

Remissio Mercedis

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Remissio Mercedis is the problem of risk in *locatio conductio*¹. The term *remissio mercedis* means the remissions of rent when the conductor retains the enjoyment of the object rented, but has held no yield, or less than was to be expected. This situation should be distinguished from that in which the *conductor* has lost the enjoyment completely: then the expression *deductio ex mercede* is used.²

While some jurists hold that *remissio mercedis* is an imperial and strict technical term that was developed under Severan emperors for agricultural political needs in the second century A.D.³, others hold that imperial *remissio mercedis* isn't different in principle from the juristic remission which is found earlier in a ruling by the Republican jurist Servius in Ulp.D.19.2.15.2.⁴

D.19.2.15.2Ulpianus libro trigesimo ad edictum

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¹ Rado, T., **Roma Hukuku Dersleri, Borçlar Hukuku**, 1974, 134

² Mayer-Maly, Th., **Locatio Conductio. Eine Untersuchung zum klassischen römischen Recht**, 1956, 140-141; Watson, A., **The Law of Obligations in the Later Roman Republic**, 1965, 110, n.4; de Neeve, P.W., **Remissio Mercedis**, ZSS 100, 1983, 297

³ Mayer-Maly, 140-141; Kaser, **Periculum Locatoris**, ZSS 74, 1957, 173 sqq.; Mayer-Maly's notion of **remissio mercedis** is also that of remission of rent in modern law systems, with the proviso that in these systems remission of rent also occurs in cases where the lessee has missed the enjoyment of the object temporarily.

⁴ Watson, 114; de Neeve, 308-318

*Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare deberia ex ipsa e ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint. Sed et si labes facta sit omnemque fructum tulerit, damnum coloni non esse ne supra damnum seminis amissi mercedes agri praestare cogatur. Sed et si uredo fructum oleae corruperit aut solis fervore non adsueto id acciderit, damnum domini futurum: si vero nihil extra consuetudinem acciderit damnum coloni esse. Idemque dicendum, si excercitus praeteriens per lasciviam aliquid abstulit. Sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.*⁵

Remissio mercedis in it's strict technical sense is a modern notion and did't exist in Roman times, but at the same time, we have some evidents that *remissio mercedis* did exist in Republic⁶. We also find the expression *mercedem remittere* in some fragment, where there isn't any problem of remission of rent in this strict technical sense. For example;

D.19.2.33Africanus libro octavo quaestionum

⁵ Ulp.D.19.2.15.2 If the force of a catastrophic storm befalls him, should the lessor be held responsible to the lessee for anything? Servius says that the owner should be held responsible to his tenant farmer for all force against which resistance is impossible, as, for example, that of rivers, jackdaws, and starlings, and if some similar event occurs or if there is an enemy invasion; but if flaws arise from the object itself, this loss is the tenant's, for instance, if wine sours or if crops were destroyed by worms or weeds. But again, if there were a landslide that removed the entire crop, the loss is not the tenant's, since he should not have to provide land rent over and above the loss of his perished seed. But again, if a frost destroys an olive crop or if this occurs due to an unaccustomed heat wave, the loss will be the owner's; but if nothing out of the ordinary occurs, the loss is the tenant's. The same is true if a passing army wantonly steals something. But again, if an earthquake so completely destroys the land that it no longer exists, the owner bears the loss; for he must present the land to the lessee for his enjoyment.

⁶ Suetonius, Div.Iul.20.3; Columella, RR.1.7.1; Plinius, Ep.9.37.2, 10.8.5 ; Ulp.D.19.2.15.3-5-7, CJ.4.65.19,

.....*sin vero ab eo interpellabitur, quem tu prohibere propter vim maiorem aut potentiam eius non poteris, nihil amplius ei quam mercedem remittere aut reddere debebis*⁷.

This fragment is about *frui* becoming impossible definitively; consequently, we should speak of *deductio ex mercede*⁸. There is another example of a non- technical use of *mercedem remittere* in

D.19.2.24.5 Paulus libro trigesimo quarto ad edictum

*Qui in plures annos fundum locaverat, testamento suo damnavit heredem, ut conductorem liberaret. Si non patiatur heres eum reliquo tempore frui, est ex conducto actio: quod si patiatur nec mercedes remittat, ex testamento tenetur.*⁹

Conversely, although some cases are about the matter of *remissio mercedis* in strict technical sense, we find the use of other terms and of periphrases.¹⁰

D.19.2.19.1 Ulpianus libro trigesimo secundo ad edictum

*Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata; et ita Cassius scripsit. Aliter atque si saltum pascuum locasti, in quo herba mala nascebatur: hic enim si pecora vel demortua sunt vel etiam deteriora facta, quod interest praestabitur, si scisti, si ignorasti, pensionem non petes, et ita Servio Labeoni Sabino placuit.*¹¹

⁷ Africanus D.19.2.33.....but if he will be hindered by a person whom you cannot stop ue to his greater force or power, you will owe him no more than the return or remission of the rent.

⁸ Mayer-Maly considers the word *remittere aut* as interpolated. On the contrary Wecke, A., Africanus D.19.2.33, ANRW II, 15, 1976, 493; Ankum, H. Africanus D.19.2.33, ZSS 97, 1980, 159

⁹ Paul.D.19.2.24.5 A man leased out a farm for many years, and then in his will he condemned the heir to discharge the lessee (from paying rent) The words *nec mercedem remittat* are considered genuine also by Mayer-Maly 46, n.26

¹⁰ Ulp.D.19.2.15.2; Ulp.D.19.2.15.3

¹¹ Ulp.D.19.2.19.1 If someone unknowingly leases out defective storage jars and wine runs out of them, he will be liable for the (lessee's) interest, nor will his lack of awareness have been excused, so Cassius wrote as well. It is quite different if you leased out out a pasture in which harmful weeds grew; in this case, if cattle either died or lost value, the (lessee's) interest is owing if you knew this, but if you were unaware

The content of *remissio mercedis* can be a partial or a complete remission of rent.

D.19.2.15.7 Ulpianus libro trigesimo secundo ad edictum

*Ubicumque tamen remissionis ratio habetur ex causis supra relatis, non id quod sua interest conductor consequitur, sed mercedis exoneratio pro rata: supra denique damnum seminis ad colonum pertinere declaratur.*¹²

In the case of partially bad harvest, *remissio mercedis* comes down to *deductio ex mercede*¹³.

D.19.2.27 pr. Alfenus libro secundo digestorum

*Habitatores non, si paulo minus commode aliqua parte caenaculi uterentur, statim deductionem ex mercede facere oportet:...*¹⁴

Deductio ex mercede like *remissio mercedis* hasn't a precise technical signification. We also find the expression *deducere ex mercede* in a fragment which has such no signification:

D.19.2.19.3 Ulpianus libro trigesimo secundo ad edictum

*Si dominus exceperit in locatione, ut frumenti modum certo pretio acciperet, et dominus nolit frumentum accipere neque pecuniam ex mercede deducere, potest quidem totam summam ex locato petere, sed utique consequens est existimare officio iudicis hoc conuenire, haberi rationem, quanto conductoris intererat in frumento potius quam in pecunia soluere pensionis exceptam portionem. Simili modo et si ex conducto agatur, idem erit dicendum.*¹⁵

of it, you may not sue for payment of rent, a view that Servius, Labeo and Sabinus also approve.

¹² Ulp.D.19.2.15.7 Whenever the amount of a remission is calculated because of the causes described above, the lessee is not claiming his interest, but rather a prorated abatement of rent; for the rest, it is established that the loss of seed is borne by the tenant farmer.

¹³ Ankum, 222; 225

¹⁴ Alf.D.19.2.27 pr. The occupants, if their use of some portion of an apartment is a bit less comfortable, must not immediately make a deduction from the rent;

¹⁵ Ulp.D.19.2.19.3 If in a lease the owner reserves that he will take a fixed amount of grain at a fixed price and the owner then refused both to take the grain and to deduct the Money from the rent, he can sue on the lease for the entire amount; but in that event it is logical to think it is consistent with the judge's discretion that he assesses the extent of

Deductio ex mercede could be used where the enjoyment had become definitively impossible, so it was not confined to this situation. But the expression *remissio mercedis* could also be used instead of *deductio ex mercede*. It is not difficult to discover why in D.19.2.27 pr. *deductio ex mercede* was used: The habitatores took the initiative in paying less rent and accordingly made a *deductio ex mercede* (a deduction from the rent previously agreed). On the other hand *remittere mercedem* could be used only if the *locator* waived part of the rent. The principal underlies the ruling on D.19.2.27 pr. is the same as *remissio mercedis* in strict technical sense, so we would conclude that D.19.2.27 pr. and such *remissio mercedis* should be regarded as the first and foremost parallel manifestations following the same principal: *periculum locatoris*¹⁶

Periculum locatoris means that the conductor is entitled to pay less or no rent if in certain circumstances his employment has been seriously impaired or even become completely impossible¹⁷. Romans used *deducere ex mercede* or *remittere mercedem* to describe this reduction of rent. The first expression could be used in case the enjoyment had become definitively impossible or equally in case it was seriously impaired. So, it can be said that to all appearances in certain circumstances a bad harvest was nothing else than an instance of impaired *frui*.¹⁸

However, the expression *remittere mercedem* could be used even when there was no question of impaired enjoyment. We can find it in D.19.2.24.5¹⁹. Also, *remittere mercedem* was not only confined to farm tenancy but to house rent.

D.19.2.5 Ulpianus libro vicesimo octavo ad edictum

the lessee's interest in paying the reserved portion of his rent in grain rather than in Money.

¹⁶ According to Frier, B.W., *Landlords and Tenants in Imperial Rome*, 1980, 150-164 *deductio ex mercede* and *remissio mercedis* are different, and "the right to remission of rent was apparently never accorded to the urban tenant". Contra, de Neeve, 302 n.19

¹⁷ Umur, Z. *Roma Hukuku Lügatı*, 1983, 155

¹⁸ de Neve, 303

¹⁹ Other sources Suet. Div. Iul. 38.2; Caes. BC.3.21.1

*Si tibi habitationem locavero, mox pensionem remittam, ex locato et conducto agendum erit.*²⁰

Now, we must answer why *remissio mercedis* and *remittere mercedem* appear mostly in farm-tenancy and hardly in house-rent or *locatio vectigalium*.

It's difficult to answer with regard to *locatio vectigalium*, because there are no sources about it; but it should be noted that the request of the publicans in 61 B.C. was unjustified. This may be the reason why we hear of this case and not of others in which we may guess that any remissions were requested and granted in conformity with existing rules²¹.

There are a lot of reasons with respect to house-rent, firstly, house-rent payment of rent might occur beforehand (*praenumerando*), as, for instance, when conductores acting as middlemen subleased blocks of apartments, and in the case of the lower classes²². If we find *remissio* in the sense of "to waive, remit etc.", it refers to a debt still to be paid. When payment of rent occurred *praenumerando*, normally the debt would already have been paid, and there would be nothing to remit, only to repay. Consequently, while the term *remittere* did have a regular function in farm-tenancy, where payment normally occurred *postnumerando*, in house-rent the term had no regular function²³. Though in these cases remission of rent means that the locator had to waive any claims to the rent for the period of non-enjoyment, our sources generally view the problem from the aspect of enjoyment having become impossible, and discuss it in terms of the tenant's being discharged from the duty to pay rent²⁴. But in farm-tenancy, after an interruption of *frui*, the tenant would probably continue his tenancy, if only because of what

²⁰ Ulp.D.19.2.5 If I lease out a dwelling to you and shortly thereafter remit your rent, the proper action is stil on lease and hire. Frier, 163; *remissio* was caused by "unusual circumstances".

²¹ There are problems concerning locationes vectigalium in 184 B.C. liv.39.44.7-8; Plut. Cato mai.19.1-2

²² Frier, 34-37

²³ Iul.D.23.4.22; Scaev.D.7.1.58 pr.; de Neeve, 306; However as Frier has argued, at the upper social level with which the legal sources are primarily concerned tenants of dwellings normally also paid *postnumerando*., Frier, 37-55

²⁴ Alf.D.19.2.27.1; Iav.D.19.2.60 pr.; Ulp.D.19.2.9 pr.; Ulp.D.19.2.19.6

he had invested in his holding. For these reasons *remissio mercedis* did occur regularly in farm-tenancy, so much so that to some extent the term could acquire a technical sense - without, however, becoming a strict technical term, at least during the Roman Principate: even as late as the early third century A.D. *mercedem remittere* couldn't be used for remission of rent in technical sense. Paul.D.19.2.24.5 demonstrates this. Consequently, *remissio mercedis* is not to be seen as a definite institution (though in the course of time it acquired some institutional character) but rather as an instance of *periculum locatoris*²⁵.

Some scholars accept that *remissio mercedis* first appears in the imperial rescripts contained in Ulp.D.19.2.15.3 and 5, the earliest of which probably is to be dated to the middle of the second century A.D.

D.19.2.15.3 Ulpianus libro trigesimo secundo ad edictum

*Cum quidam incendium fundi allegaret et remissionem desiseraret, ita ei rescriptum est: Si praedium coluisti, propter casum incendi repentini non immerito subveniendum tibi est.*²⁶

D.19.2.15.5 Ulpianus libro trigesimo secundo ad edictum

*Cum quidam de fructuum exiguitate quereretur, non esse rationem eius habendum rescripto divi Antonini continetur. Item alio rescripto ita continetur: Novam rem desideras, ut propter vetustas vinearum remissio tibi detur.*²⁷

There is general agreement that the first and oldest fragment Ulp.D.19.2.15.2 is to a greater or lesser extent interpolated²⁸. But they don't agree about Gai.D.19.2.25.6.²⁹

D.19.2.25.6 Gaius libro decimo ad edictum provinciale

²⁵ de Neeve, 307

²⁶ Ulp.D.19.2.15.3 When a man alleged that his farm had burned down and sought a remission, he received this rescript: "If you cultivated the property, you are not undeserving of relief for the mishap of an unforeseen conflagration."

²⁷ Ulp.D.19.2.15.5 When someone complains about the small yield of his crops, a rescript of the deified Antoninus holds that no consideration need be taken of this (claim). Likewise, another rescript holds: "You ask for something unheard of, namely to receive a remission due to the age of your vines"

²⁸ Mayer-Maly, 161-162; Kaser 170; Watson 111-112

²⁹ Even in Mayer-Maly's reconstruction, the latter fragment cannot but refer to the right to *remissio mercedis*. , 135; de Neeve, 309

Vis maior, quam Graeci..... appellant, non debet conductori damnosa esse, si plus, quam tolerabile est, laesi fuerint fructus: aliquin modicum damnum aequo animo fere debet colonus, cui immodicum lucrum non aufertur. Apperet autem de eo nos colono dicere, qui ad pecuniam numeratam conduxit: aliquin partiarius colonus quasi societatis iure et lucrum et damnum cum domino fundi partitur.³⁰

The cases in the fragment probably is to be ascribed to Servius: the locator bears the risk for damage resulting from *vis cui resisti non potest*³¹. Also, what Servius refers to is nothing else than *remissio mercedis*. This view has been strenghtened by the fact that *remissio mercedis* is already to be found in:

Columella, RR.1.7.1 Comiter agat cum colonis facilemque se praebeat, et avarius opus exigit quam pensiones, quoniam et minus id offendit et tamen in universum magis prodest. Nam ubi sedulo colitur ager, plerumque compendium, numquam, nisi si caeli maior vis aut praedonum incessit, detrimentum adfert, eoque remissionem colonus petere non audet.

Though this fragment does not prove certainly that the locator was obliged to grant *remissio*, it proves that the concept of *remissio mercedis* was already known in the early Empire. By *remissionem* nothing else can be meant. In addition, the passage contains elements that can be related to Ulp.D.19.2.15.2 as well as to the "imperial" *remissio* of Ulp.D.19.2.15.3 and 5. This passage from Columella is not the only evidence for what Servius's statement in Ulp.D.19.2.15.2. *Remissio mercedis* was known by the mid-first century B.C. in house-rent and

³⁰ Gai.D.19.2.25.6 Higher force, for which the Greeks term is "the force of god", should not be a source of loss to the lessee if his crops are damaged more than is bearable; on the other hand, if the tenant farmer does not lose his considerable profit, he should bear with equanimity a slight loss. Clearly, I am speaking about a tenant farmer who hires for a fixed sum of Money; on the other hand, a metayer bears both profit and loss in common with the farm's owner, much like the law in partnership.

³¹ The text is drawing a distinction between *vis, cui resisti non potest* and *vitia, quae ex ipsa re oriuntur* but the important element for the distinction is not *cui resisti non potest* but the meaning of *vis*. *Vis* is often used to mean a force coming from outside, *extraria vis*. *Cui resisti non potest* merely qualifies this external force and the distinction drawn by Servius is between external force and faults arising from the thing itself., Watson, 112

*locatio vectigalium*³². But it is equally clear that at that time *remissio mercedis* was known also in farm-tenancy. This is apparent from a fragment of Cicero (Cic.Off.3.88) referring to the occasion in 61 B.C. on which, according to Suetonius (Div.Iul.20.3), the publicans asked for *remissio mercedis*.³³

Hostilis incursio in Ulp.D.19.2.15.2 was a legal ground for *remissio mercedis*. The granting of *remissio mercedis* to the publicans was justified also in a case in which it was not dictated by law. It was justified in that the publicans had become embroiled in difficulties through causes which they had been unable to resist, and not as a result of their own fault, e.g. by overbidding or poor management. In other words, the difficulties were due to *vis cui resisti non potest*³⁴.

It seems certain that by the mid-first century B.C. the concept of *vis cui resisti non potest* was well-known and functioned as a criterion for assessing whether or not *remissio* was justified, even if not every instance of *vis cui resisti non potest* was a legal ground for it. And there are some examples that they grant *remissio* even if there had been no *vis cui resisti non potest*³⁵.

Thus, the concept of *remissio mercedis* and that of *vis cui resisti non potest* were known in the first century B.C., and we can hold that Ulp.D.19.2.15.2 does not refer to the right to *remissio mercedis* and we can conclude without any doubt, it was enunciated by Servius. The final sentence of the fragment, *oportere enim agrum praestari conductori ut frui possit*, doesn't present a problem: a bad harvest as a result of *vis cui resisti non potest* essentially is nothing other than a case of impaired *frui*. Consequently, there seems to be no reason to accept in deleting the explicit reference to *remissio mercedis* which is contained in the words *ne supra damnum seminis amissi mercedes agri praestare cogatur*.³⁶

³² Suet.Div.Iul.20.3 and 38.2; Caes.B.C.3.21.1

³³ de Neeve, 311-313

³⁴ de Neeve, 316

³⁵ CJ.4.65.19; Iul.D.2.14.56; Caesar and Caelius granted a *remissio* of a year's house-rent in 48 B.C.

³⁶ Mayer-Maly, 142-161; Kaser, 174, also considers this sentence interpolated because influenced by imperial *remissio*. This however, is a circular argument, since Kaser's view is based on Mayer-Maly's theory of *remissio mercedis* as an imperial institution,

It is possible to suppose that Servius's function was to provide a legal basis for a practice which already existed in his time. But, it may be thought that *remissio mercedis* in farm-tenancy was first created by Servius, who was inspired in this by *remissio* in *locatio vectigalium*, the rules of which he transferred to farm tenancy, possibly with some adaptations to fit the peculiar exigencies of this type of contract³⁷.

Finally, it can be said that *remissio mercedis* had been accepted to help economically weak tenants. Apart from any other considerations, *remissio mercedis* existed in at least three different kinds of *locatio conductio*. It is hard to imagine that social motives of this kind played a part with regard to publicans³⁸.

D.19.2.15.4 Ulpianus libro trigesimo secundo ad edictum

*Papinianus libro quarto responsorum ait, si uno anno remissionem quis colono dederit ob sterilitatem, deinde sequentibus annis contigit uberitas, nihil obesse domino remissionem, sed integram pensionem etiam eius anni quo remisit exigendam. Hoc idem et in vectigalis damno respondit. Sed et si verbo donationis dominus ob sterilitatem anni remiserit, idem erit dicendum, quasi non sit donatio, sed transactio. Quid tamen, si nouissimus erat annus sterilis, in quo ei remiserit? Verius dicetur et si superiores uberes fuerunt et scit locator, non debere eum ad computationem vocari.*³⁹

which theory in its turn is founded precisely on the notion that the sentence at issue is an interpolation.

³⁷ de Neeve, 318

³⁸ Depending on the question whether or not Cic.Off.3.88 implies *remissio* without *vis cui resisti non potest*, and on the date of Servius' ruling, it may even be that Ulp.D.19.2.15.2 was a retrograde step in comparison to existing practice de Neeve, 318

³⁹ Ulp.D.19.2.15.4 Papinianus, in the fourth book of his Replies, says that if in one year a man gives his tenant a remission due to barrenness and plenty then ensues in the following years, the remission is no obstruction to the owner; the entire rental payment for the year of the remission may be collected. He responded that this is also true for loss on public land held under long lease. But again, if due to one year's barrenness the owner remits using the form of a gift, the same rule holds on the theory that this is not a gift, but a settlement. But what if the barren year for which he gave remission to him was the final year (of the lease)? The better position will be that if the earlier years were plentiful and the lessor knew this, he (the lessee) should not be called upon to undergo an offset.

If we compare Ulp.D.19.2.15.4 to Ulp.D.19.2.15.2 it is to the advantage of the locator and not of the tenant. So, we can not accept Ulp.D.19.2.15.4 as evidence of any imperial goodwill to tenants, and there is no reason to accept that Ulp.D.19.2.15.4 is connected to imperial *remissio*. Columella, RR.1.7.1 testifies that the imperial rescripts of Ulp.D.19.2.15.3 and 5 only apply the principle of *vis cui resisti non potest* which dates from the time of Servius. In particular, the consequences of *remissio* are the same. There is no reason to imply that Ulp.D.19.2.15.7 should refer to imperial *remissio* only. And even if this were so, no essential difference can be found between the effect of *remissio* as stated in Ulp.D.19.2.15.7 and in Ulp.D.19.2.15.2: in either case the tenant only gets a proportional reduction of rent, while the loss of *semen* he has to bear himself⁴⁰.

Imperial *remissio* wasn't more advantageous to tenants than formulary *remissio*. Imperial and formulary law of remission were the same in essentials. So, there is no reason to think that imperial *remissio* originated from social or economic motives for helping tenants. However, the imperial rescripts concerning *remissio mercedis* have an important role in finding legal redress for tenants⁴¹. In fact, there was no special imperial policy whatever concerning *remissio mercedis*. And there was no "imperial remissio" in the sense of an institution. Rather there existed only one *remissio mercedis*, essentially dating from the Republic, which could be obtained by formulary action or in other ways, and on which the emperor could give a reply if petitioned to do so. The main explanation why after a certain date we hear relatively often of imperial decisions concerning *remissio mercedis* is that people could more easily approach the emperor than institute a formulary action. To be sure, the fact that the emperor could be approached could in itself have had some effect in protecting tenants.

The tenant who obtained a *remissio*, obtained only a proportional reduction of his rent while he had to bear the loss of *semen* himself⁴². If he specialized in grain-growing, or in growing seed products, he received no special compensation for the loss of his produce, including the loss of his seed for the next year. The tenant who obtained a *remissio* obtained

⁴⁰ De Neeve, 326

⁴¹ De Neeve, 332

⁴² Ulp.D.19.2.15.2-7

relief regarding the rent to be paid and relief of part of his expenditures, while at the same time he had to sustain the loss of at least part of the produce which had to provide him with his main income⁴³.

In fact, *remissio mercedis* had economic value, but it was definitely not an economic solution. It didn't originate to help the economically weak tenants. Rather, *remissio mercedis* should be seen as stemming from mainly legal considerations: the lessor must *frui praestare* (Ulp.D.19.2.15.1); if this enjoyment was impaired through circumstances which neither the tenant nor the locator was able to resist, the lessor bore the risk for the rent. *Remissio mercedis* was, and always remained, basically an instance of *periculum locatoris*⁴⁴.

⁴³ de Neeve, 338

⁴⁴ de Neeve, 339