-problems", *The Last Age of the Roman Republic, 146-43 B.C.* (J.A. Crook, A. Lintott, E. Rawson eds.), Cambridge, 1992, pp. 1-15, 6-10; Gelzer, M., "Die römische Gesellschaft zur Zeit Ciceros", *Kleine Schriften* (H. Strasburger, C. Meier eds.), Volume 1, Wiesbaden, 1962, pp. 154-185, 181-183; Amunátegui Perelló, C.F., "The Decline of the Middle Class and the Fall of the Roman Republic", *Révue Internationale des Droits de l'Antiquité* LXI (2014), pp. 97-109, 104-105.

[60] Frier, B.W., "Urban Praetors and Rural Violence: The Legal Background of Cicero's Pro Caecina", *Transactions of the American Philological Association* 113 (1983), pp. 221-241, 231-234; Ebert, U., *Die Geschichte des Edikts de hominibus armatis coactisve*, Heidelberg, 1967, pp. 10-11.

[61] Frier, *The Rise of the Roman Jurists*, p. 52; Giltaij, J., "Augustus and Self-Defence as the Stoic Reason of State in the Roman Legal Order", *History of Political Thought* XXXVII. (2016), pp. 26-56, 38 fn. 92; Tellegen-Couperus, O., "Cicero and Ulpian, Two Paragons of Legal Practice", p. 488.

possessionis in the *interdictum de vi armata* indicates that the *praetor* intended to limit self-help[62]. The interdict still serves as a paradigm example for the strong notion of self-defence and admissibility of reprisal in Roman law as it is emphasized in the maxim of *vim vi repellere (licet)*[63].

From a policy-oriented stance, Cicero's interpretation makes sense: The Roman state and its institutions profited from a rigid reading of the interdict in favour of the public order as brought forward by Cicero.[64] The rationale behind this might not even only have been limited to disputes about lands but rather concerned the obedience to the law and loyalty towards the state more generally. In this sense, the praetor as a representative of the Roman state might have even intended to encourage privates to apply for the *interdictum de vi armata* by lowering its conditions in comparison to the ordinary *interdictum unde vi*.[65]

Remarkably, Cicero addresses such disturbances in his speech *pro Tullio* as well. In this lawsuit, Cicero's client Tullio sues Fabius for damages on the ground of the *edictum de vi hominibus armatis coactisve*[66]. This edict was introduced by *praetor* Lucullus shortly before the proceedings of Tullio and Fabius. It established strict liability for the tortfeasor. This evidences that Roman law in the late Republic tried to inhibit violent outbreaks with rigorous remedies. Moreover, Cicero mentions the *interdictum unde vi* in *pro Tullio* as well. Again, he deduces the proviso of possession out of *cum ille possideret*[67]. This continuity shows that either Cicero's construction of the interdict was defensible, or, at least, that he advanced his argument *bona fide*. Anyway, both conclusions speak against the common thesis that Cicero intentionally misrepresented the law.

One should also keep in mind that law in this time was much stronger influenced by a general sense of justice than nowadays[68]. Notably, Cicero's approach to the law did not only rest on technical intricacies but covered more broadly notions of the general social consensus regarding equity and justice[69]. His strategy in *pro Caecina* depicts this point impressively. He invokes the spirit of the law against its letter underlining the detrimental effects of violence on the stability of the legal order and the state's monopoly on the use of force[70].

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[62] Lehne-Gstreinthaler, "Schiedsgerichtsbarkeit und außergerichtliche Konfliktbereinigung im klassischen römischen Recht", p. 143; Müller, *Besitzschutz in Europa*, p. 14

[63] Giltaij, J. "Roman law and the *causa legitima* for reprisal in Bartolus", *Fundamina* 20 (2014), pp. 349-356, 350-351.

[64] Holtius, *Abhandlungen civilistischen und handelsrechtlichen Inhalts*, p. 66.

[65] Interestingly, this resembles a modern-day mechanism often described as 'private enforcement of public issues', when the legislator confers strong substantive and procedural entitlements on privates to enforce its regulations and directives with their help; for the classic, US American perspective on that issue see Burbank, S. B., Farhang, S., Kritzer, H.M., "Private enforcement", *Lewis & Clark Law Review* 17 (2013), pp. 637-722, 643-648; in context of European Union law see Wilman, F., *Private Enforcement of EU Law Before National Courts*, Cheltenham, 2015, paragraphs 1.01-1.08 and 12.30-12.37.

[66] For a detailled account see Ebert, U., *Die Geschichte des Edikts de hominibus armatis coactisve*, *passim*; see as well Behrends, O., "Selbstbehauptung und Vergeltung und das Gewaltverbot im geordneten bürgerlichen Zustand nach klassischem römischem Recht", pp. 101-106.

[67] Holtius, *Abhandlungen civilistischen und handelsrechtlichen Inhalts*, pp. 61-63 and 66-72; Mühlhölzl, *Cicero „pro A. Caecina"*, p. 105; Frier, *The Rise of the Roman Jurists*, pp. 174-176.

[68] Harries, J., *Cicero and the Jurists, From Citizens' Law to the Lawful State*, London, 2006, pp. 187-188.

[69] Harries, J., Cicero and the Law, *Cicero the Advocate* (J. Powell, J. Paterson eds.), Oxford, 2004, pp. 147-163, 147-148, 152 and 157-158.

[70] Harries, J., The law in Cicero's writings, *The Cambridge Companion to Cicero* (C. Steel ed.), Cambridge, 2013, pp. 107-121, 108-109.

In conclusion, the general historical background of the *interdictum de vi armata* makes Cicero's explanations plausible. There is good reason to believe that Cicero's policy-oriented stance was a reasonable interpretation against a narrow, literal reading of the interdict[71].

5.3. Interim Conclusion

Given these considerations, it is hardly possible to decide the case of Caecina from the perspective of contemporary legal-historical knowledge. Evidence of concrete application of the *interdictum de vi armata* in the Roman Republic besides Cicero's remarks remains scarce.

Conclusively, this article stresses that neither a literal interpretation nor a comparative analysis of the classical texts of Ulpian (or, at best, its interpolated version presented by the compilers) suffices to present a definite answer. One should be cautious to lay too much weight on the account of 19th-century Pandectists. It is well-known that Roman law was over and over used as a narrative to employ one's own normative concepts[72] – and it was also not uncommon for the historic school to ignore the historic contingency of Roman legal terms as a consequence of an excessive emphasis on the rationality of Roman law[73].

6. Conclusion

Pace the predominant opinion, historical evidence does not prove that Cicero intentionally distorted the meaning of the interdict. There are other potential explanations, which must be taken into consideration by legal-historical analysis as well. The orator's reading of the *interdictum de vi armata* was at least defensible.

This finding is relevant in the vigorous debate about an assumed antinomy between (Roman) law and rhetoric. It is a widely held belief and often repeated topos in pandectistic and neo-pandectistic[74] jurisprudence that Roman law evolved as a systematic, autonomous, and dogmatic science immune from the quackery of rhetoric[75]. This dichotomy follows a platonic view[76] that favours philosophical truth derived from deductive logic over rhetorical reasoning as the latter only employs methods of informal logic relying on plausibility instead of cogency[77].

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[71] Maggio, L.A., "El interdicto unde vi armata en la defensa pro Caecina de Cicerón", *Los derechos reales: Actas del II Congreso Internacional y V Iberoamericano de Derecho Romano* (A. J. Torrent Ruiz, ed.), Madrid, 2001, pp. 461-471, 470-471.

[72] Tuori, K., *Ancient Roman Lawyers and Modern Legal Ideals, Studies on the impact of contemporary concerns in the interpretation of ancient Roman legal history*, Frankfurt am Main, 2007, *passim*.

[73] Schwarz, F., "Begriffsanwendung und Interessenwertung im klassischen römischen Recht", *Archiv für die civilistische Praxis* 152 (1952), pp. 193-215, 202-203.

[74] Term borrowed from Schulze, R., "European legal history – a new field of research in Germany", *The Journal of Legal History* 13 (1992), pp. 270-296, 276; but see against this label Heirbaut, D., "Comparative Law and Zimmermann's New *ius commune*: A Life Line or a Death Sentence for Legal History: Some Reflections on the Use of Legal History for Comparative Law and Vice Versa", *Fundamina* 11 (2005), pp. 136-153, 147.

[75] Seminal piece Schulz, F., *History of Roman legal science*, Oxford, 1952, pp. 53-55, 67-68, 71-72 and 76-77; Horak, F., *Rationes decidendi, Entscheidungsbegründungen, bei den älteren römischen Juristen bis Labeo*, Volume 1, Aalen, 1969, pp. 48, 57 and 295.

[76] Tellegen-Couperus, O., "Roman Law and Rhetoric", *Revue belge de Philologie et d'Histoire* 84 (2006), pp. 59-75, 59-60.

[77] In the tradition of ancient rhetoric see for a modern-day concept among others Perelman, C., Olbrechts-Tyteca, L., *The New Rhetoric, A Treatise on Argumentation* (J. Wilkinson, J. Weaver trans.), Notre Dame, 1969, pp. 1-14; with special attention to legal argumentation Perelman, C., *Logique Juridique, Nouvelle rhétorique*, 2.

Such a separation of law and rhetoric manifests in a sharp contrast that is drawn between jurists and orators. This distinction can be traced back to the development of increasing professional differentiation in the (late) Republic[78]. In academic literature, the former, a *iuris consultus*, is often identified with his endeavour to develop objective discoveries from a strictly legal point of view. The latter, a *patron*, on the other hand, takes a certain outcome for granted that simply needs to be defended or argued for[79]. Viewed in this way, Roman jurists are regarded as being rigorously bound by the non-compulsive force of strictly legal arguments to convince others. In contrast, rhetoricians allegedly do not abstain from persuading their audience by artificial, seductive means[80].

As a consequence of this somewhat apocryphal division, the forensic speeches of orators were often not regarded as credible sources for the state of Roman law[81]. This is mirrored in the ambivalent approach of VON SAVIGNY and his adherents towards Cicero's *pro Caecina*. In the course of centuries, a plethora of scholars pondered about this short section from this lesser-known speech. This circumstance reflects the immense interest of legal historians in oratory material concerning even minor legal problems. However, at the same time, the worth of Cicero's reasoning is marginalized by resorting to an artificial antinomy between Roman law and rhetoric.

This paper intended to look beyond this façade. A more comprehensive method of legal history requires considering social circumstances and cultural dynamics as well[82]. Of course, Cicero's advocacy was no legal *l'art pour l'art*. Indeed, it followed practical and rhetorical exigencies[83]. The *Caeciniana* is just one of many illustrative examples of strategic communication: Its *dispositio* shows a striking imbalance between the different *partes*. Cicero argues on more favourable matters *in extenso*[84]. Asymmetrically, the crucial passage about the condition of possession follows those lengthy, attention-consuming explanations briefly in an inconspicuous place at the end of the speech[85]. However, Cicero's repeated emphasis on the protection of the public order offers a kernel of truth considering the actual historical situation. His

edit., Paris, 1976, pp. 99-177; for a short appraisal of Perelman's approach in the context of Roman legal history see Ribas Alba, J., "Retórica y derecho romano en lo pequeño", *Encuentro Interdisciplinar sobre Retórica, Texto y Comunicación* (A. Ruiz Castellanos ed.), Volume 1, Cadiz, 1993, pp. 235-240, 236.

[78] Riggsby, A.M., Roman Law and the Legal World of the Romans, 47-49; but see as well Leesen, T.G., *Gaius meets Cicero, Law and Rhetoric in the School Controversies*, Leiden, 2010, p. 30.

[79] Kacprzak, A., "Rhetoric and Roman Law", *The Oxford Handbook of Roman Law and Society* (P.J. Du Plessis, C. Ando, K. Tuori eds.), Oxford, 2016, pp. 200-218, 211-212.

[80] Wieacker, F., *Römische Rechtsgeschichte*, § 40 II. 4; Wieacker, F., "The Importance of Roman Law for Western Civilization and Western Legal Thought", *Boston College International and Comparative Law Review* 4 (1981), pp. 257-281, 265 and 267-268.

[81] Critically Tellegen, "Savigny's System and Cicero's Pro Caecina", pp. 86-87 and 109-110; *pars pro toto* for a new, more inclusive approach see the aspiration formulated by Du Plessis, P.J., "Introduction", Cicero's Law, *Rethinking Roman Law of the Late Republic* (P.J. Du Plessis ed.), Edinburgh, 2016, pp. 1-6, 3-6, and the articles to this extensive anthology.

[82] Enos, E.L., "Rhetoric and Law", *The Oxford Handbook of Rhetorical Studies* (M.J. MacDonald ed.), Oxford, 2017, pp. 173-182, 174 and 176-178.

[83] Robinson, O.F., *The Sources of Roman Law, Problems and Methods for Ancient Historians*, London, New York, 1997, p. 67; Lintott, *Cicero as Evidence*, pp. 3-4.

[84] This technique of recurrence is not unsurprising due to the oral character of the trial; May, J.M., "Ciceronian Oratory in Context", *Brill's Companion to Cicero, Oratory and Rhetoric* (J.M. May ed.), Leiden, Boston, Köln, 2002, pp. 49-70, 54.

[85] Fotheringham, L., "Repetition and Unity in a Civil Law Speech: The Pro Caecina", *Cicero the Advocate* (J. Powell, J. Paterson eds.), Oxford, 2004, pp. 253-276, 274.

argumentation was at least defensible, especially if we remember that the *interdictum de vi armata* was a legal innovation and a stricter version of the ordinary *interdictum unde vi*.

For that reason, it is important to understand these complexities instead of rejecting them as (in-)valid arguments without further consideration. The rehabilitation of the orator Cicero as a *vir bonus* helps to overcome widespread discomfort with regard to his legacy as a credible source for the living character of (preclassical) Roman law. *Pro Caecina* should be – with due caution – regarded as authentic evidence for the law in the Roman republic.

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