

Book VIII.
Title IX.

Concerning possession by suffrance and concerning the Salvian interdict.
(De precario et de Salviano interdicto.)

Dig. 43.26.33; Bas. 25.2.36.37.

8.9.1. Emperor Gordian to Aristo.

If your debtor sold the property pledged to you, and you did not release your lien, you have the unquestioned right to recover the property, not by the Salvian interdict - for that lies only against a lessee or debtor - but in a Servian action against the purchaser or the action provided in analogy thereof.
Promulgated September 8 (238).

Note.

Salvian interdict, and hypothecary action.

The Salvian interdict was issued in the beginning in order to enable a landlord to recover possession of property brought onto land and which was mortgaged to the landlord to insure the payment of rent. It was prohibitory in character; that is to say, it forbade the tenant to interfere with the landlord in taking possession of the property mortgaged. Later on, the interdict was used also in cases to enable a pledgee or mortgagee to obtain the possession of the pledged or mortgaged property; D. 43.1.2.3; Paul, Sent. 5.6.16. That is also shown by the instant law, which says that the interdictional action was available against a lessee and debtor. But in so far as it states that it was available only against the lessee and debtor it is in conflict with D. 43.33.1, which indicates that this interdictional action was available also, if third persons had obtained the possession of the pledged or mortgaged property. Lenel has shown that this law originally dealt only with the Servian action - not the interdict Salvianum. However Theophilus 4.15.3, who wrote during Justinian's time, states that the interdictional action was available against third persons as well as against the pledgee and mortgagee. Hence some of the authorities hold that at least from the time of the compilation of Justinian's works, the interdictional action (which was a comparatively quick remedy) was extended, so that it might be employed by a pledgee or mortgagee to recover possession of the property pledged or mortgaged, whether in the hands of the original mortgagee or pledgee or in the hands of a third person. If that is true, the instant law and C. 4.10.1, which is to the same effect, were, to that extent repealed.

The Servian action was designed originally for the same purpose as the interdict Salvianum. The former tested the right, the latter simply the right of possession, and hence the latter was simply a simpler, and generally quicker, remedy. Like the interdict, so the Servian action, under the name of quasi Servian, or hypothecary action, was subsequently extended to enable a mortgagee or pledgee to recover possession of the mortgaged or pledged property. It was an action in rem, and was available to the pledgee or mortgagee when the property was in the hands of third persons, as long as the interdictional action was not available against them. Certain defenses, of course, might exist against the hypothecary action, and further mentioned in this regard, and in other respects, will be found in headnote (4) to C. 8. 13. See generally, Lenel, E.P. § 266;

Buckland, Textbook etc. 472; Girard, Manuel 823 note 4; Winscheid, Pand. § 236, note 5; Vangerow, Pand. § 389-390; Karlowa, 2 R.RG 1283; Gaius 4.147; Inst. 4.6.7; Inst. 4.15.3.

8.9.2. Emperors Diocletian and Maximian and the Caesars to Fabricius.

That the heirs of one in possession by suffrance must restore the habitation, is clearly declared in the interdict provided against them.¹

Subscribed at Sirmium December 1 (293).

¹ [Blume] See generally as to tenants by sufferance C. 4.65.33.