The Principle of *praedia vicina esse debent* in the Sources of Roman Law

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Abstract:
The text focuses on the principle of *praedia vicina esse debent* in Roman law. It examines on what basis it appeared, how the sources of Roman law reflect the need for land contiguity in the case of servitudes, and what is meant by contiguity, i.e. whether it is direct, immediate contiguity or whether the proximity of the land is sufficient. The text also shows that the general principle in question does not inherently have a uniform interpretation and must always be viewed in the light of individual servitudes and the possibility of exercising them. Finally, the text indicates that the principle as such tends rather towards the criterion of a more general requirement for servitudes, namely that they must always be useful to the dominant tract of land (*utilitas fundi*).

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There are several principles that are traditionally understood[1] to apply to the formation, existence and possible termination of servitudes. In their essence, it is these principles which intertwine the heterogeneous group of various rights thus creating the whole

[1] Where we speak about principles in Roman law we see them from our contemporary perspective and define them with contemporary terms, although the situation in the past was not identical. A deeper analysis of the role, nature and objectives of legal principles as were understood directly by ancient jurists is a separate topic, which is rather extensive but only poorly treated. That is why "principle" in this paper is to be understood as is in contemporary jurisprudence, i.e. as essentially general and typical of the institution at

category of servitudes. On the other hand, some principles, although designated as the principles of servitudes, are much wider in their application – for example the principle of *nulli res sua servit*, whose substance covers the whole category of *iuris in re aliena.* In contrast, some principles apply to only a part of servitudes, such as servitudes relating to land (predial servitudes). It is the latter category of principles that traditionally includes the principle *praedia vicina esse debent*.

The substance of the principle of *praedia vicina esse debent* need not appear as essentially problematic. However, as it frequently happens, a deeper look would give rise to several questions regarding its origin, its authenticity from the perspective of Roman law, and finally its actual meaning. This is why it is desirable to handle those questions in detail and to attempt to provide answers within Roman law, or, alternatively, only indicate answers since the temporal remoteness between the modern day and the period of Justinian law, although quite long, is rather extensive and chances to explore the issues are significantly more limited.

This principle is treated in handbooks of Roman law, whether in those oriented generally[2] or those dealing directly with servitudes under Roman law,[3] namely as the principle significant for the whole group. Considering the usual meaning of this principle it is necessary to define the application thereof. Since the principle has usually been explained as the requirement that tracts of land must be neighbouring,[4] its application is essentially non-existent in the area of personal servitudes where it is impossible to take two tracts of land into account but rather only one. However, such conclusion cannot be found in the sources of Roman law[5], because the category of personal servitudes itself, if it was purposefully created at all, does not require the existence of two tracts of land (unless the right to enjoy covers two tracts at a time, which is legally a totally different situation though).

It may be asked whether, by analogy, a requirement of a certain proximity in the case of personal servitudes between the beneficiary and the land charged with the servitude would be applicable under Roman law. As one of the fundamental purposes of personal servitudes is to provide support to the beneficiary and their needs, such requirement may appear to be justified. Considering obviously one of the most frequent types of personal servitudes, namely the right of enjoyment, we can assume that, in order to exercise the right to use and enjoy a certain tract of land, that land must be in a distance reachable by the beneficiary. Since the sources of Roman law quite unquestionably agree that the exercise of the right of

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issue, and often not excluding the opposite. For more see, for example, ITALIA, V. Milano: Giuffrè, 2018, p. 24, and primarily pp. 41–44.

2 For example, HEYROVSKÝ, L. *Dějiny a systém soukromého práva římského* [*A History and System of Private Roman Law*]. Praha: Otto, 1910, p. 427; VÁŽNÝ, J. *Vlastnictví a práva věcná* [*Ownership and Right In Rem*]. Brno: Československý akademický spolek Právník, 1937, p. 109; ARANGIO-RUIZ, V. *Istituzioni di diritto romano*. Napoli: Jovene, 1989, p. 235; BONFANTE, P. *Corso di diritto romano*, 3. Milano: Giuffrè, 1972, p. 36.

3 For example, SOLAZZI, S. *Requisiti e modi di costituzione delle servitù prediali*. Napoli: Jovene, 1947, p. 29; BIONDI, B. *Le servitù prediali nel diritto romano*. Milano: Giuffrè, 1954, p. 179; GROSSO, G. *Le servitù prediali nel diritto romano*. Torino: Giappichelli, 1969, p. 109.

4 For example, HEYROVSKÝ, *op. cit.*, p. 427; VÁŽNÝ, *op. cit.*, p. 109; SOLAZZI, *op. cit.*, p. 29; BIONDI, *op. cit.*, p. 179; GROSSO, G. *Le servitù*, p. 110.

5 The original texts of Justinian's Digests taken from *Corpus iuris civilis*. Editio sexta decima. Berolini: Weidmann, 1954. Translated by the author of this paper.

enjoyment can be leased,[6] the function of support can be easily attached to the rental paid for the lease and can be provided to the beneficiary over a certain distance. Therefore, as Roman law allows for such possibility, the requirement of certain local proximity between the servient land and the holder of the right of enjoyment in its essence disappears. It should be taken into account that not only a tract of land can be an object of the right of enjoyment; it is possible to hold the right of enjoyment of movable property,[7] and as early as in the classic era it was possible to hold the right of enjoyment of intangible things, such as a debt.[8] In such situation, the application of the principle of *praedia vicina esse debent* is absolutely impossible. Thus, it appears to be obvious that the principle applies only to servitudes relating to land. The fact that the principle is often mentioned as generally applicable to all types of servitudes is obviously based on that many legal systems under the influence of classical Roman law understand, until today, the concept of servitude solely as predial servitudes, i.e. those charging the land.[9]

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6 There are several fragments admitting such possibility. For example, Dig. 7.1.27.1 (Ulp. lib. 18 ad sab.): *Si dominus solitus fuit tabernis ad merces suas uti vel ad negotiationem, utique permittetur fructuario locare eas et ad alias merces, et illud solum observandum, ne vel abutatur usufructuarius vel contumeliose iniurioseve utatur usu fructu*. (If the owner used the premises for his own goods or for trading the holder of the enjoyment right is certainly allowed to lease the premises for other goods; the only thing to be monitored is that the holder does not abuse the enjoyment right or does not use it unlawfully or in an offensive manner.) Or more generally Dig. 7.1.12.2.
This conclusion is confirmed for example by GROSSO, G. *Usufrutto e figure affini nel diritto romano*. Torino: Giappicchelli, 1958, p. 146.

7 See for example fragment Dig. 7.1.15.5 (Ulp. lib. 18 ad sab.): *Proinde etsi scaenicae vestis usus fructus legetur vel aulaei vel alterius apparatus, alibi quam in scaena non utetur, sed an et locare possit, videndum est: et puto locaturum, et licet testator commodare, non locare fuerit solitus, tamen ipsum fructuarium locaturum tam scaenicam quam funebrem vestem*. (If the right of enjoyment regarding a theatrical costume, curtain or other decoration has been bequeathed these cannot be used on premises other than the theatre. However, it should be clarified whether these things may be leased. And I believe that it is possible; although the decedent was only lending them, not leasing, the holder of the enjoyment right can offer costumes or funeral garments for lease.) This confirms that the exercise of the right of enjoyment can be subject to lease even in the case of movable property.

8 This is admitted in quite a general manner in Dig. 7.5.1 (Ulp. lib. 18 ad sab.): *Senatus censuit, ut omnium rerum, quas in cuiusque patrimonio esse constaret, usus fructus legari possit: quo senatus consulto inductum videtur, ut earum rerum, quae usu tolluntur vel minuuntur, possit usus fructus legari*. (The Senate stipulated that all property in the ownership of someone can be subject to the right of enjoyment via legacy or bequest. What is instituted by this Senate resolution is that things which cease to exist or get reduced as a result of their use can be subject to the right of enjoyment.) Regarding the debt itself see Dig. 7.5.3 (Ulp. lib. 18 ad sab.): *Post quod omnium rerum usus fructus legari poterit. an et nominum? nerva negavit: sed est verius, quod cassius et proculus existimant, posse legari. idem tamen nerva ipsi quoque debitori posse usum fructum legari scribit et remittendas ei usuras*. (Thus, all things can be subject to usufruct via bequest or legacy. Does that also apply to a debt? Nerva denies it but what is evident is that the debt may be bequeathed as claimed by Cassius and Proculus. However, Nerva himself asserts that the right of enjoyment /of a debt/ can be bequeathed for the benefit of the debtor so that the interest on the debt can be waived.) See the whole title of Dig. 7.5. *De usu fructu earum rerum, quae usu consumuntur vel minuuntur*. (On the use and enjoyment of such things that are consumed or reduced as a result of using them.) See for more details GROSSO, *Usufrutto*, p. 421.

9 For example, the French Code civil (Art. 637 *Une servitude est une charge imposée sur un héritage pour l'usage et l'utilité d'un héritage appartenant à un autre propriétaire*.), but also Codice civile in Art 1027 provides for predial servitudes but personal servitudes are absent. (Art. 1027 La *servitù prediale consiste nel peso imposto sopra un fondo per l'utilità di un altro fondo appartenente a diverso proprietario* [1072].

The basic source upon which the existence, formulation and functioning of the principle relies, is a fragment of Ulpian, where he states that "neither the right to draw water, nor to herd cattle, to dig chalk, nor to burn lime, can be had on such land of another but on the neighbouring land".[10] This fragment deserves more attention than just stating that its text is the basis for the principle of *praedia vicina esse debent*. First, we should take note of a relatively large number of quoted Roman lawyers who expressed their opinions regarding this issue, although most of them can be designated as representatives of the Proculeian School. Second, it should be noted that this source gives rise not only to the principle that servitude must apply to the neighbouring tracts, but also to the very significant principle, which restricts the exercise of servitude, namely the principle of an objective need of the dominant estate, i.e. the servitude may be executed only to the extent of the need of the dominant estate (and of that which arises on it). Finally, it is necessary to take into account individual types of servitude upon whose casuistic example the principle was formulated. Neratius, mediated via Ulpian, mentioned the principle only with respect to the right of drawing water, herding cattle, digging chalk and burning lime. However, when speaking about predial servitudes (servitudes relating to property) the most frequent group mentioned is that covering the right of way, trail, footpath and watermain.[11] One may argue, as will be explained below, that the application of the principle of *praedia vicina esse debent* would be different in the case of the rights of way, trail, footpath and watermain respectively on the one hand, which could be designated as line items in the modern language, compared to servitudes presented in the fragment by Ulpian and Neratius on the other hand, where it can be prima facie easier to waive the condition of an immediate proximity between tracts.

The line between the two groups of servitude is emphasized in other parts of Justinian Digests, such as directly in the introductory title assigned to predial servitudes.[12] Ulpian enumerates individual types of land servitudes in the countryside and the rights of way, trail, footpath and watermain are considered as purely rural.[13] Ulpian, in the following

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10 Dig. 8.3.5.1 (Ulp. lib. 17 ad ed.): *Neratius libris ex plautio ait nec haustum nec appulsum pecoris nec cretae eximendae calcisque coquendae ius posse in alieno esse, nisi fundum vicinum habeat: et hoc proculum et atilicinum existimasse ait. sed ipse dicit, ut maxime calcis coquendae et cretae eximendae servitus constitui possit, non ultra posse, quam quatenus ad eum ipsum fundum opus sit*: (Neratius, in his work on Plautius, says that the right of drawing water for cattle or of driving cattle to water, or of digging chalk or of burning lime, on the ground of another, cannot exist unless the party has adjoining land; and he states that Proculus and Atilicinus hold the same opinion. But he also says that, although there is no question that a servitude for burning lime and digging chalk can be established, still this cannot be done for a greater amount than required by the dominant estate.)

11 For example, Dig. 8.1.5pr. (Gai. lib. 7 ad ed. provinc.): *Via iter actus ductus aquae isdem fere modis constituitur, quibus et usum fructum constitui diximus*. (The rights of way, trail, footpath and watermain are constituted in the same way as applies to usufruct.); Dig. 8.3.26 (Paul. lib. 47 ad ed.): *Si via iter actus aquae ductus legetur simpliciter per fundum, facultas est heredi, per quam partem fundi velit, constituere servitutem, si modo nulla captio legatario in servitute fit*. (If the rights of way, trail, footpath or watermain were bequeathed simply to lead through the tract, the heir can constitute the servitude to specify which part of the tract it should be so that the legatee cannot be exposed to any mistake.)

12 Dig. 8.3 *De servitutibus praediorum rusticorum*. (On rural predial servitudes.)

13 Dig. 8.3.1pr. (Ulp. lib. 2 inst.): *Servitutes rusticorum praediorum sunt hae: iter actus via aquae ductus. iter est ius eundi ambulandi homini, non etiam iumentum agendi. actus est ius agendi vel iumentum vel vehiculum: itaque qui iter habet, actum non habet, qui actum habet, et iter habet etiam sine iumento. via est ius eundi et agendi et ambulandi: nam et iter et actum in se via continet. aquae ductus est ius aquam*

paragraph of the fragment, adds the right of drawing water, driving cattle to water, pasture, burning lime and digging sand.[14] It can be argued that such division need not be authentic as is not the division of fragments into paragraphs or sections.[15] However, the division exists not only due to formally cutting the text into paragraphs, but it is determined by the text itself and its exact formulation. It can be noted that while the rights of way, trail, footpath and watermain "are" ("*sunt*") servitudes, the rights of drawing water, driving cattle to water, pasture, burning lime and digging sand are only included in the category of rural servitudes, or more precisely, if considering the Latin term ("*computanda sunt*"), are deemed to be rural servitudes. Therefore, the formulation of the text itself gives rise to certain differences between the two groups of servitudes, and it is necessary to examine their difference in the application or nature of the principle of *praedia vicina esse debent*.

The above-mentioned fragment undoubtedly forming the principle of *praedia vicina esse debent*, can be posed in opposition to another fragment where the same Ulpian introduces an opposite opinion because he simply states that "considering servitudes, it is quite irrelevant whether the buildings are neighbouring or not".[16] Not only is it prima facie evident that Ulpian's two fragments are contradictory to each other, it is also identifiable at first sight that Ulpian's latter fragment, i.e. that denying the principle of *praedia vicina esse debent*, had been subject to many essential interferences by compilers.[17] However, such interferences had always been directed, as was the case of the whole Justinian compilation, at removing old formal juridical acts, e.g. transfer (*mancipatio*) and *in iure cessio*, which were replaced by simple delivery (*traditio*). As a result, Ulpian, at the place of delivery, wrote rather about *mancipatio,* but the significance of the principle of *praedia vicina esse debent* would not be disturbed anyway.

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ducendi per fundum alienum. (Rural predial servitudes are the following: rights of footpath, trail, way, watermain. Footpath is the right of an individual to walk but not to drive cattle. Trail is the right to drive cattle and to lead a cart. Thus, he who has the footpath does not have the trail, and who has the trail has also a footpath even without cattle. The way is the right to walk, drive, lead and ride, as the way includes the trail and footpath. The watermain is the right to run water across the land of another.)

14 Dig. 8.3.1.1 (Ulp. lib. 2 inst.): *In rusticis computanda sunt aquae haustus, pecoris ad aquam adpulsus, ius pascendi, calcis coquendae, harenae fodiendae*. (Rights of drawing water, driving cattle to water, pasture, burning lime and digging sand are counted as rural servitudes.)

15 Both names are used to designate parts arising from division of classical fragments. As the word "section" can be linked with contemporary legislative techniques and division of statutes we will use only the term "paragraph" to avoid potential confusion.

16 Dig. 8.4.6pr. (Ulp. lib. 28 ad sab.): *Si quis duas aedes habeat et alteras tradat, potest legem traditioni dicere, ut vel istae quae non traduntur servae sint his quae traduntur, vel contra ut traditae retentis aedibus serviant: parvique refert, vicinae sint ambae aedes an non. idem erit et in praediis rusticis: nam et si quis duos fundos habeat, alium alii potest servum facere tradendo. duas autem aedes simul tradendo non potest efficere alteras alteris servas, quia neque adquirere alienis aedibus servitutem neque imponere potest*. (If someone has two buildings and transmits one of them he may set the rule that either the building kept would be servient to that transmitted, or, the other way round, the transmitted building would be servient to the building kept. It is irrelevant whether the two buildings are neighbouring or not. The same would apply to rural tracts; if someone has two tracts these can be transmitted as one being servient to the other. However, two buildings being transmitted at a time cannot be determined as one being servient to the other since servitude cannot be acquired for a building of another, nor can such building be charged with a servitude.)

17 As confirmed by LEVY, E., RABEL, E. *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*. Weimar: Böhlaus, 1929, p. 107.

Other parts of the text may also, to a certain extent, raise some doubts and one could hesitate whether those are authentic. Particularly, the formulation "*vicinae sint ambae aedes*" manifests a quite inelegant statement, which would probably not be expected from a classical Roman lawyer. If it is stated that "both buildings are neighbouring" then one would ask "adjacent to what?" Either one building neighbours the other, but to make both neighbour there should be a third element the two buildings would neighbour. Should the word "both" ("*ambae*") be omitted, the text would make much better sense.[18] One can reasonably assume that interventions by compilers in that fragment had been more extensive than is generally presumed, i.e. what happened was not just simple replacement of classical forms of acquisition by those introduced by Justinian.

Despite that fragment giving rise to doubts and requiring more analysis in the future, it appears quite certain that the proximity, neighbourhood or maybe interrelationship between tracts are relevant, as suggested and confirmed by other fragments. However, it is important how such proximity is defined or formulated and what formulations can be found in fragments dealing with that topic.

In many cases, we can find in fragments dealing with servitudes that the text speaks about "neighbour" and not about "neighbouring estate".[19] These fragments write about servitudes for the benefit of the "neighbour" and not the "neighbouring tract". However, one cannot deduce from such formulations the existence of servitude in the irregular form;[20] rather we can assume that it is a result of certain simplification of the text because if a person is a neighbour of someone that feature evokes that the neighbour has a tract in near proximity. Justinian's Digests contain several fragments that explicitly mention "*fundus vicinus*"[21] in relation to servitudes. It seems quite probable in both cases that these are

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18 See SOLAZZI, *op. cit.*, p. 35; BIONDI, *op. cit.*, p. 181.

19 For example, Dig. 8.4.15 (Paul. lib. 1 epit. alf. Dig.): *Qui per certum locum iter aut actum alicui cessisset, eum pluribus per eundem locum vel iter vel actum cedere posse verum est: quemadmodum si quis vicino suas aedes servas fecisset, nihilo minus aliis quot vellet multis eas aedes servas facere potest*. (If someone made a footpath or trail for another through a particular place it is true that he can make a footpath or trail to that place for more persons. In the same way, if someone makes his buildings servient for his neighbour; even in that case he can make his buildings servient for so many persons as he wishes.) Similarly, Dig. 8.4.16 (Gaius lib. 2 rer. cott.): *Potest etiam in testamento heredem suum quis damnare, ne altius aedes suas tollat, ne luminibus aedium vicinarum officiat, vel ut patiatur eum tignum in parietem immittere, vel stillicidia adversus eum habere, vel ut patiatur vicinum per fundum suum vel heredis ire agere aquamve ex eo ducere*. (He may in his testament bind his heir not to erect buildings higher, not to obstruct the lighting of the neighbour's building, or to tolerate the insertion of the neighbour's beam into the wall, or having gutters to it, or to suffer the right of the neighbour to walk, drive cattle or draw water through his or his heir's land.)

20 For more details on irregular servitudes see GROSSO, *Usufrutto*, pp. 124–126; BIONDI, *op. cit.*, p. 133 et al.; BONFANTE, *op. cit.*, pp. 129–137; or more regarding pandects law see SERAFINI, F. *Delle così dette servitù irregolari*. Bologna: Fava e Garagnani, 1877, pp. 5–16.

21 Dig. 8.5.2.1 (Ulp. lib. 17 ad ed.): *Haec autem in rem actio confessoria nulli alii quam domino fundi competit: servitutem enim nemo vindicare potest quam is qui dominium in fundo vicino habet, cui servitutem dicit deberi*. (Such real action regarding the servitude must be in favour of the owner because servitude can be vindicated only by a person having the ownership of the neighbouring tract charged with the servitude.); and Dig. 19.1.6.5 (Pomp. lib. 9 ad sab.): *Si tibi iter vendidero, ita demum auctorem me laudare poteris, si tuus fuerit fundus, cui adquirere servitutem volueris: iniquum est enim me teneri, si propter hoc adquirere servitutem non potueris, quia dominus vicini fundi non fueris*. (If I sold the footpath to you, you can designate me as the transferor provided you owned the tract for which you wish to acquire the servitude. It

again interferences by compilers who inserted "neighbourhood" to copied/compiled texts as the text is equally comprehensible and clear without that insertion.[22] This is also the case where, due to the mentioned rule, the whole sentence was inserted.[23] We can then assume that Justinian's lawyers intended to strengthen that prima facie understandable principle in the text of original codes and to emphasize it for common users.

Finally, regarding some fragments it is possible to consider that today's wording, which explicitly refers to neighbours, was originally slightly different and rather than mentioning neighbours, it was more about defining the servitude so that it could only serve for the benefit of the land. As a result, S. Solazzi[24], instead of the preserved formulation in which only servitude which *nihil vicinorum interest*,[25] proposes servitude which *praediorum nihil interest*.[26]

The above-mentioned forms of relativisaton and prima facie denial of the principle of *praedia vicina esse debent* were not intended, and do not intend to deny the requirements hidden behind the principle. They rather suggest that the origin of the principle and the scope of its application are not as they seem at first sight, even upon direct study of the Roman law sources.

It is worth noting the relatively high variability of the concept of neighbour or neighbouring (*vicinus*). Even today, sometimes the term "neighbour" means an immediately

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appears inappropriate to be obligated if the servitude cannot be acquired due to the fact you were not the owner of the tract.)

22 See SOLAZZI, S. *op. cit.*, pp. 30 and 31.

23 Dig. 34.1.14.3 (Ulp. lib. 2 fideic.): *Quidam libertis suis ut alimenta, ita aquam quoque per fideicommissum reliquerat: consulebar de fideicommisso. cum in ea regione africae vel forte aegypti res agi proponebatur, ubi aqua venalis est, dicebam igitur esse emolumentum fideicommissi, sive quis habens cisternas id reliquerit sive non, ut sit in fideicommisso, quanto quis aquam sibi esset comparaturus. nec videri inutile esse fideicommissum quasi servitute praedii non possessori vicinae possessionis relicta: nam et haustus aquae ut pecoris ad aquam adpulsus est servitus personae, tamen ei, qui vicinus non est, inutiliter relinquitur: in eadem causa erunt gestandi vel in tuo uvas premendi vel areae tuae ad frumenta ceteraque legumina exprimenda utendi. haec enim aqua personae relinquitur*. (Someone left to his freed slaves both sustenance and water via fideicommissum. I was asked about such fideicommissum. It was established on the border of Africa, maybe in Egypt where water is regularly for sale; so I said that this is an advantage of fideicommissum whether or not the person establishing it possesses water tanks as there is sufficient value in fideicommissum to acquire the water. However, such fideicommissum appears to be useless if provided to a person other than the possessor of the neighbouring land. The same applies to drawing water or driving cattle to water, which are personal servitudes but again would be useless if established for a person other than the neighbour. And the same appears to apply when your land is used for walking through, pressing wine grapes, threshing the grain or legumes. It is similar with leaving water to a person.)

24 SOLAZZI, *op. cit.*, p. 30.

25 Dig. 8.1.15pr. (Pomp. lib. 33 ad sab.): *Quotiens nec hominum nec praediorum servitutes sunt, quia nihil vicinorum interest, non valet, veluti ne per fundum tuum eas aut ibi consistas: et ideo si mihi concedas ius tibi non esse fundo tuo uti frui, nihil agitur: aliter atque si concedas mihi ius tibi non esse in fundo tuo aquam quaerere minuendae aquae meae gratia*. (Where the servitude applies neither to persons nor land because it brings no benefit to neighbours such servitude is invalid; for example, if you would neither walk across your tract nor stay there, or if you confirm to me that you would not use your tract, all that is invalid. A different situation is when you confirm the right not to search for water on your land with the aim of not reducing my water resources.)

26 The change in formulation is a bit larger. Even the first part of the fragment does not appear to be authentic and S. Solazzi proposes the first sentence to read as follows: *Quotiens praediorum nihil interest non valet, veluti ne per fundum tuum eas aut ibi consistas*. (If it brings no benefit to the land it is invalid; for example, for you not to walk across your land or stay there.)

adjacent place or person, while sometimes the term "neighbour" can mean almost half a municipality. Similarly, it is necessary to distinguish meanings within the sources and try to establish certain criteria of what is meant by "neighbour".

The first approach to such term may be evoked in Digests by the clause "*proximus vicinus*", meaning the closest neighbour. This two-word term can be found in several fragments clearly pointing at such neighbour who is the closest to the event or place at issue.[27] However, the second quoted fragment indicates that immediate neighbourhood is not an essential requirement of servitudes. On the contrary, there are fragments obviously relying on quite a large distance.[28] Paulus, in the case of the right of pasture or driving cattle to water, admits the right to erect a shelter to be protected in bad weather. Such situation evokes an explanation that it would not be easy and quick to return to the dominant land to hide out. Logically, one can assume that it existed because the dominant estate was not located within reachable proximity. Should we accept that the term *proximus vicinus* means the immediately adjacent neighbour one can assume that the terms *vicinus* or *vicinitas* respectively do not include that immediate proximity; as a result, the servitude can be charged to such neighbouring land which is not immediately adjacent.

To a certain extent, this fragment[29] resembles the question debated above. Paulus, on the one hand, clearly asserts that those rights differ from usufruct. However, this does not mean that those servitudes can be unambiguously designated as predial. On the other hand, there are several fragments indicating that personal characteristics and entitlements make, or can make, these legal relations different from classical predial servitudes.[30] Pomponius's quoted fragment admits that the right of pasture was established in such a way

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27 Dig. 8.6.14.1 (Iav. lib. 10 ex cass.): *Cum via publica vel fluminis impetu vel ruina amissa est, vicinus proximus viam praestare debet.* (Where a public way disappeared as a result of floods or landslide the closest neighbour must tolerate another way.), and Dig. 39.1.8pr. (Paul. lib. 48 ad ed.): *Non solum proximo vicino, sed etiam superiori opus facienti nuntiare opus novum potero: nam et servitutes quaedam intervenientibus mediis locis vel publicis vel privatis esse possunt.* (The prohibition to erect a new building can apply not only against the closest neighbour but also against a construction to be higher since there may exist servitudes across the obstructing middle tract whether public or private.)

28 Dig. 8.3.6.1 (Paul. lib. 15 ad plaut.): *Item longe recedit ab usu fructu ius calcis coquendae et lapidis eximendi et harenae fodiendae aedificandi eius gratia quod in fundo est, item silvae caeduae, ut pedamenta in vineas non desint. quid ergo si praediorum meliorem causam haec faciant? non est dubitandum, quin servitutis sit: et hoc et maecianus probat in tantum, ut et talem servitutem constitui posse putet, ut tugurium mihi habere liceret in tuo, scilicet si habeam pascui servitutem aut pecoris appellendi, ut si hiemps ingruerit, habeam quo me recipiam*. (Similarly, usufruct is significantly different from the right to burn lime, break stone and quarry sand intended for erecting what is on the land. Also to cut timber in order to provide shoring in vineyards. So what served the improvement of those tracts? Undoubtedly via servitudes. This is confirmed by Maecianus asserting that such a servitude can be established that I could have a shelter on your land to use it when enjoying the servitude of pasture or driving cattle, and to have a possibility to hide if winter comes.)

29 Dig. 8.3.6.1.

30 Dig. 7.1.32 (Pomp. lib. 33 ad sab.): *Si quis unas aedes, quas solas habet, vel fundum tradit, excipere potest id, quod personae, non praedii est, veluti usum et usum fructum. sed et si excipiat, ut pascere sibi vel inhabitare liceat, valet exceptio, cum ex multis saltibus pastione fructus perciperetur. et habitationis exceptione, sive temporali sive usque ad mortem eius qui excepit, usus videtur exceptus*. (If someone delivers his own building or land to another it is possible to reserve what belongs to the person, not to land as the right to use and usufructus. But if he reserves the right of pasture or living, such reservation is valid and that was the reason why fruits had been collected from vegetation. And the reservation of living whether for a particular period or for life of the person having made reservation, appears to be the reserved use.)

that it brings benefit to only a particular person although the right of pasture has been traditionally considered as a typical predial servitude.[31] Nor is it contrary to logic that such an assumption could similarly have a specific person as beneficiary in the other servitudes mentioned in Paulus's fragment. One can deduce that the fact that Paulus's fragment subliminally admits a larger distance between the place of pasture or water source can show that the regime of such servitude was established in a way similar to the right of enjoyment, i.e., within the regime of the principle of *praedia vicina esse debent*, as described above in relation to personal servitudes, which means, in other words, independent of the principle. A potential objection that he directly speaks about the benefit of tracts (*praediorum meliorem causam*), can be refuted as this sentence is rather inconsistent within the whole structure of the text; as a result it is considered as an intervention in Justinian's compilations introducing the concept of personal servitudes and the following texts got adapted to it. However, we should return to this fragment within the context of effectiveness of servitude.

Should the principle apply only to predial servitudes other questions can be asked such as whether it would apply to both rural and municipal servitude, and in what form the principle would be used and what consequences it would lead to.

The first fragment that may be used to answer those questions with respect to rural servitudes stands, to a certain extent, in opposition to Paulus's quoted fragment allowing for a rather remote servitude. Paulus denies that a rural servitude can exist if it does not apply to an immediately adjacent tract.[32] It is well-known what servitudes are usually included in the category of rural servitudes according to the sources; however, Paulus appears in his statement quite radical, in particular when considering the fact that this fragment is regarded as authentic without identifiable interferences by the compilers. The conflict between Paulus's two fragments can be explained that in the first case Paulus means situations that could be called "irregular servitudes" in the language of modern Roman law. However, it is much harder to explain other fragments also conflicting with Paulus rigidly enforcing the principle of *praedia vicina esse debent* in the meaning of immediate neighbourhood; such conflict, as indicated above, cannot be removed or healed.

Paulus in other fragments deals with a possible construction of servitudes charged across certain places; despite his prohibition mentioned above, Paulus allows for drawing water which is a classical predial servitude, even across public space. However, he essentially denies that a watermain can be built across such land unless with the leave of the Emperor.[33] Such relativisation of his prohibition can be seen in another fragment even contained in the same source where Paulus strictly claims that a rural servitude cannot

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31 See above-quoted Dig. 8.3.1.1 (Ulp. lib. 2 inst.): *In rusticis computanda sunt aquae haustus, pecoris ad aquam adpulsus, ius pascendi, calcis coquendae, harenae fodiendae*. (Rural servitudes include drawing water, driving cattle to water, the right of pasture, burning lime, digging sand.)

32 Dig. 8.3.7.1 (Paul. lib. 21 ad ed.): *In rusticis autem praediis impedit servitutem medium praedium, quod non servit*. (Rural servitudes are obstructed by a middle tract which does not serve.)

33 Dig. 8.1.14.2 (Paul. lib. 15 ad sab.): *Publico loco interveniente vel via publica haustus servitus imponi potest, aquae ductus non potest: a principe autem peti solet, ut per viam publicam aquam ducere sine incommodo publico liceat. sacri et religiosi loci interventus etiam itineris servitutem impedit, cum servitus per ea loca nulli deberi potest*. (Public area or a public way can be charged with a right of drawing water, but not the right of watermain. The Emperor is frequently pleaded to allow the leading of water across a public way without causing inconvenience to the public. It is not possible to impose the right of footpath

be established between tracts that are not immediately neighbouring. On the other hand, he admits in this fragment that it is possible to have the right of trail or footpath leading across an intermediate public way.[34] As a result it appears to be impossible to draw a line between servitudes subject to this principle and those to which the principle is inapplicable; the same applies to two paragraphs of one fragment where Paulus introduces rural servitudes,[35] since individual servitudes are mentioned differently, as it appears crucial to determine whether the intermediate land is detrimental to the existence of the servitude or not. On the other hand, in another part of the fragment Paulus denies a possibility to have some municipal servitudes established across a public way. Nor is the assertion correct that the principle of immediate neighbourhood applies to municipal servitudes; in one fragment these are among servitudes that can be exercised across public space, in another municipal servitudes on both sides, such as the insertion of a beam, are excluded, but erecting a higher construction is not.

Paulus complements the whole mosaic with another stone: he strictly and unambiguously asserts that no servitudes can be established between tracts that cannot be seen by one another.[36] It should be noted that the fragment does not concern land (servient and dominant) but only buildings. Such assertion can lead to the conclusion that Paulus could mean that the principle applied to municipal servitudes which traditionally could have been established between built-up tracts; however, as suggested in the quoted Roman law sources – it should be read as "established between buildings". We should return to Ulpian's fragment already quoted, which deals explicitly with buildings and expressly states that "it matters little whether the buildings are adjacent"[37] in order to consider whether

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across sacred and consecrated places as such places cannot serve as servitude to anyone.) This fragment is considered as authentic with the exception of the last sentence. See LEVY, RABEL, *op. cit.*, 104.

34 Dig. 8.2.1pr. (Paul. lib. 21 ad ed.): *Si intercedat solum publicum vel via publica, neque itineris actusve neque altius tollendi servitutes impedit: sed immittendi protegendi prohibendi, item fluminum et stillicidiorum servitutem impedit, quia caelum, quod supra id solum intercedit, liberum esse debet*. (If the intermediate tract is public space or public way this is not in conflict with the right of footpath or trail nor the right to erect a higher construction. However, the insertion of a beam, a roof overhang, the establishment of a niche, or the servitude of eaves and gutters hinders this, as the space over that intermediate tract must remain clear and unobstructed.)

35 Dig. 8.3.1pr. (Ulp. lib. 2 inst.): *Servitutes rusticorum praediorum sunt hae: iter actus via aquae ductus. iter est ius eundi ambulandi homini, non etiam iumentum agendi. actus est ius agendi vel iumentum vel vehiculum: itaque qui iter habet, actum non habet, qui actum habet, et iter habet etiam sine iumento. via est ius eundi et agendi et ambulandi: nam et iter et actum in se via continet. aquae ductus est ius aquam ducendi per fundum alienum*. (Predial rural servitudes are as follows: the rights of footpath, trail, way, watermain. Footpath is the right of an individual to walk but not to drive cattle. Trail is the right to drive cattle and to lead a cart. Thus, he who has the footpath does not have the trail, and who has the trail has also a footpath even without cattle. The way is the right to walk, drive, lead and ride, as the way includes the trail and footpath. The watermain is the right to run water across the land of another.) Dig. 8.3.1.1 (Ulp. lib. 2 inst.): *In rusticis computanda sunt aquae haustus, pecoris ad aquam adpulsus, ius pascendi, calcis coquendae, harenae fodiendae*. (Rights of drawing water, driving cattle to water, pasture, burning lime and digging sand are counted as rural servitudes.)

36 Dig. 8.2.38 (Paul. lib. 2 quaest.): *Si aedes meae a tuis aedibus tantum distent, ut prospici non possint, aut medius mons earum conspectum auferat, servitus imponi non potest*: (If my building is so remote from your building that one cannot be seen from the other, or where a hill obstructs the view between them a servitude cannot be established.)

37 Dig. 8.4.6pr. (Ulp. lib. 28 ad sab.): *Si quis duas aedes habeat et alteras tradat, potest legem traditioni dicere, ut vel istae quae non traduntur servae sint his quae traduntur, vel contra ut traditae retentis aedibus*

a particular servitude can or cannot exist. Therefore, one should ask whether the distinction between "neighbourhood" and a certain larger space should be made "useful proximity" hopefully in line with Paulus's "visibility".

The concept of "useful proximity" suggests one underlying aspect of the principle of *praedia vicina esse debent*, namely that when considering the extent to which the dominant and servient tracts must be close to each other an essential criterion always appears to be "usefulness". That fact is indicated in the above-quoted fragment of Pomponius who interlinks the principle of *praedia vicina esse debent* and the criterion of usefulness of a servitude.[38] Pomponius states that such servitude is not valid (*non valet*) which brings to its neighbours no benefit. Regarding the nature of the principle of usefulness of a servitude[39] we can assume that, in the case of predial servitudes, only such servient and dominant tracts can be considered useful if they are located in a certain proximity to one another. If they are not then, as Pomponius says, they bring no benefit compared to the basic legal situation. It may appear in Pomponius's fragment that the term "neighbours" was inserted in the text later, although without that term the text makes even more sense. Should we accept such thesis we can assume that the principle of *praedia vicina esse debent* is essentially only a criterion or an indicator directed to the consideration of another principle, namely the principle of usefulness of a servitude.

Such perspective can be used regarding one of the above-mentioned fragments showing various approaches to the principle of *praedia vicina esse debent* in the area of municipal servitudes.[40] Paulus describes in that fragment when and how an intermediate tract creates, or does not create an obstacle to executing a servitude. And Paulus does so in the case of

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serviant: parvique refert, vicinae sint ambae aedes an non. idem erit et in praediis rusticis: nam et si quis duos fundos habeat, alium alii potest servum facere tradendo. duas autem aedes simul tradendo non potest efficere alteras alteris servas, quia neque adquirere alienis aedibus servitutem neque imponere potest. (If someone has two buildings and transmits one of them he may, in the course of transmission, stipulate that either the one not transmitted will be servient to that transmitted, or the other way round. It does not matter whether the buildings are neighbouring. The same will apply to rural tracts; if someone has two tracts he may transmit both with one stipulated as a servient tract to the other. However, two buildings transmitted at a time may not be designated as one being servient to the other because a servitude may not be acquired for the building of another nor may such building be subject to a servitude.)

38 Dig. 8.1.15pr. (Pomp. lib. 33 ad sab.): *Quotiens nec hominum nec praediorum servitutes sunt, quia nihil vicinorum interest, non valet, veluti ne per fundum tuum eas aut ibi consistas: et ideo si mihi concedas ius tibi non esse fundo tuo uti frui, nihil agitur: aliter atque si concedas mihi ius tibi non esse in fundo tuo aquam quaerere minuendae aquae meae gratia*. (If a servitude applies neither to people nor tracts as it brings no benefit to the neighbours, such servitude is invalid; for example, it is invalid if you claim that you would not walk across your tract or stay there, or if you confirm that you would not enjoy your tract. On the other hand, a different situation is if you confirm that you would not seek water on your tract in order not to reduce my resources.)

39 Simply said, a servitude must bring an objective and permanent benefit to the dominant tract. See, for example, GROSSO, *Le servitù*, p. 97 et al.; SOLAZZI, *op. cit.*, p. 21 et al.; BIONDI, *op. cit.*, p. 174 et al.

40 Dig. 8.2.1pr. (Paul. lib. 21 ad ed.): *Si intercedat solum publicum vel via publica, neque itineris actusve neque altius tollendi servitutes impedit: sed immittendi protegendi prohibendi, item fluminum et stillicidiorum servitutem impedit, quia caelum, quod supra id solum intercedit, liberum esse debet.* (If the intermediate tract is public space or public way this is not in conflict with the right of footpath or trail nor the right to erect a higher construction. However, the insertion of a beam, a roof overhang, the establishment of a niche, or the servitude of eaves and gutters hinders this, as the space over that intermediate tract must remain clear and unobstructed.)

predial servitudes.[41] The two fragments indicate how Paulus as a lawyer is very flexible in his thoughts, but it should be added that he uses rather casuistic or sophistic methods to solve the question whether a public tract is or is not an impediment. If the public tract of land is designated for public use, e.g., walking, and then if the servitude, in order to function, requires walking across the intermediate tract, then the servitude is possible. However, if something is at issue which cannot be provided by the intermediate public tract, in such case that tract constitutes an obstacle. However, Paulus's answers would definitely be different if the intermediate tract of land was a private tract as then it would not be possible to meet the objectives of the servitude, as is suggested in the last sentence of Paulus's second fragment,[42] denying a possibility of creating a footpath across a sacred or consecrated tract. The same thought can be visible here – those places cannot ensure that a servitude be executed and used by the owner of the dominant land, so, as a result, such servitude would be designated as useless.

It is quite possible that even in his radical statement in the fragment regarding rural servitudes, that if there is an intermediate tract not serving the dominant tract then such tract constitutes an obstacle,[43] Paulus tries to articulate the above-indicated thought that a private tract does not serve if not charged by a servitude; on the other hand, a public tract can serve in a specific manner without being charged by a servitude. In such case and in compliance with that rigid prohibition, Paulus considers the whole situation as regular since the servitude can exist, function and be useful. Also in the basic fragment from which the principle of *praedia vicina esse debent* was derived, the text hinges on the purpose of a servitude, namely to fulfil an objective need of the dominant tract.[44]

Finally, we can return to Paulus's fragment where he admitted a possibility to erect a shelter on the servient land.[45] It is possible to see this situation from the perspective of

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41 Dig. 8.1.14.2 (Paul. lib. 15 ad sab.): *Publico loco interveniente vel via publica haustus servitus imponi potest, aquae ductus non potest: a principe autem peti solet, ut per viam publicam aquam ducere sine incommodo publico liceat. sacri et religiosi loci interventus etiam itineris servitutem impedit, cum servitus per ea loca nulli deberi potest*. (Public area or a public way can be charged with a right of drawing water, but not the right of watermain. The Emperor is frequently pleaded to allow the leading of water across a public way without causing inconvenience to the public. Over sacred and consecrated places it is also not possible to lead a footpath servitude, so these places cannot be charged by anyone with a servitude.)

42 Dig. 8.1.14.2.

43 Dig. 8.3.7.1 (Paul. lib. 21 ad ed.): *In rusticis autem praediis impedit servitutem medium praedium, quod non servit*. (An intermediate tract which does not serve, obstructs the establishment of a servitude on rural tracts.)

44 Dig. 8.3.5.1 (Ulp. lib. 17 ad ed.): *Neratius libris ex plautio ait nec haustum nec appulsum pecoris nec cretae eximendae calcisque coquendae ius posse in alieno esse, nisi fundum vicinum habeat: et hoc proculum et atilicinum existimasse ait. sed ipse dicit, ut maxime calcis coquendae et cretae eximendae servitus constitui possit, non ultra posse, quam quatenus ad eum ipsum fundum opus sit*: (Neratius, in his work on Plautius, says that the right of drawing water for cattle or of driving cattle to water, or of digging chalk or of burning lime, on the ground of another, cannot exist unless the party has adjoining land; and he states that Proculus and Atilicinus hold the same opinion. But he also says that, although there is no question that a servitude for burning lime and digging chalk can be established, still this cannot be done for a greater amount than required by the dominant estate).

45 Dig. 8.3.6.1 (Paul. lib. 15 ad plaut.): *Item longe recedit ab usu fructu ius calcis coquendae et lapidis eximendi et harenae fodiendae aedificandi eius gratia quod in fundo est, item silvae caeduae, ut pedamenta in vineas non desint. quid ergo si praediorum meliorem causam haec faciant? non est dubitandum, quin servitutis sit: et hoc et maecianus probat in tantum, ut et talem servitutem constitui posse putet, ut tugurium*

usefulness of a servitude, and to ask whether, due to a longer stay on the tract resulting in the creation of the shelter, the servitude can at a longer proximity of tracts become useful for the dominant land and thus meet the proposed basic requirement for servitudes.

At the end of this brief look through the sources at the proposed principle of *praedia vicina esse debent*, a few observations can be made. What is evident at first sight is an extremely casuistic or sophisticated approach, when Roman lawyers make statements regarding every single type of servitude or obstacle between the dominant and servient tract individually. Although that approach is typical of Roman jurisprudence here the approach is even more fragmented. On the other hand, later interventions in the texts show attempts to cover casuistic conclusions by more general rules, which might have led to the construction of the principle of *praedia vicina esse debent;* that happened possibly unintentionally and definitely not expressly. The Roman law sources suggest that those general maxims did not play such a role to exclude the casuistic jurisprudence formed earlier. Finally, we can say that, despite emphasising the need of proximity of the dominant and servient tracts respectively, such need is part of another principle constituted of several partial principles, namely the principle of *utilitas fundi*, i.e., the usefulness of the tract. The predial servitude where the dominant and servient tracts are remote to such an extent that they have no real link, has no purpose and should not exist as it is in its essence useless and obstructing the owner of the servient tract due to failure to meet his objective needs.

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mihi habere liceret in tuo, scilicet si habeam pascui servitutem aut pecoris appellendi, ut si hiemps ingruerit, habeam quo me recipiam. (Similarly, usufruct is significantly different from the right to burn lime, break stone and quarry sand intended for erecting what is on the land. Also to cut timber in order to provide shoring in vineyards. So what served the improvement of those tracts? Undoubtedly via servitudes. This is confirmed by Maecianus asserting that such a servitude can be established that I could have a shelter on your land to use it when enjoying the servitude of pasture or driving cattle, and to have a possibility to hide if winter comes.)