Book VIII.
Title I.

Concerning Interdicts.
(De interdictis.)

Dig. 43.1; Bas. 58.10.

Headnote.

In any nation pretending to be civilized, there are certain matter which require the immediate intervention of a court and a speedy trial. Under our law this is intended to be effected mainly by injunctions, and particularly preliminary injunctions. Under the Roman law this was doubtless intended to be effected, to some extent, at least, by what are called the interdicts - orders of the court - although these interdicts fell far short of the effect of our preliminary injunctions. Authors do not agree, however, on the beginning of these interdicts, or their purpose. Hunter (999,1000) thinks that whenever the praetor gave a new right in personam, he merely called it an action, and whenever he gave a new right in rem, he called it an interdict. This is probably a narrow view. While we have no distinct evidence of the origin of interdicts, it seems probable that they were first employed for the protection of sacred places, sewers and other public property, and since such protection needed immediate action, and interdict, order, was issued, the violation of which, unless justified, was punished. Gradually the same proceeding was extended to protect rights in property which were deemed of sufficient importance to call for immediate action. See Moyle, note to Inst. 4.15, at 588. The fact that the procedure, particularly in some cases, was not at all summary, does not disprove this theory. Summary action is provided for, as will be found in the law of the following titles, in cases which originally fell within the interdict procedure, recognizing the importance of immediate action, and it is hardly possible that this idea in connection with interdicts did not exist previously. The interdict - order of the court - was issued at the commencement of the proceeding, after notice to the defendant, but without any hearing, except, perhaps, the most informal. It may originally have been peremptory, like our preliminary injunction, but if so, it soon lost that character, and so far as we are definitely advised, the order of the court had no such effect. The proceeding by interdict was summary in its nature only to the extent that it must often have happened that a defendant would acquiesce in the order made by the court, and thus a quick settlement would be reached. If the defendant, however, did not acquiesce in the order of the court, the case was under the proceedings prior to Diocletian's time, that is to say, prior to the introduction of the so-called extraordinary procedure, referred to a trior of facts, like any other case. When the latter procedure by interdict necessarily ceased, and while the interdicts were issued for a time thereafter, as a matter of formality merely, they gradually fell out of use altogether. None were issued in Justinian's time, and when the laws speak of a party being entitled to an interdict, or that an interdict lies, it means nothing more than that he has a right of action, under the same circumstances and with the same result as in the former interdict procedure. The trials in such cases were, however, more summary. C. 8.1.4; C. 8.2.3; C. 8.4.8; C. 11.47.14. See, generally, 2 Bethmann-Hollweg 344, et seq.

The interdicts, and the actions that subsequently took the place thereof, were intended to protect various rights in rem. There were many such interdicts, known by different names. 1. If an owner was injured by a neighbor's tree, as by roots or branches extending into or over his land, they must be removed, partly or wholly, so that the injury would be abated. This interdict was known as de arboribus caedendis. See C. 8.1.1. 2. The owner of land on which fruit fell from a neighbor's tree, was compelled to permit him once on every alternate day to gather the fruit, and if the latter refused, the former had the right to an interdict called de glande legenda. 3. So interdicts were provided for protecting servitudes, as for the use of a right of way or an aqueduct, to repair a road, stream, spring, or to take water from another's spring or pond. Mackeldy §325. 4. There were several remedies, some being under the interdict procedure, in case of an attempted, or completed, unlawful construction of a building or other work, as will be more fully noted in the notes to C. 8.10.14. The streets in the large cities of the empire were narrow, and the centers of the cities were crowded, and the remedies just mentioned were doubtless sought frequently. 5. A father had a right to reclaim by interdict procedure his unemancipated child detained by another. C. 8.8; D. 43.30. So, too, a man who detained a free person against his will might be compelled to produce such person under an interdict which was much like the common-law writ of habeas corpus. D. 43.29.6. The most important of the interdicts were the possessory interdicts, namely that of unde vi, treated in title 4, and of uti possedetis, treated in title 6 of this book, the former being used for the recovery of possession, and the latter for the retention of possession. The interdict quorum bonorum, treated in title 2 of this book, could be used only by a person recognized as heir under the praetorian system of succession, for the purpose of obtaining possession, but it may be classed as a possessory interdict only in a limited sense.

Interdicts were, generally, intended merely to protect the present status, or the status existing previous to an unlawful invasion of rights. They were not, ordinarily, intended to determine title, and that question was, generally speaking, excluded from consideration. Under the possessory interdicts only the right of possession was determined, and another action was necessary in order to determine the right of property. In a few cases, however, all of the rights existing between the parties were determined in the proceeding under the interdict. That was true, for instance, where the case depended on whether the complainant had been granted a water right out of public waters. 2 Cujacius 459; Moyle, note to Inst. 4.15; Lightfoot, 3 L.Q.R 43-45; Bond, 6 L.Q.R 259.

The possessory interdicts or actions here mentioned, for the recovery or retention of possession, could not b e used by everyone. They were available only to a juristic possessor; that is to say, generally speaking, a possessor who was in physical possession personally, or through some sort of agent, with intent to hold the property as owner, although that intent was generally presumed. See C. 7.32 and notes. Thus tenants for years or a bailee were not entitled to bring these actions, because they held physical possession simply for someone else. An emphyteuticary, however, that is to say, a tenant with a perpetual lease, as well as a tenant by suffrance, were entitled thereto. So, too, a pledgee who had actual possession of a pledge, had such right. The subject of juristic possession has given rise to a considerable amount of controversy, centering mainly around the theories of Savigny and Ihring respectively. It is treated to some extent in the notes to C. 7. 32. See generally the exhaustive treatment of Savigny in his book "Das

Recht des Besitzes;" Lightfoot, 3 L.Q.R. 32-53; Bond, 6, L.Q.R. 259-279; Buckland 198-206.

8.1.1. Emperor Alexander to Aper, a veteran.

Since you say that the roots of trees situated and growing in the neighboring yard of Agathangelus threaten the foundations of your house, the president will settle the matter according to equity in pattern of the interdicts, which the praetor has written on his tablets, relating to a tree hanging over another's house, or to a tree hanging over another's field, and which show that a neighbor should not be injured even by trees.
Promulgated March 26 (224).

8.1.2. Emperors Valerian and Gallien to Messia.

The president of a province cannot render a judgment against a man who does not live in the same province even pursuant to an interdict.
Promulgated April 25 (260).

Note.

The statement herein cannot be taken literally. In some cases a judge could render a judgment against a nonresident, as in a case where the person submitted himself to the jurisdiction of the court; D. 5.1.1; where he himself sued in another province and a counterclaim was filed against him, and in a few other cases. 9 Donellus 881-2. The within law simply means to say that no judgment may be rendered against a nonresident merely because the procedure is by interdict.

8.1.3. Emperors Diocletian and Maximian and the Caesars to Pompeianus.

The law is not doubtful that when a dispute arises as to ownership and physical possession, the question of physical possession should be first decided by proper actions, so that if thereupon a suit for the ownership is brought in regular order, the proofs may be demanded from the party who lost in the dispute for physical possession.[1] For although interdicts have no proper place under the present extraordinary procedure, still the method of procedure is patterned after them.
Subscribed at Sirmium December 28 (293).

Note.

A similar provision here mentioned is contained in C. 3.32.13; C. 3.39.3; C. 7.62.1; D. 5.1.37. The purpose is clear. Possession was important. The right to that was to be determined first, and whoever obtained the legal decision on that point had an advantage, for his adversary must then prove title against him in order to dispossess him. See also C. 3.1.10.

8.1.4. Emperors Arcadius and Honorius to Aemilianus, City Prefect.

If anyone asks for any interdict whatever, the ancient circuities shall be avoided, and he must state his cause (rationem exprimere) and make his allegations in the very beginning of the suit.
Given at Constantinople July 20 (406).
C. Th. 2.4.6.

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[1] [Blume] i.e. the burden of proof is on him.

Note.

The circuities mentioned here are, according to the Theodosian Code, those of the "denuntiatio" - the former notice by which actions took their beginning and after which a defendant was entitled to too long a time to answer. See note C. 2.2.4. But the authors of the Justinian Code, by simply referring to "veteribus ambagibus" meant to refer to all the various ways by which the ancient procedure was obstructed, and meant to provide a quick and summary trial. The expression "rationem exprimere" is explained by 9 Cujacius 15; Gothofredus on this law.