

## SPECIAL APPROACHES TO ALLOCATION OF TYPES OF SERVITUDES FROM THE ACCOUNTING POSITIONS

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**Abstract.** *Articulation of issues.* A number of bases, positions, which previously were recognized as the only correct and irrefutable, served as the foundation of legal regulation of civil relations. But now they do not fully correspond to modern tendencies in the development of civil law science. That is why, today, it should be mentioned about the formation of a new doctrine, which can meet the requirements of the formation and development of the rule-of-law state. In such conditions, it is obvious that the scientific and theoretical study of individual approaches to the allocation of types of servitudes from the standpoint of accounting will contribute to the improvement of civil-law relations, to the formation of a clear and coherent system. At the same time, the variety of scientific views about types of way-leaves constantly encourages the implementation and improvement of scientific research in the field of property rights for someone else's property. In this context, the issue of the implementation of contractual, inheritance, and land relations for servitudes becomes very important and necessary. Also, another important question is: Are specific legislative approaches to allocation of servitudes on the basis of specific features fixed in legislation or not? Has the legislator stopped only on land and personal servitude? *The aim of the article* is to study the theoretical and legal possibilities and approaches to the allocation of way-leaves on the basis of specific features from the standpoint of accounting and jurisprudence. Also, another aim is to attract the attention of legal scholars to possible further scientific researches on the introduction of this phenomenon in modern civil legislation of Ukraine. *The subject of the study* is the individual approaches to the allocation of types of servitudes from the standpoint of accounting. *Methodology.* The research is based on the analysis of legal acts, which are connected with legal regulation of way-leave relations in Ukraine. On the basis of the comparative legal method of investigation of certain provisions of Ukrainian legislation, the possibilities and limits of the use of types of servitudes in contractual hereditary and land relations are determined. *Results* of this study have shown that special approaches to the allocation of way-leaves on the basis of specific features in Ukraine are in a real legal vacuum. Such a conclusion is based on the lack of legislative clarification and consolidation of other types of servitudes, which are not connected with the material component. Thus, property rights under the Tax Code of Ukraine are intangible assets, and the provisions of the Civil Code of Ukraine consolidate the material constituent of real rights to someone else's property. From the standpoint of accounting, we can talk about the presence of intangible servitudes that are associated with the recognition and accounting of intangible assets. If this gap will be solved, then we can talk about the revision of the characteristics of way-leaves, relying on the positions of other branches of law. *Practical impact.* The idea that certain positions of intangible servitude are contained in national law is rather necessary and expedient. So, we can talk about corporate rights as a person's rights, the share of which is determined in the statutory fund (property) of a business organization. These rights include the competence to participate in the management of a business entity, obtaining a certain percentage of profits (dividends) of this organization and assets in case of liquidation of it in accordance with the law, as well as other powers provided by law and statutory documents and, for example, the rights to use websites, or aspects of commercial secrecy. *Correlation/originality.* An analysis of the possible use of other types of way-leaves than those, which are enshrined in civil law in contractual, inheritance, land relations can become the basis for developing the most promising directions for the development of domestic civil law in this area and improving the civil law doctrine.

**Key words:** way-leave (servitude), accounting, civil law, real rights to someone else's property, licensing, contractual relations, inheritance, land relations.

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## 1. Introduction

A number of the principles and positions which were recognized only as correct and incontestable earlier served as the base of legal regulation of the civil relations. But now these principles don't correspond to current tendencies of development of the science of civil law in a full way. Therefore, today, it should be stated about the formation of a new doctrine, which, as objectively as possible, can meet the requirements of the formation and development of a law-governed state. In such conditions, it is obvious that the scientific and theoretical study of separate approaches to the allocation of types of way-leaves from the standpoint of accounting will contribute to the improvement of civil-law relations, the formation of a clear and coherent system.

At the same time, the variety of scientific views on the types of servitude constantly encourages the implementation and improvement of scientific research in the field of property rights for someone else's property. In this context, the issue of the implementation of contractual, inheritance, land relations for way-leaves becomes really important. Also, another important question is: Are specific legislative approaches to allocation of way-leaves on the basis of specific features fixed in legislation or not? Has the legislator stopped only on land and personal servitude?

Such famous scientists studied these issues as: Yu. O. Zaika, O. O. Loviak, Ye. A. Sukhanov, H. V. Sosnina, A. A. Biriukov, O. V. Bilotskyi, M. B. Honcharenko, I. E. Kosariiev, T. V. Predchuk, O. V. Rozghon, I. F. Sevriukov, O. O. Tomyi, V. V. Tsiura, O. Yu. Tsybul'ska, O. O. Shchypanova and many others.

## 2. Statement of the basic material

Proceeding from the provisions of clause 4 of Article 403 of the Civil Code of Ukraine (Tsyvilnyi kodeks Ukrainy, 2003), which states that servitude is not a subject to alienation, we can state that the application of certain contractual constructions (purchase and sale, donation) cannot be applied to servitude legal relations. Accordingly, can we argue that there are no other means of transferring the rights and obligations of way-leaves to another person? Probably no. A huge attention in this context should be paid to the inherited legal relationships, as well as ambiguous positions of regulation of servitude legal relationships with other branches of law, particularly, land. So, according to Part 1 of Art. 101 of the Land Code (Zemelnyi kodeks Ukrainy, 2002), the effect of land way-leaves is remained in case of transferring rights to a land plot, concerning which it was established, to the other person. That is why the Land Code of Ukraine establishes the right to inherit the servitude as a substantive right. In turn, the Civil Code of Ukraine confirms the position that the inheritance includes all rights and obligations

belonging to the ancestor at the time of the opening of the inheritance and did not cease as a result of his death (Art. 1218). Also, according to Art. 1219 of the Civil Code of Ukraine, such rights and obligations are not part of inheritance, which are inextricably connected with the person of the ancestor, particularly: 1) personal non-property rights; 2) the right to participate in associations and the right to join associations, unless otherwise provided by law or their constituent documents; 3) the right to compensation for damage caused by injury or other damage to health; 4) the right to alimony, pensions, benefits or other payments established by law; 5) the rights and obligations of a person as a creditor or a debtor, which are provided in Article 608 of the Civil Code of Ukraine (Tsyvilnyi kodeks Ukrainy, 2003). There is no way-leave in this list, and accordingly, it can be the object and basis of hereditary legal relationships.

But the diversity of way-leaves by specific features does not allow us to say that in each case, the established way-leave will pass to the heirs, and also whether it will be the subject of contractual relations or not. Let's consider the theoretical and practical grounds for the specific characteristics of servitudes of the modern legal field of Ukraine with the determination of the possibility of further implementation of the inheritance rights and duties of heritors in servitude. If we analyse the provisions of the Civil Code of Ukraine and the Criminal Code of Ukraine, we can distinguish two types of way-leaves at the level of law – they are land way-leave and personal way-leave.

First of all, it should be noted that the servitude, enshrined in the Land Code, by its nature differs from that one, which is contained in civil law. In the science of civil law, according to the Roman legal tradition, servitudes are subdivided into the land (praedial) and personal (personal). The differences between them are determined not by the object of servitude law, but solely by the way of establishing the subject of the latter, that is, that authorized person, who owns the right to restrict the use of another's thing. As it was already mentioned, servitudes are established in the interests of certain persons. This right belongs to a particular person and it is confirmed by its name, or it is associated with the existence of any other right (including property rights). Therefore, servitude belongs to a person (personal servitude) or it belongs to a person as the owner (possessor) of a particular real estate (praedial servitude) (Pravo zemelnoho servitutu). At the level of the law, we can also speak of forest servitude. The concept of forest way-leave reveals Art. 23 of the Forest Code of Ukraine. It is stated there that the forest servitude is a right to a limited paid or free use of another's land plot (Lisovyi kodeks Ukrainy).

As the result of the analysis of law enforcement practice, we can see that the user of the objects of the animal world and the forest user, the owner of the territory, water areas, on which the creatures of the

animal world live, they are usually different persons. In this case, the person who owns or uses the necessary territory, water area, may create obstacles to the implementation of the right of users of hunting areas for the use of objects of the animal world (Tomyn, 2013). The legislator in Art. 24 of the Law of Ukraine "On Hunting Sector and Hunting", in order to prevent abuse of the law, he provided a guarantee for users of hunting areas in the form of a contract with the owner or permanent user of land plots, on which these hunting areas are located. The size and procedure of payment for the use of hunting areas are determined in this law (Pro myslivske hospodarstvo ta poliuvannia). In such conditions, we can talk about the presence of faunal servitude (Tomyn, 2013). Some scholars use such term as "floristic servitude" (Sokolova, 2005). Again, based on the enforcement practice of implementation of the provisions of the Water Code of Ukraine (Vodnyi kodeks Ukrainy, 1995), the Code of Ukraine on Subsoil (Kodeks Ukrainy pro nadra, 1994), we can talk about the presence of water and subsoil servitudes. So, Art. 23 of the Code of Ukraine on subsoil gives to landowners and land users within the boundaries of the land parcels, which are granted to them, the right without special permits and mining claim to extract locally produced minerals. Besides, they can extract peat with a total depth of development of up to two meters, as well as underground water (other than mineral) for all needs, except for the production of packaged drinking water, in case that the volume of underground water extraction from each of the water intakes does not exceed 300 cubic meters per day (Kodeks Ukrainy pro nadra, 1994). Accordingly, the prohibition of servitude on such a law code does not establish. Therefore, the code does not establish the prohibition of servitude on this right. In this way, the national legislation somewhat relates the types of servitudes with the peculiarities of the legal nature of natural objects. N. G. Yurchichin states exactly about it (Yurchichin, 2015). It is possible to allocate urgent, termless, and single servitude according to the validity period. If we talk about one-time servitudes, they are servitudes set by the territorial authorities, for example, in order to celebrate certain events (the feast of wine, honey, etc.) (Polozhennia «Pro servitutne vykorystannia zemel komunalnoi vlasnosti terytorialnoi hromady m. Mukachevo»). Servitudes can be divided into those, which are established by the contract, law, will or a court decision according to the grounds of the establishment (Article 402 of the Civil Code of Ukraine) (Tsyvilnyi kodeks Ukrainy, 2003). If we talk about the possibility of charging – there are paid and free servitudes. In our opinion, the distinction of the specific features of way-leaves is not possible without the analysis of the regulatory framework of other branches of law, particularly, the economic and legal direction. M. P. Gorodysky proposed some positions regarding types of servitudes (Horodyskyi, 2012).

He distinguishes material and non-material servitudes. Regarding the availability of material servitudes, the positions of the Civil Code of Ukraine indicate that the servitude is established in relation to the objects of the material world (land, building, construction, etc.). From the accounting standpoint, we can speak of the presence of non-material servitudes that are associated with the recognition and accounting of intangible assets.

Intangible asset – is a non-monetary asset, it is non-material and can be identified. Acquired or received intangible asset is defined, if there is a possibility of receiving future economic benefits by the subject, which are connected with its use, and its cost can be reliably determined (Polozhennia (standart) bukhhalterskoho obliku). An asset is identified if it: a) can be separated. That means that it can be separated from the enterprise and it can be sold, it can be transferred, licensed, rent or exchanged individually or together with a contract, which is connected with it, with identified asset or liability, regardless of whether the entity intends to do so, or b) arises from contractual or other legal rights, regardless of whether they can be transmitted or separated from the entity or from other rights and obligations (Polozhennia (standart) bukhhalterskoho obliku).

Assets are not recognized as intangible assets but they should be reflected as a part of the expense of the reporting period, in which there are expenses for: research, training and retraining of personnel, advertising and promotion of products on the market, creation, reorganization and relocation of the enterprise or its part, increase of business reputation of the enterprise, the cost of publications and the cost of creating trademarks (commercial label). Acquired (created) intangible assets are counted to the balance of the enterprise at their initial cost. The initial cost of the acquired intangible asset consists of the price (cost) of the acquisition, duties, indirect taxes which aren't subject to compensation and other expenses, which are directly related to its acquisition and bringing it to a condition, which is suitable for use.

The initial cost of intangible assets is increased by the amount of costs, which is connected with the improvement of these intangible assets and the enhancement of their capabilities and terms of use. All these will contribute to an increase in the initially expected future economic benefits (Polozhennia (standart) bukhhalterskoho obliku).

According to the standards, the accounting of intangible assets is conducted for each object in the following groups:

1. Rights to use natural resources (the right to use subsoil or other resources of the natural environment, geological, and other information on the natural environment, etc.).
2. Rights to use property (the right to use the land plot in accordance with the land legislation, the right to use the building, the right to lease premises, etc.).



3. Rights to commercial designations (rights to trademarks (marks for goods and services), commercial (firm) name, etc.), except for those whose acquisition costs are recognized as royalties.

4. Rights to industrial property objects (right to inventions, utility models, industrial designs, plant varieties, breeds of animals, layout (topography) of integrated circuits, commercial secrets, including know-how, protection against unfair competition, etc.), except for those, whose acquisition costs are recognized as royalties.

5. Copyright and its related rights (right to literary, artistic, musical works, computer programs, programs for electronic computers, compilation of data (databases), performances, phonograms, videograms, broadcasts (programs) of broadcasting organizations, etc.), except for those, whose acquisition costs are recognized as royalties.

6. Other intangible assets (the right to conduct activities, use of economic and other privileges, etc.) (Polozhennia (standart) bukhhalterskoho obliku).

Paragraph 14.1.120 of the Tax Code establishes the provision that intangible assets can be ownership of the results of intellectual activity, including industrial property, as well as other similar rights recognized as the object of property rights (intellectual property), the right to use the property and property rights of the taxpayer in accordance with the procedure established by law, including the rights of use of natural resources, property and property rights, which are acquired in the order established by the legislation (Podatkovi kodeks Ukrainy, 2011). The order of the Ministry of Finance No. 242 of 18.10.99 "On Approval of the Regulation (Standard) of Accounting", paragraph 6 fixes the position that the acquired or received intangible asset is reflected in the balance sheet, if there is a probability of obtaining future economic benefits, which are connected with its use, and its cost can be authentically determined (Nakaz Ministerstva finansiv). That means that property rights are intangible assets according to the Tax Code of Ukraine. In this case, the Civil Code fixes real confusion. Property law is an independent category and it cannot be defined through other concepts. Property rights cannot be identified with the thing. That is why their determination through the non-consumable thing, as it is stated in Art. 190 of the Civil Code of Ukraine, is incorrect. The Civil Code repeatedly differentiates things as a type of property and property rights. As an example, we can use the norms of Art. 656 of the Civil Code of Ukraine, which state that the subject of a contract of sale may be a product in the sense of materially existing thing (Part 1 of Article 656) and property rights (Part 2 of this article). A similar approach is reflected in Art. 718 of the Civil Code of Ukraine. This article defines the subject of a gift contract. Bringing together property rights with the material rights, as it is shown in the norms of Art. 190 of the Civil Code of Ukraine, is incorrect (Iavorska, 2011).

Also, the existence of non-property rights in the legislation and their use may indicate the presence of intangible servitude. So, in Art. 21 of the Law of Ukraine "On Copyright and Related Rights" it is possible freely use of quotations, even without the consent of the author. The quote is a relatively short excerpt from a literary, scientific or any other published work, which can be used only with the obligatory reference to its author and sources of quotation, by another person in his work in order to make his statements more understandable. The quotes are also used for reference to the views of another author in an authentic formulation (Pro avtorske pravo i sumizhni prava, 1994). For example, under the law of France and Switzerland, objects of property rights can be both material and intangible things, particularly, rights (Mozolyna, Kulahyna, 1980). According to Art. 529 of the Civil Code of France, movable are obligations and lawsuits (by definition of the law), whose subject of the requirement are sums of money or personal estate, actions or shares in the financial, trade or industrial organizations (Frantsuzskiy hrazhdanskiy kodeks: ucheb.-praktych. Kommentariy, 2008). We think national legislation contains certain positions of the immaterial servitude. Again, here we can talk about corporate rights as the rights of a person, whose share is determined in the statutory fund (property) of a business organization. These corporate rights include the power to participate in the management of a business organization, a right to receive a certain share of profit (dividends) of the organization and assets in case of liquidation of the latter in accordance with the law, as well as other powers provided by law and statutory documents (Podatkovi kodeks Ukrainy, 2011) and, for example, the rights to use websites or aspects of commercial secrecy. It is important that the object of intangible assets, which was received for use, is considered by the public sector entity (the licensee) on the off-balance sheet account in the valuation, which is determined on the basis of the amount of remuneration established in the contract. In this case, payments for the given right of use of intellectual property objects are included in the expenses of the reporting period by the licensee. These payments are in the form of periodic payments and they are calculated in order and terms established by the agreement.

Also, some of the positions of well-known, civilized scientists suggest the presence of servitudes for movable things. For example, O. A. Podoprigora notes that the object of servitude may be movable property: animals, vehicles, equipment, household goods, etc. (Tsyvilnyi kodeks Ukrainy, 2004). Ch. Azimov emphasizes that the subject of servitude can be either immovable (land, buildings, apartments, houses, etc.), or movable property (raw materials, goods, etc.) (Azimov). Although these theoretical approaches were not clearly fixed in the legislation, were only mentioned during the drafting of the Civil Code of Ukraine. Therefore, servitude on the

movable property can exist, for example, for a thing, which is defined by individual characteristics (perhaps the loan features some peculiarities of servitude on a movable thing). In this context, in our opinion, T. V. Predchuk has a successful scientific position about the types of way-leaves according to the classification criteria, which are in some way enshrined in national legislation.

Firstly, by the way of establishing: servitude can be according to the property of things – servitude on a stationary and moving thing.

Secondly, according to the need of satisfaction of desires of other persons which can't be satisfied in a different way – there are land, natural resources, personal.

Thirdly, according to the peculiarities of the legal nature of natural objects – there are forest, faunistic, floral, aquatic, inferior.

Fourthly, according to the terms, we can allocate the term, termless, and one-time servitudes.

Fifthly, by the possibility of charging, we can allocate paid and free of charge servitude.

Sixthly, according to the accounting standards – there are tangible and intangible servitudes.

Seventhly, according to the property of things – servitude can be on a stationary and movable thing (Predchuk, 2016).

Of course, we do not reject other criteria for the classification of servitudes, but their full definition is impossible within one article. Finally, we want to note that, in accordance with the Civil Code of Ukraine, the testator has the right to make a will with the establishment of servitude. As well as the testamentary refusal, establishments of the servitude are burdening of a hereditary part of the successor under the will. The testator has the right to establish a way-leave on the land plot in the will, other natural resources or another real estate to satisfy people's needs. The servitude determines the volume of the rights concerning the use of someone else's property by a person. The servitude is not subject to alienation: it cannot be sold, given or exchanged. Land servitudes, which are established in the will, the heir accepts the inheritance, in the future may also be passed on to inheritance. They can be alienated only with the land plot. Personal servitude is established in the interests of a particular heir, and only this person has the right to use it. Personal servitude is not subject

to alienation and it cannot be inherited. It is terminated in case of the death of the heir, in whose favour it was established (Posvidchennia zapovitiv). So, the current Civil Code of Ukraine on species characteristics allows the inheritance of land and personal servitudes with certain peculiarities. There is no one single answer regarding the non-traditional types of servitudes outlined in our article, which of them can be passed on to inheritance or which may be the subject of the contract on the establishment of servitude.

### 3. Conclusion

So, there are so many scientific views on the types of servitude constantly encourages the implementation and improvement of scientific research in the field of property rights for someone else's property. Servitude is not an exception. Our research leads us to believe that from the standpoint of accounting, we can speak of the presence of intangible servitudes, which are connected with the recognition and accounting of intangible assets. The law on accounting determines the economic benefits that are the criterion for recognizing any asset as a potential opportunity for an enterprise to obtain funds from the use of assets. However, the receipt of funds does not necessarily have to be direct, that is, from the use of the asset as a commodity, or as a tool for obtaining cash income. Some objects are used to receive income indirectly, that is, in the economic system, which is the enterprise. This may not only be an input financial stream (revenue) but also a reduction in outflows (savings). Consequently, if the use of an object at the enterprise can potentially positively affect the overall performance of this system (lead to income generation) and if an object can be alienated with the receipt of certain funds – these both cases can prove about the existence of an asset recognition criterion. And hence we can talk about the possibility of using contractual constructions to establish servitude as a regulatory component that combines economic and civil-law components.

That is why; taking into account the specific features of servitude, our future scientific questions may be the clarification of the issues about which type of servitude may be subject to contractual or inheritance legal relationships and what encumbrances it contains, concerning the object in private-law or economic legal relations.

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