

Book III.
Title XXXII.

Concerning real actions for the recovery of property.
(De rei vindicatione.)

Bas. 15.1.81; D. 6.1.

Headnote.

The action called vindication lay in favor of the owner of specific real or personal property, to recover it from one in possession—when the defendant had taken possession of it in his absence or when it was in defendant's possession under a condition precedent which had failed or under a contract which was totally void, etc. It was not the only action designed to enable plaintiff to recover his property. Special actions existed in cases of fraud and duress. C. 2.19 and 20. If a man held plaintiff's property under a contract as that of deposit, pledge, or accommodation loan, the contract action lay, and was the easier remedy, since in that case plaintiff did not need to prove ownership. So condition, the general personal unjust enrichment action (C. 4.5) could at times be brought for the return of specific property owned by plaintiff, as where defendant had stolen the property. But condition and contract actions were primarily designed to enforce an obligation or quasi obligation; they and the action for fraud, and, originally, the action for duress, were personal actions, and lay only against the immediate person receiving possession from or through plaintiff. But vindication was a real action (in rem), operating directly against the property, and had the advantage that it lay against any person whatever in possession thereof, even though he might be an innocent purchaser (D. 6.1.9), and hence gave greater security to one entitled thereto.

The scope of rights in rem were enlarged from time to time, particularly by Justinian. Vindication lay, perhaps, even in classical law, when plaintiff had transferred property under the condition subsequent that the sale should be invalid if he, within a fixed time, receive a better offer. C. 4.54, headnote Justinian gave it to legatees. C. 6.43.1. He also gave an analogous action (utilis) to a wife to insure the return of her dowry (C. 5.3.15. 1); to a soldier to recover property bought with his money (C. 3.32.8 itp) to recall a mortis causa gift (D. 39.6.29. itp); to cancel a gift made subject to the duty of support (C. 8.54.1). These analogous actions, however, probably did not lie against third parties who were innocent transferees. Some times a personal action was given, with the effect of a real action, as in C. 8.55.7.3, which merely meant that plaintiff was given a preference over general creditors.

If a person in possession was sued, but he held under another, he could, according to C. 3.19.2, so inform the court and have notice given to his principal to defend the action. Under Justinian, probably not before, the action lay against one who fraudulently gave up possession to evade suit, as well as against one who gave himself out as the possessor (D. 6.1.27.3; D. 5.3.13.13; D. 5.3.45, all itp), but these rules were probably of little value, except where personal property was involved. No one, however, was compelled, as in personal actions, to join issue in the case (D. 6.1.80; D. 50.17.156), and if he did not, possession was transferred to plaintiff. Vat. Fr. §92; D. 6.1.80; D. 2.3.1.1. This, originally, left the question of ownership undecided. But in later law the plaintiff had the right to have a definitive judgment on that point. C. 7.43.8. If defendant joined issues, then, in classical law, he was, if the suit was decided against him, ordered to

restore the property, together with its increments, and he was condemned in a money judgment, and in that only, if he failed to obey the order, and then in an amount sworn to by plaintiff, moderated by the referee in the case. Law 21. h.t. In later law, the order of restitution was enforced in similar manner as with us. D. 6.1.68. (itp.) Damages to the property could also be recovered in this action, but in that respect it was concurrent with the action for wrongful damage under the Aquilian law (C. 3.35). As to fruits, see *infra*.

A person who bought from an owner without the formal transfer required by law, or bought in good faith from a non-owner, acquiring it upon some legal ground, such as a contract of purchase, could obtain legal title by usucaption or prescription, and had a right of action similar to that of an owner, called the Publician action, and his title was good against the world except the true owner, and against him, if he acquired the property from him. This was abolished by C. 7.25.1--.

3.32.1. Emperors Severus and Antoninus to Caecilia.

It is accepted law that ownership and obligations may be acquired through another's slave, possessed in good faith, either by means of property of such possessor or by means of the slave's work. If, therefore, you possessed this slave in good faith and he purchased some other slaves for you during that time with your money, you may defend yourself according to the rule of law. 1. But a person who possesses a slave in bad faith can gain nothing thereby, and is compelled to surrender not only such slave himself, but also the fruits of his work, and the offspring of his animals, as well as the children of a female slave.

Promulgated May 5 (210) at Eboraceum.

Note.

As to possessors in good or bad faith, see C. 3.31.1, note. That property could be acquired through a slave, see C. 4.27.

3.32.2. The same Emperors to Aristaenetus.

If you can prove that the lower part of the building which touches the ground belongs to you, there is no doubt that the part placed above it by a neighbor inures to your ownership. 1. A structure also built upon your soil rightfully belongs to you, while it remains in that condition. But if it is torn apart, its material returns to its first owner, whether the building was constructed in good or bad faith, provided that it was not constructed with the intention of making a gift thereof to you.¹

Promulgated October 21 (213).²

3.32.3. Emperor Alexander to Domina.

Neither your mother, nor your husband, could rightfully sell your farm against your will and without your knowledge, and you can sue to recover your property from the possessor without returning the purchase price. 1. But if you afterwards consented to this sale or lost ownership in some other manner, you have, indeed, no case against the purchaser, but you are not forbidden to sue the seller for the price in an action on volunteer agency.

¹ [Blume] See also C. 8.10.5 and note; C. 3.34.2.

² Beneath the above note, Blume penciled in: "The last part interpolated. Recovery was not dependant in classical times on absence of intent to make a gift. C. 2.18.11 note. 42 Z.S.S. 320.

Promulgated October 30 (222).

Note.

A similar principle to that in the beginning here applied in C. 2.29.2; C. 2.18.19; C. 4.51.1; C. 4.51.2; C. 4.51.4; C. 4.51.6; C. 4.52.2. C. 8.53.24. For quasi agency, see C. 2.18. Ownership might be lost by prescription.

3.32.4. Emperor Gordian to Muniacus, a soldier.

You have an action against those who in good faith acquired a farm from possessors in bad faith, if you acquired it before usucaption was completed, or the prescriptive period of long possession had run.

Promulgated October 21 (238).

Note.

In Justinian's time the period of prescription—formerly called usucaption—was ten years if the parties lived in the same province, and twenty years if they lived in different provinces. C. 7.33. A possessor in bad faith could not acquire title by adverse possession for the prescriptive period. Law 24 h.t. C. 7.26, headnote. But, as shown here, a party who in good faith acquired title from a possessor in bad faith, could get such prescriptive title.

3.32.5. The same Emperor to Herasianus.

The president of the province will award you the house which you can show to belong to you as part of your mother's inheritance, and to be wrongly occupied by the adverse party, and the rents therefrom which she (the adverse party) received or could have received and all damage caused by any means. 1. A rescript has been rightly written that no account may be taken of what she paid, since possessors in bad faith who do not act as agents of those whose property they possess, have no right of repayment of expenses paid out on the property of another; unless these expenses were necessary. If they made useful additions, they will be permitted to take them away, if that can be done without injury to the former condition of the property.

Promulgated February 12 (239).

Note.

Expenditures were divided into necessary, useful, or ornamental. All possessors were entitled to a right of retention, if they were necessary; possessors in good faith, and to a limited extent those in bad faith, had such right in the expenditures were useful. D. 5.3.38. Ornamental might be removed, if that did not injure the main property.

3.32.6. The same Emperor to Austronius, a soldier.

If you deposited money with a man and he bought land with it for himself which has been delivered to him, it would be unjust that all or any part of it should be delivered to you without his consent for the purpose of compensating you.³
Promulgated July 11 (239).

3.32.7. Emperor Philip and the Caesar Philip to Aurelius Antonius.

The law is clear that the offspring of a female slave follows the condition of the mother and that the status of the father is not considered in connection with them.
Promulgated October 19 (245).

Note.

It was a rule of universal application in Roman law that if the mother was a slave, the child was a slave; if the woman was free, the child was free. C. 7.14.9. The rule was followed in the case of serfs. Novel 156.

3.32.8. The same Emperor and Caesar to Philippus, soldier.

If, as you say, your opponent acquired some property in his name with your money, the president of the province will not refuse to extend justice to you who, on account of our military service, demand that an action (*utilis*) to recover the property be granted to you. He will also permit you to bring an action on mandate or volunteer agency.
Promulgated March 6 (246).

Note.

The ordinary rule in cases like the foregoing is stated in law 6 of this title, and see note C. 4.50.1 and references. In the case of soldiers and minors, an exception was by interpolations made by Justinian: if property was acquired with their money, they might demand the property, instead of the money. For volunteer-agency see C. 2.18; for action on mandate, C. 4.35.

3.32.9. Emperors Carus, Carinus and Numerian to Antonius.

Show in the trial before the president that the female slave concerning whom you speak in your petition, was a part of the dowry. If this appears, there is no doubt that the slave cannot be recovered from your wife by vindication.
Promulgated February 26 (283).

Note.

Bas. 15.1.88 states this law as follows: "Things given as part of a dowry cannot be recovered in a real action by the father, because ownership thereof is in the husband." For the nature of dowry property, see C. 5.12.1, note.

3.32.10. Emperors Diocletian and Maximian to Januarius.

Since you say that you have no documentary proof as to your ownership of your home-born slaves, you should have demanded what you now ask in your petition, in the court in which the action concerning them is stated to have been commenced. For the judge knows that the ownership of slaves may be shown, without producing documents, by other modes of proof, including interrogation of the slaves themselves.

³ [Blume] According to Greek ideas, property that was bought belonged to the man whose money paid for it. That was not Roman law. C. 4.50.1. There were some exceptions. See law 8 h.t.

Promulgated February 6 (290).

Note.

As to methods of proof, see generally C. 4.9, and particularly law 4. Slaves could not ordinarily be witnesses in a civil case. Novel 90, c. 6, noted at C. 4.20. But there were exceptions. Their testimony was normally taken under torture. See C. 9.41.1 and note. Documenting proof was not necessary. Law 15 and [illegible].

3.32.11. The same Emperors and the Caesars to Gaianus.

If anyone knowingly sowed another's field or put plants thereon, and these have struck their roots into the ground, they justly become part of the soil. For he makes the seed and the plants the property of the owner, instead of making, through such action, the soil his own. 1. Of course, if he does so when he is in possession in good faith, he may, according to law, by setting up fraud, receive his expenses from the owner who brings an action in rem to recover the property.

Given at Sirmium February 26 (293).

Note.

See also law 2. h.t. A possessor in good faith could plead a defense of fraud, which in this case meant nothing more than that he pleaded that the owner of the property should not be unjustly enriched at his expense. He had the right of retention. Law 16 h.t.; D. 6.1.48.

3.32.12. The same Emperors and Caesars to Alexander.

What you ask is unreasonable and unheard of, namely that the female slave which you delivered, thereby transferring ownership of her, should be turned over to you by our rescript without the consent of the owner. Hence, you know that when a female slave has once become the property of the purchaser, her sons born subsequently belong to the person who is at that time the owner of the mother. Of course, if it is shown that you have not received the purchase price, you may sue your opponent for it.

Given April 8 (293).

Note.

A contract once made could not be renounced (C. 4.10.5), but could be rescinded by mutual consent. C. 4.45.1 and 2. According to this rescript, a sale was valid though the price was not paid. Justinian changed the rule. C. 4.38.9 note.

3.32.13. The same Emperors and the Caesars to Etychius.

It is customary law that after a dispute has arisen as to slaves, the latter being first produced in court the question of possession shall be adjudicated, and only then shall the question of ownership be decided and that by the same judge.⁴

Dated April 13 (293).

3.32.14. The same Emperors and the Caesars to Septima.

Since you say that you knowingly bought a son's house from his mother, you have no defense against his action to recover it, unless he has become his mother's heir. But if he has become such heir, you may set up defense of fraud as to the proportion of the inheritance which he received.

⁴ [Blume] See also C. 3.1.10; C. 8.1.3; C. 3.39.3.

Given June 29 (293).

Note.

If the actual owner became heir of the party who sold the property without right, it was fraud—against equity (C. 2.20, headnote)—for him to try to recover it, since he stepped into the shoes of the deceased. C. 8.4.4.14. For the classical and post-classical law in case he had an independent title, see C. 8.44.31 and note. If he did not become the heir no defense, of course, lay. C. 4.51.5; C. 8.53.24.

3.32.15. The same Emperors and Caesars to Aurelius Proculus.

If an entire farm is legally sold to two different persons, the law is clear that the party to whom possession is first delivered has the better right in holding ownership.

1. If you, accordingly, prove before the president of the province that you acquired the possession first and paid the price, he will not permit you to be evicted under the pretense that no documents of sale were given you.

2. You have, however, the option to recover the price paid, with interest, but an accounting must be had of the fruits received and expenses paid. Even if both of you claim ownership of a property by reason of a gift, the person to whom possession was first delivered has the better right.

Given September 17 (293).

Note.

A contract of sale was completed when the parties mutually agreed to the terms thereof. Headnote C. 4.38. It was not necessary that documents of sale should be executed; the contract was not required to be in writing, though without it a party might have difficulty of proving the contract. C. 4.21.10. So if the documents of purchase were lost, the sale was not by that fact affected in any way. C. 4.21.8; C. 2.3.17; law 10 and law 19. h.t. As here stated, if a sale was made to two separate parties, the party to whom the property was first delivered had the better right. For delivery see C. 2.3.20 note.

3.32.16. The same Emperors and Caesars to Januarius.

If a person builds a house on property held by you in common, the structure, according to the rule of law, becomes your common property. But if you want to recover our portion of it from the person who built it as possessor in good faith, you must offer him the cost thereof, lest you be defeated by the defense of fraud.⁵

Given at Sirmium November 13 (293).

3.32.17. The same Emperors and Caesars to Sabinus.

If the person against whom you direct your petition and who wanted to buy your farm was notified by you not to buy it, because it was not the property of the seller, but nevertheless bought it without right, or in some other manner contracted for it in bad faith, the president of the province will, when you go before him, order the farm, if you prove it to be yours, as well as the fruits which are shown to have been received by him in bad faith, to be restored to you.⁶

Given at Sirmium November 20 (293).

3.32.18. The same Emperors and Caesars to Clarus.

⁵ [Blume] See law 11 h.t., note.

⁶ [Blume] See C. 3.31.1, note; law 22 h.t.

If your property is in the hands of someone else, your error as to the ownership thereof cannot hurt you, if no other ground against you has intervened.
Given December 24 (293).

3.32.19. The same Emperors and Caesars to Callistratus.

Other⁷ testimony which the law does not reject has no less evidentiary value than documents. You are not, accordingly, forbidden to use such other testimony, if you have a dispute as to the ownership of the house, and the case has not yet been decided.⁸
Given at Sirmium December 25 (293).

3.32.20. The same Emperors and Caesars to Quartilla.

You will notice that you cannot sue a slave who detains our property according to our allegations, but his master, to recover it.
Given February 24 (294).

Note.

Slaves had no status in court and could neither sue or be sued in civil cases.
C. 8.1.6; C. 3.1.6 and note.

3.32.21. The same Emperors and Caesars to Herod.

If you sue to recover slaves in the possession of another whom you allege to belong to you, and you afterwards prove your claim, but they are not delivered up, then condemnation will follow upon the customary oath being taken.
Given October 10 (294).

Note.

The oath here mentioned was the so-called assessment oath, fully considered at C. 5.53. If a party either through fraud, disobedience, or gross negligence did not deliver property ordered to be delivered, the value of the property was assessed according to the oath of the claimant, subject to the control of the court. In case of ordinary negligence, the oath was not admissible, and only the actual value of the property was payable in case the property could not be delivered. D. 12.3.4.4. Under former law, condemnation in any case was for money only. Headnote C.7.53 (4). But under the Justinian law, delivery of the property sued for could be compelled. Inst. 4.6.32; see D. 6.1.68.

3.32.22. The same Emperors and Caesars to Diodotus.

It is certain that the possessors in bad faith must restore all fruits, together with the property itself; the possessor in good faith only the fruits at hand at the time of joinder of issue and all of those which accrue thereafter.⁹
Given October 30 (294).

3.32.23. The same Emperors and Caesars to Magniferus.

⁷ “Definite” has been lined through and “other” penciled in.

⁸ [Blume] L. 10 and 15 h.t.

⁹ [Blume] See note to C. 3.31.1; law 17 h.t.

If upon no just grounds, others sold your slave who had been carried away by force or stealth, it is not necessary for you when you sue in rem to recover him to pay the price for him.

Given November 14 (294).

3.32.24. The same Emperors and Caesars to Julianus.

The law forbids that possessors should acquire ownership of property without proper title. Since, therefore, usucaption does not apply without such title, the claim of the owner is not defeated. So in this case, a person who returns from captivity has, without resorting to an action for rescission, a direct real action to recover the property. Given November 14 (294).

Note.

See law 4 h.t. As to rights of captives on their return home, see C. 8.50. Lost rights of action could be reinstated and commenced within a judicial year. C. 2.53.6; C. 8.50.18. As to judicial year, see C. 2.50.1.

3.32.25. The same Emperors and Caesars to Eugomius.

Though a person pays the customary dues of a property for another, such payment does not make the payor the owner if no sale is made.

Given at Nicomedia November 14 (294).

Note.

The same principle stated at C. 4.49.8; C. 8.53.4; Vat. Fr. 288.

3.32.26. The same Emperors and Caesars to Heliodorus.

Delay in litigation does not put a possessor in position to set up the defense of prescription of a long [time] since only the time preceding the joinder of issue is counted in that respect.¹⁰

Given December (294).

Note.

Suit and joinder of issues interrupted the prescriptive period for adverse possession (ten and twenty years). C. 7.33.1 and note; C. 7.33.2 and 10; Hunter, Roman Law 289.

3.32.27. The same Emperors and Caesars to Philadelphus.

The purchaser of a slave not actually delivered while present, cannot bring a real action to recover him.

Given at Nicomedia December 15 (294).

Note.

It was the duty of the vendor to deliver the property sold under a contract of sale. But if the contract was broken, the vendee had only a personal action for his damages. Ownership was not transferred by the contract itself. Delivery was essential. C. 7.32.9; C. 2.3.20; Hunter, The Roman Law 282; Bas. 15.1.106.

3.32.28. The same Emperors and Caesars to Sopatrus.

¹⁰ [Blume] Literally “which, after joinder of issue, is estimated (only) as to the part.”

A person who possesses property which does not belong to him, is not compelled to deliver it to an adverse claimant who fails to prove his claim, although the former has no just ground for holding it.

Given December 25 (294).

Note.

In other words, the burden devolved on the plaintiff to prove his title. The right of the possessor prevailed, unless a better title was shown by plaintiff. Se C. 3.31.11; C. 4.19.2 and note.