

Book III.
Title XXXIII.

Concerning the right to usufructs, habitation and services of slaves.
(De usufructu et habitatione et ministerio sevorum.)

Bas. 16.8.24; D. 7.1.7.8; Inst. 2.4.5.

Headnote.

A usufruct was, strictly speaking, the right of using and taking the fruits of anything that was not consumed for the life of the person receiving, unless another time was fixed. By senate decree, however, a usufruct was permitted to be created in perishable property, as noted in note to law 1 of this title. A usufructuary, while having the right of enjoying the use of the property, was bound to use it in a good husbandlike manner. If he received the usufruct of a farm, he had the use of the implements and instruments of husbandry attached thereto; if he had the usufruct of wood and timber land, he might cut timber. So he could burn lime or dig for gravel for his house, or work quarries or clay or sandpits on the land, and open, and use when opened, mines of gold, silver, copper, iron, and other minerals, in such as the better use of the property. If the usufruct was in a slave, the usufructuary had the right to his services and his labor. Fruits of animals given as a usufruct included the young thereof. D. 7.1-9; Hunter 306; Buckland 267 et seq.

3.33.1. Emperors Severus and Antoninus to Pasidonius.

If your wife bequeathed the usufruct of all her property to you in her testament, you cannot receive the debts due from her debtors unless you have given a bond (cautio) according to the decree of the senate, although the testatrix forbade the requirement of any bond (cautio) from you.
Promulgated September 26 (199).

Note.

Law 4 of this title provides that a usufructuary was required to give a bond with sureties—satisdatio—that he would not damage the principal of the property. C. 6.54.7 states that a testator could not release a usufructuary from this bond. He was required to give a bond not alone to the foregoing effect, but also that he would return the property when his interest terminated. D. 7.9.1 pr. Some authorities hold that whatever bond was given was required to be given with sureties. Hunter 406; see 5 Cujacius 580. This must have been a harsh requirement indeed, particularly when a testator wished to release the usufructuary therefrom.

A usufruct of money, oil, grain, clothing, debts, and other property necessarily consumed in the use, could not, originally, be given: but this was later permitted by the terms of a senate decree, and it is this sort of a usufruct that evidently was specially in the mind of the emperor when the foregoing rescript was written. Inst. 2.4.2, which mentions this provision, also states that according to the decree of the senate, a bond should be given in such case with sureties—satisdatio, which should take the place of the property in which the usufruct was given. The present law speaks only of a cautio, which, according to C. 6.38.3 (see note C. 4.2.17), means a simple promise without surety, unless the contrary is indicated. Bas. 16.8.27, in stating this law, specifically mentions

nuda cautio, which cannot mean anything else than a simple promise in writing, without surety. It may, accordingly, be that the bond to restore the property was required to be merely a promise in writing, without surety, and such promise could, of course, always be given without harshness. The subject is not clear.

3.33.2. The same Emperors to Felix.

We understand by the words of the testament, which you have inserted in your petition, that a usufruct was bequeathed to you. This does not prevent the proprietor of the property to pledge it to a creditor but your right of usufruct will not be affected (thereby).¹

Promulgated May 10 (205).

3.33.3. Emperor Antoninus to Antonianus.

If a usufruct has been bequeathed to your father and he dies, nothing belongs to you, since a usufruct bequeathed or acquired in some other way ceases with the death of the usufructuary and becomes again a part of the (principal) property. But the death of the proprietor does not deprive the surviving usufructuary of the right of enjoying the usufruct.²

Promulgated July 30 (213).

3.33.4. Emperor Alexander to Verbicius.

If a usufruct is given, it is proper that the man who receives such benefit should give a bond with sureties (satisdatio), satisfactory in the judgment of a fair man, that he will not cause damage in the use of the principal property. It makes no difference whether the usufruct has been created by testament or by voluntary contract.

Promulgated March 10 (226).

3.33.5. The same Emperor to a veteran soldier and others.

If your father left the usufruct of his farms to your mother during the time of your puberty, then, after you have passed that age and the right to the usufruct has ended, you may recover from her the fruits received by her after that time without right and with knowledge that they belonged to another.

Promulgated April 1 (226).

3.33.6. The same Emperor to Stratonica.

It makes a difference whether your husband only received a usufruct as your dowry or whether he also received the proprietary right of the property with the agreement that you should have it after his death. For a usufructuary cannot pledge the principal property. But a person who receives property as a dowry at a certain valuation could not pledge it any the less for that reason, since he must return its value to you upon the dissolution of the marriage.

Promulgated July 1 (230).

Note.

It was customary with the Romans for a wife to bring a dowry to her husband. Headnote C. 5.3; C. 5.12. 1, note. If the dowry consisted of personal property, the

¹ [Blume] Note law 9 of this title.

² [Blume] Note law 10 of this title; see C. 3.33.12 pr.

husband became the owner and he could sell or otherwise alienate it without the consent of the wife. Mackeldy §565. But he could not alienate lands, particularly under the provisions of Justinian law, even with the wife's consent (C. 5.13.15), unless the lands were valued, in which case he became the owner of them (C. 5.12.1a), and he could then alienate them, as stated in this law, and as appears in C. 5.13.15. See also Mackeldy §565. But even if valued, still if the wife reserved the right to have the identical property returned, rather than its value, an alienation was invalid. C. 5.23.1. The wife, however, had a lien on the husband's property to secure her in her rights. C. 5.13.

3.33.7. Emperor Gordian to Ulpianus, a soldier.

The law is clear that a person who has the usufruct (of a house) must repair the roofs at its own expense. But if you can show that you paid out more than it was your duty to pay, you can recover it in the usual manner.
Promulgated February 1 (243).

Note.

The usufructuary was required to see that the property was kept in good condition, otherwise he was liable to the owner in damages. He was also required to keep up the rights belonging to the property and discharge all dues regularly falling on the occupant, such as water-rent and other burdens, and he was also required to pay the taxes. Mackeldy §309; 1 Roby 485; Buckland 268, 269. If he spent more than he was required to do and acted in a good husbandlike manner, he could recover the extra amount from the owner, as stated in the foregoing law. Bas. 16.8.30.

3.33.8. Emperors Diocletian and Maximian and the Caesars to Hieron.

No prescriptive period of any length avails a usufructuary, or his heirs, for acquiring ownership of any property of which the former has the usufruct.³
June 26 (293).

3.33.9. The same Emperors and the Caesars to Auxanusa.

When a usufruct of lands or slaves is left to your mother, alienation or manumission by her is forbidden. Of course delivery to anyone, of the slaves, where the services were left her by the testament, but whom she does not own or the manumission of the slaves, is without effect since they belong to the heir of the testator, is without effect.

Given December 1 (293).

Note.

An absolute transfer of the usufruct was invalid, as here stated.⁴ See also Mackeldy §308. This led to various other questions. Could the usufructuary pledge it? And it was decided that he could. D. 20.1.11.2. Could he let someone else enjoy it, either for a compensation or gratuitously? This led to controversy, and it was decided that he could do so. Law 13 of this title. Mackeldy supra.

3.33.10. The same Emperors and the Caesars to Pomponius.

³ [Blume] Law 11 of this title.

⁴ Blume has penciled a question mark into the margin here along with the note: See Hunter?

If the female owner of the property gave its usufruct to your wife in return for an annual rental, the right of enjoying the usufruct is not to be denied by reason of the death of the owner.

Given at Sirmium, December 20 (293).

Note.

The death of the usufructuary ended the usufruct, but the death of the proprietor did not. Law 3 of this title; law 12 of this title.

3.33.11. The same Emperors and the Caesars to Claudius Theodotus.

The right of habitation is ended with death (of the holder of the right). A person who holds such right cannot bar an action to recover the property by bequeathing the proprietorship thereof.

Written September 28 (294) at Viminacium.

Note.

The right of habitation did not differ materially from a usufruct. C. 3.33.13. As shown by law 9 of this title, a sale of it conferred to title. And as here stated, it ended with death. It was not lost by non-user or change of status. D. 7.8.10 pr.

3.33.12. Emperor Justinian to Julianus, Praetorian Prefect.

Solving the ambiguities of the ancient law, we ordain that if a person leaves a usufruct to his wife or to anyone else until a son or someone else should reach a certain age, the right to the usufruct shall be in force for the period of years fixed by the testator, whether the person, by whose age the time of its enjoyment is fixed, reaches that age or not; for the testator had in mind a definite period of time and not the period of life of an individual—unless the person to whom the usufruct is left, himself departs this life; for the law is clear that a usufruct cannot be transmitted to posterity, and ceases with death. 1. But when an uncertain condition is affixed to the usufruct, for instance, “as long as the son or someone else remains insane,” or in other similar cases in which the outcome is uncertain, if the son, or someone else in connection with whom this is said, recovers, or if the condition is fulfilled, the usufruct is ended; but if he dies while still insane, then the right to the usufruct remains as though given for the life of the usufructuary; for since it was possible that the insane person might not become sane, or the condition might not be fulfilled, till the end of the life of the usufructuary, it is just that the latter should enjoy the usufruct during his life. As the usufruct is extinguished, if the usufructuary dies before the condition is fulfilled or the insanity is ended, so it is just that the usufruct should be enjoyed during the life of the usufructuary, if the insane person dies or some other condition fails.

Given at Constantinople August 1 (530).

3.33.13. The same Emperor to Julianus, Praetorian Prefect.

Since the ancients had doubts as to the usufruct of habitation, first as to whether it was like a use or a usufruct or neither, but rather a right sui generis, and second whether a legatee of a right of habitation could let it to another or claim ownership of the property in himself, we herewith settle all controversy and remove all doubt by a comprehensive provision.

1. It appears to us, adapting a humane interpretation, that if anyone leaves such right, he also leaves the legatee the right to let it to another. For what does it matter whether the legatee himself occupies it or lets it out to another, so that he may receive the rent?

2. The is true so much more if a person has left the “usufruct” of habitation, for by the addition of the word “usufruct,” the greatest subtlety seems to be satisfied.

3. We want the right of habitation to be of value, without being superior to a usufruct. Nor may the legatee claim ownership of the property unless he can show by the plainest proofs that the ownership of the house was left him—if he can show that, the wishes of the testator must be fully carried out.

4. This decision shall apply in all cases in which the right of habitation may be given.

Given September 15 (530).

3.33.14. The same Emperors to Julianus, Praetorian Prefect.

The ancients had doubts whether a legacy was valid in case a testament left land or other property to another by testament, but provided that the usufruct thereof should remain in his “heir.”

1. Some of them though such legacy ineffective, because the usufruct would never be united with the ownership, but would always remain in the “heir.” They thought this, perhaps, because the second and subsequent heirs seem to be the one person, and such usufruct cannot be extinguished in the accustomed modes of the ancient law. Others, however, thought that such legacy ought not to be rejected. In settling such disputes, we decree that such a legacy shall be valid and that such usufruct shall come to an end with the (immediate) heir, and shall expire when he dies or loses it in other legal ways. For why should such usufruct be specially privileged and alone be excepted from the general rule that a usufruct ends (with the death of the usufructuary)? It is clear that this cannot be inferred on any reasonable ground.

2. Hence, by ordaining that such usufruct finds an end and becomes united with the ownership, and is valid, we eliminate all doubt by a few words.

Given September 17 (530).

Note.

A testator devised certain property to one A, and provided that the usufruct of the property should remain in A’s “heir.” Now what did the term “heir” in this connection mean? It might mean not only the immediate heir, but also subsequent successors into infinite time. And if construed in the latter sense, the person who would become owner of the property would never have the benefit thereof, and the usufruct would, accordingly, be the equivalent of ownership. Hence, it was claimed that the grant of the usufruct was void. Justinian solved the difficulty by providing that the usufruct should end with the death of the person who first received the usufruct, and should not extend to any heir of such heir. The rule of construction in case of a grant of an annuity to a person and his heirs was different. In such cases the annuity was payable to heirs into infinite time, the second and subsequent heirs being considered such just as much as the immediate heirs. C. 6.37.22.

3.33.15. The same Emperor to Julianus, Praetorian Prefect.

A dissension arose among the ancient jurists whether when a master acquires a usufruct through a slave, and it should happen for some reason—for many things happen

with mortals—that another should become the owner of an interest in the slave, the whole usufruct would remain the right of the party who first acquired it through the slave, or whether it would become wholly void, or void only in part, the first party retaining (his proportionate) part.

1. Three opinions prevailed concerning this doubtful question: one that in case of a partial alienation of the slave the usufruct failed entirely, another that it would fail to the extent that the slave would be alienated, a third, that an interest in the slave could be alienated, but that the whole of the usufruct would remain in the party who owned the entire interest in the slave in the first place. We find that Salvius Julianus, the superb master of jurisprudence, held the last opinion.

2. In deciding this controversy, we adopt the opinion of Salvius Julianus and of others who held a like view, to whom it appeared better not to favor the destruction, but rather the maintenance, of the usufruct, so that, although an interest in the slave is alienated, nevertheless no part of the usufruct fails, but remains according to the nature thereof, whole and unimpaired; and so it remains as it was established in the beginning and is in no manner lessened in value in such case.

Given October 1 (530).

Note.

The right here mentioned relates to the right of accrual (*jus accrescendi*) in connection with a usufruct. A man was the sole owner of a slave. While he was so, he became the holder of a usufruct through such slave, for whatever property was acquired by the slave became the property of the master. Thereafter the owner sold an interest in the slave. The point was, what became of the usufruct? Justinian decided that the situation with reference to it should remain the same as though no such sale had been made; that the person who acquired the usufruct, through the slave, in the first instance, should retain it. See Buckland, Roman Law of Slavery 153, 578; see also C. 7.7.1.

3.33.16. The same Emperor to Julianus, Praetorian Prefect.

The ancient jurists held that the destruction of a usufruct arose in many ways, partly through the death of the usufructuary, partly through change of status, partially by nonuser, partly in other but not unknown ways. This much was certain concerning a usufruct. But a dispute arose concerning the personal action arising out of a usufruct—whether such usufruct was created by a stipulation or by testament—and while all conceded that such action did not lie in case of the death of the usufructuary or in case of change of status, they disputed as to whether the right to such personal action was lost in case of nonuser; that is to say, if the usufructuary failed to demand the usufruct for a year, or perhaps two years.

1. In settling these disputes, we ordain that neither the right of action which arises by reason of the usufruct, nor the usufruct itself, shall fail by reason on nonuser, but only in case of death of the usufructuary or the destruction of the property itself, but that the usufruct which a person acquires shall be in force, unimpaired, while he lives, since many and innumerable causes arise in the lives of mortals, by reason of which they are unable to keep constant possession of what they have, and it would be hard for anyone to lose through such difficulties a right which he once had—unless a defense may be interposed against the usufructuary which, if the latter claimed ownership of the property, would exclude him, either present or absent.

2. Nor do we permit such detriment to be incurred by our subjects through every change of status. If, for instance, an unemancipated son who has a usufruct, acquired

perchance as special-military property, which does not inure even to the father's benefit, is it lost through his emancipation? According to what has been said, it is lost only when the usufructuary dies or the property perishes; it ceases only with the death of the man or the loss of property, unless the defense above mentioned exists, and except in case of a change of status which involves either loss of liberty or citizenship. For in such case the usufruct is entirely lost and becomes reunited to the ownership.

Given at Constantinople October 1 (530).

Note.

A usufruct became extinguished by either express renunciation on the part of the person entitled thereto, or when the usufruct became the owner of the fee in the property, or by the destruction of the property, or when the usufruct terminated. It could not, as stated in the foregoing law, be lost by nonuser, unless that was continued for a sufficient length of time for a prescriptive title, and someone else had acquired such title by adverse possession, which was a possession held for ten years if the parties lived in the same province, or twenty years if they lived in different provinces. C. 7.33. A usufruct was usually for life, as mentioned in the foregoing law, but it might be for a less time.

D. 7.14.3. When it was given to a corporation, its limits under Justinian was 100 years.

D. 7.1.56. it could also be lost by loss of status, as when a man was deported or banished or sentenced to a mine. But if the change of status was small, as it was, for instance, when a man was emancipated, no such result followed. See the next law. As to special-military property not accruing to the benefit of the father, see headnote C. 6.60; C. 8.46.2.

3.33.17. The same Emperor to Johannes, Praetorian Prefect.

A question contained in the books of Sabinus is reported to us, which raises a doubt whether a usufruct acquired through a slave or through an unemancipated son, is still valid after a great or intermediate change of status of a son, or after his death or emancipation, or after the alienation of the slave, or after the latter's death or manumission.

1. We, therefore, ordain that if that occurs in the case of a slave or unemancipated son, the usufruct of the father or master acquired through them, shall not be lost, but it shall remain unimpaired; and if the father suffers a change of status, great or intermediate, or should be taken from the light of day by death, the usufruct shall not be void, but shall remain unimpaired in the hands of the son, although he is not appointed as his father's heir.

2. For a usufruct acquired through him should remain in him after his father's misfortune, since it is, in general, more likely that the testator left the usufruct more on account of the son than the father.

Given at Constantinople October 18 (531).

Note.

A change, loss, or reduction in status was either maxima (very great), media (intermediate), or minima (slight). The first arose when a man lost his liberty—as when he was condemned to death or deported to an island; the second arose when a man lost his citizenship but not his liberty; the third arose when there was a change in family rights, as when a man was emancipated. Hunter 215.