

A TEXT-BOOK
OF ROMAN LAW
FROM
AUGUSTUS TO JUSTINIAN

BY

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the aggrieved person brought an action¹, in which the issue raised was the same as that in the *formula* issued in earlier days after disregard of the interdict. This is well exemplified in the case of *unde vi*. In the old system the interdict was issued in the form "*unde tu illum vi deiecisti* (etc.)... *vim fieri veto*." In the Digest the rule was similar except that it was put in general impersonal form, and for the last three words were substituted the words "*iudicium dabo*²." The same development took place in all interdicts (though the words of the old interdictal form are used in most cases in the Digest³), and in relation to possessory interdicts, much the most important in private law, a system of possessory actions was developed, in which the issue was as in the old interdict, but the order itself was no longer issued⁴.

We have seen that interdicts were not essentially provisional; possessory interdicts may be so described, but only because the right they protected was itself provisional: if it were not it would not be possession, but ownership. The true owner must always be able to recover from one who has no title but possession. Many considerations justify, and have produced in various legal systems, protection to a mere possessor: we need not here consider which of these were the cause of the Roman rules⁵. But there is one point which has led to controversy and may be mentioned. In the long run the mere possessor would have to yield to the owner. The *bonorum possessor sine re* might recover the thing from the *heres* by the interdict *quorum bonorum*, but he must ultimately give it up, if he was sued by *hereditatis petitio*. A bare possessor might win against the owner in *uti possidetis*, but the owner could regain his property by *vindicatio*. Why was he driven to this lengthy process? Why might not his ownership be pleaded in reply to, e.g., *uti possidetis*⁶? An *exceptio iusti dominii* would have served the purpose, and under such a plea he would have had to prove his title just as he would in *vindicatio*. The explanation may lie in a well-known characteristic of Roman procedure: *possessio* and *dominium* are distinct things⁷, and the Romans did not like joining distinct issues in one *formula*. It was this for instance which made them so reluctant to admit set-off, *compensatio*, in *stricta iudicia*, and led them in classical times to drive the parties to *mutuae petitiones* even where the claims arose out of the same matter⁸.

1 See rubric of D. 43. 1. 2 Lenel, *E.P.* 462; D. 43. 16. 1. pr. 3 E.g. D. 43. 2; 43. 6, etc. 4 E.g. 43. 16. 5 *Ante*, § LXXII. 6 Distinct from the question why possession was protected at all. It is maintained by Ubbelohde, *Besitzinterdicte*, 20, 97, 104, 430, etc., that *unde vi (cotidianiana)* and *uti possidetis* were not available against an ousting *dominus*: i.e. that however the owner took it from the other he was not considered to have taken it *clam vi aut precario*. 7 41. 2. 12. 1: "*nihil commune habet proprietatis cum possessione*." 8 17. 1. 38. pr. See however *ante*, p. 693.

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