The Law of Obligations

Roman Foundations of the Civilian Tradition

REINHARD ZIMMERMANN

Dr. iur (Hamburg)
Professor fur Privatrecht, Romisches Recht und Historische Rechtsvergleichung,
Vniversitat Regensburg; formerly W.P. Schreiner Professor of Roman
and Comparative Law, University of Cape Town

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but also for the fault of others? One of the key fragments, in the present context, relates to a drowsy furnace-tender:[24]"

> "Si fornicarius servus coloni ad fornaccm obdormisset et villa fuerit exusta, Neratius scribit ex locato conventum praestare debere, si neglegens in cligendis ministeriis fuit:. . . ."[2+1]

The slave fell asleep, and, as a consequence, the house burnt down. The master of the slave (i.e. the conductor) is liable ex locato, but only if he himself was negligent in choosing the slave. In other words: the conductor is not responsible for the fault of third parties, whose services he used, "to the same extent as for his own fault";[242] he is not subject to strict {= no fault) liability. For the actio locati to be successful, culpa must be attributable to him (and not only to the third party) in cases such as these too. Culpa remains the basis of the tenant's liability; it merely usually takes the form of culpa in eligendo.[243] The tenant is held responsible, because it was ultimately he who endangered the house by selecting an unsuitable slave to tend the furnace. Along very similar lines runs the argument in Ulp. D. 19, 2, 11 pr.:

> "Videamus, an et scrvorum culpam et quoscumque induxent praestare conductor debcat? . . . mihi ita placet, ut culpam etiam eorum quos induxit praestet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit, quod tales habuerit vel suos vcl hospitcs: et ita Pomponius . . . probat."

Here it is not so convenient to refer to culpa in eligendo, because to bring both his family and his servants onto the estate is not really a matter of choice for the tenant. His fault seems rather to lie in the fact that he exposed the lessor's estate to people who were prone to cause damage, without properly supervising them.[244] Again, however, the tenant is held responsible for his own fault.[245]

11. The position of the lessee

(a) His protection against the lessor

We have thus far been discussing the requirements for a contract of lease, to which obligations on the parts of both the lessor and the lessee

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[240] The example is not as outdated as it might seem. On Zimbabwean tobacco farms 1 have seen big barns in which the tobacco leaves are stored and dried. An open fire is kept burning in a furnace, and this furnace has to be watched by a servant (who still occasionally falls asleep).

[241] Ulp. D. 9. 2, 27, 9 (cf. also Coll. XII, VII, 7).

[242] In the words of § 278 BGB.

[243] Culpa in eligendo has often been regarded as spurious: cf. e.g. Wolfgang Kunkel, "Diligentia", (1925) 45 *ZSS* 329 sqq.; Manlio Sargenti, "Problemi della responsabilita contrattuale", (1954) 20 *SDHI*210; von Lubtow, *Lex Aquilia,* p. 160. Contra: Mayer-Maly, *Locatio conductio,* p. 199; Geoffrey MacCormack, "Culpa in eligendo", (1971) 18 *RIDA* 539; Frier, (1978) 95 *ZSS* 256 sqq.; Rolf Kniitcl, "Die Haftung fur Hilfspersonen im romischen Recht", (1983) 100 *ZSS* 399 sqq.

[244] Knutel, (1983) 100 *ZSS* 404.

[245] For further details about the vicarious liability of tenants and for a discussion of Proc./Ulp. D. 9, 2, 27, 11 and Coll. XII, VII, 9, see Frier, (1978) 95 *ZSS* 256 sqq. and Knutel, (1983) 100 *ZSS* 391 sqq.

it gave rise, and when and under which circumstances the contractual relationship came to an end. A final comment has to be made concerning the position of the lessee. From the point of view of a modern observer, it was stunningly weak. Not only did the conductor not acquire ownership or a limited real right, he did not even become possessor. He was a mere detentor. As a result of this, he did not have any protection through actiones in rem; nor could he avail himself of the possessory interdicts. Thus, the lessor could at any time expel his tenant, even where the parties had agreed upon a specific term of tenancy. Alternatively, he could evict the tenant by bringing the interdicta unde vi or uti possidetis. Of course, by doing so, the lessor committed a breach of contract and unless the expulsion was justified,[246] he became liable to the tenant under the actio conducti. But a mere actio in personam for damages must often have been cold comfort for somebody who had just lost his home.[247]

(b) Alienation of the leased property by the lessor

Most precarious, too, was the tenant's position if the lessor sold the leased property to a third party. Once ownership had been transferred, such a third party could evict the tenant, who again did not have any protection against the new owner/possessor. The latter did not even commit a breach of contract, since he did not become party to the contract of lease. Again, the only remedy the tenant could resort to, once he had been evicted, was the actio conducti against his lessor, i.e. the old owner/vendor. In order to achieve at least some indirect protection for the tenant, the lessor/vendor was required to include a special pactum in the contract of sale to the effect that the purchaser would allow the tenant to remain on the premises for the term of the lease:

> "Qui fundum fruendum vel habitationem alicui locavit, si aliqua ex causa fundum vel aedes vendat, curare debet, ut apud emptorem quoque cadem pactione et colono frui et inquilino habitare liceat: alioquin prohibitus is aget cum eo ex conducto."[248]

But this was not really a satisfactory solution to the problem. Of course, such a pactum did not give the tenant any direct claim or defence against the purchaser.[249] That would have been a direct contract

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[246] Cf. supra, p. 356.

[247] It must be kept in mind, though, that this result was much less peculiar in Roman law than it would be in a modern legal system. For whatever remedy (real or personal) the lessee might have had—ultimately everything boiled down to condemnatio pecuniaria.

[248] Gai. D. 19, 2, 25, 1. *Cf.* also C 4, 65, 9 (Alex.): "Emptori quidem fundi necesse non est stare colonum, cui prior dominus locavit, nisi ea lege emit, verum si probetur aliquo pacto consensisse, ut in eadem conductiorte maneat, quamvis sine scripto, bonae fidei iudicio ei quod placuic parere cogitur." On [he reception (and the "productive misinterpretation") of this text by the glossators, cf. E.J.H. Schrage, "Emptio (Nondum) Tollit Locatum", 1978 *Actajuridica* 3 sqq.

[24] Wesenberg, *Vertrage zugunsten Driller,* pp. 41 sqq.; Mayer-Maly, *Locatio conductio,* pp. 43 sqq.; Genius, op. cit., note 115, pp. 35 sqq.

in favour of a third party, which, as we know, was anathema to the Roman lawyers.[250] The pactum did, however, improve the position of the tenant in so far as the purchaser had to think twice before he resorted to expulsion: for, whilst the tenant still had only his actio conducti against the lessor/vendor, the latter was now able to take recourse against the purchaser and to sue him with the actio venditi for breach of his informal promise.

(c) Emptio tollit location

The authors of the European ius commune usually summed up the position which had been handed down to them from Roman law in the maxim "emptio tollit locatum": sale breaks hire. This is as crisp and poignant as it is inaccurate. First of all, it is not the contract of sale that has any detrimental effect on the relationship between the lessor/vendor and his tenant. It is only on account of the subsequent transfer of possession and of ownership that the lessor/vendor makes it impossible for himself to carry out his obligation under the contract of lease (namely to provide uti frui praestare licere), and that he exposes the tenant to the risk of being expelled by the purchaser.[251] And the second point: the contract of lease was, of course, not "broken" by either sale, transfer of ownership or any other transaction. It continued to exist and did, in fact, provide the tenant with his only remedy, the actio conducti against the lessor. Whatever transaction had taken place between the lessor and the third party did not affect the tenant's contractual position, but jeopardized his (continued) detention. Emptio tollit locatum therefore really means that the tenant was not in a position to counter the claims of any new owner of the property.

Harsh as it is, this rule, once again, cannot really be said to reflect a social bias on the part of the Roman lawyers. It was not designed as an instrument to oppress poor tenants. It was the logical consequence of certain basic and general concepts about real rights and personal rights and about their interplay and relationship. The actual cases cropping up in legal practice do not seem to have necessitated fundamental rethinking;[252] the fairly roundabout chain of contractual actions (tenant against lessor/vendor—lessor/vendor against purchaser) by and large

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[250] Cf. supra, pp. 34 sqq.

[251] The position of the tenant, incidentally, was jeopardized not only on account of a transfer of ownership following a contract of sale; if, for instance, the lessor granted an usufructus over the leased property to a third party, the same problem could arise. The tenant could not prevail against the claims of the usufructuary. For further details, see Mayer-Maly, *Locatio conductio,* pp. 46 sqq.;J.A.C. Thomas, "The Sitting Tenant", (1973) 41 *TR* 35 sqq.

[252] Mayer-Maly, *Locatio conductio,* pp. 45 sq.; Genius, op. cit., note 115, pp. 39 sqq.; Frier, *Landlords and Tenants,* pp. 64 sqq. (who discusses the "nuisance value" of expulsion).

appears to have worked well enough to provide a not inconsiderable deterrent against heedless expulsion.[253]

(d) D. 43, 16, 12 in fine

"Emptio tollit locatum" became part and parcel of the European Roman common law;[254] on the eve of codification it represented pandectist doctrine[255] and obtained in parts of Germany. By that time, however, strong tendencies against the retention of this rule had made themselves felt. They emanated from three entirely different quarters. Firstly, the Digest itself contained a rather curious inconsistency, which appeared to improve the position of the tenant. A small clause at the end of D. 43, 16, 12 strengthened the tenant's right of uti frui during the term of the lease,[256] in that it gave him the right to resist the purchaser, if the latter wanted to take possession, provided he (the tenant) did so on account of a iusta et probabilis causa. It appears plausible to accept the contract of lease as a iusta causa in this sense.[257] As soon as one did so, however, one had granted the tenant the right to prevent traditio of the property from the lessor/vendor to the purchaser and thus effectively to paralyse the purchaser's right of eviction—at least in all those cases where the purchaser's right to evict was dependent upon his position as owner and where the acquisition of such a position, in turn, depended, as it usually did, on traditio.[258]

Digesta 43, 16, 12 in fine is a post-classical addition and does not represent classical Roman law.[259] But in the days when the law of the Corpus Juris Civilis was still applicable and therefore had to be approached under systematic rather than historical auspices, the text provided—depending on the interpreter's point of view—either an awkward stumbling block or a welcome inroad into "sale breaks hire".

" Again, one must guard against evaluating Roman law, ahistorically, from a modern perspective. A claim for damages was not as "weak" as it might appear to us. First of all, all other claims ultimately gave the successful plaintiff not more than a sum of money either: omnis condemnatio pecuniana. Secondly, the way in which damages were assessed in court, particularly the iusiurandum in litem (taken by the plaintiff!), put some pressure on the defendant rather to provide restitution in kind.

[4] But see Schrage, 1978 *Acta Juridica* 3 sqq. and now (more clearly) idem, "Zur mittelalterlichem Geschichte des Grimdsatzes 'Kauf bricht nicht Miete' ", in: E.J.H. Schrage (ed.), *Das romische Recht im Mitteialter* (1987), pp. 283 sqq., where he demonstrates that the glossators and commentators interpreted C. 4, 65, 9 so restrictively and recognized so many exceptions that the main rule (emptio tollit locatum) did not have much practical significance.

^ Cf. e.g. Windscheid/Kipp, § 400, n. 7.

~[56] Cf. further Pap. D. 43, 16, 18 pr. and Mayer-Maly, *Locatio conductio,* pp. 53 sqq.; Genius, op. cit., note 115, pp. 30 sqq.

[257] Cf. e.g. Christian Fnedrich Muhlenbruch, *Die Lehre von der Cession der Forderungsrechte* (3rd ed., 1836), p. 279; Rudolf von Jhering, *Der Besitzwille* (1889), p. 441. For a thorough discussion of this problem, see Karl Ziebarth, *Die Realexecution und die Obligation* (1866), passim, e.g. pp. 1 sqq., 163 sqq.

[258] Cf. e.g. Jhering, op. cit., note 257, pp. 448 sqq.

[59] Mayer-Maly, *Locatio conductio,* pp. 53 sqq.; Kaser, *RPr* II, p. 406; but see Thomas, (1973) 41 *TR* 37.

(e) Huur gaat voor koop

In a much more fundamental way, secondly, this principle came to be attacked during the eighteenth century by the natural lawyers. They proceeded from the basic proposition of a promise as being "aut via ad alienationem rei, aut alienatio particulae cujusdam nostrae libertatis".[260] Thus, the lessor, by concluding the contract of lease and thereby promising to let the tenant use and enjoy the property, had parted with and transferred a part of his own liberty {namely to use and enjoy the property himself) and he was therefore unable subsequently to confer this same particulum libertatis on another person, the purchaser. As a result, the lessee's right prevailed against any further transaction which the lessor might choose to effect and so the natural lawyers arrived at the exact opposite of sale breaks hire.[261] However, their view did not influence the contemporary practice of law.

The third source of opposition against emptio tollit locatum can best be located in 17th- and 18th-century Dutch law. Here, interestingly, the fronts were reversed in that the main thrust did not come from doctrinal jurisprudence but from local practice.

> "Dan by ons gheeft alle huur ccnig eigen rccht, als zijnde een bruick van korten tijd: 't welck daer uit blijckt, dat het vcrhuirdc land ofte huis zijnde verkocht, den huirman evenwel sijn huir rnoet volghen."

These are the words of Hugo Grotius,[262] and we find similar statements in the works of all the other Roman-Dutch authors.[263] They tie in with the custom in other regions ("Moribus tamen Brabantiae, Flandriae, Hannoniae, aliarumque quarundam harum regionum contrarium ius est, ubi dictat lex municipalis potiorem esse conductionis quam emptionis causam"),[264] go back to medieval Germanic law[265] and were usually based, dogmatically, on the following consideration: "Moribus insuper . . . jus reale conductor adquirit, sic ut a successore singulari

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[261]1 Hugo Grotius, *Dejure belli ac pads,* Lib. II, Cap. XI, IV; Christian Wolff, *Jus Naturae,* Pars III, Cap. IV, § 360 ("Qui altcri ad faciendum sese obligat perfecte, particulam quandam libertatis suae alienat"). Cf. further Diesselhorst, *Hugo Grotius,* pp. 34 sqq.; 50 sq.; Franz Wieacker, "Die vertragliche Obligation bci den Klassikern des Vernunftrechts", in: *Festschrift fur Hans Welzel* (1974), pp. 11 sqq.

[261] For details, see Genius, op. cit., note 115, pp. 173 sqq.; cf. also Klaus Luig, "Der Einfluss des Naturrechts auf das positive Privatrecht lm 18. Jahrhundert", (1979) 96 *ZSS* (GA) 44 sqq.

[26i] *Inleiding,* II, XLIV, 9.

[263] For details, see J.C. de Wet, "Huur Gaat Voor Koop", (1944) 8 *THRHR* 166 sqq.; Genius, op. cit., note 115, pp. 138 sqq.; E.J.H. Schrage, "Sale Breaks Hire—Or Does It? Medieval Foundations of the Roman-Dutch Concept", (1986) 54 *TR* 294 sqq.

[264] Gudelinus, *Commentarii de hire novissimo,* Lib. Ill, Cap. VII, n 12. Cf. further, for instance, John Gilissen. " 'Huur gaat voor koop' in het oud-belgische Recht", (1939) 16 *TR* 281 sqq.

[26b] For details Genius, op. cit., note 115, pp. 101 sqq.; Schrage, (1986) 54 *TR* 293 sq. The tenant had (although perhaps not always) *"Gewere",* i.e. his position had the character of a real right, and he was granted legal protection against expulsion.

ante tempus expelli nequeat. . . ."[266] The position was summed up succinctly in the maxim "huur gaat voor koop". Where they dealt with Roman law, on the other hand, the Dutch jurists stressed the principle of emptio tollit locatum.[267]

It was under the influence of natural law that the great codifications at the turn of the 19th century departed in a more or less radical fashion from the Roman rule.[268] The South African courts apply "huur gaat voor koop",[269] and § 571 BGB states that

> "if the leased land is sold to a third party by the lessor after delivery to the lessee, the acquirer takes the place of the lessor in the rights and obligations arising from the lease during the existence of his ownership."

Thus, in most modern legal systems the tenant is well protected against the acquirer. It must be realized, though, that from a dogmatic point of view this presents something of an anomaly: for the tenant, on the basis of a conceptually purely obligatory contract of lease, acquires a quasi-real position, a "modified and exceptional" real right.[270]

12. Towards security of tenure

Naturally, the eventual abolition of emptio tollit locatum did not occur in isolation; even more basic is the tenant's protection against expulsion by his lessor. Over the centuries various ways were found to achieve at least some sort of protection. The locatio ad longum tempus[271] can be seen in this light, for it gave the tenant what he lacked with regard to locatio conductio simplex: possessory remedies, a real right and an actio in rem. Later on the actio spolii (that had made its way into the ius commune from the so-called Canon redintegranda of the Corpus Juris

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[266] Paulus Voet, *Institutionum imperialium commentarius* (Ultrajccti, 1668), Lib. Ill, Tit. XXV, § 6, n. 4.

[267] Cf. e.g. Voet, *Commentarius ad Pandectas,* Lib. XIX, Tit. II, 17; Ulrich Huber, *Praelectiones,* Lib. Ill, Tit. XXV, 11 (". . . per venditionem (!) a locatore factam solvitur conductio"); Van Leeuwen, *Censura Forensis,* Pars I, Lib. IV, Cap. XXII, 19.

[268] §§ 3, 358 I 21 PrALR; art. 1743 code civil; §§ 1095, 1120 ABGB. For all details, see Genius, op. cit., note 115, pp. 193 sqq., 198 sqq., 204 sqq.

[269] De Wet, (1944) 8 *THRHR* 226 sqq.; De Wet en Yeats, pp. 330 sqq.; Kerr, *Sale and Lease,* pp. 277 sqq.

[270] *Cane v. Wynberg Municipality* (1893) 10 SC 118 at 120 (per De Villiers CJ). For Germany cf. RGZ 59, 326 (328): *"Mil der Ubergabe der Mietsache entwa'chst das Recht des Mieters dew reinen Obligationenrechte. Es bestehen nicht mehr bloss zwischen den obligatorisch Verbundenen Rechte und Pjiichten, sondem jedermann hat das durch den Besitz erkennbare Mietrecht zu achten"* (With the handing over of the leased object the lessee's right outgrows the pure law of obligation;.. There are no longer only rights and duties between the parties to the obligational relationship; everybody has to respect the lessee's right which is identifiable by virtue of h's possession); Emmerich/Sonnenschein, op. cit., note 15, pp. 307 sqq. For a more radical and unequivocal approach, *cf.* the Prussian Code of 1794 which recognized the lessee's right as a ius in rem. For a detailed comparison and evaluation cf. Gerhard Otte, "Die dingliche Rechtsstellung des Mieters nach ALR und BGB", in: *Festschrift flir Franz Wieacker* (1978), pp. 463 sqq.

[271] Cf. supra, p. 359.

Canonici)[272] was used to assist the tenant, even though he was only a detentor.[273] The whole topic of possession gave rise to one of the most complex and heated debates in 19th-century pandectist literature, but it was only the legislator who finally abolished the distinction between possessio and detentio. Since then, it has been beyond dispute that a tenant is possessor. The institution of notice, on the other hand, which was of Germanic origin and prevented the lessor from expelling his tenant without further ado, came to be received into the ius commune in the course of the later usus modernus pandectarum[274] and was firmly entrenched by the end of the 19th century. By that time, too, a clear distinction was drawn between contracts of lease for a specific period and those for an indefinite time.[275] In the latter instance, both parties were at liberty to give notice at any time, but had to observe customary periods of notice which varied from place to place.[276] If a specific time had been agreed upon, the contract normally came to an end with the lapse of that time. Under certain circumstances, however, both the lessor and the lessee had the right to terminate the contract prematurely. It was in this context that the Roman grounds for justified expulsion (mainly C. 4, 65, 3) and for justified abandonment[277] became relevant again.[278]

In the course of the present century, notice protection on the part of the tenant has been considerably increased. Today, according to the BGB, the lessor may terminate the lease of residential accommodation only if he can show a reasonable interest in such termination.[279] But even in the light of the legitimate interests of the lessor, the tenant can demand a continuation of the lease if hardship would otherwise ensue for himself or for his family.[280] Security of tenure reigns supreme.[281]

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[272] For all details see, most recently, Duard G. Kleyn, *Die Mandament van spolie in die Suid-Afrikaanse Reg* (unpublished LLD thesis, Pretoria, 1986), pp. 73 sqq.

[273] Cf., for example, Leyser, *Meditationes ad Pandectas,* Spec. CCCCLI; Carl Georg Bruns, *Das Recht des Besitzes im Mittelaiter und in der Gegenwart* (1848), pp. 393 sq.

[274] Cf. e.g. Justus Henning Boehmer, *Consultations et Dedsiones luris,* vol. H, Pars II (Halae Magdeburgicac, 1734), Resp. 1014, n. 6.

[275] Cf. e.g. Vangerow, *Pandekten,* § 643, n. 1.

[27(3] Cf. e.g. Windscheid/Kipp, § 402, 1.

[277] Cf. supra, pp. 355 sqq., 357 sq.

[278] Cf. e.g. Gluck, vol. 17, pp. 373 sqq., 477 sqq.

[279] § 564 b BGB. The interpretation of this rule has recently been the subject of much controversy. Cf. BVerfG, 1989 *Neue Juristische Wochenschrift* 970 sqq., 972 sqq.; Johann Friedrich Henschel, "Eigentumsgewahrleistung und Mieterschutz" 1989 *Neue Juristische Wochenschrift* 937 sqq.

[280] § 556 a BGB.

[2H1] The historical development of security of tenure of residential accommodation has been comprehensively analysed in the monographs of Genius op. cit., note 115 (from Roman law down to the times of usus modernus and the great natural-law codifications) and Udo Wolter, *Mietrechtiicher Bestandsschutz* (1986) (who takes the reader through from 1800 to the present-day law).