The Law of Obligations

Roman Foundations of the Civilian Tradition

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CHAPTER 12

Locatio conductio II

I. LOCATIO CONDUCTIO OPERARUM

1. Essential elements of Roman "labour law"

(a) Locare conducere

> "Simile est regnum coelorum homini patrifamilias, qui exiit primo mane conducere operarios in vincam suam. conventione autem facta cum operariis ex denario diurno, misit eos in vineam suam. Et egrcssus circa horam tertiam, vidit alios stances in foro otiosos, ct dixit illis: Itc et vos in vineam meara, et quodjustum fucrit, dabo vobis. Illi autem abicrunt. . . ."[1]

We all know the parable of the labourers in the vineyard. Quite apart from its theological significance, it gives us a vivid picture of how the labour market worked—in Rome as much as in Galilee. It was the place where people offered themselves into service. They were prepared to work for somebody else, and this involved, first of all, that they made themselves available for a change of place (locare,[2] as derived from locus). The employer/master, in turn, took them along or instructed them where to go, and his activity was described as conducere. We are dealing here with the second of the cardinal types of locatio conductio: the contract of service, or locatio conductio operarum, as it was termed by the lawyers of the ius commune. "Operae" are services,[3] services as such and without reference to a specific result to be achieved. Where such result was contemplated, one spoke of "opus".

(b) Essentialia negotii; periculum conductoris

By and large, locatio conductio operarum followed rules similar to locatio conductio rei. It was a consensual contract, and the parties had to agree on two essentialia negotii: the services to be rendered (operae) and the remuneration to be paid (merces).[4] The remuneration had to

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[1] St. Matthew 20, 1-4.

On sc locare and operas suas locare cf. De Robertis, / *rapporti di lavoro nel diritto romano* (1946), pp. 18 sq., 25 sq., 52 sq.; J.A.C. Thomas, "Locatio and operae", (1961) 64 *BIDR* 234; Kaufmann, *Altromische Miete,* p. 203. Could a slave let himself out? Cf. e.g. Lab. D. 19, 2, 60, 7; Pap. D. 33, 2, 2, and Thomas, (1961) 64 *BIDR* 232 sqq.; contra (on the basis that the texts are interpolated or untechnical) Mayer-Maly, "Romischc Grundlagen des modernen Arbeitsrechis", 1967 *Recht der Arbeit* 285.

[3] For a detailed discussion, see Kaufmann, *Altromische Miete,* pp. 182 sqq.; cf. also Maver-Maly, 1967 *Recht der Arbeit* 282.

On the history and etymology of merces and its derivatives, "mcrcennarius" (a person working for wages) and "Mercedonius" (an old, probably unofficial, name for the month of November(?), in the course of which the merces was due) see Kaufmann, *Altromische Miete,* pp. 138 sqq.

consist in money and could not merely be a token amount.[5] The employer could avail himself of the actio conducti to enforce due performance of the services promised; if he did not pay the merces, he was liable to his employee under the actio locati. The contents of the contract and all details of the parties' obligations were determined by the agreement of the parties; failing that, by the standard of "dare facere oportere ex fide bona" as set out in the intentio of the actiones locati and conducti. Thus, questions of risk and liability, for instance, were settled on this basis in a very flexible and finely balanced manner. As far as risk is concerned, we find only one statement of a more general nature in the Digest: "Qui operas suas locavit, totius temporis mercedem accipere debet, si per eum non stetit, quo minus operas praestet."[6] "Periculum", in this context, again refers to the question whether counterperformance (in this instance: payment of the remuneration) still has to be made, even though rendering of the performance has become impossible. Digesta 19, 2, 38 pr. tells us that the employee did not, as a rule, lose his claim for the merces in this case; thus: periculum conductoris.[7] A very important exception, however, is expressed in the words "si per eum non stetit, quo minus operas praestet". Naturally, if it was due to the employee's fault that the services had not been rendered, he could not sue his employer for the wages. "Si per eum non stetit", however, takes things much further and goes beyond mere dolus and culpa. What mattered was whether the reason why the work had not been done had its origin within the *sphere* of the employee.[8] Which incidents were, in this sense, attributable to the employee and which were not, is very difficult to determine. This is due to the great

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[5] On these requirements see, in general, Theo Mayer-Maly, "Dienstvertrag und Arbeitsvertrag", (1966) 1 *Zeitschrift fur Arbeitsrecht und Sozialrecht 2* sqq.

[6] Paul. D. 19, 2, 38 pr. See De Robertis, op. cit., note 2, pp. 148 sqq.; Mayer-Maly, *Locatio conductio,* pp. 181 sqq.; Max Kaser, "Periculum locatoris", (1957) 74 *ZSS* 194 sqq.; Giuseppe Provera, Sul problema del *rischio contrattuale nel* diritto romano", in: *Studi in* onore di Emilio Betti, vol. Ill (1962), pp. 693 sqq.; Claude Alzon. "Lcs risques dans la 'locatio conductio' ", (1966) 12 *Labeo* 319 sqq.; J.A.C. Thomas, "The Worker and His Wage", in: *Uit Het Recht, Rechtsgeleerde opstellen aangebaden aan mr. P.J. Verdam* (1971), pp. 201 sqq.; Imre Molnar, "Verantwortung und Gefahrtragung bei der locatio conductio zur Zeit des Prinzipats", *ANRW,* vol. II, 14 (1982), pp. 640 sqq.

[7] Differently Robert Rohlc, "Das Problem der Gefahrtragung mi Bereich des romischen Dienst- und Werkvertragcs", (1968) 34 *SDHI* 184 sqq.

[8] The parallel with the *"Spharentheorie",* which the modern German courts have developed to determine the allocations of risk (cf. supra p. 195) is obvious. The BGB itself, incidentally, had turned away (at least on a conceptual level) from the sphere-oriented way of risk allocation which dominated the earlier ius commune; it followed the generalized and will-oriented approach developed by the natural lawyers, as taken over by Savigny: in case of impossibility of performance, counter-performance also falls away on account of a "tacita conditio resolutiva" (Christian Wolff), i.e. the idea of the so-called conditional synallagma (cf. infra, p. 811). In the modern discussions about risk-allocation we see how even under the new normative roof of the BGB the old tradition of the ius commune still lives on (". . . *die gemeinrechttiche Erbschaft, die auch unter dem neuen normativen Dach des BGB fortwuchert").* For an analysis of the historical development, see Joachim Ruckert, "Vom casus zur Unmoglichkeit und vor den Sphare zum Synallagma", (1984) 6 *ZNR* 50 sqq. (quotation on p. 52).

scarcity of sources dealing with locatio conductio operarum. We are not even sure how what must have been—and still is—one of the most relevant practical examples, sickness of the employee, was dealt with.[9] Death of the employer, on the other hand, certainly did not affect the employee's claim for wages.[10] The same must have applied to the usual cases of vis maior—earthquakes, invading armies and the like: the risk was on the employer. In actual practice, however, things often looked less favourable for the employee, for the parties frequently seem to have provided otherwise in their contract. One such clause has been preserved in the text of the Transylvanian wax tablets: ". . . [q]uod si fluor inpedierit, pro rata conputare debebit"[11]—if the mine was flooded, so that the mine worker was unable to work for part of the time for which the contract had been concluded, his claim for wages was reduced proportionately.

(c) Imperitia culpae adnumeratur

The employee obviously had to do what was required of him diligently. It is probable (though not certain),[12] that the employer was liable (only) for culpa and not for custodia. Such culpa could, however, appear in the interesting guise of imperitia: imperitia culpae adnumeratur.[13] The muleteer whose services were hired, provides an example:

> "Mulionum quoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, vulgo dicitur culpae nomine teneri. idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit: nee videtur iniquum, si infirmitas culpae adnumeretur. . . ."[14]

Mules can be vicious and obstinate, and in order to be able to handle them, a considerable amount of skill and strength is required. If the muleteer lacks such skill or strength and consequently is unable to control the mules, he is liable, even though, considering his limited capabilities, it might be difficult to blame him either for his actions or for his failure to act at the time when the incident happened. His fault, however, consisted in offering to perform a service without being competent therefor; for the conductor may reasonably expect the

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[9] Risk on employee (i.e. no claim for wages): Kaser, *RPr* I, p. 570; Benohr, *Synallagma,* p. 107. Risk on employer (i.e. duty to pay wages): Mayer-Maly, *Locatio conductio,* p. 182; Provera, *Studi Betti,* vol. Ill, p. 712. The question was very controversial among the writers of the ius commune too; *c(.* e.g. Coing, p. 460 (today § 616 BGB).

[10] Ulp. D. 19, 2, 19, 9; 10. On these texts, See Nicola Palazzolo, "Le consueguenze della morte del Conductor operarum sul rapporto di lavoro", (1964) 30 *SDHI* 284 sqq.

[11] *Corpus Inscriptionum Latinarum,* vol. Ill, 2, 948 X.

[12] For a discussion of this question, see Molnar, *ANRW,* op. cit., note 6, pp. 613 sqq.

[13] This rule can be found in Gai. D. 50, 17, 132.

[14] Gai. D. 9, 2, 8, 1; cf. also *lust.* IV, 3, 8; both texts, however, deal with Aquilian liability. For an analysis, see Mayer-Maly, *Locatio conductio,* pp. 158 sq.; Molnar, *ANRW,* op. cit., note 6, pp. 611 sqq.; Okko Behrends, "Die Rechtsformen des romischen Handwerks", (1981) 22 *Abhandlungen der Akademie der Wissenschaftm in Gottingen* 145 sqq.

locator to possess both peritia and firmitas for the specific service which the latter undertakes to render.[15]

2. The range of application of locatio conductio operarum

So much for Roman labour law, or perhaps rather: so little. Again we pose the question why this area of the law received so little attention from the Roman lawyers and why we do not find any attempt to mitigate the lack of equilibrium inherent in the relationship of employment. Particularly striking is the lack of any protection against socially unjustified dismissal of the employee.[16] As we have seen, the institution of giving notice to terminate the relationship was unknown in Roman law, and that meant that the contract of locatio conductio operarum came to an end either on the expiration of the time for which it had been entered into—this was what normally happened—or, if no time had been fixed, the contract could be terminated at any time by either of the parties.

(a) Status relationships

Again, however, we should not rashly attribute what seems to us to be a highly unsatisfactory state of affairs to a social bias or to sinister capitalistic machinations on the part of the Roman lawyers. For it is important to realize that locatio conductio operarum dealt with only a small segment of the Roman labour market. To a considerable extent,[17] the demand for both skilled and unskilled labour was met by slaves, and slaves, of course, did not enter into employment relationships. Their status was determined in terms of potestas and dominium, and it was not on a contractual basis that they worked for their masters. Where the master let out his slave to a third party, this constituted locatio conductio rei, not operarum.[18] If, therefore, the services rendered by slaves were excluded from the ambit of locatio conductio operarum, so were the operae which liberti owed towards their former masters (now patrons). These operae were usually rendered on the basis of a promise under oath[19] or of a stipulation; for the enforcement of such a promise, the ius civile provided a special action, the actio operarum.[20]

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[15] Cf. today § 276 I 2 BGB: "A person who does not exercise ordinary care acts negligently." Negligence is determined according to an abstract objective criterion, not according to whether this particular debtor could have foreseen or prevented the damage.

[16] One of the main concerns of modern labour law; for a comparative analysis, see Tony Honore", *The Quest for Security: Employees, Tenants, Wives* (1982), pp. 1 sqq.

[17] Cf., for example, Behrends, op. cit., note 14, pp. 182 sqq. But see also, as far as public works were concerned (such as large-scale imperial building programmes), P.A. Brunt, "Free Labour and Public Works at Rome", (1980) 70 *JRS* 81 sqq.

[18] Cf. e.g. Paul. D. 19, 2, 42; 43; 45, 1.

[19] Gai. III, 96.

[20] For details on the operae libertorum, cf. Kaser, *RPr* I, pp. 298 sqq.; Behrends, op. cit., note 14, pp. 184 sqq.; and now, in particular, the splendid work of Wolfgang Waldstein, *Operae Libertorum* (1986). He emphasizes that we are dealing here with a social phenomenon

(b) The artes liberates

Was locatio conductio operarum thus confined to service transactions between members of the upper classes? It would be wrong to draw such a conclusion. For not only at the lower, but also at the upper end of the social scale a whole range of services was largely excluded from this type of contract. We are dealing with the so-called artes liberales, activities which could be regarded as worthy of a free man[21]—such as those in which philosophers, advocates, architects, land surveyors or teachers and students involved in studia liberalia engaged.[22] These activities did not per se fall outside the scope of locatio conductio operarum; it was, however, regarded as inappropriate and unseemly among the higher echelons of Roman society to work for a wage.[23] Thus, "one" did not let one's (professional) services under a contract of locatio conductio.[24] A life of otium cum dignitate was the ideal of the Roman aristocracy:[25] otium, however, not implying a Mediterranean attitude of "dolce far niente", but providing the opportunity to concentrate one's efforts on the common weal. Only those who did not have to worry about their daily bread were able to seek self-fulfilment by devoting their lives to the service of the res publics.[26] A reflection of this attitude was the rather low estimation of labour, as it appears, for instance, from a famous passage of Cicero's de officiis:[27]

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of great importance. On the actio operarum, cf. pp. 135 sqq., 345 sqq. and passim. Cf. also Johannes Michael Rainer, "Humanitat und Arbeit im romischen Recht", (1988) 105 *ZSS* 745 [S]49,-

Cf. e.g. Seneca, *Epistulae ad Lucilium,* Lib. XI, 88, 1, 2 and 20; referring, however, to "libcralia studia". There is an extensive literature dealing with the operae liberales (a term that does not appear in the legal sources; cf., however, Ulp. D. 50, 13, 1: ". . . liberalia autem studia . . ., quae Graeci eX.Evd?pux appellant"); cf, above all, Karoly Visky, *Geistige Arbeit und die "artes liberates" in den Queilen des romischen Rechts* (1977), pp. 9 sqq.

[22] ". . . what might generally be described as 'the professions', with intellectual as distinct from skilled manual activity": Thomas, (1961) 64 *BIDR* 240 sq.

[23] Prevailing opinion; cf. e.g. Mayer-Maly, *Locatio conductio,* pp. 125 sqq.; Kaser, *RPr* I, p. 569; Thomas, *TRL, p.* 298; Watson, *Failures,* p. 78. For a different view, see, for instance, Heinrich Siber, "Operae liberales", (1939-40) *SSjhJb* 161 sqq. (all types of operae liberales were typically rendered under a contract of locatio conductio) and Visky, op. cit., note 21, pp. 9 sqq. (operae liberales by law excluded from this contract). Others differentiate between the various professions (cf. e.g. Karl Heldrich, "Der Arzt im romischem Privatrecht", (1939-40) *SSJhJb* 139 sqq.; Michel, *Gratuite,* pp. 198 sqq.), one of the main difficulties being that the term "artes liberales" lacked both precise definition and technical significance. Thus, a single coherent doctrine of the practice of "the" professions at Rome cannot be extracted from the sources (Thomas, (1961) 64 *BIDR* 241). For further standard literature on the topic, *cf.* Antoine Bernard, *La Remuneration des Professions Liberates en Droit Romain Classique* (1936); Jean Macqueron, *Le travail des hommes libres dans I'antiquite romaine* (1958).

[24] Cf. e.g. Ulp. D. 11, 6, 1 pr.: ". . . quia non crediderunt veteres inter talem personam locationem et conductionem esse . . . " (dealing with agri mensores),

[25] Cf. e.g. Cicero, *Pro P. Sextio oratio,* XLV—98; idem, *De oratore,* 1, I; Francesco M, de Robertis, *Lavoro e lavoratori nel mondo romano* (1963), pp. 21 sqq.

[26] Dieter Norr, "Zur sozialen und rechtlichen Bewertung der freien Arbeit in Rom", (1965) 82 *ZSS* 76.

[27] 1, XLII—150 sq. On this text cf. e.g. De Robertis, op. cit., note 25, pp. 53 sqq.; Visky, op. cit., note 21, pp. 10 sqq.; Behrends, op. cit., note 14, pp. 149 sq.

> "Inliberales autem et sordidi quaestus mercennariorum omnium quorum operae, non quorum artes emuntur: cst enim in illis ipsa merces auctoramentum servitutis, . . . Opificesquc omnes in sordida artc versantur: nee enim quicquam ingenuum haberc potest officina, minimcque artes eae probandac quae ministrac sunt voluptatum: Cetarii, lanii, coqui, fartores, piscatores, ut ait Terentius; adde hue, si placet, unguentarios, saltatores totumque ludum talarium."

Sordidus: this is strong stuff. It should not induce us to paint too undifferentiated a picture.

(c) The value of "labour" in Roman society

First of all: we are dealing with upper-class attitudes. Among the Romans of less elevated station, middle-class artisans and traders, for instance, whose circumstances we know of through tombstones and inscriptions, a much more positive view about the value of labour prevailed.[28] Secondly, even among the upper classes it was not every type of work (operae, labor)[29] that was despised, not even every kind of manual labour. One merely has to think of the anecdotes about Republican statesmen being called away from their plough share[30] in order to realize that agriculture enjoyed a special status.[31] There can be little doubt that all activities connected with it were worthy of the sweat of even the most distinguished Romans. Thus, it was sometimes not so much the activity as such that was frowned upon, but rather whether the work was done for the working party himself or for a third person. To plough one's own field was in order, but to join the neighbour's workforce to harvest his olives was hardly suitable. But even that distinction must not be carried too far: it was one out of a variety of factors that influenced the social evaluation of labour.[32] To work for somebody else's benefit may be highly desirable, and genuinely altruistic behaviour was certainly never looked down upon by the Roman aristocracy. Thus, two further very important and closely connected factors determined the esteem in which a particular activity was held: whether it involved subjection to somebody else's will and whether or not the services were rendered gratuitously. A person who agreed to work for money somehow appeared to have sold himself.[33]

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[28] On the necessity of differentiating between what he calls the ambiente volgare and the ambiente aulico, and on the social evaluation in both spheres, see De Robertis, op. cit., note 25,pp. 21 sqq. and passim.

On the terminology, see De Robertis, op. cit., note 25, pp. 9 sqq.; cf. also Mayer-Maly, 1967 *Recht der Arbeit* 282.

[30] Cf. e.g. Valerius Maximus, Lib. IV, Cap. IV, §§ 4 sqq.; Plinius, *Historia naturalis,* XVIII sq.; Cicero, *Cato maior de senectute,* XVI.

[31] Cf. Cato, De *agri cultura, praefatio* (". . . pius stabilissimusque minimeque invidiosus") and Cicero, *De officiis* 1, XLH—151: "Omnium autem rerum ex quibus aliquid adquiritur, nihil est agricoltura melius, nihil uberius, nihil dulcius, nihil homine, nihil libero dignius." For details, see De Robertis, *Lavoro,* pp. 87 sqq.

[32] For an analysis of the various factors to be taken into consideration, see Norr, (1965) 82 *ZSS* 73 sqq.

[33] Norr, (1965) 82 *ZSS* 76.

Hence the exclusion of the activities of the upper classes from locatio conductio operarum. To engage in philosophy, mathematics, rhetoric or architecture was entirely respectable, as long as it served the purpose of edification, instruction or self-fulfilment. Apart from that, however, the Roman aristocracy felt honour-bound to make their skills available to assist others and operae liberales could therefore also be rendered to third parties. But this had to happen free of charge. The fiction had to be preserved that the work was done voluntarily, without legal obligation and as a matter of amicitia or public spirit. Take, for instance, the advocacy, a profession that carried high prestige.[34] Even though for many it was a professional activity, by means of which considerable sums of money were earned, it was not carried out on the basis of a contract of service. To be asked for help was an honour for the advocatus, and what he eventually received for his services was a ("voluntary") honorarium.[35] All this was ancestral or social convention, for a legal prohibition to enter into lucrative agreements does not seem to have existed for any of the more highly rated professional activities. Thus, for instance, physicians were obviously able to work for merces.[36] But then the activities of medici in general did not enjoy the same sort of prestige as the other "quaestus liberales";[37] medicine was usually practised by slaves or freedmen of Greek or Oriental origin;[38] ingenui seem to have remained an exception.[39]

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[34] For details cf. Visky, op. cit., note 21, pp. 54 sqq. and, more generally, on the legal professions, their status and their members, Fritz Schulz, *Roman Legal Science* (1946), passim; Bruce W. Frier, *The Rise of the Roman Jurists* (1985), passim. Cf. also, in the present context, Thomas, (1961) 64 *BIDR* 245 sqq.; Michel, *Gratuiti,* pp. 215 sqq.

[35] Cf. e.g. Ulp. D. 11,6, 1 pr.: ". . . sed magis operam beneficii loco praeberi et id quod datur ei, ad remunerandum dari et inde honorarium appellari" (dealing, however, with agri mensores).

[36] Cf. e.g. Ulp. D. 9, 2, 7, 8; Gai. D. 9, 3, 7; Visky, pp. 73 sqq. Too extreme are Heldrich, (1939-40) *SSJhJb* 141 sqq. (medici typically entered into a contract of locatio conductio) and Karl-Heinz Below, *Der Arzt im romischen Recht* (1953), pp. 57 (the medicus ingenuus—as opposed to servi and liberti—was excluded from entering into this type of contract).

[37] Cicero, *De officiis,* 1, XLII—150 sq. During the Republic, physicians were regarded as artisans (faber); cf. e.g. Plautus, *Aulularia,* Act III, Sc. II, 1. 448 (on the notions of craft and craftsmen in Rome generally, see Behrends, op. cit., note 14, pp. 142 sqq.; cf. also Harald von Petrikovits, "Die Spezialisierung des romischen Handwerks", (1981) 122 *Abhandlungen der Akademie der Wissenschaften in Gottingen* 63 sqq.). For a long time (and in contrast to other Mediterranean nations) the Romans did not have any kind of scientific medicine at all. Cato is still reported to have treated all the members of his household himself. For his ideas about medicine cf. e.g. *De agri cultura,* CLXVIII, 160 ("Luxum si quod est, hac cantione sanum fiet"). According to Varro, *De re rustica,* Lib. I, 2, 27, gout could be cured by singing 27 times "Ego tui memini, medere meis pedibus, terra, pestem teneto, salus hie maneto in meis pedibus", whilst at the same time touching the soil and spitting out. But see Ulp. D. 50, 13, 1, 1 and 3 for a different assessment of the activity of doctors prevailing in classical times; cf. also Seneca, *De benefidis.* Lib. VI, XIV, 3 sqq. and Watson, *Failures,* pp. 68 sqq.; Ralph Jackson, *Doctors and Diseases in the Roman Empire* (1988), pp. 56 sqq.

[38] Many of the most brilliant Roman doctors were of Greek origin: Asklepiades of Bythinia (who was friendly with Quintus Mudus Scaevola, Cicero, Marcus Antonius and other prominent Romans), his pupil, Themison of Laodikeia, and Galenos of Pergamon. Under their influence, the social evaluation of medicine and of those practising it seems to

(d) Common law (ius civile) and employment relationships

But wherever exactly the "upper" limit of locatio conductio operarum was drawn, it has become clear that this type of contract covered only a relatively small (middle) sector of the services available. If that was so, and if it is also kept in mind that the claims of middle-class wage-earners were not likely to come to the attention of the Roman jurists in great numbers,[40] the somewhat cursory treatment of this branch of law becomes much less surprising. Furthermore, there are other legal systems where the "common" law has not had a major formative influence on employment relationships either. In England, for instance, the courts traditionally paid no attention "to the reality of subordination which lurks behind the facade of contractual equality",[41] and as a result

> "the worker's obligation to obey the lawful commands given by management and the employer's obligation to remunerate the worker are [regarded as] contractual obligations freely incurred among equals. Pacta sunt servanda".[42]

The whole body of what we today know as labour law has been built up from different sources. One may well ask why this is so: are the courts simply not willing to lift the veil of equality, have they lacked the opportunity of doing so (because exploited workers have had no access to the courts or were deterred from litigating), or are we dealing with an inherent inability of (judge-made) case law to meet the expectations of society and to cope with the challenges presented by individual industrial relations?[43] Whatever the answer may be: one

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have changed. The Emperors granted them immunitas and other privileges (Below, op. cit., note 36, pp. 22 sqq.). Antonius Musa (a libertus and another pupil of Asklepiadcs) became personal physician to Augustus and was able to cure a severe liver disease of the Emperor by way of hydrotherapy. He received the anulus aureus (entailing equestris dignitas), and a statue of him was made. For further details, see Manfred Just, "Der Honoraranspruch des medicus ingenuus', in: *Sodalitas, Scritti in onore di Antonio Gttarino,* vol. VI (1984), pp. 3072 sqq.; generally on Roman physicians and their medicines cf. Jackson, op. cit., note 37, pp. 56 sqq. From C. 4, 43, 3 it is evident that even in Justinian's time medical practitioners could well be slaves. They were, incidentally, valued at three times the rate of slaves with no trade, and double the rate of skilled slaves (cf. Watson, *Failures,* pp. 67 sq.).

Did medicine belong to the artes liberales, as opposed to the "quaestus illiberales", activities which could not be reconciled with upper-class status? Cf. e.g. Thomas, (1961) 64 *BIDR* 241 sqq. (yes); Visky, op. cit., note 21, pp. 73 sqq. (no); Just, *Scritti Guarino,* vol. VI, pp. 3057 sqq. (at first not, but later on yes). For a detailed analysis of the social status and legal position of medical practitioners cf. Bernard, op. cit., note 23, pp. 57 sqq.; Below, *Der Arzt im romischen Recht* (1953), passim; Visky, op. cit., note 21, pp. 73 sqq.; Watson, *Failures,* pp. 66 sqq.

Cf. supra, pp. 348 sq. The same point has been emphasized with regard to English law; cf. Kahn-Freund's *Labour and the Law* (infra, note 41) p. 35; cf. also Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment", (1977) 93 *LQR* 508 sqq., 521.

[41] Kahn-Freund's *Labour and the Law* (3rd ed., 1983, by Paul Davies, Marc Freedman (eds)), p. 36.

Kahn-Freund's *Labour and the Law,* op. cit., note 41, p. 35.

All these factors are discussed in Kahn-Freund's *Labour and the Law,* op. cit., note 41, pp. 29 sqq.

should in any event not blame the Roman lawyers for an exceptional and entirely unprecedented lack of social conscience.

(e) The contribution of Roman law

Finally, the great contributions the Roman lawyers have made even to this field of law must not be overlooked. Two major points, in my view, stand out. First of all, critical as we tend to be today of freedom of contract in labour relations, the move from status to contract, as it occurred during the Roman Republic,[44] represents a considerable advance in the management of human resources. Some of the more radical modern attempts to discredit contract as the basis for the relations between employers and workers, and to think in terms of incorporation and of what has been termed *"pevsonenrechtliches Gemeinschaftsverhdltnis"*[45] have soon become thoroughly discredited. And secondly; the nature of locatio conductio as a consensual contract giving rise to reciprocal rights and duties, the rules relating to merces and the refined way of determining liability and of allocating risks: these have remained essential elements of the contract of service (*"Dienstmiete")* of the continental ius commune. Much of it has been preserved in modern law.[46] And even though, for instance, it is often

[44] Not very much is known about the early history of service transactions. But it seems certain that, whereas locatio conductio presupposed at least formal equality of the parties, the legal institutions preceding it were based on a relationship of subordination; thus, the right of the paterfamilias to the services of his slaves and of his sons in power (and his right to transfer them into the service, i.e. the power, of another paterfamilias), the right of the patron to the services of his clientes and of the manumissor to those of his liberti were all based on relationships of power and status. For details, see Kaufmann, *Altromisdie Miete,* e.g. pp. 44sqq., 67sqq., 118 sqq., but also the summary by Mayer-Maly, 1967 *Recht der Arbeit* 283. The contract of locatio conductio did not involve a change of the legal status on the part of the employee: Norr, (1965) 82 *ZSS* 86 sqq. as against De Robertis, op. cit., note 25, pp. 143 sqq. More recently on the transition, as far as the activities of artisans are concerned, from status relationships to the liberalistic and individualistic contractual system, see Behrends, op. cit., note 14, pp. 193 sqq. Regarding the English common law, Kahn-Freund, (1977) 93 *LQR* 508 sqq. has argued that Blackstone's classification of the relationship of master and servant as essentially one of status impeded the development in England of a contractual approach to employment. Contra: John W. Cairns, "Blackstone, Kahn-Freund and the Contract of Employment", (1989) 105 *LQR* 300 sqq. One of the points at dispute between Kahn-Freund and Cairns is whether Blackstone's neglect of the contract of employment is a "specimen case to demonstrate the contrast between English legal thinking and the legal thinking of the continental nations of Western Europe". On Pothier's analysis *(Traite du contrat de louage)* cf. Kahn-Freund, (1977) 93 *LQR* 514 sqq. and Cairns, (1989) 105 *LQR* 302 sq. Other civilian authors did not deal with the master-and-servant relationship as part of the law of contract, but did so when they discussed various status relationships within the society at large. So did, incidentally, the Prussian General Land Law (§§ 1 sqq. II 5).

[45] On these developments, which occurred as part of the permeation of the law by national-socialistic thinking, see Bernd Riithers, *Die unbegrenzte Auslegung. Zum Wandet der Privatrechtsordnung im Nationalsozialistttus* (1968), pp. 379 sqq.

[46] Cf., for example, Mayer-Maly, 1967 *Recht der Arbeit* 281 sqq.; Rcinhold Trinkner, Maria Wolfer, "Modernes Arbcitsrecht und seine Beziehung zum Zivilrecht und seiner Geschichtc", 1986 *Betriebsberater* 4 sqq.; as far as the problem of risk allocation is concerned, cf. in particular Riickert, (1984) 6 *ZNR* 50 sqq. On the (earlier) ius commune, cf.,

claimed in Germany that labour law has become a distinctive and autonomous field of law, the §§ 611 sqq. BGB still remain of fundamental importance in individual labour relations. Apart from that, they govern all service contracts falling outside the area of labour law, particularly the services rendered by the so-called liberal professions: doctors, lawyers, chartered accountants, etc.[47]

II. LOCATIO CONDUCTIO OPERIS

1. Essential characteristics and range of application

We have seen that medici were able to work for mcrces.[48] In other words, they could render their services under a contract of locatio conductio. Such a contract was, however, not necessarily locatio conductio operarum. Indeed, in one of the texts referred to above,[49] the doctor was said to be liable ex locato: "Proculus ait, si medicus servum imperite secuerit, . . . ex locato . . . compctere actionem."[50]" Had he been employed under a contract of service, he would himself have been the locator. But since we are dealing with an operation, the services as such were not the object of the contract. What was owed was opus faciendum, a particular job to be done as a whole. This is the essential characteristic of locatio conductio opens.[51] One person undertakes to perform or execute a particular piece of work, and he promises to produce a certain specified result. This person is called the conductor (operis). The person commissioning the enterprise (the customer) is the

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in this respect, Thco Mayer-Maly, "ESemcme der Entwicklung des Arbeitsrecht", in: *La formazione storica,* vol. Ill, pp. 1320 sqq. He draws attention to the fact that the history of labour law does not commence with the Industrial Revolution, but that a scientific body of law dealing with labour relations already existed in the late Middle Ages.

[47] Cf. e.g. Gottfried Schiemann, "Der freie Dienstvertrag", 1983 *Juristische Sdiulung* 649 sqq. and also § 1163 ABGB. In so far as modern law deviates from the IUS commune which, like Roman law, did not regard the services of members of the free (liberal) professions as being rendered under a contract of locatio conductio: cf. e.g. Gliick, vol. 17, pp. 315 sqq.; D.J. Joubert, "Die kontraktuele verhouding tussen professioncle man en khe'nt", 1970 *Acta Juridica* 15 sqq.; Coing, pp. 458 scj.; cf. also Wmdscheid/Kipp, § 404 (emphasizing, however, thai the legal regime is the same as if one were dealing with locatio conductio); § 895 I 11 PrALR; art. 1779 code civil. The situation in modern South African law is unclear (locatio conductio or mandatum?): cf. Joubert, 1970 *Acta Juridica* 22 sqq. (with very sensible suggestions). Generally on locatio conductio operarum in modern South African law, cf. James Fourie, *Die Diemkontrak in die Suid-Afrikaans? Arbeidsre^* (unpublished LLD thesis, Pretoria, 1977).

[48] Cf, supra, p. 390.

[49] At, p. 390, note 36.

[50] Ulp. D. 9, 2, 7, 8. Cf. e.g. Heldrich, (1939-40) *SSJhJb* 150; Just. *Scritti Guarino,* vol. VI, p. 3061.

[51] Cf. e.g. Wmdscheid/Kipp, §§ 399, 401; Berger, *ED,* p. 567; Buckland/Stcin, p. 505; Kaser, *RPr* I, p. 570; Thomas. (1961) 64 *BIDR* 236 sq.; F.B.J. Wubbe, "Opus scion la definition de Labeon" (1982) 50 *TR* 241 sqq.; for the historical development cf. particularly Kaufmann. *Altromische Miete.* pp. 205 sqq.