

Book VIII.
Title LII.

What is an old custom.
(Quae sit longa consuetudo.)

Bas. 2.1.50-52; Dig. 1.3.

Headnote.

Law 2 of this title show that custom must not be in conflict with positive law. D. 1.3.33, is to the same effect, and provides: "It is the practice for custom of long standing to be observed as law and statute in all such matters as are not regulated by written rules." Inst. 1.2.9 says: "The unwritten law is that which usage has approved; for ancient customs, when approved by consent of those who follow them, are like a statute." But apparently a custom, long continued, might repeal a law, for it is said in D. 1.3.32.1: "It is also admitted law, and very right so, that statutes are abrogated not only by the voice of one who moves to repeal them, but also by the fact of their falling out of use by common consent." See Inst. 1.2.11. It may be noted that in D. 1.3.34, it is provided that an important inquiry in determining whether a certain custom exists is: "Has the custom ever been confirmed by a judicial decision given after objections were heard?" And, as noted in the laws of this title, the custom, in order to be of validity, must be ancient and tenaciously adhered to. See 9 Cujacius 1248, 1249.

8.52.1. Emperor Alexander to Aper, Veteran.

The president of the province will, after trial of the cause, give his decision, in accordance with the custom frequently followed in the city, according to the proof, in the same sort of controversies. Both the existing custom as well as the reasons which gave rise to it must be preserved¹, and the president of the province must make it his business to see that nothing is done contrary to such ancient custom.
Promulgated March 27 (224).

8.52.2. Emperor Constantine to Proculus.

An ancient custom and long usage is of no mean authority, but it shall not have the effect of contravening common sense or the law.
Given April 24 (319).

8.52.3. Emperors Leo and Anthemius to Alexander.

Approved and ancient customs tenaciously adhered to are like laws, and maintains them (et retinet). And we order that whatever custom has been followed in departments (offices), local senates, cities, posts of command and guilds, shall have the force of a perpetual law.

Given September 7 (469).

Note.

¹ [Blume] To determine whether the particular controversy falls within the custom.

Et retinet - a custom might be exactly contrary to a law. In a general way, it may, however, be said that laws are maintained by custom, so that they do not become worn out by non-usage.