

Book VIII.
Title X.

Concerning private buildings.
(De aedificiis privatis.)

Bas. 58.11.

Headnote.

The present and the subsequent title deal with construction of buildings and other works, and seem, at first blush, to be altogether different in character from the contents of the preceding titles in this book. The reason, however, of their present position in the Code, lies in the fact that building restrictions might be enforced by the so-called interdicts, or remedies in the nature of interdicts.

8.10.1. Emperors Antoninus and Severus to Taurus.

You may, if you wish, construct a bath, and a building above it, observing the regulation under which others are permitted to build over baths, that is to say, build the building superstructure and the bath itself upon arches - and not to exceed the customary height.

Promulgated without day or consul.

Note.

Arches were compelled to be constructed because of the strength which they lent. The customary height of buildings was apparently not to exceed 70 feet. Strabo 5.3.7; the maximum height being apparently reduced to 60 feet by order of the emperor Trajan. 9 Cujacius 1102. Law 12 of this title makes some changes in this respect.

8.10.2. Emperor Alexander to Diogenis.

To demolish buildings for speculation and despoil them of their marble, is forbidden by the edict of the Divine Vespasian and by a senate decree. An exception is made if some material is transferred from one house to another (of the same owner), but such transfer is not permitted to the extent of marring the sight by tearing whole buildings down.

Promulgated December 22 (222).

Note.

There was a general senate decree that no building in Italy should be demolished with the view of making a profit. The destruction of buildings for any purpose except their immediate reconstruction, unless permission was given by the local senate, was prohibited in the various laws enacted for a number of municipalities. Bruns, Fontes, No. 54 (Lex Col. Genetivae, c. 70; Lex Mun. Malac, c. 62; Lex Mun. Tarent, c. 4). See law 6 of this title and note.

8.10.3. The same Emperor to Aper, a veteran.

Whether it was permissible not to restore the old appearance out of the ruins of a house, but change it entirely and turn it into a garden, and whether this was done by the consent of the then magistrates, and by that of the neighbors, will be decided by the

president upon investigation and proof of what has been generally done in the town in similar controversies.

Promulgated March 26 (224).

Note.

It will be noted from this, and particularly from law 8 of this title, that it was the policy of the law to compel an owner whose building had fallen into ruins to reconstruct it. It might well be questioned whether such a law would be constitutional in any of the states of the United States. In order to carry out such a policy - or perhaps before this policy was inaugurated - the emperor Vespasian, as related by Suet., Vesp. § 8, "allowed anyone to take possession of vacant sites and build upon them, in case the owners failed to do so" - a law which would clearly not be tolerated with us. And it seems from C. 11.30.4 that if a building had fallen in ruins and the owner did not reconstruct it, the municipality might sell the ground - in other words, forfeit the property. From the present law, however it appears that the magistrates of the city, joined by the neighbors, might, according to custom, consent that the property, instead of being restored to its original shape, be turned into a garden or into anything else. That custom played an important part in municipalities. See C. 8.52. It would, apparently, not be necessary to show an express consent. Silence would imply consent in a city where such consent might be given according to custom; hence, as stated in the present law, the president will investigate such custom. See 9 Cujacius 1105-1106. See also C. 8.11.12.

8.10.4. Emperors Philip and Caesar Philip to Victor.

If, as you state, your partner in a building, refuses to contribute his part of the expense in repairing it, you unnecessarily want assistance in an extraordinary manner, for if you alone made the repairs, and the amount expended by you for your partner's portion is not repaid to you, with twelve percent interest per annum, within four months, or that the non-payment thereof is due to your partner's fault, you may, according to the ancient law, sue for the right of the ownership of the whole.

Promulgated March 29 (245).

Note.¹

The foregoing law again illustrates the policy of the Roman law to compel the reconstruction or construction of buildings. It is stated in D. 17.2.52.10, along the same line as in the present law: "If a partner who restores portions of one or more blocks of house which is or are out of repair, and in consequence can recover his principal with the prescribed interest in four months after the work is completed, with a preferential right, or in case of non-payment may from that time hold the property as owner, he has, nevertheless, in addition to the above, a right of action on the partnership (*pro socio*) so far as to enable him to secure an indemnity. It may, for instance, suit him better to recover what is due to him than to acquire the ownership of the building. In fact the reason why the address of the Divine Marcus (Aurelius) makes the prescribed interest in four months is that it allows ownership to be assumed at the end of that time." The rate of interest mentioned in the foregoing law was not allowable under the later law of Justinian. See C. 4.32.26.

¹ Blume penciled in here: "Gaius D. 39.2.32, did not yet know of it. Marcus Aurelius."

8.10.5. Emperors Diocletian and Maximian to Octavius.

If the man against whom your petition is directed knew and was fully aware that part of the soil belongs to you and he undertook the complete reconstruction of the baths, not with the idea of taking care of the jointly-owned property as your partner or co-owner and to recover from you the proportionate part of the expense, but that he restored the collapsed baths with the intention to usurp ownership of the whole property, the, since buildings constructed on another's soil became part of it, and the expense of such buildings should not be repaid to those that construct them with dishonest intentions, the edict of the Divine Hadrian (granting the right of reimbursement) is not applicable in such case, and the president of the province, mindful of the law, will, in deciding the dispute, apply the provisions thereof.

Promulgated October 2 (290).

Note.

This law does not give the right of reimbursement to a man who, in bad faith, and with the intent to rob his neighbor of his property, undertakes to reconstruct buildings, putting a portion of it on his neighbor's land. The law on its face would seem to deprive such man of any remedy. 9 Cujacius 1106, contends, and seemingly rightly, that he is not deprived of all remedy but may detain the possession of the property till paid. He refers to D. 3.5.5.5, which says: "If a man has managed my affair with no thought of me, but for the sake of gain to himself, then, as we are told by Labeo, he managed his own affair rather than mine; and no doubt, a man who intervenes with a predatory object aims at his own profit, and not at my advantage; but none the less, nay all the more will such a man too be liable to the action for managing my affairs (*negotia gesta*). Should he himself have gone to any expense in connection with my affairs, he will have a right of action against me, not to the extent to which he is out of pocket, seeing that he meddled with my business without authority, but to the extent that I am enriched." C. 3.32.5, says:

"Possessors in bad faith who do not act as agents of those whose property they possess, have no right of repayment of expense 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." To tear down buildings, in a city, however, was against the policy of the law, and hence this law (C. 8.10.5), is rather unsatisfactory. Perhaps, it may be said, that the builder had the right of reimbursement to the extent that the owner was enriched, with the right, ordinarily, to take away the construction on another's land, in case of the insolvency of the latter. See also C. 3.32.2.

8.10.6. Emperor Constantine to Helpidius, Vice Praetorian Prefect.

If anyone after the enactment of this law, despoils a city by carrying ornaments, that is to say, marble or columns, to rural places, he shall be deprived of the property which he has ornamented in that manner. 1. But if a man wants to transfer marble or columns of shaky walls from his property in one city to his property in another, he may lawfully do so, since such marble or columns will be a public ornament in either city. Permission is also given to transfer an ornament of this sort from one possession to another, tho it is necessary to carry it thru walls (of a city) or thru a city, but only those things which were carried into a city shall be permitted to be transported out of it.

Given at Viminacium May 27 (321).

Note.

We saw at law 2 of this title that no building could be torn down for the purpose of gain or profit. The emperor Hadrian provided that in no community should any house be demolished for the purpose of transporting the building materials therein to another city. Spartianus, Life of Hadrian c. 18. And the present law deals with that subject, permitting such transportation in case the building from which the material is taken is in bad condition. Law 7 of this title apparently prohibits any such transportation whatever, and on its face, therefore, is inconsistent with the present law. Now by C. Th. 8.5.15, persons are prohibited from transporting any building material for their own use along the highway of the public post at the expense of the provincials, and it is believed that law 7 of the present title is intended to prohibit the same thing and is limited to that point. 9 Cujacius 1103, and 3 Cujacius 511 (Obs. 19, c. 19); Gothofredus ad C. Th. 15.1.1. The two laws are by the emperor Julian to the same man, and are probably of nearly the same date. Others have supposed that law 7 simply prohibits the moving of ornaments from one place in the province to another for profit's sake. Otto, Schilling and Sentennis translate the law to mean that no one shall take columns or statues out of a province - i.e. from one province to another.

D. 30.1.41.5, states that while a man is permitted to bequeath buildings to be used on public works, he cannot do so for the purpose of being transported to another city. The Theodosian Code contains several provisions which prohibit ornaments in connection with a public building in one city to be transported to be used for ornamentation of a public building in another city. C. Th. 15.1.1 and 14; and see C. 8.11.13.

8.10.7. Emperor Julian to Avitianus, Vicar of Africa.

No one shall carry away or move from a province (*ex alia eademque provincia*), columns or statues of any material whatever.
Given October 27 (362, 363).

8.10.8. Emperors Valens, Gratian and Valentinian to Modestus, City Prefect.

The decurions of each city shall be compelled, even against their will, to repair or reconstruct their houses in the cities, and shall be constantly bent upon their duties, endeavoring to increase the population of their own cities. 1. And land-holders who are not decurions shall, in cities in which they have houses, repair those fallen-down and neglected, and they must be held to the performance of this order by judicial authority.
Given October 20 (377).

Note.

See note to law 3 of this title. It may be further noted that D. 39.2.46, says: "It is part of the duty of the curator of a city to see to it that houses which have fallen down are reconstructed by the owners. If a house is reconstructed at public expense, and the owner refuses to repay it, with interest, at the time it is due, the city may legally sell it." The time in which the money was payable was doubtless the period of four months given to private parties in general. See law 4 of this title and note, and 10 Cujacius 476.

8.10.9. Emperors Arcadius, Honorius and Theodosius to Aemilianus, City Prefect.

If an owner of a plot of land next to a public building concludes to build he must know that he must know that he must construct it by leaving a vacant space of fifteen feet between the public and the private building, so that the public building will be protected from danger by this intervening space, and the builder or a private structure (if he complies with this regulation) need not be in fear that it will be torn down at some future time because it is built in the wrong place.

Given at Constantinople October 22 (406).

C. Th. 15.1.46.

8.10.10. Emperors Honorius and Theodosius to Monaxius, Praetorian Prefect.

In the provinces of Mesopotamia, Osrhoena, Euphratensis, the second Syria, Phoenicia, Libanon, the second Celicia, both Armenias, both Cappadocias, Pontus Polemaniacus, and Hellespontus, where it is especially desire, and in all other provinces, persons may, if they wish, surround the farms or places which they own with a wall.

Given at Constantinople May 5 (420).

Note.

This was permitted on account of robberies and hostile incursions. It is implied that in other portions of the empire this was not permitted. 9 Cujacius 1107.

8.10.11. The same Emperors to Severinus, Praetorian Prefect.

Projecting balconies, called existai in Greek, whether heretofore, or hereafter to be, constructed in the provinces, must be all means be lopped off unless there is a space of ten feet for free air between them. 1. Where private buildings are built up against public graneries, an interval of fifteen feet shall be maintained free from obstruction from projecting balconies. 2. We prescribed this interval also for all who wish to build, so that if anyone attempts to build within ten feet, or to have a balcony within fifteen feet (respectively as mentioned) he may know that his structure will not alone be demolished, but the house itself will be confiscated to the fisc.

Given September 29 (423).

Bas. 58.11.9.

8.10.12. Emperor Caesar Zeno, pious, victor, triumpher, the always specially to be revered Augustus to Adamantius, City Prefect.²

Desiring our subjects to enjoy freedom from litigation, as well as to be freed from external wars, we always give them warning beforehand. We accordingly enact the present law, which sufficiently shows the good suggestions of Your Magnificence to us, and how prudently we define what may solve difficulties. 1. We shall to some extent avoid words ordinarily used in governmental affairs and shall employ those which are more commonly known so that no one who comes in touch with this law will need an interpreter. 1a. We have learned from the report made to us by Your Magnificence, that the law of our father Leo, of immortal memory, which he made for people in this city who wanted to build, has become ambiguous in several particulars through doubts raised by men who interpret badly the direction therein, that those who restore their buildings shall not increase the former size thereof, lest they cut off the light and view of the

² [Blume] Bas. 58.11.10, et seq.

neighbors, contrary to the former situation, without adding what shall be done, if the builder (owner) has received permission by pact or stipulation to change the structure if he wishes. 1b. We, therefore, ordain that if a builder (owner) has such pact or stipulation, he may build according to the terms thereof, although he thereby injures the neighbors who are bound thereby. 2. And since the same constitution provides that a man who builds must leave a space of twelve feet between his house and that of his neighbor, and adds "more or less," which leads to the greatest obscurity - and an ambiguity is hardly suited to clear up a doubt - we, more clearly, order that there shall be twelve feet of space left between the houses, from top to bottom. A man who complies with this requirement may erect his house to any height desired, and may have windows for his view as they say, or for light according to the imperial legislation, whether he wants to build a new house or repair an old one or reconstruct one consumed by fire. 2a. But no one shall, in this space, be permitted to shut off from a neighbor's house the direct and unobstructed view which he has, standing or sitting in his house, of the sea, (and shall not force him) to turn or look sideways or put his body in a forced position, in order to see the sea. 2b. Nothing was said in former legislation about gardens or trees, nor is anything added herein about them; for there should be no servitude as to them. 3. If a man builds a house and an alley or street more than twelve feet wide intervenes (between his house and that of a neighbor), he shall not on that account be permitted to occupy any part of the alley or street, adding it to his property; for the provision for twelve feet of space between houses is not made in order that public property may be encroached upon, and used for buildings, but in order that the spaces between houses shall not be less than that, and any space in excess of that shall remain as it is, and will not be permitted to be diminished, and the rights of cities will be protected. 3a. If the shape of an old building is such that the space between it and the neighboring building is less than twelve feet, its height shall not be increased, nor shall windows be cut, unless ten feet of distance intervenes; and even then no window[s] for view can be constructed, as stated, which were not there before; but windows for light may be constructed six feet from the ground, and no one must, with the light-giving windows being opened at the stated altitude of ten feet, make what is called a false floor, and thereby circumvent the law. 3b. For if that were permitted, windows for light would, by reason of the false (high) floor, serve for purposes of view and would be too near to the neighbor. We forbid that to be done; provided, however, that we do not take away any right, which may exist by reason of any pact or stipulation. 4. Besides, since a former law ordained that houses previously consumed by fire might be reconstructed to a height of a hundred feet, although a neighbor's view of the sea might be obstructed, and desirous to rid that law of its ambiguity, we order that such right shall exist as to houses burned down as well as to those which are repaired, and as to houses not heretofore existing, but now erected, and as to those which are not damaged by any fire but are in ruin through age or other cause. The construction of such house may proceed without hindrance, though the view of the sea from another house may be obstructed, provided that there is a distance of a hundred feet between it and its surrounding houses. 4a. Any view of the sea, however, from a kitchen, toilet room, nook, stairs, passage-way or from what are commonly called gang-ways³ (basternia) may be obstructed, by a man wanting to build within one hundred feet, provided the intervening

³ [Blume] Cujacius, 3 Obs. (Lib. 13, c. 30) 354.

distance is twelve feet. 4b. These provisions apply where no agreement exists to build otherwise; for if there is such agreement, the building may be constructed according to its terms though no such interval is left, and although the parties who made the agreement or their successors in interest have their view of the sea obstructed, since rights acquired by pacts ought not to be nullified by general laws. 5. We likewise ordain that sun-rooms (salaria)⁴ shall not be constructed of beams and poles merely, but in the Roman⁵ shape, and an interval of ten feet shall be left between two sun-rooms opposite each other. 5a. But if this cannot be done on account of the narrowness of the space, the sun-rooms shall be constructed diagonally from each other. 5b. If the alley itself is not wider than ten feet, neither party shall undertake to construct sun-rooms or projecting balconies. 5c. And these structures built according to these directions shall be fifteen feet high from the ground, and shall not be supported (on the outside) by any perpendicular columns of wood or stone or by walls set in the ground, lest the air under the sun-rooms, built at the height aforesaid, be shut off, or the alley and public way be narrowed thereby. 5d. We also forbid the construction of stairs leading from the alley to the sun-rooms, so that by more careful construction, and by the fact that sun-rooms are not too close to each other, danger from fire threatening the city and the owners of houses - would that it did not exist - may be diminished and become scarcer and may be more easily warded off. 5e. If a sun-room or stairway is constructed contrary to our law, it shall not only be torn down, but the owner of the house shall also be fined ten pounds of gold and the master-builder or contractor who constructed it shall pay another ten pounds of gold, and if the man who erected it cannot pay the fine on account of poverty, he shall be scourged by lashes and expelled from the city. 6. In addition we order that no one shall hereafter be permitted to close up several columns on the public porticos, from the so-called mile-column to the capitol, with booths constructed of boards only, or put up in some other manner, between the columns. 6a. But structures of that kind shall not exceed six feet in width, with the walls toward the street, and seven feet in height, and a free passage from the porticos to the street shall in any event be left in the space between four columns. 6b. Besides, booths or shops of that sort shall be decorated on the outside with marble, so as to be an ornament to a city and a pleasing sight to the passers-by. 6c. Shops erected between columns in other parts of the city may be constructed of the size and in the manner as Your Magnificence deems for the city's interest, preserving equality for all, so that a right granted to one may not be denied to another. 7. We also embrace in the law that honest men shall not be wronged by the fraud of malicious disputants. For many men, induce by envy, and without having sustained any harm, raise a dispute against those who want to build, and delay the work, so that the man who had commenced to build, and who is then forbidden to do so, is compelled not only to leave his work incomplete, but, in addition thereto, the money with which he had hoped to erect the building is eaten by the lawsuit; and what is more absurd than anything else is that when the decision is in his favor, he is still enmeshed in indissoluble chains while the man who hindered the construction appeals and takes the time granted therefor, delighted to have obstructed the work to the great injury of his neighbor. 7a. We accordingly order that if an appeal is taken from the decision of the trial judge in suits of this kind, the winner or loser, alone or with the

⁴ [Blume] Sort of balcony. Becker, 2 Gallus 239.

⁵ [Blume] Romanensium specie - the special character of buildings not known.

opponent, may, as soon as the report or written draft (of the proceedings) is made by the judge, go before the tribunal of Your Magnificence without awaiting for the regular time, and having called the opponent in the usual manner, if absent, lay the decision of the judge before you, so that the cause may be lawfully ended without delay, and so that, if winter is at hand or approaches, the man who wants to build and is unjustly forbidden to do so, may not suffer intolerable injury while waiting for the long time given for appeals. 7b. In like manner, if anyone wants to appeal, objecting to the decree of Your Magnificence, the consultation⁶, as it is called, shall be made immediately, and the loser as well as the winner may, in the usual manner, open the examination of the decision in our imperial palace without any delay. 7c. And everyone, moreover, must bear in mind that if he tries to stop anyone from building, he must, if defeated, make good all the damage caused by him, including the value of the material spoiled or deteriorated during the time of the litigation; further, if a man undertakes to build contrary to law, he must, if defeated, make good the damage of the man who forbade him to do so, and who was compelled to commence a suit in connection therewith. 8. We further direct that every suit of this kind (in this city)⁷ shall be disposed of by the decision of the judicial tribunal of Your Magnitude alone, and not other of the illustrious magistrates shall hear it, and none who are engaged in such litigation shall have the right to make any objection to the jurisdiction of the court by reason of their imperial service, in order to evade the judgment or the payment of the damage awarded by the decision of the glorious prefect of the city or by the decision of the referee appointed by him; but the defeated party shall be forced to pay by the staff of Your Magnificence, without the right to object to the jurisdiction of the court. 9. Your Magnificence, moreover, shall see that no contractor or artificer leaves any work uncompleted, but must compel the man who commenced the work, upon receiving his pay, to complete the work or to pay the damage sustained by the owner thereby, and all loss of profit by reason of the non-completion of the work, and if a defaulting contractor is, perchance, a pauper, he shall be whipped and expelled from the city. 9a. Another man of the same trade shall not be prevented from completing a work commenced by someone else, which, we have learned, that contractors or artificers have attempted against builders, they themselves not finishing the work which they commenced, and not allowing others to do so, but seeking to inflict intolerable damage on owners who prepared to build. 9b. And if, moreover, a man refuses to finish a building commenced by another, merely for the reason that someone else commenced it, he shall suffer the same penalty as the man who abandoned the work.⁸

Note.

Holmes, 1 Age of Just. and Theodora 42, 43, gives a good picture of some parts of Constantinople in the 6th century, which will illustrate some of the legislation here mentioned. He says:

"A main street consists of an open paved road, not more than 15 feet wide, bounded on each side by a colonnade or portico. More than fifty of such porticoes are in existence at this date, so that the pedestrian can traverse almost the whole city under shelter from sun or rain. Many of them have an upper floor, approached by wooden or

⁶ [Blume] See C. 7.62.

⁷ [Blume] Seems to be necessary in view of appeals to this official mentioned previously.

⁸ [Blume] See C. 4.59.2.

stone steps which is used as an ambulatory or promenade. They are plentifully adorned with statuary of all kinds. *** On the inside the porticoes are lined for the most part by shops and workshops. Opening to them in certain positions are public halls or auditoriums, architecturally decorative and furnished with seats, where meetings can be held and professors can lecture to classes on various topics. Between the pillars of the colonnades next the thoroughfare we find stalls and tables (limited to six feet of length and seven of height) for the sale of all kinds of wares. In the finer parts of the city such stalls or booths must by law be ornamentally constructed and encrusted outside with marbles so as not to mar the beauty of the piazza. At the tables especially are seated the money-changers or bankers, who lend money at usury, receive it at interest, and act generally as the pawnbrokers of the capital. Such pleasant arcades have naturally become the habitual resort of courtesans, and they are recognized as the legitimate place of shelter for the houseless poor. The open spaces to which the Latin name of forum is applied *** are expansions of the main streets, and like them, are surrounded on all sides by porticoes. *** Few of them (the private streets) are more than ten feet wide, and this scanty space is still more contracted above by projecting floors or balconies. In many places also the public way is encroached upon by Solaria or sun-stages, that is to say, by balconies supported on pillars of wood or marble, and often furnished with a flight of stairs leading to the pavement below. In such alleys low windows, affording a view of the street, or facile to lean out, are considered unseemly by the inmates of the opposite houses. Hence mere light-giving apertures, placed six feet above the flooring are the regular means of illumination. Transparent glass is sometimes used for the closure of windows, but more often we find thin plates of marble or alabaster with ornamental designs, figured on the translucent substance. Simple wooden shutters, however, are seen commonly enough in houses of the poorer class. *** In 447 Zeno, taking advantage of an extensive fire, promulgated a very stringent building act (C. 8.10.12) contravention of which renders the offending structure liable to demolition, and inflicts a fine of ten pounds of gold on the owner. The architect also becomes liable in a similar amount, and is even subjected to banishment, if he is unable to pay. By this act, which remains permanently in force throughout the empire, the not very ample width of twelve feet is fixed for private streets; solaria and balconies must be at least ten feet distant from similar projections on the opposite side, and not less than fifteen feet above the pavement; while stairs connecting them directly with the thoroughfare are entirely abolished. Prospective windows are forbidden in streets narrower than the statutory allowance of twelve feet."

8.10.13. Emperor Justinian to John, Praetorian Prefect.

Doubt has arisen as to whether the constitution of Zeno of blessed memory directed to Adamantius, City Prefect, treating of servitudes, is purely local and its rules applicable to and required to be observed only in this city (of Constantinople), leaving the ancient rules, contrary thereto, in force in the provinces. Deeming it unworthy of our times that one law should apply in this imperial city, and another in the provinces, we ordain that the above constitution shall apply in all cities in the Roman empire alike, and everything shall be done according to the rule therein stated, and if any rule contained of the ancient law is changed thereby, the changed rule shall also be enforce in the provinces

by the presidents thereof. Rules of the ancient law not changed by the law of Zeno shall remain in full force and effect everywhere.

Given at Constantinople September 1 (531).

8.10.4. The same Emperor to Johannes, Praetorian Prefect.

Our Tranquility has learned that some doubt arose among the ancients concerning protests against new construction, saying that if anyone sent a protest to stop a work, he could not, after the lapse of a year in which he sent it, again stop construction. 1. This appears to us doubly iniquitous. For if he did not rightly prohibit the work, he ought not to stop it for a whole year, and if he rightly complained, he, likewise, should have permission to prohibit the building after the year. 1a. Avoiding, therefore, such injustice, we ordain, that if anyone has sent such complaint, the prefect in this imperial city, and the rector in the province, shall make haste to decide the cause within three months. But if there is a question that is doubtful which hinders a prompt decision, the man who hastens to build may complete the structure in dispute after first furnishing security to the city prefecture or to the provincial court, that, if he shall not have built lawfully, he will tear down the structure erected after the making of the complaint. In this way construction will not be stopped through foolish complaints and at the same time care is taken of the interests of complainants.

Given at Constantinople October 21 (532).

Note.

1. This constitution deals with what is commonly called *operis novi nuntiatio*, that is to say, a protest against the construction of new work. When a man undertook to construct a new building or some new work on his land which would be an encroachment on his neighbor's rights; if for instance he would interfere with his neighbor's light which he had no right to do, or would cause a smoke-nuisance, or flood his neighbor's land, the latter had a right to stop the continuance of such work by protesting against it. When notice to stop was given, the party notified proceeded at his peril. If no attention was paid to the notice, the praetor, or judge, would, on application, issue an order, interdict, directing the party notified to remove everything constructed, after the notice was given. D. 31.1.20. pr 3. The law here translated provides that if the litigation which ensues in this connection drags out for more than three months, the party notified may give security that he will tear down the structure, if it should ultimately be found that he had no right to put it up. In other words, he had no right whatever to proceed within the period of three months. The position, however, taken by some authors seems to be justified, that unless the complainant had instituted proceedings in court, the party notified might put up security at once, and thus proceed with his construction - at his ultimate peril of course. D. 39.1.8.4; 9 Cujacius 110; Colquhoun § 2297. Necessary repairs to a building might be made and cleansing of foul sewers and streams might, on account of necessity, be done without interference. See generally, 1 Roby 417-520; 4 Donnellus 495, et seq; D. 39.1.

2. Another procedure, closely allied to interdicts because of the summary mode of procedure, may be mentioned here. This relates to anticipated future damage (*damnum infectum*), which was likely to arise from the faulty condition of a house, or of a work, private or public, which was being done on a house or in any place of another in a city or country. D. 39.1.19.1. It seems that on the principle that everyone could generally do with his property as he wished, and could repair it or not as he pleased, no damages could

be recovered e.g. from a dilapidated building falling down, unless a promise to pay such damages had previously been made. For this reason the right was given to demand security against such damage, which if ordered by the judge, and was not given, and cause for the demand existed, the demandant was, on application to the judge, put in possession of the property to serve him in the first place as security only. If the owner of the ruinous property persisted in his refusal, the demandant was then, by a second order, put in possession, which gave him praetorian, equitable, ownership, excluding the original owner. The property was even discharged from all liens of other parties, although provisions were made of retaining the lien by recouping the complainants for their cost or loss. D. 39.2.4.4; D. 39.2.4.6 and 7; D. 39.2.44.1; D. 41.2.3.23; Colquhoun § 2307; Mackeldy § 516; Buckland 721; 1 Roby 509-514.

3. The protest against new work, heretofore mentioned, would, of course, be of no avail where it was already constructed; but where it should not have been constructed, the injured party still had a remedy. This was given under the interdict, or action, called *quod vi aut clam* - the interdict against what had been done by force or stealth, the interdict being in these words: "Anything that has been done by force or stealth in the matter now in question, you are to restore, if it is not more than a year since there was the power of suing." 1 Roby 521. This interdict or action was not, however, limited to such cases. It applied in case buildings or works of any kind were wrongfully constructed on the doer's or the complainant's land, and aimed not merely at stopping works begun, but at undoing, or securing a remedy or compensation for injury by works whether in progress or completed. The work must be connected with land. This remedy was available where anyone had done an act, secretly or by force, by which harm was caused to the soil or to buildings or the like, permanently a part of it, whether the work was in itself lawful or not. In other words, the action or interdict was not a possessory action or interdict, but one to protect a possession against damage or rather to make the damage good. The erection of buildings, tearing them down, digging a trench, plowing, throwing stones on land, cutting trees, polluting a well and other similar acts came within the scope of the action. The aim of the action was to put the complainant in the position he would have been in if the work had not been done, which might include the restitution of servitudes or usufructs lost or impaired as a result of the work. The work was considered to have been done by force where it was forbidden, and was considered to have been done secretly where it was done without knowledge of the party injured or without the proper opportunity to acquire such knowledge. See generally D. 43.24; 1 Roby 520-525; Colquhoun § 2280; Buckland 725 note.

4. In short the law aimed to protect just possession and the enjoyment thereof in every way, not only against nuisances, but also against any forcible or secret interference or encroachment. In some cases, as already noticed under note to C. 8.6, a remedy was at times given under the interdict, or action, there mentioned (*uti possedetis*) though that does not appear to have been aimed at encroachments where a building or other work was unlawfully constructed. In other cases one of the remedies mentioned above applied. Special names were given to interdicts or actions or proceedings in certain other cases, but on account of the liberal procedure in Justinian's time, the importance of the use of technical names largely disappeared.