

Book VII.
Title XXXII.¹

Concerning acquisition and retention of possession.
(De adquirenda et retinenda possessione.)

Dig. 41. 2 [?]; Bas. 50.2.52.

Headnote.

There were certain modes of acquiring rights of ownership in property; that dealt with in the within title is prescription. There were other modes, which may be mentioned briefly:

1. By sale or gift and delivery of the property, as well as by heirship in the broad sense, including legacies and trusts.

2. By operation of law; if, for instance a co-proprietor of tenements refused to contribute his share towards the expense of necessary repairs, he forfeited his rights of ownership in favor of the proprietor who effected the repairs; a judicial proceeding to effect the transfer seems to have been necessary, however. So if an owner deserted his land for two years, and another occupied and cultivated it, and paid the state dues on it, he became the owner thereof. Amos 166; C. 11.58.

3. By adjudication in court or proceeding similar to it; e.g. by an adjudication in an action for partition, or sale of pledged property. Amos 166, 167.

4. By occupation, which included every act of seizure of ownerless property, the occupier becoming owner; included under this head is acquisition by alluvion (see C. 7.41), capture of wild or tame animals; capture of enemy's goods in war; finding of abandoned property, and other cases. Inst. 2.1; Amos 160, 161.

7.32.1. Emperors Severus and Antoninus to Atticus.

It is agreed that possession may be acquired by a free person for a man who has no knowledge thereof, and expediency dictates and the law permits that the period of prescription may start to run after knowledge (of such possession) is obtained. Promulgated November 26 (196).

Note.

The question of agency was fully discussed in not to C. 4.27.1, and we saw that it was held and continued to be held that contractual rights and liabilities could only accrue to the contracting parties themselves, and that contracts could not be validly concluded in the name of a third party. See 32 Z.S.S. 201ff. See also Sohm 233. In fact the law of agency was imperfectly developed. During the empire, however, a significant exception to the rule came to be recognized, and possession and ownership of corporal property could be acquired for a person, not only through his slave and child in his power, but also through another person who was free, probably originally procurator. Headnote C. 4.27. Knowledge of the acquisition was not essential, as stated in the foregoing law

¹ Blume penciled in here: "Maybe note on traditio mancipatio C. 7.2. [?]" [not completely legible].

² Question mark in original.

(C. 7.32.1.). This appears to mean that general authorization was sufficient. For if no such general authorization was given, the principal must have knowledge. Inst. 2.9; Sohm 233; Buckland 202; Hunter 378; D. 41.1.20.2; D. 41.2.42.1.

7.32.2. Emperor Alexander to Gaurus.

The man who made you fearful that you were not inducted into the unquestioned possession of the property which you bought thru a procurator, is not well informed, since you yourself state that you have long been in possession, managing everything as owner. For although the document of purchase did not state that possession was delivered to you, still such delivery must be considered as in fact made, if you were in possession with the knowledge of the vendor.

7.32.3. Emperor Decius to Rufus.

Good possessory title is acquired of property given by a person, to an infant and delivered, and although opinions of authors differ, it seems wiser, meanwhile, that delivery should give legal possession, although the will to take was in the meantime incomplete; otherwise, as stated in the response of the learned Papinian, legal possession could never be acquired for an infant even through a guardian. Promulgated March 28 (250).

Note.

The rescript appears to hold:

1. That a guardian, (as direct agent) could acquire ownership of a minor. That he could do so as early as classical law-times, (though not originally) is the prevailing opinion, and he is thus put on the same footing as a procurator. D. 13.7.11.6; D. 41.1.13.1; D. 41.2.20, so hold.³

2. Under this rescript, also, an infant could acquire ownership (if delivered) by himself, but apparently only in cases in which he had the capacity to form an intent was incomplete (non plenus), implying some capacity. As thus construed, it may be harmonized with other texts. The process or development of the rules on this subject was probably something like this: Originally, perhaps, no minor under the age of puberty could acquire ownership, since that required an intent to take. D. 41.2.1.3. Later, and before the time of Gaius, one approximating the age of puberty could do so, if he acted personally, and by the consent and authority (auctoritate) of a guardian, or through him. G. 3.107 and 109; D. 41.3.4.2; D. 41.2.1.11. Perhaps somewhat later, but as early as the time of Gaius, this was construed to include infants, since the rules as to them were relaxed. Gaius 3.109; D. 41.2.32.2. Even though strictly speaking authority given to such infant was without avail. Buckland, Textbook 159. And, perhaps even during classical times, a minor under the age of puberty, who had some judgment so as to form an intent to take (later fixed at the age of seven - Buckland, Textbook 159), could acquire ownership by himself. D. 41.3.4.2; C. 3 h.t. D. 41.2.1.11 and 13; Bas. 50.2.1 and 31. Persons below that age could acquire possession only by the assistance of, or through, someone else. Under Justinian, ownership by them could be acquired through a guardian,

³ [Blume] This did not, however, apply to an inheritance. The acceptance thereof might entail a great burden, and the personal consent of a minor, if over 7 years of age was necessary. C. 6.30.5, in conjunction with C. 6.30.18.

parent, or slave. C. 5.30.18; C. 8.53.26. Writers on these subjects are not agreed as to the meaning of the texts, some of which are undoubtedly interpolated. See Solazzi, Di Alcuni Punti Controversi. Riccobono in 31 Z.S.S. 362-367; Peters in 32 Z.S.S. 205 et. seq.; Lewald in 34 Z.S.S. 452 et. seq.

7.32.4. Emperors Diocletian and Maximian to Nepotiana.

Although possession as owner cannot be acquired by mere intention (*nudo animo*), it may, nevertheless, be retained by intention alone (*solo animo*). If you, therefore, failed to cultivate the land, which was left untilled in the past, without any intention to abandon it, but you simply deferred the cultivation thereof by reason (*revire*)⁴ of some fear, you could not be prejudiced by reason of the misfortune (*injuria*) of the time gone by.

Promulgated August 1 (290).

Note.

We saw in the note to the previous law that both occupation and intent to hold as owner was necessary for possession as owner. It follows that if either occupation or intention ceased, possession as owner ceased. The within law appears to negative that proposition, stating that intention to hold is sufficient to keep it, after it has once been acquired, though occupation ceases. But that is not, as Hunter, Roman Law 350, points out, its true meaning. Its meaning evidently is that the law presumes in favor of continuance of a possession once begun, and that when no hostile occupant has entered on a deserted farm, the presumption of abandonment, which ordinarily arises from neglect (D. 41.3.37.1), is rebutted by proof that the occupier was deterred by fear and had no intention of giving up his possession as owner.

7.32.5. The same to Mennonis.

Since no one can, by himself, change the legal ground under which he holds possession, and you state that without title, your tenant (*colonus*) simply, through the occasion of his cultivation of the property, committed the wrongful act of selling it, the president of the province will not, after inquiry into the true facts, permit you to be deprived of the ownership of the property.

Note.

A man could not make a contract with himself. He could not be in possession of property as lessee, depositary or other agent, and then arbitrarily decide for himself that he was in possession as heir, purchaser, owner, donee or some other capacity. D. 41.2.19.1. In this instance the lessee evidently had thought that he had, through cultivation, acquired ownership and so could sell the land. But his arbitrary determination did not change his status. See also C. 4.65.23 and 24 Z.S.S. 13ff.

7.32.6. The same and the Caesars to Valerius.

When the president learns that the man you mention invaded your field or vineyards without lawful cause, and your claim is not barred by prescription, he will not hesitate to restore possession and all its belongings to you.

Subscribed April 13 (293).

⁴ Blume penciled into the margin here “revise.”

7.32.7. The same to Asyncritus.

Dishonest possession cannot give any firm right to possession. Hence it is certain that one who takes exclusive possession of another's farm without the consent of the owner or manager who had power to grant the right therefor, does not acquire any color of title.⁵

Promulgated December 9 (293).

7.32.8. The same to Cyrillus.

It is agreed, on account of expediency, that possession (as owner) may be acquired through a procurator, and that is true also with ownership, if that cannot be separated from possession.⁶

Promulgated at Sirmium February 14 (294).

7.32.9. The same to Sergius.

A purchaser cannot, even pursuant to an actual sale, dishonestly retain possession which was not delivered to him. Much less has he a lawful cause of detention who, under a false claim of purchase, invades another's farm; when in fact he merely had made a loan without receiving the farm as a pledge.

Promulgated at Sirmium April 3 (294).

7.32.10. Emperor Constantine to Maternus.

No one doubts that possession may be looked at in a double aspect, one consisting of a right, the other of physical occupation, and both are legal only when confirmed by the silence and muteness of all adversaries. Hence a man cannot be considered in possession as owner, while a suit and controversy is pending, who, though he holds it physically, is doubtful and uncertain as to his right of possession by reason of the suit and joinder of issue therein.

Promulgated January 22 (314) at Trier.

Note.

A person was said to be in legal possession of a thing, when he was, at the moment, conducting himself as if he had the full right of ownership in it. Amos, Roman Civil Law 157; Bas. 50.2.61. Being doubtful of his rights, he could hardly be said to be conducting himself, at the moment, as if he had the full right of ownership.

7.32.11. Emperors Arcadius and Honorius to Petronius, Vicar of Spain.

The vices (inherent) in possession, brought about by predecessors, continue, and the successor is accompanied by the fault of his vendor.

Given at Milan December 17 (397).

Note.

This was not true as to innocent purchasers of real estate. See C. 7.33.1; see also C. 7.33.4.

⁵ [Blume] See Nov. 119, c. 7.

⁶ [Blume] Note C. 4. 27. 1.

7.32.12. Emperor Justinian to Johannes, Praetorian Prefect.

Settling the dispute contained in the books of Sabinus and brought to the ears of Our Majesty, we order that if a slave, procurator, serf, tenant or any one else, through whom possession may be acquired, either abandons the physical possession of property (held for the owner), or permits it to be delivered to someone else, either negligently or fraudulently, so that opportunity is given to another to take possession, no prejudice shall result therefrom to the owner, lest damages be inflicted on a man through the evil intention of another; and he himself (who thus permits or gives possession) will, if free, be subject to proper actions, and must make good all loss to the owner or to him toward whom he acted negligently or fraudulently. 1. But if possession has not yet come into the hands of a procurator, serf, tenant or slave, but he (such procurator etc.) neglects to receive it, either through sloth or fraud, then the man who sent him to take possession must, as the result of his bad selection, suffer the loss as to the possession, resulting from the trickery or negligence of such aforementioned persons. 2. For we ordain merely (that a man who is already) an owner shall suffer no loss through the agents whom he has [?]⁷, not that he may also make a gain through them, since also the ancient rule, which holds that the condition of the master shall not be made worse by a slave, only applies when the master is in danger of loss, not when he seeks to make a gain through his slave; saving, forsooth, also in such case, to the owner or person who sent the aforesaid persons (as his agents to take possession and) to hold the property, every right of action against them which is granted to him by law.

531-532.

Note.

A man cannot lose his possession through the fraud or negligence of his agents; but if his agents do not acquire possession for him, and loss - of failure to gain - results, he must bear that loss or failure to make a gain. 9 Cujacius 949.

⁷ Blume's original had "employs" here, but he lined that out and penciled in above it a word now illegible.