

Edict *si neque potestatem*

Summary. The edict *si neque potestatem* punished a litigant who had been summoned and had given a representative (*vindex*) to appear temporarily in his place, but who nevertheless remained absent from proceedings *in iure*.

¶1

An edict of the Urban Praetor threatened *missio in bona* against a person summoned (*vocatus*) *in ius* who had given a *vindex* to represent him but then kept himself beyond reach without otherwise being defended (*si neque potestatem sui faciet neque defenderetur*).¹ In Ulpian's commentary on the edict (though not in the words of the edict) the *vocatus* was deemed, obliquely, to be a recalcitrant litigant under a separate edict or edicts on fraudulent self-concealment (*latitare*) and absence.² The need for the edict *si neque potestatem*, when another, existing edict might equally serve, has provoked debate, provoking also a wider examination into the relationship between the threat of *missio* and the opportunity, also afforded the plaintiff, to sue the *vindex* himself if the *vindex* failed to produce the *vocatus*.³ Putting aside bold emendations and reconstructions,⁴ the view with widest support suggests that the edict *si neque potestatem*, in allowing *missio*, served to preserve the property of the *vocatus* while the plaintiff pursued the *vindex*, providing security in the event he did not use the action against the *vindex*, or the action did not satisfy his claim; forced sale (*bonorum venditio*) would follow (under a separate edict on recalcitrance) in the event the *vocatus* remained beyond reach.⁵

¶2

A very different view, that the edict served to relieve the *vindex* (and not only the plaintiff) in the face of an uncooperative *vocatus*, i.e., that *potestatem sui facere* in some manner complemented the duty of the *vindex* to produce the *vocatus*, has few adherents.⁶ This view, though simpler and arguably more coherent than the prevailing view, founders on the counter argument that the duty of the *vindex* to 'defend' the *vocatus* is illusory if the *vindex* is in fact relieved.⁷

¶3

The latter part of Ulpian's commentary discusses the second stated condition in the edict, want of defence. This condition is not met unless the plaintiff suffered prejudice and the *vocatus* persistently (and not simply occasionally) failed to be defended.⁸

¶4

¹ Ulp. 5 ed. D. 42.4.2 pr.-4; Iul. 6 Min. D. 8.5.18. Literature: Beseler (1920) 164-165; Lenel (1927) 71-73; Aru (1934) 66-69; Solazzi (1937) 17-19; Pugliese (1949) 267-276; Pugliese (1963) 392-395; Provera (1970) 88; Giménez-Candela (1982) 145-147; Buti (1984) 308-310; Gómez-Iglesias Casal (1984) 122-125; del Pilar Pérez Álvarez (2001) 120-125; Platschek (2005) 212-214. In Ulp. 5 ed. D. 42.4.2 pr., the interpolation *qui iudicio sistendi causa fideiussorem* for *vindicem* is widely accepted, but see Aru (1934) 69; Giménez-Candela (1982) 146; Buti (1984) 300, 308 n.304.

² On these edicts, see esp. Lenel (1927) 415-416; Platschek (2005) 147-266. Sources: Gai. inst. 3.78; Ulp. 59 ed. D. 42.4.7.1-19; Ulp. 59 ed. D. 5.1.63; Ulp. 60 ed. D. 3.3.51,53; 42.5.5; Ulp. 39 Sab. D. 50.16.173; Ulp. 8 omn. trib. D. 50.16.199 pr.; Paul 57 ed. D. 3.3.52,77; 22.1.35; 42.4.6; Cic. Quint. 60. On the association of these edicts with the edict *si neque potestatem*: Ulp. 5 ed. D. 42.4.2.1; Platschek (2005) 212-214.

³ Paul 4 ed. D. 2.8.4; Ulp. 5 ed. D. 2.8.2.5; Paul 1 Plaut. D. 2.11.10 pr.

⁴ See Beseler (1913) 20; Beseler (1920) 164; Aru (1934) 69.

⁵ Pugliese (1949) 272-276; Pugliese (1963) 394-395; Provera (1970) 88 n.7; Buti (1984) 309; Gómez-Iglesias Casal (1984) 123-125. See also del Pilar Pérez Álvarez (2001) 120-125 (*bonorum venditio* proceeds under a separate edict on recalcitrance). Cf. Lenel (1927) 73 (the purpose of the edict was to make clear that the duty of the *vocatus* did not end when he gave a *vindex*).

⁶ See Schlossmann (1903) 318 n.1, and Behrends (1991) 31 n.78, both citing Paul 21 ed. D. 10.4.2.

⁷ See Pugliese (1949) 274 (the edictal words *neque defendetur* [*defenderetur* F] exclude the possibility that the *vindex* is granted *missio*).

⁸ Ulp. 5 ed. D. 42.1.2.3,4.

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