

Book VIII.
Title IV.

The edict granted in case of dispossession by force (of real estate).
(Unde vi.)

Dig. 43.16; Bas. 50.3.48.

Headnote.

This title is taken from the first words of the praetorian interdict: "Unde vi tu illum dejecisti" etc. - "whence you have ejected him by force" etc. It deals with force or violence used in connection with obtaining possession of real estate. It considers the remedy provided for a man forcibly or violently ejected from his house or lands. It does not deal, primarily, with the remedy in cases where personal property was forcibly taken from him, the remedy in the latter case - a counterpart, as it were of the present - being dealt with in C. 9.33, under "robbery," so-called. Personal property, however, used in connection with the real estate from which a man was forcibly ejected, might be recovered in the action here mentioned. D. 43.16.1.6 and 32. The aim of the action as to restore the party ejected to his former status and give him the damage to which he was entitled. D. 43.16.1.31. It lay against the ejector and his heirs, so far as the latter were enriched, and by the person ejected and his heirs, within a judicial year; that is to say, a year composed of the days during which a man had access to the court. D. 43.16.1.44 and 48. After the year it might be brought against the ejector and recovery be had from him to the extent that he was enriched. D. 43.16.1pr. On account of the reverence due a parent from a child, the latter could not bring such action against the former, nor could a freedman bring such against his patron, unless the ejection was by armed force (D. 43.16.1.43), even though this action did not carry infamy along with condemnation. D. 43.16.13.

The purpose of this interdict, was to protect possession, and was available only to the possessor who was ejected. D. 43.16.1.23. To recover, he was not required to prove title. Under the earlier law, however, a distinction was made between ejection by armed force and ejection by non-armed force. A person ejected by armed force could recover the possession, though he himself held it by force, stealth or sufferance, but if he was ejected by non-armed force, and had held the possession by force, stealth or sufferance, he had not remedy. This distinction was later abolished, and in whatever manner a man held possession he could not be forcibly ejected by force, armed or unarmed. C. 8.4.7, and note; see Roby 462. The scope of this interdict, or rather the action that took its place, was also broadened, so that any possession obtained unlawfully, or even against the will of the owner could be recovered, the action being then known as that for instantaneous possession. C. 8.4.10 and note.

8.4.1. Emperors Diocletian and Maximian to Theodorus.

One rightly possession property, which he holds without blemish (i.e. without force, stealth or sufferance), may ward of an attack upon it, with the moderation of necessary protection.

Promulgated November 17 (290).

Note.

Ordinarily force might be opposed by force, and arms by arms, to the extent necessary. No one had the right, however to pursue his adversary after he retreated. D. 43.16.1.27; D. 43.16.3.9. Under former laws, if a man in possession by force, stealth or suffrance, he might be evicted by the rightful possessor with impunity, provided that this could be done without armed force. Paul Sent. 5.6.7; Gaius 4.154. But that right was taken away by the later law. C. 8. 4. 7 and note. In other words, even though a rightful possessor was evicted by force, still he could not, later, return and use force to regain possession. But under law 1, supra, neither could force be used for resistance, if possession was held by force, stealth or suffrance. Hence both of them would, in such a case, have been equally guilty under the law, if they used force. See also note law 7 of this title.

8.4.2. The same Emperors and Caesars to Alexander.

The law is certain that those ousted by force must, in patten of the interdict (relating thereto), be restored if a year has not yet passed, and the heirs of the (dispossessor) are liable to the extent that they received any of the property. Subscribed (293).

Note.

After the year, the ejector and his heirs would still be liable to the extent that he was, or they were, enriched by the ejectment. D. 43.16.1 pr; 1 Roby 465. Where a man ejected regained possession and the ejector then brought an action against him, the year's limitation did not apply, but a defense against the ejector was good at any time thereafter. C. 8.35.5.

8.4.3. The same Emperors and the Caesars to Ulpia and Proculia.

You make a dishonest request when you ask for an imperial rescript permitting you to hold possession, which you acknowledge to have obtained by violence. Subscribed April 6 (294).

8.4.4. The same Emperors and Caesar to Hyginus.

If you are ousted form possession by force, you may accuse the aggressor under the Julian law concerning private violence¹, and also sue him in pattern of the interdict for a case of dispossession by force (unde vi), and there is no doubt that the defendant must, in such case, make complete restitution, which includes the income which the former possessor could have received, and not only the income which was actually received by the robber.

Subscribed at Sirmium April 10 (294).

8.4.5. Emperor Constantine to Tertullianus.

A person who seizes another's possession will be visited with legal punishment, provided it appears that he seized it by force. For if possession of property is taken thru

¹ [Blume] As to criminal action for violence, see C. 9.12.6, 7 and 10. This is also referred to in the next law. As to [illegible] see headnote C. 4.31. [The headnote referred to deals with set-offs.]

error or carelessness of the owner, it must be restored, but without infliction of any penalty.

Given February 24 (330).

C. Th. 2.26.1.

8.4.6. Emperor Gratian, Valentinian and Theodosius to Paucratius, City Prefect.

All must know that whether they have an imperial rescript that is filed (*vulgato*) or a decision of a judge, they must (in order to take possession of another man's place against which they have a claim) sue the owner of the place, or, if he perchance is absent, seek out his manager or procurator to notify him of the decision (of the emperor or judge), lest what give rise to a right be the occasion for a wrong. If anyone neglects to comply herewith, he shall lose all his rights which he has commenced to enforce. 1. But if curators or guardians of minors take possession, without authority, of property which is due to such minors, and do so by collusion, as often happens, in order to deprive such minors of the right to sue for the property and its fruits, we aid such minors to the extent that they shall not be mulcted in damage by reason of another's temerity; possession, however, shall be immediately restored to the one from whom it is taken, and the curator or guardian shall be punished by perpetual deportation and his property shall be confiscated.

Given April 4 (382).

Note.

The law is taken from C. Th. 4.22.2, but with the first part much interpolated. It originally provided that if an interlocutory order (perhaps for possession) had been issued by a judge, or a rescript of the emperor had been obtained, actual physical possession could not be taken until the matter had been duly investigated and determined in court, just as is stated at C. 8.5.2, which deals with a similar situation in the case of absent persons. The emperors frequently issued rescripts. See generally, C. 1.23. A man thinking himself entitled to certain rights addressed the emperor stating to him certain facts, and asking him what his rights were. The emperor, answering, stated that if his rights were so and so, he would be entitled to certain relief, stating it. Such answer, commonly called rescript, constituted the commencement of action, but it did not take effect until it was duly filed with the proper judge and the opponent duly notified, so that the facts could be investigated and the opponent could either concede the claim or make a defense. See C. 1.23.3.

The law as reconstructed in the Justinian Code evidently contemplated (1) that no one can enforce his rights in lands to which he deems himself entitled, by taking possession pursuant to such an imperial rescript which he has simply filed, but of which he has not notified the owner or his agents, so that the latter might come in and defend, just as if an action had been commenced in any other way; (2) that he cannot take such possession even if he had a judgment giving him the right of possession or some other relief upon which possession might follow in due course of law, but that he must bring an action upon the judgment (*actio iudicati*) - or in later law, ask for execution - and notify his opponent thereof, and let the judgment be enforced by the proper officers of the court. If he violates these rules, he loses his rights. This is the view of 9 Donellus 934, as well as Gothofredus ad C. Th. 4.22.2, which appears to be reasonable, although 9 Cujacius 1082, has a slightly different interpretation. The latter part of the law

punishes guardians who enter into an understanding that they should, on behalf of their wards, take such unlawful possession, so that the latter might lose their rights.

A similar rule was stated by the Emperor Marcus Aurelius. "The best course for you," he said, "is, if you think you have any legal demand, to bring it to the test of an action. *** Accordingly if anyone is shown to me to be in possession of or to have taken, recklessly and without judicial authority, anything belonging to his debtor, or money which was owing him, where it was not given voluntarily by the debtor, and so to have laid down the law for himself in the matter, he shall forfeit the right of a creditor." D. 4.2.13; D. 48.7.7. And see also C. 2.14 and 15, and Nov. 164.

This subject is continued in note to the next law.

8.4.7. Emperors Valentinian, Theodosius and Arcadius to Messianus, Count of the Private Estate.

If a man is so reckless as to violently invade the possession of property in the hands of the fisc or of individuals without waiting for the result of judicial arbitrament, he shall, if he is the owner, restore possession and lose ownership thereof; if he has invaded the possession of another's property, he shall not only restore possession, but shall also be compelled to pay the value of the property.

Given at Treves June 15 (389).

C. Th. 4. 22. 3.

Note.

In early law, a man could probably take possession of his property if he could do so without violence against a person. Pernice, Labeo 55.

See headnote C. 9.33. We have seen that a creditor could not take the law in his own hands, but would lose his rights, if he did. That was true not only as to creditors but as to everyone else. The Roman law tried to repress violence and self-help. And such laws were, perhaps, particularly necessary under the later empire when feudal tendencies appeared, and men of power and influence gradually sought to acquire possession of the lands. In 319, the Emperor Constantine enacted a law, as shown by C. 9.12.7, providing for deportation and confiscation of property of a man who violently took possession of property, claiming it as his own. The law here mentioned (C. 8.4.7), dealt with forfeiture of rights to the party against whom the violence was committed, or from whom property was forcibly taken, and was not confined, at least as construed by Justinian, as the laws in this title generally, to real property, but extended also to personal property. Upon it is based the statement in Inst. 4.2.1: "It shall not be lawful for anyone to forcibly carry off movable property, inanimate or animate, even though he believes it to belong to him; and that whosoever disobeys this, shall forfeit the property (to the possessor) if it be in fact his, and if it be not, shall restore it, and along with it its value in money. And by the said constitutions it is also declared that this provision relates not only to movables, of which alone robbery can be committed, but also to forcible entries on land and houses, so as to deter men from all violent seizing of property whatsoever under the cloak of such excuses."

And in Inst. 4.15.6, it is further stated: "The ejector is compelled to restore possession, even although the ejected person got possession from him by force, by stealth or by sufferance. *** And further, he that ejects anyone from possession by force, is liable under the Julian law for employing force, either public or private." The Julian law

was a criminal statute. See also C. 2. 14. 15. 16, forbidding the putting of placards and seals on property.

Formerly, if a man recovered, by unarmed force, possession of property taken from him by force, fraud or stealth, no action to recover the property from him lay. D. 43.16.14 and 17; Gaius 4.154. But that seems not to have been true under the later law. See Buckland 729; Poste, Gaius 605; 1 Roby 464. See also law 1 of this title. And the former difference between an interdict, when armed or unarmed force was used, disappeared. In other words, no man could forcibly eject another from possession, no matter how the latter himself got the possession. If he did, he had no defense, and was not only compelled to restore possession, but he also lost his property to the person ejected. Practically speaking, the law probably operated all right; it sought to prevent anyone from setting up any fictitious claim that he himself had been dispossessed by force, or fraud, or that the person ejected was in possession only by his suffrance. Suppose, however, that A was in possession and was forcibly ejected by B. Two days later A returns and is able to forcibly eject B. B thereupon brings an action against A. The rule was plain under the old law: B had no remedy, unless armed force was used. 9 Cujacius 1079; Gaius 4.154. It is hardly possible that the later law was literally applied in such case, though both might be guilty of a crime under the Julian law referred to in C. 9. 12. In fact we have an indication that in a case just illustrated, the old rule remained in force. It is said in C. 8.35.5, that a man who was expelled by force, but afterwards regained possession, has a defense that is permanently good.

8.4.8. Emperors Arcadius and Honorius to Pasiphilus.

The interdict (action) for recovering present repossession (*momentariae possessionis*), which does not always imply public or private violence, should be heard immediately, sometimes also without a written complaint.

Given at Milan December 25 (395).

C. Th. 2.1.8.

Note.

This law states that the action for recovering possession (*actio momentariae possessionis*) did not always imply violence. Originally the interdict, to be available, implied physical force against the possessor, by which he was ejected (D. 43.16.1.1 and 3), or apparently, an exhibition of force which caused the possession to flee. 9 Pauly-Wissowa 1678. But its scope was later extended, embracing situations where no force was used. These were considered matters of little importance and were to be tried at once. Law 11 of this title deals with occupation of the lands of an absent owner and provides a remedy, giving such owner the same right as though he had been present and had been actually ousted. So, too, possession might be lost by mistake, by the fraud of an agent, or by illegal judicial award, for which evidently only a remedy was given by the action for possession here considered. In other words, it became the policy of the law that possession should in all cases, whether violence was used or not, be restored by this action if unlawfully obtained, or if held against the will of the owner (C. 8.4.10) to the rightful owner. It is generally held that *possessionis interdictum* is the same as the interdict *unde vi*. At any rate the difference was not great except as the latter was broadened in its scope. See 9 Cujacius 1087-1088; Gothofredus ad C. Th. 2.1.8;

Lightwood, in 3 Law Quarterly Review 46; C. 3.6.3; Colquhoun § 2270; Bruns, Besitzklagen 90, 100; Savigny, Besitz, 568; Mommsen, Straffklagen 658 note 7.

8.4.9. Emperor Zeno to Sebastianus, Praetorian Prefect.

Whenever it appears in a trial that violence has been used, and the question arises as to what property was carried off or was forcibly taken possession of or what damage was done at the time of the seizure and the party against whom the violence was committed cannot prove each particular thing which he lost, the judge shall fix a maximum valuation (*taxatio*), depending upon the character of the persons and the nature of the transaction, and the person who lost the property shall declare its value under oath, not exceeding the maximum fixed by the judge, and the latter shall enter a judgment of condemnation for the amount so declared.

Given at Constantinople December 13 (477).

8.4.10. The same Emperor to Sebastianus, Praetorian Prefect.

As the former and present imperial constitution provides punishment for intruders of another's possession, so it is not unreasonable that lessees and persons who detain the property of another also should not remain unpunished, if they, without any lawful claim thereto, resist lessors who wish to retake possession, according to law, of property which they permitted others to have on sufferance, and do not immediately - that is without judicial proceeding - give up possession to those lawfully entitled thereto. 1. We order that if condemned as a result of a suit, they shall, for such shameless iniquity, be compelled to pay the value of the property, the possession of which they refused to surrender voluntarily before judgment, in addition to being compelled to surrender such property.

Given at Constantinople March 28 (484).

Note.

This constitution, in abbreviated form is also found at C. 4.65.33, in the note to which will be found a discussion of the subject of tenants at sufferance. The instant law seems to apply only to them, although according to Bas. 50. 3. 58, it is made to apply to all lessees, including tenants on sufferance. There was a special interdict in classical law for the recovery of property held on sufferance. D. 43.26; C. 8.9.2. But it would seem, in view of the fact that the instant law is found in the present title, that under the later law, the action for instantaneous possession, mentioned in law 8, *supra*, was intended to be applied, and it thus illustrates what was said in the note to that law, that the action was intended as a remedy in all cases where the possession of property was withheld from the owner against his will.

8.4.11. Emperor Justinian to Johannes, Praetorian Prefect.

There has been a dispute among the members of the legal profession of Illyria as to what ought to be done in the case of those who detain vacant property of absent persons, in view of the fact that, under the ancient law, neither the interdict in case of armed force (*unde vi*), nor the interdict for damage in case of property held by force or stealth (*quod vi aut clam*) nor any other action applied to recover such possession, no force having been used in connection therewith. They only permitted the owner to bring an action in rem (*vindicatio*). But we do not permit anyone to usurp the movables or

possessions of others by his own authority and ordain that such intruder shall be considered as a robber and the action, provided by the ancient laws against such persons for restoration of possession, shall have full application. For it would be ridiculous to say or hear that a man might occupy another's property as his own through ignorance. 1. On the contrary, all must know that any property which is not their own belongs to someone else. The ancient laws long ago held that to be the case in an action on theft, saying: If anyone takes the property of another against the wish of the owner, he will be liable in an action for theft. 2. These, our provisions for recovery of possession, shall apply, if the period of thirty years from the day that possession is unlawfully detained has not run.² Given at Constantinople October 18 (532).

² [Blume] See note to law 8 of this title.