

Book III.
Title XXXIV.

Concerning servitudes and concerning water.
(De servitutibus et de aqua.)

Bas. 58.7; D. 8.1.3. 4; Inst. 2.3.

Headnote.

Servitudes. A servitude in its broadest sense is, as its name indicates, a right enjoyed by one man in the property of another. Usufruct, including the right of habitation, and the right to the labor of a slave, has already been considered in the previous chapter, and is commonly spoken of as a personal servitude, because the right thereto was purely personal and was not attached to any property. Servitudes proper were, under the Roman law, called praedial servitudes because attached to a praedium, a term which, in this connection, included not only land but buildings as well. They are commonly divided into urban and rural servitudes, the former applying to a servitude annexed to a building, the later to a servitude annexed to land. Hence, the terms “urban” and “rural,” while roughly designating the kinds of servitude—since a servitude annexed to a building would generally exist only in towns and cities—are not quite correct, inasmuch as an urban servitude might exist wholly in the country, and a rural servitude¹ wholly in a town or city. The servitude was attached only to land or a building, without reference to the owner; it was a right in favor of whoever happened to be the owner of the land or building; and it was a burden upon land or a building, without reference as to who the owner might be; in fact land or a building might be burdened by a servitude though it was ownerless. In other words, a servitude as here discussed did not exist except only in connection with land or a building. The property that had the right to the servitude was—and is today—called the dominant estate; the property upon which the burden thereof rested was—and is today—called the servient estate. Attention may here be called to the fact that rules and regulations existed in Roman times, as they exist today, in regard to the construction of buildings in cities, fixing the height thereof, regulating the construction of balconies and prescribing various duties in connection therewith. This subject is considered in C. 8.10. These regulations were in the nature of servitudes created by the state of the community in favor of one neighbor as against another.

Justinian, in Inst. 2.3.4, says: “When a landowner wishes to create any of these rights in favor of his neighbor, the proper mode of creation is agreement, followed by stipulation. By testament, too, one can impose on one’s heir an obligation not to raise the height of his house so as to obstruct his neighbor’s ancient lights, or bind him to allow a neighbor to let a beam into his wall, to receive the rain water from a neighbor’s pipe, or allow a neighbor a right of way of driving cattle or vehicles over his land, or conducting water over it.” Servitudes could also be created by prescription, that is to say, by user, presumably for the period of ten years, if both parties lived in the same province, and for the period of twenty years, if the parties lived in different provinces. See C. 7.33.12;

¹ The typed original reads “rural or rustic servitude.” Blume struck “rustic,” which he had previously used everywhere “rural” appears previously in this note, and wrote above it “urban.” This statement is also true with “urban” in this clause, but destroys the parallelism it would appear that Blume initially intended.

Hunter 419; Buckland 266. In this case the claimant was not bound to prove that the origin of the servitude rested on any title, but simply that he had in fact enjoyed it for the prescribed number of years without force, stealth or by dimple sufferance. C. 3.34.1. The servitude might be lost by surrender, merger or the dominant and servient estate, prescription for the period above mentioned, by the destruction of either the dominant or the servient estate without restoration, or by such an alteration of the conditions of the servient estate that there could be no servitude on it or by the disappearance of the subject of the servitude, as where a spring, subject to a servitude, dried up.

Illustrations of urban servitudes are: The right to have a house rest upon a wall or pillars belonging to another; to insert beams into the walls of another's house; to pass a sewer through or below another's ground; to receive the rain from another man's house, or to have it fall on the property of another; to build projections, such as balconies and eaves over on to another man's property. Changing structures in cities, thereby shutting off light or free vision, must have been a constant subject of attention and annoyance to citizens, leading to the creation of servitudes, as well as imperial legislation, as may be seen upon examination of C. 8.10, and Novels 63 and 163, appended to C. 8.10.12. Zeno enacted a building code for Constantinople, and Justinian made it applicable in the provinces. C. 8.10.12 and 13.

There were many rural or rustic servitudes, as: the right of a path or road to cross another's land on foot, by vehicles or both; the right to quarry stones for the use of one's land from the land of another; the right to dig for and or chalk or to burn lime; the right to cut wood for stakes to vines; the right to put one's cattle to pasture on another's land; the right to water one's cattle on another's land, or to draw water from a well or fountain. The subject of water was one of importance; a number of rescripts are contained in C. 3.34 in reference thereto, from which it appears that the Romans were not strangers to irrigation. The Digest, too, contains many references to the subject, which have been collected by E. F. Ware in his book on Roman Water Law. In cities the water supply was generally public, from aqueducts constructed at public expense. On that subject see C. 11.43.

It will be noticed from what has been said, that praedial servitudes were either those by virtue of which the owner of the servient estate was required to suffer something to be done which as an absolute owner he would not need to suffer, or those by virtue of which he was either forbidden to do something, or might be forbidden, which as owner he would be permitted to do. The former are generally termed affirmative or positive servitudes, the latter negative servitudes. Urban servitudes were nearly all negative, rural servitudes nearly all positive. The distinction is of some importance in view of the fact that possession of negative servitudes was not, according to the prevailing opinion, protected by any interdicts, or the interdical procedure, which is considered at C. 8.1, et seq. Positive servitudes, on the other hand, were protected thereby. These interdicts, or the interdical procedure, protected the possessory right only; they did not involve the determination of the right itself. Other actions existed for the protection and determination of these rights themselves and were similar to the general action in rem for the recovery of property. The action confessoria—vindication of a servitude—was available for enforcing a servitude; the action negatoria—vindication of freedom from servitude—was available for the enforcement of the freedom of a thing from a servitude. The action introduced by Publicius, mentioned in headnote to C. 3.32—publiciana in rem action—was also available in certain cases and under similar circumstance as when the

ownership of property, instead of a servitude, was in question. On the subject of servitudes generally, see Hunter 394-420; Mckeldy § 302-325; Buckland 258-274.

3.34.1. Emperor Antoninus to Calpurnia.

If you think that you have an action against a person who built his house different from what it formerly was, so that it obstructs your lights, you are not forbidden to bring suit in the usual manner. The person who will act as judge will know that use for a long time ripens into a servitude, provided that the person sued is not in possession of the property either by force, stealth, or sufferance.

Promulgated November 11 (211).²

3.34.2. The same Emperor to Martial.

If you (for the period of prescription) conducted water throughout the lands of Martial with his knowledge, you have acquired a servitude through the lapse of time, in pattern of acquisition of immovable (immobilium) property. But if its use was forbidden you before the lapse of the prescriptive period, you ask the repayment of your outlay in this matter in vain, since the right to put any structure on another's property belongs, as long as it remains in that situation, to the person who owns it.

Promulgated July 1 (215).

3.34.3. The right to have an aqueduct or other servitudes can also be acquired over a provincial farm, provided the formalities which create such servitude precede contracts, have been complied with; for arguments between contracting parties should be performed as made. Hence you are not unaware that if former possessors could not rightly hinder water from being conducted through your farms, these farms will pass to subsequent purchasers subject to the same burden.

Promulgated May 1 (223).

3.34.4. The same Emperor to Cornelius.

The edict of the praetor does not permit the taking of water which arises on another's place, without the consent of the person who has the right to the use thereof. Promulgated August 15 (223).

Note.

That a subsequent right to take water, granted to another, might injure the possessor of the first right, is, of course, clear. The law probably referred to one who had the whole of the right, so that he would sustain injury by a subsequent grant. For it is said in Digest 39.3.8, which refers to the same principle mentioned in the present rescript, that the consent of the owner of the first right is justly required, for since his right is diminished, it is reasonable to inquire whether he consents.

Not only was such consent required, but also the consent of the owner of the land, or of all, if more than one. D. 39.3.8-10. This was true as a matter of course, if the owner or owners themselves made the grant; but these laws refer to the grant by some one other than the proprietor, as for instance to the perpetual lessee (emphyteuticary). In such case, the land might revert to the owner by forfeiture or lapse. And while the grant of the water right would in such case lapse with the perpetual lease, still the owner of the

² Blume penciled in after this law: "Partsch 99-100."

land was interested in not having ditches dug on his land, and which he might be required to level up at his own expense. See Karlowa 505, 506.

3.34.5. Emperor Philip and the Caesar Philip to Lucianus, a soldier.

If your adversary constructs anything which is detrimental to servitude annexed to your houses, the president of the province will, in accordance with his power, take care that the former condition is restored and that all damage is paid.
Promulgated February 1 (264).

3.34.6. Emperor Claudius to Priscus.

The president of the province will not permit that, contrary to established custom, you should be deprived of the use of water which you allege flows from a spring belonging to you, since it would be harsh and nearly cruelty that a flow of water arising from your lands should be wrongly conducted away for the use of neighbors when your lands are thirsting.
Promulgated April 25 (269).

3.34.7. Emperors Diocletian and Maximian to Julianus.

If it can be clearly shown that the use of water, flowing through certain places in accordance with ancient custom and practice, benefits certain lands through irrigation, our procurator will take care that no innovation against ancient practice and established custom is permitted.
Promulgated May 4 (286).

3.34.8. The same Emperors and the Caesars to Anicetus.

An owner is not forbidden to raise a building higher, if it is not subject to a servitude. But if Julianus is shown to have built a window in your wall, by force or secretly, he will be compelled to tear the new work down at his expense, and restore the former condition of the wall.
Given at Sirmium January 1 (293).

3.34.9. The same Emperors and Caesars to Zosimus.

If Heraclius built a wall higher in neighboring buildings which are subject to a servitude owning to you, he will be compelled by the president of the province to take the new work down at his expense. But if it is not shown that you own the servitude, your neighbor is not forbidden to raise his building higher.
Promulgated at Sirmium June 25 (293).

3.34.10. The same Emperors and Caesars to Nymphidius.

If the president of the province learns that you are the owner of a servitude of water and that you have not hitherto lost it by nonuser during the (prescriptive) period, he will take care that you may enjoy your right which you own. But if this is not shown, the owner of the land will not be forbidden to impound the water on his own property by works erected thereon, and prevent it from irrigating yours.
Promulgated January 22 (294) at Sirmium.

3.34.11. The same Emperors and Caesars to Aurelius.

A neighbor is not permitted to go or drive through another's field which owes no servitude. But no one is rightly prohibited from using a public highway.
Given at Sirmium October 22 (294).

3.34.12. The same Emperors and Caesars.

Not the size of the lands, but the limit of the servitude, measures the right of conducting the water.
Promulgated at Nicomedia December 30 (294).

3.34.13. Emperor Justinian to Johannes, Praetorian Prefect.

As we have not permitted a usufruct, which was (formerly) lost through nonuser for two years if in land, or for one year if in movables or self-moving property, to undergo such swift destruction, but have given ten and twenty years therefor,³ we have thought best to apply the same rule to servitudes, and the right thereto shall not be lost by nonuser for only two years, since they are annexed only to immovable property, but in ten years to residents, and in twenty years to non-residents,⁴ so that the rule, after equalizing the differences, is the same in all such cases.
Given at Constantinople October 18 (531).

3.34.14. The same Emperor to Johannes, Praetorian Prefect.

The following proposition is propounded in the books of Sabinus: Someone made an agreement with his neighbor that he, in person or by his men, might make a path on and go across the field of such neighbor on foot, but only during one day every five years, so as to go to his own forest to fell trees or do whatever he liked, and the question was as to when such servitude is lost through nonuser. Some thought that if he did not go through in the first or second five-year's period, the servitude would be lost, as if lost by nonuser in two years, considering a single day of each five-year's period the same as one year. Others have thought differently. We have considered it proper to decide the dispute as follows: Since we have, by law, already provided that servitudes are not lost by nonuser for two years, but by nonuser for ten and twenty years, so in the present case, if either the owner of the servitude or his men do not use the servitude a single day during four periods of five years each, then he entirely loses the right, through his sloth of twenty years. For whoever has not followed up his right for such a long and extended period is too late in his regret to have his servitude returned to him. 1. Since, moreover, a man has a clear right to have his fruits show their nature and utility, after threshing which takes place on the barn floor, someone forbade his neighbor to so construct a house beside his barn, that the wind would be excluded and the separation of the chaff from the fruits be prevented by the obstruction, as though the wind would by such a building be prevented from using its force over the place, though, according to the situation of the place, the help of the wind is a right annexed to the soil. We, accordingly, ordain that no one shall be permitted to so construct his building or act in any manner that the wind would hinder the aforesaid work, and make the barn and the grain useless to the owner.
Given at Constantinople October 22 (531).

³ [Blume] C. 3.33.16.

⁴ [Blume] See C. 7.33.12.