

Casebook on the Roman Law of Contracts

Chapter V: Other Consensual Contracts: Problems in Execution

Beyond sale, the Urban Praetor's Edict recognized three other "consensual" contracts: lease/hire (*locatio conductio*); partnership (*societas*); and mandate (*mandatum*). All three arise through agreement (*consensus*) alone, without any formality and without the start of performance by either or both parties. Further, all three, like sale, give rise to actions by both parties, and these actions are based on and governed by the concept of good faith, *bona fides*; this concept provides the jurists with leverage for the development of legal rights and duties. The four consensual contracts, taken together, are likely to have accounted for most commercial contracts in the Roman Empire, especially when they were supplemented by stipulation. On the other hand, significant problems remained. The bilateral contract of mandate, in particular, was gratuitous by definition but needed expansion in order to cover situations in which the mandatary acted on a broad commission over an extended period of time (Chapter V.C, see also VII.C); and remaining gaps in the list of acceptable contracts had to be filled somehow (Chapter VI). None of this was conceptually easy.

Beyond these jurisprudential problems, the contracts considered in this Chapter often raise an additional, very important difficulty. Sale archetypically involves a one-off transaction, a transfer of money in exchange for the transfer of an object of sale. However, many contracts (often, even sales) involve performance over a relatively prolonged period of time, during which one party may be—and very often is—extending credit to the other. Take the easy case of the tenant of a dwelling who, without legal justification, stops paying rent. The landlord obviously has available a legal action to collect the unpaid rent; this is a remedy at law. But legal mechanisms are often slow to work. In the meantime, and for the remainder of the lease term, is the landlord obliged to go on providing shelter to the tenant? It seems obvious that the answer is no, and that the landlord will also, *in addition to the legal remedy of damages for unpaid rent*, be able to expel the tenant from the dwelling—that is, to use nonpayment as a legal basis for ceasing performance of his or her own side of the contract, as a self-help remedy exercised outside the judicial system.

Anglo-American law handles this type of informal self-help remedy through a theory of implied conditions: performance by one side becomes a legally implied condition for performance by the other. Conditions such as these can, of course, be express, as part of the contract. But more frequently they operate through implication, as part of a logical sequence of performance between the parties, justifying one party in suspending and ultimately terminating performance because of a material failure in the other's performance. Obviously, this is a tool that a party must use cautiously, since suspending or terminating performance may be a breach of contract in its own right if it is unjustified.

The jurists never developed a generalized theory of material breach, one that is serious enough to justify the other party in suspending its performance, or even, in sufficiently extreme cases, in terminating the contract altogether. But although Roman law

appears to lack an explicit doctrine of implied conditions, and instead may treat them just as an aspect of *bona fide* rights and duties, juristic sources nonetheless, as we shall see, often do seem to recognize the underlying difficulty and, at least in some situations, to provide for it.

Part A: Lease/Hire (*Locatio Conductio*)

Although the details are intricate, sale is a relatively simple contract: the exchange of money for an object of sale. By contrast, the contract of lease/hire (*locatio conductio*) is far more convoluted. The starting point is the Latin verb *locare* (“to put into position, to place”; see *locus*), which can be used to describe three quite different legal relationships:

- a person can “place” an object with another who hires its use (*l.c. rei*);
- a person can “place” a job that another party undertakes to perform (*l.c. operis faciendi*); or
- a person can even “place” his or her own labor (*l.c. operarum*).

The “placer” is then called the *locator*, while the other party is the “taker” or *conductor*, with a “fee” (*merces*) that passes between the parties depending on the economic sense of the transaction. Thus, a *locator* who leases out property—in common parlance, the lessor—receives a fee from the *conductor*—a lessee; a *locator* who hires out the performance of a job pays a fee to the *conductor*, who acts as what we would call a contractor; and a *locator* who hires out his own labor receives pay from the *conductor*, in an employment arrangement.

This typology may help to suggest both the origin and ultimate limits of *locatio conductio*, but it has scant relevance to most juristic discussions of the sprawling contract. As sale is the exchange of an object, so *locatio conductio* involves the exchange of a performance for money; and a set “fee” (*merces*) for this performance is as crucial to *locatio conductio* as a set price (*pretium*) is to sale. Beyond this central rule, however, Roman legal sources all but ignore general problems in the contract of lease/hire. They focus, instead, on particular contractual “sub-types,” such as lease of a dwelling or a farm, the hire of objects or slaves, or the performance of a job by a building contractor, a transporter, or an artisan. Such contracts obviously have massive social and economic significance.

For each contractual “sub-type,” the jurists concentrate on developing a set of dispositive rules designed to govern the normal manner and standards for rendering performance, although the parties can usually vary these rules by express agreement. Since, unlike delivery in sale, a performance almost always takes place over a period of time, disputes may often arise between the two parties. Accordingly legal rules for performance must take account of an intricate balance of interests.

Section 1: Lease of a Dwelling

Case 147: Grounds for Expelling the Tenant

C. 4.65.3 (Imp. Antoninus A. Flavio Callimorpho)

Diaetae, quam te conductam habere dicis, si pensionem domino insulae solvis, invitum te expelli non oportet, nisi propriis usibus dominus esse necessariam eam probaverit aut corrigere domum maluerit aut tu male in re locata versatus es.

The Emperor Caracalla to Flavius Callimorphus (214 CE)

If you pay to the building's owner rent for the lodging that you claim you hold under lease, you should not be unwillingly expelled, except if the owner proves that it is required for his own use, or he wishes to repair the house, or you have behaved wrongly in the leasehold.

The Problem:

Under what circumstances can a landlord expel a tenant from an urban leasehold prior to the expiration of the lease?

Discussion:

1. The Contract. The emperor's rescript to Flavius Callimorphus (otherwise unknown) assumes that Flavius has a valid lease with the building's owner and is already in residence. Rules for the formation of *locatio conductio* were said to bear a family resemblance to those for sale (Gaius, *Inst.* 3.142, 145; Justinian, *Inst.* 3.24 pr.-5); for instance, the parties must set a money "fee" (*merces*) that is comparable to the price in sale, although Ulpian accepts paying in kind (D. 19.2.19.3; also Gaius, D. 19.2.25.6: sharecropping). The *merces* must be real (Ulpian, D. 19.2.46, 41.2.10.2; Paul, D. 19.2.20.1), but need not be equivalent in value (Case 83).

2. Justifications for Expulsion. Caracalla lists four grounds that, as it appears, would justify Flavius being expelled from his lodging before the lease term ends: 1) the tenant's failure to pay rent in a timely fashion; 2) the building owner's personal need for the lodging; 3) the owner's wish to repair the house; and 4) the tenant's misbehavior in the lodging. The first and fourth of these reasons are, as it seems, in the nature of implied conditions imposing duties on the tenant, with violation justifying expulsion and thus allowing the owner to cease performance under the contract. Timely payment of rent is a fairly obvious duty; see also Paul, D. 19.2.54.1, and Hermogenianus, D. 39.4.10.1 (both of a tenant farmer), and the following Case. Tenant misconduct is much less easy to understand, although other legal sources show particularly intense concern about the peril of city fires (e.g., Ulpian, D. 1.15.3.3-4 and 4), a danger about which tenants were at times expressly cautioned (Ulpian, D. 19.2.11.1). It is unclear what sorts of lesser misconduct might lead to justified expulsion. Possibly serious damage to the leasehold? "Immoral or illegal conduct"? "Disorderly conduct"?

What is interesting is that these two reasons are blended with two others that do not represent tenant conduct, but instead the owner's permissible desires within the contract: either his wish to rehabilitate the building (see also Alfenus, D. 19.2.30 pr., and Africanus/Servius, D. 19.2.35 pr.), or his needing the leasehold for his own use. Does it seem right to you that the tenant should have to bear the risk of such things? Would the landlord have to be acting reasonably, according to an objective test? The mixture, in any case, strongly indicates that the Romans are

not thinking in terms of the reciprocal contractual rights and duties of the two parties, but rather of what sorts of events might trigger the contract being justifiably terminated by the owner. See also below, Cases 149-150, for the tenant's remedies, which have a similar construction.

Had the jurists been challenged as to the doctrinal basis for their construction of this law, they would probably have sheltered beneath the opaque umbrella of *bona fides*. Is that explanation adequate here? For instance, can *bona fides* provide a rationale for preferring the interests of the landlord to those of the tenant?

3. Justified and Unjustified Expulsion. The general rule was that either the owner or the landlord of a leased dwelling could, with legal irreversibility, expel a sitting tenant at any time, with no requirement of reasonable prior notice or specification of grounds. The effects of an expulsion—whether or not it can be justified—are that the tenant can consider the lease terminated (Labeo/Javolenus, D. 19.2.60 pr.) and seek an alternative dwelling. If the tenant believes the expulsion is unjustified, he can also sue the landlord for damages; see the following Case. The surviving texts suggest that the landlord would be obliged to prove the justification; e.g., “except if the owner proves” in this Case.

The rule on expulsion will certainly seem extraordinary to any modern student of Anglo-American law, who may well assume that tenants have always enjoyed some degree of property rights. But the Romans insist that the landlord's most basic duty was only to allow the tenant to “enjoy” the leasehold (*frui licere*), to “dwell” there (*habitare licere*). See, e.g., Labeo, D. 19.2.60 pr.; Gaius, D. 19.2.25.1 (Case 156); Ulpian, D. 19.2.9 pr. (Case 154) and 15.8; Paul, D. 19.2.7. The rights that a tenant derives from this duty are defined by contract, not by property law; tenants (both urban and farm) do not legally possess their leaseholds, but only physically “hold” them (*detinere* or *tenere*). See Gaius, *Inst.* 4.153 (Case 63); Ulpian, D. 43.16.1.22. On a tenant's absence of possession, see, for instance, Pomponius, D. 41.2.25.1; Ulpian, D. 43.26.6.2; also Alexander, C. 7.30.1 (230 CE). It is worth devoting a good deal of thought to the implications of the Roman legal position on this question. Can a tenant be adequately protected on the basis of contract alone?

On what happens when an owner-landlord sells a dwelling that is under lease to a tenant, see the Discussion on Case 156.

4. Interest. Note that, after default (*mora*), the landlord is entitled to interest on overdue rent: Paul, D. 19.2.54 pr., 22.1.17.4; Diocletian, C. 4.65.17 (290). As Diocletian observes, this is normal for money debts in actions based on good faith.

Case 148: Damages for Unjustified Expulsion

D. 19.2.28.2 (Labeo libro quarto *Posteriorum* epitomatorum a Iavoleno)

... Sed si locator conductori potestatem conducendae domus non fecisset et is in qua habitaret conduxisset, tantum ei praestandum putat, quantum sine dolo malo praestitisset. Ceterum si gratuitam habitationem habuisset, pro portione temporis ex locatione domus deducendum esse.

Labeo in the fourth book of his *Posthumous Writings* as Epitomized by Javolenus:

... If the lessor did not provide the tenant with the power to hold the house under lease, and he rented (another dwelling) in which to live, he (Labeo) thinks he must be provided with as much as he (the lessor) would have provided in the absence of deceit (*sine dolo malo*). But if he (the lessee) had obtained a free dwelling, reduction from the lease of the house should be in proportion to this period.

Discussion:

1. Damages. Here the assumption is that the landlord has failed in his duty to provide the tenant with a dwelling; the tenant has, in effect, been unjustifiably expelled (see the reference to deceit, *dolus malus*), and so he sought alternative housing. This is one of the rare texts that tries to describe what the tenant can obtain as damages. How clear is it? Suppose that the substitute dwelling was substantially identical, but 10% more expensive than the rent for the original one; what would the damages be? Does it look like they would cover any other consequential damages, such as the cost of moving? If the lessee is offered a free dwelling and declines to accept it, would damages be lower?

Case 149: Justified Abandonment Because of Fear

D. 19.2.27.1 (Alfenus libro secundo *Digestorum*)

Iterum interrogatus est, si quis timoris causa emigrasset, deberet mercedem necne. Respondit, si causa fuisset, cur periculum timeret, quamvis periculum vere non fuisset, tamen non debere mercedem: sed si causa timoris iusta non fuisset, nihilo minus debere.

Alfenus in the second book of his *Digests*:

Again, he (Servius) was asked whether or not someone owes rent if he moved out (of the leasehold) because of fear. He responded that if there was a cause (*causa*) why he feared danger, he owes no rent even if there was not danger in fact; but if there was no legitimate cause (*causa iusta*) for fear, he owes it nonetheless.

Discussion:

1. Unjustified Abandonment. In a fragment that the Digest compilers somewhat coarsely amalgamated so as to cover both urban and farm lease, Paul (D. 19.2.24.2) says: “If a house or a farm is leased for rent for five years, the owner can sue them at once if either the urban tenant abandons the dwelling, or the tenant farmer the cultivation of the land.” This rule, in its highly condensed form, seems to presume that the tenants were not justified in abandoning their leaseholds. It therefore allows their landlords to bring a lawsuit at once against the tenants, so also effectively terminating the lease. Do you see how this is the reciprocal of the tenant’s right to bring suit if unjustifiably expelled?

2. Fear and Other Causes. Alfenus’ position in this text is rather more remarkable than it may seem. The tenant is justified in abandoning the leasehold because of fear (*timoris causa*) if there was a “legitimate cause” for fear; but otherwise not. So what is a legitimate cause? Is it presumed the tenant is acting rationally? The Digest has some remarkable opinions on the subject, but none more so than Ulpian, D. 19.2.13.7, which deals with a tenant who abandons a leasehold in the face of an approaching (and not necessarily hostile) army, which then proceeds to strip the dwelling of windows and other furnishings. The landlord, of course, wants compensation. Ulpian approvingly cites Labeo as holding that the tenant is liable “if he could resist and did not”; and Ulpian adds that, even if he abandons justifiably, he must inform the lessor and is liable unless “he was unable to inform him.” A tenant may also justifiably abandon the leasehold if he reasonably fears the collapse of a neighboring building (Ulpian, D. 39.2.28), or of his own if the problem arises during the lease term (Ulpian, D. 39.2.13.6, 33; Paul, D. 39.2.34); and likewise if a neighbor’s construction darkens the windows of his dwelling, thereby significantly reducing the leasehold’s comfort (Case 150; see also Ulpian, D. 39.2.37).

Remarkable about these sources is that it seems to make no real difference whether the landlord is at fault for the circumstances, or even could have prevented them from arising. The landlord presumably did not bring about the invading army, or the neighbor’s construction, although he may be responsible for the tenant’s building being about to collapse. Why do the jurists assign primary importance to the continued comfort and security of the tenant?

Case 150: Tenant Remedies If Dwelling Deteriorates

D. 19.2.25.2 (Gaius libro decimo ad Edictum Provinciale)

Si vicino aedificante obscurentur lumina cenaculi, teneri locatorem inquilino: certe quin liceat colono vel inquilino relinquere conductionem, nulla dubitatio est. De mercedibus quoque si cum eo agatur, repudiationis ratio habenda est. Eadem intellegemus, si Ostia fenestrasve nimium corruptas locator non restituat.

Gaius in the tenth book on the Provincial Edict:

If the windows of an apartment are darkened by a neighbor's construction, (a jurist held) that the lessor is liable to the tenant. Indeed, there is no doubt that the tenant of a farm or dwelling may leave the leasehold. Also, if he is sued about the rent, estimate should be made of the offset. We construe the same result if the lessor did not repair doors or windows that were too broken down.

The Problem:

A tenant occupies a dwelling with large windows admitting sunshine and fresh air. The windows are subsequently darkened by construction by a third party on neighboring property. Can the tenant move out or reduce rent payments, even if the landlord was not responsible for the construction?

Discussion:

1. Remedies Less Than Abandonment. Gaius deals with two situations: the darkening of the tenant's windows by a neighbor's construction, and also the landlord's failure to repair doors or windows. Abandonment is an option, evidently if the loss of amenity is sufficiently severe. But even if the tenant remains in the dwelling, in the event the landlord sues for unpaid rent, the tenant is entitled to an offset as compensation for the reduced comfort. Does this rule follow easily from the previous Case? Ulpian, D. 39.2.37, indicates that, if the neighbor was not entitled to build, the building's owner may be able to obtain consequential damages (under an action protecting neighbor rights, the *actio damni infecti*), including loss of rent because the tenants either abandoned their dwellings or could not dwell as comfortably (this latter a reference to the offset).

2. DIY. What happens if the tenant takes matters into his own hands and replaces the broken doors or windows himself? See Case 158.

Case 151: Deduction from Rent

D. 19.2.27 pr. (Alfenus libro secundo *Digestorum*)

Habitatores non, si paulo minus commode aliqua parte caenaculi uterentur, statim deductionem ex mercede facere oportet: ea enim condicione habitatorem esse, ut, si quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi sustineret: non ita tamen, ut eam partem caenaculi dominus aperuisset, in quam magnam partem usus habitator haberet.

Alfenus in the second book of his *Digests*:

The occupants, if their use of some part of the apartment is a bit less comfortable, must not immediately make deduct from their rent. For (Servius held) that an occupant is subject to the condition that, if something adverse occurred on account of which the owner had to raze something, he should experience a small part of the inconvenience—but not to the extent that he (the owner) had laid bare a part of the apartment in which the occupant had much of his use.

Discussion:

1. A Bit Less Comfortable. This is a remarkable Case, for all that the Digest compilers fairly clearly condensed and mangled the original. (This is evident from the uncouth Latin wording.) As it stands, the late Republican jurist Alfenus states that an urban tenant may not deduct from rent payments (*deductio ex mercede*) for minor reductions in a dwelling's amenities, and that it is implicit in the contract (a condition, *condicio*!) that the tenant may be inconvenienced so long as his overall use is not substantially impaired. Alfenus therefore appears to acknowledge that the situation would be different if the inconvenience were greater; and he suggests (with the word *statim*, "immediately") that the tenant need not wait indefinitely even for minor impairments of use. In the case of such impairments, the tenant is entitled, as a self-help remedy, to deduct from the rent an amount that is left undefined, but would presumably be roughly proportional to the reduction in amenity. If the landlord disagrees, he would then have the burden of bringing suit. Somewhat similar is Labeo, D. 19.2.28 pr.-1: "If the lessee's use of a dwelling in a home is unchanged, he (Labeo) thinks that rent is owed even for that part of the home which became defective."

Think about deduction from rent as a self-help remedy. What conception of urban lease does it rely upon? Is it fair to both sides in the contract? How would a deduction operate in practice?

Case 152: The Tacit Pledge of Furnishings

D. 43.32.1 pr.-1 (Ulpianus libro septuagensimo tertio ad Edictum)

pr. Praetor ait: "Si is homo, quo de agitur, non est ex his rebus, de quibus inter te et actorem convenit, ut, quae in eam habitationem qua de agitur introducta importata ibi nata factave essent, ea pignori tibi pro mercede eius habitationis essent, sive ex his rebus est et ea merces tibi soluta eove nomine satisfactum est aut per te stat, quo minus solvatur: ita, quo minus ei, qui eum pignoris nomine induxit, inde abducere liceat, vim fieri veto". **1.** Hoc interdictum proponitur inquilino, qui soluta pensione vult migrare: nam colono non competit.

D. 20.2.4 pr. (Neratius libro primo Membranarum)

Eo iure utimur, ut quae in praedia urbana inducta illata sunt pignori esse credantur, quasi id tacite convenerit: in rusticis praediis contra observatur.

Ulpian in the seventy-third book on the Edict:

The Praetor states: "If the slave in question is not included in the property concerning which the plaintiff and you agreed that what was introduced or brought into the dwelling, or born or made there, would be a pledge for your rent for this dwelling, or (if the slave) is included in that property and your rent has been paid or satisfaction given to you on this account, or you are responsible for its nonpayment: I forbid use of force to prevent the person who brought him in as a pledge from leading him out." **1.** This interdict is established for an urban tenant who has paid the rent and wishes to move; for it does not apply to a farm tenant.

Neratius in the first book of his *Parchments*:

Our law is that things brought or conveyed into urban properties are treated as a pledge, as though they (landlord and tenant) had tacitly agreed on this. In rural properties the opposite rule is in force.

Discussion:

1. And Now, A Major Complication. By the interdict on moving out (*interdictum de migrando*), the Praetor orders a landlord to allow the tenant to remove property (e.g., a slave) if: 1) the tenant did not take the property into his dwelling as a pledge for the rent; or 2) the tenant did bring in the property for this purpose, but the tenant has paid his rent or given satisfaction, or the landlord has prevented him from doing so. This tightly written language, typical of much of the Praetor's Edict, is intended to deal with a situation in which the landlord is using a practice called "preclusion" (*praclusio*), which literally refers to his barring the entrance to the dwelling; see Paul, D. 20.2.9. If the amount of the rent was in dispute (for instance, because the tenant had deducted from the rent, as in the previous Case), probably the dispute had to be settled before this interdict could be used. The pledge covered not just rent already due, but also future rent (Ulpian, D. 43.32.1.4, citing Labeo).

2. Agreement on the Pledge of Furnishings. As the interdict says, the landlord may only prevent removal of property (not only furnishings in our sense, but also even the tenant's slaves) that the two parties have tacitly agreed will be pledged. We are expressly told that, for instance, temporarily introduced property was not included (Pomponius, D. 20.2.7.1), and also, in most cases, the property of other people (Alexander, C. 4.65.5 (223); but see Gaius, D. 43.32.2; Ulpian, D. 43.32.1.5). In addition, prior to preclusion, the tenant could manumit tacitly pledged slaves (Ulpian, D. 20.2.6; Paul, D. 20.2.9).

During preclusion, the landlord was obliged to protect the property he had effectively seized: Paul, D. 39.2.34.

3. The Tacit Agreement. By the end of the first century CE, as the Neratius passage shows, the agreement referred to in the interdict had been implied tacitly into all urban leases (except, most probably, where the parties expressly provided the opposite). Neratius also extends the doctrine to outbuildings on the same property (D. 20.2.4.1). After this, the doctrine of tacit pledge appears in other authors: Ulpian, D. 20.2.6, see also D. 24.3.7.11; Paul, D. 2.14.4 pr. The assumption underlying the tacit pledge is perhaps that it was so common as to be considered unexceptionable.

It is worth thinking about the desirability of a pledge of this type. Clearly, the pledge of furnishings provided the landlord with major leverage in the settling rent disputes; even the Romans recognized this (see Martial, 12.32). But it should be observed that preclusion was originally another self-help mechanism deployed without direct official intervention, in a situation that might easily be the source of contention or even violence. By the end of the Classical period, however, the Prefect of the Watch at Rome was using his court to virtually replace the interdict, indicating that preclusion had been subjected to official oversight; see Ulpian, D. 43.32.1.2, and also Paul, D. 20.2.9 (commenting on the duties of the Prefect). Was this move a real improvement?

4. Contrast with Farm Lease. As Neratius and Ulpian note, farm tenants were not subject to a tacit lease of things they brought into the leasehold (including their slaves); instead, the pledge had to result from express agreement with their landlords. The farm tenant's pledge was actionable through a special Praetorian action called the *actio Serviana*, which created *in rem* rights and was later extended to include all real securities. See Case 75.

Case 153: Tenant's Liability for Damaging the Dwelling

D. 20.2.2 (Marcianus libro singulari ad Formulam Hypothecariam)

Pomponius libro quadragesimo variarum lectionum scribit: non solum pro pensionibus, sed et si deteriore habitationem fecerit culpa sua inquilinus, quo nomine ex locato cum eo erit actio, invecata et illata pignori erunt obligata.

Marcian in his monograph on the Formula for Hypothecation:

In book 40 of *Various Readings*, Pomponius writes: the (urban tenant's) furnishings will be obligated as a pledge not only for rental payments, but also if the tenant worsens the dwelling through his fault (*culpa*), on which account there will (also) be an action on lease against him.

Discussion:

1. Damage to the Leasehold. Pomponius, quoted by Marcian, extends the tacit pledge of furnishings to cover tenant's damage to the leasehold. This ruling is somewhat complementary to the tenant's right to deduct from the rent if the level of contracted-for amenity declines (Case 150). The extension presumes that the tenant has a contractually imposed duty of care with regard to the landlord's property (so also Ulpian, D. 19.2.11.2), with the standard of care measured by the tenant's "fault" (*culpa*). The standard is an objective one, measured through reference to a reasonable person. Its application is illustrated by Ulpian, D. 19.2.13.7 (discussed above at Case 149), where the early Classical jurist Labeo holds a tenant liable for failure to offer reasonable resistance to a marauding army. Still, there is no indication that the tenant was liable for ordinary wear and tear. Beyond this default rule, however, the tenant can also assume additional liability through lease provisions; e.g., Ulpian, D. 19.2.11.1 (prohibition of fire); Ulpian/Hermogenianus, D. 19.2.11.4-12 (prohibition of a haystack, presumably a fire hazard).

2. Liability for Others. Although a tenant may be liable for his or her personal damage to the leasehold, it is far less clear that tenants also assumed contractual liability for damage done by persons they introduce into the leasehold, especially their families, guests, and slaves. The major surviving juristic text that deals with the subject, Ulpian, D. 19.2.11 pr., has been rather radically abbreviated, but seems to give it as a rule that the tenant might have contractual liability for their acts if introducing them was somehow blameworthy. A second text, Ulpian, D. 9.2.27.11 (the first part of which is also preserved in a pre-Justinianic version, *Collatio* 12.7.9), is no more helpful, but probably comes to much the same conclusion. So at least some contractual vicarious liability was probably imposed by the late Classical period. What might the obstacles have been, in Roman legal thinking?

The general legal theory here was in later ages called *culpa in eligendo*, "carelessness in choosing," the idea being that a tenant (or someone in a comparable position) might become liable for carelessness in having selected the actual culprit. It is not a common form of liability in Roman law, but you should be alert when other sources seem to pick up the idea.

Case 154: Mitigation of Damages

D. 19.2.9 pr. (Ulpianus libro trigesimo secundo ad Edictum)

Si quis domum bona fide emptam vel fundum locaverit mihi isque sit evictus sine dolo malo culpaque eius, Pomponius ait nihilo minus eum teneri ex conducto ei qui conduxit, ut ei praestetur frui quod conduxit licere. Plane si dominus non patitur et locator paratus sit aliam habitationem non minus commodam praestare, aequissimum esse ait absolvi locatorem.

Ulpian in the thirty-second book on the Edict:

If someone leased to me a house or a farm that he had purchased in good faith (*bona fide*), and he was evicted through no deceit and fault on his part (*sine dolo malo culpaque eius*), Pomponius says that he is nonetheless liable on hire to the renter, in order that he furnish him the right to enjoy what he rented. Obviously, if the owner does not allow (him to remain), but the lessor is ready to provide another dwelling that is no less comfortable, he says it is fairest that the lessor be absolved (by the *iudex*).

Discussion:

1. Mitigation. The general principle is that, after a contract has been breached, the aggrieved party ought not to run up damages at the expense of the breaching party. In this case, the landlord leased property (a house or farm) that, as it turned out, he unknowingly and faultlessly had no right to lease; and a true owner then evicted him as well as his tenant. Nonetheless, the landlord's contractual duty to the tenant remains intact despite the eviction, meaning that the tenant can sue for unjustified expulsion; but Ulpian goes on to hold that the landlord can escape liability if he offers an equivalent substitute dwelling to the tenant.

In this Case, some of the advantages of treating lease from a contractual (rather than a property) perspective become clear. The tenant is seeking a dwelling with a certain level of comfort (*commoditas*), and cannot be heard to reject the proffered substitute because the original contract concerned a particular piece of property. However, the principle is broader still, as a glance back at Case 148 shows: when no adequate substitute dwelling is on offer, but the unjustifiably expelled tenant somehow obtains a free dwelling from someone else (say, a generous relative), the landlord is not liable for the time when the rent was free.

The issue here, do you see, really concerns limiting damages. Surviving texts indicate that the Roman jurists rarely thought very deeply about such issues, but the present Case is the main source indicating a concern. The tenant's duty to mitigate is still very limited, isn't it—restricted only to situations in which the landlord is entirely faultless. Nor is it clear that the same rule would hold if the offer of a substitute dwelling came from a third party and not from the landlord; nor that the tenant was obliged to look for an equivalent substitute.

Further, mitigation appears not to apply in the converse situation, where a tenant abandons without just cause. Several texts indicate that a landlord becomes entitled to seek, not damages, but all outstanding rent (see Labeo, D. 19.2.28.2; Ulpian, D. 43.32.1.4; Paul, D. 19.2.24.2; but also Paul, D. 19.2.55.2, for farm lease, where the last clause is probably Justinianic); but no text indicates he could not then keep rent both from the departing tenant and from a new substitute tenant he has found. Can this acceleration of rent be justified?

Section 2: Lease of a Farm

Case 155: Duties of the Landlord

D. 19.2.15 pr.-1 (Ulpianus libro trigesimo secundo ad Edictum)

pr. Ex conducto actio conductori datur. **1.** Competit autem ex his causis fere: ut puta si re quam conduxit frui ei non liceat (forte quia possessio ei aut totius agri aut partis non praestatur, aut villa non reficitur vel stabulum vel ubi greges eius stare oporteat) vel si quid in lege conductionis convenit, si hoc non praestatur, ex conducto agatur.

Ulpian in the thirty-second book on the Edict:

pr. The lessee has the action on the hire (*ex conducto*). **1.** It lies for reasons such as these: for instance, if he is not permitted to enjoy the thing he rented because, e.g., possession of all or part of the land is not provided to him; or the farmhouse is not repaired, or a stable or the place where his herds must shelter; or, if they agree on something in a clause of the lease, he may sue on hire if this is not provided.

Discussion:

1. Farm Lease and Commercial Lease. Leases of property in which both parties are seeking economic gain naturally become more complex than housing leases. In farm lease, which the jurists seem to use as the archetypal example of commercial leases, the property owner is anticipating rent income while the tenant farmer seeks profit beyond expenses including rent payments. To judge from agricultural writers such as Columella, farm lease was fairly common in the Empire; and other forms of the typical private law lease are widely found in the provinces.

In addition to lease of farms, legal sources also mention lease of barns and storerooms (*horrea*: Labeo, D. 19.2.60.6, 9; Paul, D. 19.2.55 pr.) and pastures (Cases 161 and 163, see also Cato, *Agr.* 149.2). In urban settings, Ulpian, D. 5.1.19.2, mentions leases of shops, stalls, and workplaces; compare, e.g., Ulpian, D. 8.5.8.5 (a cheese factory at Minturnae), and Alfenus, D. 19.2.30.1, and Africanus, D. 20.4.9 pr. (baths).

2. What Must the Parties Do? As Ulpian indicates in this Case, the landlord's basic duty is to provide the leasehold physically, which implies a contractual duty to protect the tenant from unjustified expulsion; see the following Case. The lease might also impose specific duties on him. But the default rule is that he furnish his tenant with a farm that is and remains in good operating order, with the farm buildings and all durable equipment ready to produce the anticipated crop (Ulpian, D. 19.2.19.2, citing Neratius); and he is responsible if his equipment falls into disrepair except because through the tenant's fault. Two sources indicate that landlords could provide this equipment "with an appraisal" (*aestimatum*), meaning that the tenant had either to return it in good condition (he was liable for virtually all damage to it) or to pay its previously agreed-upon worth (Pomponius, D. 19.2.3 (citing Proculus); Paul, D. 19.2.54.2). Failing such a lease clause, the landlord probably bore the loss for normal wear and tear (*vetustas*; compare Alfenus, D. 19.2.30.4 (a lease clause), with Cato, *Agr.* 144.2).

For his part, the tenant must provide all else, including, e.g., the seed in the case of cereal cultivation (Ulpian, D. 19.2.15.2 and 7, citing Servius) or new cuttings to replace exhausted vines in the case of viticulture (see Ulpian, D. 19.2.15.5, citing an imperial rescript). It appears that the tenant also supplied farm animals (see section 1 above); and jurists regularly describe tenants as using their own slaves as a labor force: Alfenus, D. 19.2.30.4; Ulpian, D. 9.2.27.11 (citing Proculus);

= *Collatio* 12.7.9), 9.2.27.9 (citing Neratius; = *Collatio* 12.7.11); Julian, D. 43.33.1 pr.; see also Labeo, D. 7.8.12.6. For farm tenants' further duties, see Case 157 below.

What do these sources suggest about the economics of tenant farming in the early Roman Empire? Alternatively, and perhaps more to the point, what do they suggest about the interrelationship between law and the economy during this period?

Case 156: Justified and Unjustified Expulsion

D. 19.2.25.1 (Gaius libro decimo ad Edictum Provinciale)

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

Gaius in the tenth book on the Provincial Edict:

A person who leases to another the enjoyment of a farm or a dwelling, if for some reason he sells the farm or house, should take care that also with the buyer, by the same agreement, both the tenant farmer is permitted to enjoy (the farm) and the urban tenant to dwell. Otherwise, he (the tenant), if forbidden (to remain), may sue him on the hire (*ex conducto*).

The Problem:

Apronius sells to Calpurnia a house that he owns, in which Domitia is currently residing as his tenant. Can Calpurnia expel Domitia from the leasehold?

Discussion:

1. “Sale Breaks Lease.” This famous maxim (*emptio tollit locatum*), which is of medieval origin, does not mean quite what it seems to mean. When the owner of leased property sells it, the buyer may, if he or she so wishes, assume ownership and then, as the owner, expel any current tenants (with whom he or she has no contractual relationship). The leases of these tenants are not thereby “broken”; but they have no possessory remedy (since they do not have possession), nor any contractual one, against the buyer. All that they have is a contractual remedy against their original landlord, in this Case also the leasehold’s former owner. What Gaius is advising is that the landlord/owner include in the contract of sale a provision making the buyer liable for the tenant’s unjustified expulsion: liable, that is, to the seller, who will undoubtedly cede his right of action to the tenant. But this is of only modest help to the tenant, who still cannot prevent the expulsion. The same rule is given also by Alexander, C. 4.65.9 (234 CE); see also Ulpian, D. 19.1.13.30 (citing Servius). (However, Marcellus, D. 43.16.12, and Papinian, D. 43.16.18 pr., seem to provide the tenant farmer with limited access to a possessory remedy if the buyer uses force to expel the tenant.)

In principle, all of this was a straightforward application of the more general rule that the lease relationship was a matter of contract, not of property law. But the results are so very harsh that subsequent Roman-derived legal systems have regularly found legal ways to better protect tenants in this sort of situation.

2. Expropriation. In a highly controversial fragment, Africanus (D. 19.2.33, 35 pr.) discusses a situation in which a farm has been confiscated (*publicatus*) by the State. Africanus’ teacher, the great jurist Julian, had argued that the landlord owed the tenant his “interest” stemming from the breach: “that you (the lessor) be liable on hire for letting me enjoy (the leasehold), even though you were not responsible for your not providing it” (*teneri te actione ex conducto, ut mihi frui liceat, quamvis per te non stet, quo minus id praestes*). Has the landlord therefore impliedly warranted that the land would not be expropriated at some point in the future?

But Africanus, apparently rejecting Julian's view, argues that the landlord owes his tenant only return of any prepaid rent, not also the tenant's "interest." Africanus sees this situation as comparable to one in which the landlord expels an urban tenant in order to repair or demolish his dwelling (see Case 147): the expulsion is treated as justified. As Africanus says, what is the difference whether the landlord of a building is forced to remodel it on account of its age, or the lessor of a farm is forced to suffer outrage from someone whom he cannot stop?" How inevitable does this logic seem to you? Africanus admits an exception only if the lessor has leased the property knowing it belonged to someone else.

Other texts (especially Ulpian/Tryphoninus, D. 19.2.7-8, discussing the same hypothetical) incline to the same result, seeming almost to reflect a general tendency, toward the end of the Classical period, to release an innocent landlord from damages whenever a tenant was expelled by a third party not subject in some legal sense to the landlord's authority. This may help you to understand the background of the present Case.

3. A Farm Left As a Legacy. By a well established principle (called *separatio*), crops belong to the owner of the land after their harvest, unless another person, such as a tenant, has a right to them on the basis of a contract or otherwise. Ulpian, *Frag. Vat.* 44 (= D. 30.120.2), discusses a hypothetical in which a deceased man had a contract with a tenant farmer; in his will, the landlord left the farm as a legacy to a third party, who, after the will entered into force, harvested and took ownership of the crops that the tenant had planted. Can the tenant sue, and, if so, whom?

Compare Julian, D. 19.2.32: the landlord dies after leasing a farm to a long-term tenant; the landlord's heir cannot compel the tenant to cultivate (why not?), but if the tenant wishes to do so and an heir or legatee prevents this, the tenant can sue the heir for damages. Explain this holding.

Case 157: Duties of the Tenant

D. 19.2.25.3-5 (Gaius libro decimo ad Edictum Provinciale)

3. Conductor omnia secundum legem conductionis facere debet. Et ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat, ne intempestiva cultura deteriorem fundum faceret. Praeterea villarum curam agere debet, ut eas incorruptas habeat. **4.** Culpae autem ipsius et illud adnumeratur, si propter inimicitias eius vicinus arbores exciderit. **5.** Ipse quoque si exciderit, non solum ex locato tenetur, sed etiam lege Aquilia et ex lege duodecim tabularum arborum furtim caesarum et interdicto quod vi aut clam: sed utique iudicis, qui ex locato iudicat, officio continetur, ut ceteras actiones locator omittat.

Gaius in the tenth book on the Provincial Edict:

3. The lessee should do everything in accord with the terms of the lease. Above all, the farm tenant should be careful to do farm work in proper season, so that he not diminish the farm's value by his unseasonable cultivation. Further, he should take care of the farmhouses so that he keeps them in good condition.

4. But it is also counted as his fault (*culpa*) if a neighbor cuts down trees because of quarrel with him. **5.** Likewise, if he (himself) cuts them down, he is liable not only on the lease, but also under the Lex Aquilia (on wrongful damage to property) and under the Twelve Tables on furtively felling trees and by the interdict against stealth or force. But in any case it is part of the discretion of a *iudex* in a trial on lease that the lessor give up the other actions.

Discussion:

1. Basic and Implied Duties. Unmentioned by Gaius, and so obvious that they presumably did not need spelling out, are the duties to pay rent (see Case 49, and the Discussion on Case 147; also Scaevola, D. 19.2.61 pr. (the following Case), and Ulpian, D. 33.4.1.15, both of farm lease; Ulpian, *Frag. Vindob.* 1.2, holding that the duty to pay rent arises from the Law of Nations) and to surrender the farm at the end of the lease term (see Case 160). In section 3, Gaius lists three additional duties. Observing the lease seems equally obvious; see, e.g., Alfenus, D. 19.2.29 (tenant not to cut down trees); Ulpian, D. 19.2.11.1 (tenant not allowed to have a fire) and 11.4 (no haystack in a *villa urbana*). Cultivating in timely fashion is, in Gaius' wording, more intended to preserve the farm's value than to obtain profit. A closely similar list of duties is given in a post-classical work (*Pauli Sent.* 2.18.2), which specifies failure to cultivate (*cultura non exercitata*) as actionable; Paul, D. 19.2.24.2 and 54.1 (= Case 49), states that such a failure allows a landlord to terminate the lease and sue at once. As Reinhard Zimmermann observes, the imposition of an implied duty accords with "the official policy of preventing soil-exhaustion and deterioration into wasteland" (*Obligations* 375); see Gellius, 4.12, and Columella, 1.7.1. Gaius also requires a farm tenant to keep the farm buildings, and by implication other equipment provided by the landlord, in good condition; see the preceding Case. This duty is substantially higher than that imposed on urban tenants (Case 150).

The overriding principle here is rather vaguely stated by Ulpian, D. 19.2.11.2: "the tenant should see to it that he not somehow make the legal or physical condition of the property worse, or allow it to become so" (*Item prospicere debet conductor, ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur*). Similar: Marcian in Case 153, which has the most dramatic extension of this general principle: the tenant's liability for third parties in the leasehold.

2. Fault (*Culpa*). Most of the specific default duties that are associated with tenant farming were presumably developed as aspects of the doctrine of *bona fides*. However, as time passed, violation of them came increasingly to be generalized as “fault” (*culpa*), not only when the leasehold was worsened through the tenant’s act, but also through his failure to act, in violation of a contractual duty. See, e.g., Ulpian, D. 13.6.5.2 (Case 64) *in fine*: “When the advantage of both parties is involved, ... as in lease, ... both deliberate malice and non-deliberate fault (*et dolus et culpa*) are tendered.” Think about the differences between the two doctrines, *bona fides* and *culpa*. Is the distinction between them only a minor linguistic matter, or are there potential practical consequences?

Case 158: Useful Expenses

D. 19.2.61 pr. (Scaevola libro septimo *Digestorum*)

Colonus, cum lege locationis non esset comprehensum, ut vineas poneret, nihilo minus in fundo vineas instituit et propter earum fructum denis amplius aureis annuis ager locari coeperat. Quaesitum est, si dominus istum colonum fundi eiectum pensionum debitarum nomine conveniat, an sumptus utiliter factos in vineis instituendis reputare possit opposita doli mali exceptione. Respondit vel expensas consecuturum vel nihil amplius praestaturum.

Scaevola in the seventh book of his *Digests*:

Although it had not been included in the terms of the lease that he set out vines, a tenant farmer nonetheless planted vines on the farm; because of their fruits, the land started being leased for ten gold coins more per year. The question arose whether, if the owner expels this farm tenant and sues him because of unpaid rent, he (the tenant) can counterclaim by interposing the defense of deceit (*exceptio doli*) for expenses usefully made in planting the vines. He (Scaevola) responded that either he will obtain his expenses or he will owe nothing further.

The Problem:

The tenant has invested in the leasehold by planting vines, something not envisaged in his lease. The vines resulted in both greatly increased productivity and rent increases, with which the tenant was unable to keep up. As a result, the landlord justifiably expelled him. Has the tenant any recourse to get compensation for his expenditure?

Discussion:

1. Improvements. Under Roman law, the vines, once implanted, belonged to the land's owner (see, e.g., Gaius, *Inst.* 2.74-75). The tenant therefore has, in principle, no direct claim for recompense even though his expenditure is conceded to be useful (*utilis*). But when the landlord sues him for unpaid rent, he can use the *exceptio doli* in order to get an offset for them. (It's not clear why this is necessary, but perhaps a stipulation is involved; see Cases 35-36.) *Pauli Sent.* 2.18.4 (= D. 19.2.55.1), which dates from ca. 300 CE, allows the tenant to sue directly for necessary or useful expenses; this was probably an equitable postclassical development of Classical law. Our sources do not, however, think of this situation in terms of depreciation and recovery of investment. Should they have?

2. Fixtures. The outcome changes if the alterations are more or less easily removable from the land or its buildings (what in Anglo-American law are called "fixtures"). Ulpian, D. 19.2.19.4, dealing with urban lease, describes a tenant who adds a door or windows to a building. He cites Labeo for the view that the tenant may sue on the hire to get the landlord to allow their removal, so long as doing so does not damage the building and it can be restored to its prior condition. (The right to removal is called the *ius tollendi*; the sources for it provoke controversy.) If removal is too costly because of resulting damage, the tenant's ownership lapses, but it will revive if the fixtures are later removed; see Julian, D. 6.1.59. How realistic is this solution?

Case 159: Remission of Rent

D. 19.2.15.2-3, 5, 7 (Ulpianus libro trigesimo secundo ad Edictum)

2. Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re orientur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint. ... **3.** Cum quidam incendium fundi allegaret et remissionem desideraret, ita ei rescriptum est: "si praedium coluisti, propter casum incendii repentini non immerito subveniendum tibi est." ... **5.** Cum quidam de fructuum exiguitate quereretur, non esse rationem eius habendam rescripto divi Antonini continetur. Item alio rescripto ita continetur: "novam rem desideras, ut propter vetustatem vinearum remissio tibi detur." ... **7.** Ubi-cumque tamen remissionis ratio habetur ex causis supra relatis, non id quod sua interest conduc-tor consequitur, sed mercedis exonerationem pro rata: supra denique damnum seminis ad colo-num pertinere declaratur.

Ulpian in the thirty-second book on the Edict:

2. In the event of the power of catastrophic weather, let us consider whether the lessor should provide anything to the tenant. Servius says that the owner should be liable to the tenant farmer for all force that cannot be resisted, such as that of rivers, jackdaws, starlings, and if some similar thing occurs, or if there is an enemy invasion; but if some defects stem from the object itself, this is the tenant's loss, for instance if wine goes sour, (or) if standing crops are destroyed by worms or weeds. ...

3. When someone alleged a conflagration on the farm (he had rented) and claimed remission (of rent), he received this rescript: "If you cultivated the property, you are not undeserving of aid on account of the accident of a sudden conflagration." ...

5. When someone complained about small crop yield, a rescript of the deified Antoninus (Pius) held that no consideration should be taken of this (claim). Likewise, another rescript holds: "You claim something novel (i.e., unacceptable), that remission be given to you because of the age of your vines." ...

7. But whenever remission is evaluated for the reasons given above, the lessee obtains not his interest (*id quod sua interest*), but a prorated abatement of the rent; in addition, loss of the seed is held to fall on the tenant farmer.

Discussion:

1. Remission. Although this remedy may have had an earlier history (as the reference to the late Republican jurist Servius shows), its late Classical form, emerging through imperial intervention, somewhat parallels the much older deduction from rent in urban lease (Case 151). The remedy seems to have originated as a purely social practice to counter catastrophic crop losses; see, e.g., Columella 1.7.1, and Pliny, *Ep.* 10.8.5, both of whom speak of it as the sort of generosity that should be avoided. Our few sources indicate that it was quite difficult to separate agricultural catastrophes from ordinary fluctuations in yield (what distinguishes irresistible force from defects arising from the object itself?). But most genuine catastrophes would not be confined to single farms, and the imperial officials who grant remissions (which are apparently not part of ordinary lease law) would doubtless see a good many similar tenant claims from a single region. The rem-

edy, it should be noted, is only a rent abatement. Is this a good solution to the problem of agricultural catastrophes? How does the solution differ from deduction in urban lease? Can remission be explained from the standpoint of economics?

Case 160: Holdover

D. 19.2.13.11 (Ulpianus libro trigesimo secundo ad Edictum)

Qui impleto tempore conductionis remansit in conductione, non solum reconduxisse videbitur, sed etiam pignora videntur durare obligata. ... Quod autem diximus taciturnitate utriusque partis colonum reconduxisse videri, ita accipiendum est, ut in ipso anno, quo tacuerunt, videantur eandem locationem renovasse, non etiam in sequentibus annis, etsi lustrum forte ab initio fuerat conductioni praestitutum. Sed et si secundo quoque anno post finitum lustrum nihil fuerit contrarium actum, eandem videri locationem in illo anno permansisse: hoc enim ipso, quo tacuerunt, consensisse videntur. Et hoc deinceps in unoquoque anno observandum est. In urbanis autem praediis alio iure utimur, ut, prout quisque habitaverit, ita et obligetur, nisi in scriptis certum tempus conductioni comprehensum est.

Ulpian in the thirty-second book on the Edict:

When someone remained on the leasehold after the term of his lease expired, not only will he be held to have re-hired, but his pledges are also held to be obligated. ...

As for my ruling that the tenant farmer is regarded as having re-hired because of the silence of both parties, this should be interpreted to mean that they are held to have renewed the same lease for the year in which they were silent, but not for following years even if, e.g., five years had initially been provided for the lease. But also if nothing contrary is done in the second year after the five-year term ends, the same lease is regarded as having persisted in that year (as well); for they seem to have agreed by the very fact that they were silent. And this should then be observed in each (succeeding) year.

But for urban properties we use a different rule, that each person is obligated (only) for as long as he remains in occupancy, except if a definite term was fixed in writing for the lease.

Discussion:

1. Tacit Renewal. It is not at all unusual for tenants to remain in a leasehold, with the landlord's express or tacit consent, after its original term comes to an end. How would such consent be manifested? Simply by failure to expel the tenant? In any case, Ulpian draws a clear distinction between farm tenants, who are held to "renew" on a year-by-year basis, and urban tenants, who hold on what appears to be an "at will" basis. How does the economic distinction between the two forms of lease help to explain this difference? Note that the respective tenants' pledges for the rent are also simultaneously renewed: Valerian and Gallienus, C. 4.65.16 (260).

A tenant who remained on the leasehold against the owner's express will would commit theft by harvesting any crops: Celsus, D. 47.2.68.5; Ulpian, D. 12.1.4.1. Further, Ulpian, D. 19.2.14, indicates that the landlord must at least have been competent to express his will in the matter.

Section 3: Lease of a Movable Object or a Slave

Case 161: Lessor's Warranty Against Defects

D. 19.2.19.1 (Ulpianus libro trigesimo secundo ad Edictum)

Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata: et ita Cassius scripsit. Aliter atque si saltum pascuum locasti, in quo herba mala nascebatur: hic enim si pecora vel demortua sunt vel etiam deteriora facta, quod interest praestabitur, si scisti, si ignorasti, pensionem non petes, et ita Servio Labeoni Sabino placuit.

Ulpian in the thirty-second book on the Edict:

If someone unknowingly leases out defective storage casks and wine then flows out of them, he will be liable for the interest (of the lessee), nor will his lack of awareness be excused; so Cassius wrote as well. And it is otherwise if you leased a grazing pasture in which poisonous weeds grew; for if livestock either died or even lost value here, the (lessee's) interest is owed if you knew (about the weeds); (but) if you were unaware, you may not claim rent, a view that Servius, Labeo, and Sabinus also adopt.

Discussion:

1. Defective Pots; Poisonous Weeds. Ulpian describes two situations. First, the lessor has unknowingly (*ignarus*) leased out large containers that turned out to be leaky, and the lessee's wine was lost; the lessor is liable for the lessee's "interest" in this not happening, i.e., obviously at least the value of the lost wine; and the lessor's lack of knowledge is no excuse. Second, the lessor leases out a pasture containing poisonous weeds that cause the lessee's livestock to sicken or die; the lessor is liable for the lessee's "interest" if he knew of the weeds, but if he did not, for no more than loss of rent.

How are these two situations different? As you may recall (from Case 142), for the sale of containers the Augustan jurist Labeo ruled that, unless the parties expressly provided otherwise, the seller impliedly warranted their soundness (as we would say, their merchantability), so that the seller was liable for the buyer's consequential damages if the containers were unsound; and Sabinus extended Labeo's ruling to leased casks as well. But according to this Case, the same jurists went on to hold that the lessor of pastureland was not liable (beyond loss of future rent) if the lessee suffered consequential damages from the poisonous weeds, so long as the lessor was unaware of the problem. The problem here is the extent of a lessor's liability for latent defects. Put another way, did the jurists extend the implied warranty against defective containers, and, if so, how far? Unfortunately, our sources largely fail us in answering these questions.

Scholars have expended much ink in trying to puzzle out at least a theoretical answer. If the two rulings are regarded as the extremes of a spectrum, the murky line between them may include: defects in movables as against immovables; the defect's gravity and ubiquity; the reasonability of saying, in each case, that the lessor *should* have known of the defect, particularly owing to the likelihood of it having been previously detected; the likely extent of the lessor's previous personal knowledge of the leased object; the relative ability of each party to discover the defect; whether the object can serve for its ordinary purposes; whether the defect is inherent to the object, or superficial to it; and so on. Work out your own answer, always remembering that proof of a lessor's knowledge of a defect may be hard to come by.

Case 162: Leasing a Slave as a Muleteer

D. 19.2.60.7 (Labeo libro quinto *Posteriorum* a Iavoleno epitomatorum)

Servum meum mulionem conduxisti: neglegentia eius mulus tuus perit. Si ipse se locasset, ex peculio dumtaxat et in rem versum damnum tibi praestaturum dico: sin autem ipse eum locassem, non ultra me tibi praestaturum, quam dolum malum et culpam meam abesse: quod si sine definitione personae mulionem a me conduxisti et ego eum tibi dedissem, cuius neglegentia iumentum perierit, illam quoque culpam me tibi praestaturum aio, quod eum elegissem, qui eiusmodi damno te adficeret.

D. 9.2.27.34 (Ulpianus libro octavo decimo ad Edictum)

Si quis servum conductum ad mulum regendum <habens> commendaverit ei mulum <et> ille ad pollicem suum eum alligaverit de loro et mulus eruperit sic, ut et pollicem avelleret servo et se praecipitaret, Mela scribit, si pro perito imperitus locatus sit, ex conducto agendum cum domino ob mulum ruptum vel debilitatum, ...

Labeo in the fifth book of his *Posthumous Writings* epitomized by Javolenus:

You hired my slave, through whose carelessness (*neglegentia*) your mule perished. If he leased himself out, I (Labeo) hold that I will be liable to you up to the value of his *peculium* or the benefit I took (from this transaction). But if I (myself) leased him out, I will be held responsible to you for no more than the absence of my deceit and fault (*dolus malus et culpa*). If you hired a muleteer from me without specifying the particular person and I gave you the man through whose carelessness the mule died, I think that I will held responsible to you for fault in that as well, since I chose the one who caused you the loss in question.

Ulpian in the eighteenth book on the Edict:

Someone puts a leased slave in charge of driving a mule, and he (the slave) ties the mule by its rein to his thumb; the mule breaks away, thereby ripping off the slave's thumb and hurling itself down. Mela writes that if an unskilled slave was leased as a skilled one, the (slave's) owner may be sued on the lease because the mule was harmed or disabled. ...

The Problem:

A leased slave, whom the lessee placed in charge of driving the lessee's mule, tied the mule's rein to his thumb (a very, very stupid thing to do); the mule bolted, tore off the slave's thumb, and harmed itself, perhaps fatally. Can the lessee (the owner of the mule) collect damages for the loss?

Discussion:

1. A Careless Muleteer. Labeo sketches three situations: 1) the slave leased himself out, acting independently of his master (for self-leasing by a slave, see also Papinian, D. 33.2.2); 2) the slave's master leased him out, in which case the master is personally liable for deliberate or faulty (i.e., negligent) conduct; or 3) the master chose the slave, in which case he may be liable also for fault in the choice.

The first scenario, although it may seem surprising, is fairly easy; the slave himself is the wrongdoer, and the master's liability for the slave's misconduct is accordingly limited in effect to the value of the slave (see Chapter VII.A). The harder task is to distinguish the second and third scenarios. A lessor's contractual responsibility is described in terms of *dolus* and *culpa* (also, e.g.,

Ulpian, D. 19.2.9.pr., 3; *dolus* alone: Labeo, D. 19.2.28.2). But unless the lessor realized that the lessee wished to use the leased slave as a muleteer, it may be hard to pin the loss on the lessor's fault; and it should be noted that in the second fragment, at least, it is the lessee who assigns the slave to drive the mule. However, when the intended purpose of the slave's responsibilities is initially made known, and it is the lessor who picks the slave, the situation changes substantially; as we would say, the lessor warrants fitness for purpose. This form of fault (called *culpa in eligendo*) recurs in a variety of texts; we have already seen it, for instance, in the Discussion on Case 153.

2. A Thieving Slave. I lease to you a slave that you wish to use in your shop (*taberna*), and the slave steals from you. Paul, D. 19.2.45.1, maintains it is unclear "whether the action on hire suffices (for the lessee), the theory being that it is not in accord with good faith for us to have arranged that you suffer any loss because of the thing you took on lease." He goes on to favor instead a charge of theft lying "outside the sphere of hire" (*extra causam conductionis*), with a distinct cause of action—in this case, presumably an action on the slave's *peculium*. Can such an outcome be explained in terms of the theory of this Case? Under what circumstances would the contractual action be more suitable?

Section 4: Performance of a Job; Employment

Case 163: Duties of the Contractor

D. 19.2.51.1 (Javolenus libro undecimo *Epistularum*)

Locavi opus faciendum ita, ut pro opere redemptori certam mercedem in dies singulos darem: opus vitiosum factum est: an ex locato agere possim? Respondit: si ita opus locasti, ut bonitas eius tibi a conductore adprobaretur, tametsi convenit, ut in singulas operas certa pecunia daretur, praestari tamen tibi a conductore debet, si id opus vitiosum factum est: non enim quicquam interest, utrum uno pretio opus an in singulas operas collocatur, si modo universitas consummationis ad conductorem pertinuit. Poterit itaque ex locato cum eo agi, qui vitiosum opus fecerit. Nisi si ideo in operas singulas merces constituta erit, ut arbitrio domini opus efficeretur: tum enim nihil conductor praestare domino de bonitate operis videtur.

Javolenus in the eleventh book of *Letters*:

I leased out the performance of a job (*opus faciendum*) with the provision that I pay the contractor a fixed daily fee for the job. The job was defective. Can I sue on the lease (of the job)?

He responds: If you leased out the job on condition that the contractor demonstrate its quality to you, then even if it was agreed that a fixed amount be paid for each day of work, nonetheless the contractor should be liable to you if his work was defective. For it makes no difference at all whether a job is leased out for a single (overall) price or for single days of work, provided that the contractor is responsible for the entire completion. So he can be sued on the lease (of a job) if he does defective work, but not if the fee was arranged for single days of work in order that the job be done at the owner's judgment; for then the contractor is held to warrant nothing about the work's quality.

Discussion:

1. Performance of a Job (*Opus Faciendum*). Roman law, although it continues to use the vocabulary of *locatio conductio*, sharply distinguishes contracts for performance of a job. Normal construction contracts are included in this category: for a home (*domus*: Labeo, D. 19.2.60.3; Javolenus, D. 19.2.59), a building (*aedes*: Alfenus, D. 19.2.30.3), or apartment block (*insula*: Paul, D. 19.2.22.2); and likewise a water channel (*rivus*: Labeo, D. 19.2.62) or a wall (*ILS* 5317). But also more everyday jobs, such as transporting goods or persons by land or sea (Gaius, D. 19.2.25.7; Papinian, D. 19.5.1.1; Ulpian, D. 19.2.11.3; Paul, D. 14.2.2 pr., 10.2); cleaning or repairing clothes (see the following Case); setting or engraving a jewel (Ulpian, D. 19.2.13.5); pasturing calves (Ulpian, D. 19.2.9.5); harvesting crops (Cato, *Agr.* 144-145); making a ring from the customer's gold (Case 185); or educating a slave (Ulpian, D. 19.2.13.3); even a doctor performing an operation (see Ulpian/Proculus, D. 9.2.7.8). In each case, the person who "places out" the job is the *locator*, while the contractor who performs it is the *conductor*.

2. Payment and Supervision. Javolenus describes two payment methods: for the entire job, or by the day until completion; but these are the basis for classifying the contract. What is crucial, rather, is the extent to which "the contractor is responsible for the entire completion," rather than working under the customer's closer supervision; and the contractor's work is certified after the fact by the customer's "approval" (*adprobatio*). Why is this so important?

3. A Public Contract. There survives a remarkable inscription recording a public contract for construction of a wall in the port city of Puteoli, 105 BCE: *CIL* 10.1781 (=ILS 5317, FIRA 3.153). Besides giving elaborate specifications for the wall, the contract prescribes the process for approval upon completion by the local council, the date for completion, payment for the job (including a progress payment), and a list of the contractors.

Case 164: Moving a Column; Cleaning Clothes

D. 19.2.25.7-8 (Gaius libro decimo ad Edictum Provinciale)

7. Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset. Idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduxerit: idemque etiam ad ceteras res transferri potest. 8. Si fullo aut sarcinator vestimenta perdiderit eoque nomine domino satisfecerit, necesse est domino vindicationem eorum et conditionem cedere.

Gaius in the tenth book on the Provincial Edict:

7. A person undertook to transport a column. If it was broken while being removed or carried or repositioned, he is liable for this risk (*periculum*) if it occurred because of some fault (*culpa*) of his own or of the persons whose labor he used; but there is no fault if everything was done which a very careful person (*diligentissimus quisque*) would see to. We would obviously rule the same also if someone undertook to transport containers or timber; and the same rule can also be applied to other property.

8. If a fuller or a clothing-mender lost (a customer's) clothes and gave satisfaction to their owner on this account, the owner must cede to the fuller or cloth-mender) the right to reclaim their ownership and the *condictio* (for theft).

Discussion:

1. The Broken Column. This is, of course, a fairly typical example of a job. Columns are large and heavy, hence prone to fracture or chipping as they are manipulated through narrow or crowded city streets. The transporter's liability is defined in terms of *culpa*, which Ulpian, in this case, helpfully defines as requiring a great deal of care not only from the contractor but also from his employees. (It thus appears that the contractor warrants against the fault of his employees.) Ulpian, D. 19.2.9.5, cites Celsus as holding that such care requires also the skill necessary for the job; lack of experience (*imperitia*) is no excuse and is counted as *culpa*.

These duties become especially heightened when the customer has consigned property for the contractor to work on, as with the column; for instance, a fuller is liable when mice nibble at a customer's clothing, "because he should have guarded against this" (Ulpian, D. 19.2.13.6). Obviously, if the contractor exposes the customer's property to risks not associated with execution of the contract, he is liable for any resulting loss (Ulpian, D. 19.2.13.3); and, indeed, any personal use by him of the property constitutes theft (*Pauli Sent.* 2.31.29, = D. 47.2.83 pr.).

Contractors are normally expected to perform the job themselves, not to delegate its performance to third parties: Ulpian, D. 45.1.38.21, 46.3.31.

2. Stolen Clothing. Along with the high liability a contractor bears for the customer's property goes the duty to protect it against theft or harm by third parties. Fullers treated woolen cloth to make it thicker and non-abrasive, but they also did cleaning. In section 8, the fuller who lost the customer's clothing paid the customer their value. The thief may be impossible to locate, but were that to happen, the customer must cede to the fuller his legal claims against the thief. Gaius, *Inst.* 3.205-206, notes that this rule holds only if the fuller is solvent and able to pay for the clothing; otherwise, the customer's remedies may be with only against the thief. (See also Labeo, D. 19.2.60.2.) This high standard of care is frequently described as "safekeeping," *custodia*, meaning liability for any damage or loss unless the contractor can show it to have been caused by

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a “higher force”; see also Ulpian, D. 47.2.12 pr. (For what happens when the fuller pays for lost clothing that the customer later recovers, see Case 229.)

Case 165: Timely Completion

D. 19.2.58.1 (Labeo libro quarto *Posteriorum* a Iavoleno epitimatorum)

In operis locatione non erat dictum, ante quam diem effici deberet: deinde, si ita factum non esset, quanti locatoris interfuisset, tantam pecuniam conductor promiserat. Eatenus eam obligationem contrahi puto, quatenus vir bonus de spatio temporis aestimasset, quia id actum apparet esse, ut eo spatio absolveretur, sine quo fieri non possit.

Labeo in the fourth book of his *Posthumous Writings*, as epitomized by Javolenus:

In the lease of a job a date had not been fixed before which it should be completed; (but) the contractor had then promised (payment of) money equivalent to the lessor's interest if it was not so completed. I think that an obligation is contracted for whatever (time) an honest man (*vir bonus*) would estimate as the time limit, since they obviously arranged that it be finished in the time required for doing it.

Discussion:

1. Implying a Time Limit. The parties provided for the contractor's payment of liquidated damages if the work was not completed "on time," but they failed to specify the actual date for completion. Labeo does not prescribe a time (what might inhibit him from doing this?), but instead allows it to be set by the standards of a *vir bonus*, a fictional person who bears resemblance to the Anglo-American "reasonable person." *Arbitrium boni viri*, "the judgment of an honorable person," is virtually a catch phrase with the Roman jurists. As Ulpian, D. 50.17.22.1, says, it is also the standard to which a party must adhere when a contract requires him or her to determine a contract term (as when a fee for services is left to the judgment of the contractor or the customer). See also Paul, D. 19.2.24 pr.

In D. 17.2.76 and 78, Proculus discusses situations where the parties expressly refer a contract term to the judgment of a third party. As Proculus states, there are two kinds of arbitrators (*arbitri*): in some cases, the parties are agreeing to accept the arbitrator's judgment as a final settlement, regardless whether it is fair or unfair; in others, the judgment must conform to that of an honorable man, i.e., it must be objectively reasonable. In the event of doubt, Proculus prefers the second interpretation for *bona fides* contracts, and Paul, D. 17.2.77, applies this preference to contracts for the performance of a job, in cases where the customer decides on whether to approve the work.

In what circumstances might such an objective standard be inappropriate?

Case 166: Approval and Risk

D. 19.2.62 (Labeo libro primo *Pithanon*)

Si rivum, quem faciendum conduxeras et feceras, antequam eum probares, labes corrumpit, tuum periculum est. Paulus: immo si soli vitio id accidit, locatoris erit periculum, si operis vitio accidit, tuum erit detrimentum.

D. 19.2.36 (Florentinus libro septimo *Institutionum*)

Opus quod aversione locatum est donec adprobetur, conductoris periculum est: quod vero ita conductum sit, ut in pedes mensurasve praestetur, eatenus conductoris periculo est, quatenus admensum non sit: et in utraque causa nociturum locatori, si per eum steterit, quo minus opus adprobetur vel admetiatur. Si tamen vi maiore opus prius interciderit quam adprobaretur, locatoris periculo est, nisi si aliud actum sit: non enim amplius praestari locatori oporteat, quam quod sua cura atque opera consecutus esset.

Labeo in the first book of his *Plausible Views*:

If you had contracted to build a water channel and you had completed it, but a land subsidence destroys it before you get it approved, you bear the risk. Paul (comments): No, rather, if this happens because of a defect in the earth, the *locator* (the customer) bears the risk; if it happens due to a defect of the work, the loss will be yours.

Florentinus in the seventh book of his *Institutes*:

When a job is leased out for a lump sum (*aversio*), the contractor bears the risk (*periculum*) until it is approved. But when it is leased so that performance is in feet or (other) measures, the contractor has the risk for as long as it goes unmeasured. In both cases, it will harm the *locator* (who contracted to have the job done) if he is responsible for the job not being approved or measured. Nonetheless, if the work is destroyed by a higher force (*vis maior*) before it is approved, the *locator* bears the risk unless it was otherwise agreed; for no more should be provided to the *locator* than what he would have obtained by his own care and work.

Discussion:

1. Approval. As was already mentioned in Case 163, the jurists regularly describe “approval” (*adprobatio*) as the final stage in a job contract. Apart from passage of risk (discussed below), the consequences are not clearly spelled out; but presumably the customer is at least then obligated to pay any outstanding contract price. Disapproval (*improbatio*) is also possible, meaning that the customer would not have an obligation to pay until any problems were remedied; but Labeo, D. 19.2.60.3, holds that if the parties subsequently agreed on changes from the original specifications, “the work is not deemed completed according to the contract terms, but since the change was willingly made by the *locator*, the contractor should be absolved.” Compare Case 104 on modifying a sale.

A particularly odd example of approval is discussed by Labeo and Paul, D. 14.2.10 pr. Ship’s passage was arranged for a slave, who died (apparently of natural causes) while the ship was at sea. Labeo holds that the passage fee is not owed, Paul disagrees, arguing that it depends on whether the fee was imposed upon initial boarding (in which case it is owed) or upon final disembarkation (in which case, not). Sort through the argument here. What should happen if it is unclear what the parties arranged?

2. Passage of Risk. *Periculum* should probably be understood loosely. If an earth subsidence (*labes*) destroys Labeo's water channel after its (full or partial) completion, the contractor would bear the risk in the sense that he would receive no pay for his work up to this point (he has not produced the specified result); but if the subsidence occurs after the customer's approval, the contractor is entitled to full payment. So Labeo holds, as it seems, in a decision that places considerable weight on the thoroughness and accuracy of the approval process. Paul's contrary ruling lays more stress on the cause of the water channel's destruction: if prior to approval the destruction results from "a defect in the earth" (*vitium soli*; what is meant?), the *locator* bears the risk and must pay for the work (Africanus, D. 19.2.33, appears to take the same position); but if from "a defect in the work," the contractor does, and so the *locator* is off the hook. Does either Labeo's or Paul's view seem entirely satisfactory? Paul's negative comments on Labeo (a much earlier jurist) often seem excessively pedantic; is that true here, or could a real change have occurred in legal thinking over time?

Florentinus largely concentrates on measurement as a supplement to approval (although it also determines the fee), but in the final sentence he turns to destruction by *vis maior*, here a "superior force," such as an earthquake or a flood, against which "human frailty" is helpless (Gaius, D. 44.7.1.4: *humana infirmitas*); as we might say, an act of God. Is it likely that Labeo's "subsidence" (*labes*) is as catastrophic as an earthquake? Which party should bear the risk if, short of an earthquake, the soil beneath a water channel is too weak to support it?

3. A Special Case. Alfenus, D. 19.2.31, raises a related problem. Saufeius owns a ship with a large hold, into which he pours grain from various owners for transport to market; the plan is that, at the end of the voyage, the mingled grain will be offloaded and re-apportioned among the various owners. After Saufeius has offloaded and conveyed one owner's grain, the ship sinks. Do the other owners have a claim against either Saufeius or the one owner who received his grain? Servius, Alfenus' teacher, distinguishes between two ways in which the cargo might have been carried: either in separate compartments, or mixed together in one heap. In the former case, the individual owners retain ownership during the voyage; in the latter, the owners do not, since they are expecting return only of a prorated share of the cargo, of which Saufeius is the owner in the meantime. (This arrangement is described as similar to an "open deposit"; see Case 69.) How does Servius' property analysis affect the outcome? Does it make any difference if the ship sank because of Saufeius' fault? Should distribution to the single owner be regarded as Saufeius' fault?

Case 167: Cost Overruns

D. 19.2.60.4 (Labeo libro quinto *Posteriorum* a Iavoleno epitomatorum)

Mandavi tibi ut excuteres, quanti villam aedificare velles: renuntiasti mihi ducentorum impensam excutere: certa mercede opus tibi locavi, postea comperi non posse minoris trecentorum eam villam constare: data autem tibi erant centum, ex quibus cum partem impendisses, vetui te opus facere. Dixi, si opus facere perseveraveris, ex locato tecum agere, ut pecuniae mihi reliquum restituas.

Labeo in the fifth book of *Posthumous Writings*, as epitomized by Javolenus:

I gave you a mandate to estimate for how much you would want to build a villa. You notified me that your estimate of the expense was two hundred (thousand sesterces). I leased out the job to you for a fixed fee, and later learned that the villa could not be completed for less than three hundred. One hundred had (already) been paid to you; when you had spent part of it, I forbade your doing the job (any further).

I held that if you continue to do the job, you can be sued on the lease that you return to me the remainder of the money (paid to you).

Discussion:

1. Paying the Price. If, as in the previous Case, a job is let out to a contractor at a fixed fee per day, and the job is poorly done, what recourse does the customer have? Javolenus, D. 19.2.51.1, distinguishes: if the job was let out such that its quality (*bonitas*) was subject to the customer's approval, then, even if payment had been made daily, the customer may sue *ex locato* for damages if the work as an entirety is defective. However, if the wage was established for single work-days (*operae*, see the following Case) and effected under the customer's supervision, the worker does not warrant the quality of the job. How clear is this distinction?

2. The Estimate. Here the contractor gave an estimate that turned out to be grossly low. There is no sign that the estimate was given in bad faith or that the ensuing work was faulty, however, and the customer made one payment (what we would call a progress payment) before realizing—presumably because the contractor was pressuring him for an increase in the fee—that the final cost would be far higher than the estimate. Under these circumstances, the customer is legally entitled to order the contractor to stop work, and he can also recover any unspent portion of the payment. (Presumably, a more modest cost overrun would not have had a similar drastic result.) The customer is thus left with a partially completed villa, which he can perhaps complete using a less up-market contractor. How satisfactory is this outcome?

Professionals in the broader construction trade were expected to show considerable diligence. The Praetor's Edict established a special action against surveyors whose report was faulty (Case 184), although only if his deceit, *dolus malus*, was involved; but gross negligence was interpreted as deceit, at least according to our source, which also says that the customer bears the risk if the surveyor is insufficiently experienced (Ulpian, D. 11.6.1.1). The surveyor was also liable if he delegated the job to a third party who acted fraudulently (Paul, D. 11.6.2.1). Ulpian, D.11.6.7.3-4, citing an imperial rescript, recommends an analogous extension of this action to deceitful architects, bookkeepers, and public contractors. Would this seem justified?

Case 168: “Lease” of One’s Own Labor

D. 19.2.38 pr.-1 (Paulus libro singulari *Regularum*)

pr. Qui operas suas locavit, totius temporis mercedem accipere debet, si per eum non stetit, quo minus operas praestet. **1.** Advocati quoque, si per eos non steterit, quo minus causam agant, honoraria reddere non debent.

Paul in his monograph on *Rules of Law*:

pr. A person who leases out his own labor (*operae suae*) should receive pay (*merces*) for the entire time if he is not responsible for not providing the labor. **1.** Likewise, advocates, if they are not responsible for not pleading a case, should not return their honoraria.

Discussion:

1. Wage Labor. The Roman Empire had, of course, a vast multitude of wage laborers, both free and slave (working for third parties; see Case 168). Even in official sources such as statutes or the Edict, the worker is said to “lease out his own labor” (*locare operas suas*: e.g., Ulpian, D. 3.1.1.6, and Paul, D. 38.1.37 pr.), or even to “lease out himself” (*locare se*: Ulpian, *Collatio* 9.2.2). Such a wage laborer is often described as a *mercenarius* (e.g., Pomponius, D. 8.6.20; Ulpian, D. 43.24.3 pr., 5.11; Paul, D. 47.2.90; Marcian, D. 48.19.11.1), a word which, like its English derivative “mercenary,” has a disreputable ring; see, for instance, Cicero, *De Off.* 1.150-151 (“Ignoble and vulgar is the income of all *mercenarii*, whose labor, not skill, is being purchased; for in their case the *merces* itself is the payment for slavery”). Those in “higher occupations” therefore preferred to avoid the impression that they worked for wages (*Mercedes*), although a good many of them plainly did: e.g., teachers (Julian, D. 27.2.4; Papinian, D. 39.5.27; etc.), doctors (Ulpian, D. 9.2.7.8, citing Proculus; Gaius, D. 9.3.7), forensic advocates (Ulpian, D. 50.13.1.13), public officials (Labeo, D. 39.5.19.1), and surveyors (Ulpian, D. 11.6.1 pr.). Over time, however, their compensation was increasingly designated an *honorarium* or *salarium* rather than a “wage” (*merces*), thereby implying no explicit *quid pro quo*; and in the late Classical period a claim to this compensation was not actionable *ex locato*, but only through imperial courts, see Case 184, and Ulpian, D. 50.13.1 (listing entitled professions, but ruling out philosophers and law teachers, who ought to “spurn working for hire,” *mercenariam operam spernere*: 1.4-5).

One result of this social prejudice is that Roman employment law is poorly developed, few sources being the probable consequence of few actual lawsuits directly on *locatio conductio operarum*. But this Case, which allows the wage laborer to collect his full pay when he is hired for a number of days but does not work all of them because of some external cause (such as cancellation of the employer’s project, or the employer’s death, see Ulpian, D. 19.2.19.9-10, citing Papinian), is an exception. (The same rule, it should be noted, is carried over to the advocate’s honorarium.) But we have next to no information, except from occasional literary or epigraphic evidence, as to the other legal rights and duties of ordinary employers and employees during their service.

How should law best deal with such social prejudices? See also the Discussion on Case 184.

Part B: Partnership (*Societas*)

In Anglo-American law, partnership is a form of enterprise organization. Roman law, however, constructed the contract of partnership (*societas*) differently, as a kind of informal joint venture, in which two or more parties agree to cooperate and pool resources for a common purpose. Although the purpose may be commercial, it need not be. For instance, the parties may agree to share their entire estates (*societas omnium bonorum*); or, at the other extreme, the parties may have only a limited non-commercial end in view. Thus, several persons who agree to share costs while travelling together are partners (*socii*) with regard to their trip. This results in a very different construction of the legal institution. As Reinhard Zimmermann observes (*Obligations* 451, quoting David Daube), *Socii* “are not bent on getting the utmost out of each other; they are, in the first place, ‘friends’, pursuing their common interests against third parties.”

The originally non-commercial nature of *societas* produces one of its most striking legal characteristics: to a very considerable extent, the contract of *societas* has effect as between the partners, but not with respect to the outside world. If one of the partners arranges a contract with a third party, that party can enforce the contract only against the single partner, not against the others (no joint and several liability). However, the affected partner remains tied to the others through *societas*, so he or she can usually bring claims for contribution against them (and vice versa) regarding any profit or loss the partnership may incur, as well as for misfeasance in carrying out the partnership’s objectives.

Societas, although thought-provoking as a contract, was poorly conceived for business purposes. This was so both with respect to the question just discussed, and also because *societas* was constructed as a transient arrangement. Nonetheless, despite the obstacles, commercial partnerships flourished during the Roman Empire, perhaps largely owing to the absence of more sophisticated enterprise organizations. Legal and literary sources attest them in agriculture (cultivating land; breeding and grazing livestock), engaging in sales (food staples such as oil, wine, and grain; slaves; clothing; jewelry; tombs), providing services (educating or training free children and slaves; leasing dwellings; operating shops; transporting both on land and sea), and so on. Most of these operations were quite small: only a handful of partners, most often just two. They frequently seem also rather short-term.

As with the real contracts (Chapter III) and mandate (V.C below), the jurists confronted the task of adapting these contracts to make them more commercially viable. They went some distance to achieving this goal, although their efforts seem slight by modern standards. Roman law was more successful for partnerships closely associated with public policy: banking (the *argentarii*) and public contracting operations (*publicani*); for these, some special rules were developed that departed from the individualistic template of *societas*. (This topic will not be explored here, however; in the bibliography, see Andreau and Fleckner.) But more developed enterprise forms, such as private corporations based on separation of stockholders and management, were unknown in Roman commercial law, which in general therefore made little direct contribution to the later development of capitalism.

Case 169: Contributions, Profit, and Loss

Gaius, *Institutiones* 3.148-150

148. Societatem coire solemus aut totorum bonorum aut unius alicuius negotii, ueluti mancipiorum emendorum aut uendendorum. **149.** Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. Quod Quintus Mucius contra naturam societatis esse censuit. Sed Seruius Sulpicius, cuius etiam praeualuit sententia, adeo ita coiri posse societatem existimauit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa uideatur, ut aequum sit eum cum hac pactione in societatem admitti. Nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia ualet. **150.** Et illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, tamen aequis ex partibus commodum ut incommodum inter eos commune esse; sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in eo quoque, quod omissum est, similes partes erunt.

Gaius in the third book of his *Institutes*:

148. We normally enter a partnership either for our entire estates (*societas omnium bonorum*) or for some particular transaction, such as buying or selling slaves.

149. But there was (at one time) a major disagreement about whether a partnership could be entered such that one (partner) took a larger share of profit and paid a smaller one of loss. Quintus Mucius (Scaevola) thought this contrary to the nature of partnership. But Servius Sulpicius, whose view has prevailed, not only thought it possible to enter such a partnership, but held entry possible also in the following way, that one person pay for no loss at all, but receive part of the profit, provided that his services are deemed so valuable that it is fair he be admitted to the partnership on these terms. For it is agreed that a partnership can be entered such that one contributes money, the other not, but nonetheless they share profit, since often one's services are as valuable as money.

150. And this (at least) is settled: if they do not agree (specifically) on sharing profit and loss, they share advantage, like disadvantage, in equal shares; but if the shares were expressed for one purpose, e.g., for gain, but omitted for the other, the shares are the same also for that which was omitted.

The Problem:

Gaius, a wealthy Roman, and Artemisia, his freedwoman, wish to enter a *societas* in which she will operate a butcher shop. To what extent are they free to set up their partnership in the way most advantageous to themselves?

Discussion:

1. "The Nature of Partnership." Q. Mucius Scaevola (cos. 95 BCE), the earliest important jurist, disallowed agreements that varied the shares of profit and loss. Can you work out what his reasoning might have been? The eventual default rule (given in section 150) was that, unless the parties agreed otherwise, they would share equally in profit and loss; so also Ulpian, D. 17.2.29 pr. Is this irrespective of the relative size of their contributions to the *societas*? Measuring contributions may have been quite difficult, as Gaius indicates; while most partners may have contributed mainly money and property, contributions of labor (including expertise) were also possible. Thus, for instance, one partner might provide capital but then remain relatively passive,

while the other less affluent one operated the partnership on the basis of previously acquired skill and knowledge. See Proculus, D. 17.2.80; Ulpian, D. 17.2.5.1 (“A *societas* can be validly formed between persons of unequal means, since often the poorer one supplies in work what he lacks in comparative wealth. A *societas* is not acceptably entered into as a gift.”), 29 pr.; Paul 17.2.30; Justinian, *Inst.* 3.25.2. Do you see the reasoning that led Servius Sulpicius Rufus (cos. 51), Q. Mucius’ gifted successor, to relax the constrictive ruling of his teacher?

In Classical law, the parties had considerable legal freedom to shape their partnership as they wished. They could arrange for differing allotments of profit and of loss, and even that the profit be shared while the loss falls only on one partner, provided that this partner primarily contributes his effort (Ulpian, D. 17.2 29 pr.-1; Paul, D. 17.2.30). They could also leave it to a third party to determine their shares (Pomponius, D. 17.2.6: he must use “the judgment of a good man,” *boni viri arbitrium*). However, the jurists draw the line when one partner takes all the profit and the other bears all the loss (Ulpian, D. 17.2.29.2); this is a so-called “leonine partnership,” after a fable of the Roman poet Phaedrus (1.5). Ulpian describes such a partnership as “exceedingly inequitable” (*iniquissimum*). Can you formulate a better objection?

2. Profit and the *Societas Omnium Bonorum*. It is worth noting that, although Roman partnerships need not be aimed at profit, the jurists usually assume that profit is their primary goal. Ulpian, D. 17.2.7, indicates that, unless partners had specified otherwise, “profit” includes “everything stemming from their business” (*universorum quae ex quaestu veniunt*), including any income from sales or leases; see also Paul, D. 17.2.8. But, absent an express agreement to the contrary (Paul, D. 17.2.3.2), partners could still keep for themselves what they received outside the partnership, e.g., by way of inheritance, bequests, or gifts: Ulpian, D. 17.2.9 (citing Sabinus); see also Pomponius, D. 17.2.60.1; Ulpian and Paul, D. 17.2.10-13. Ulpian, D. 17.2.71.1, gives a case in which two freedmen with the same former master and patron formed “a partnership for profit, business, and income” (*societas lucri, quaestus, compendii*); when their patron’s will then left his estate to one freedman and a legacy to the other, neither partner was obliged to share. A similar ruling by Julian, D. 29.2.45.2.

However, profit is probably not the normal motive in one particular form of partnership that Gaius mentions in section 148, in which two or more persons merge all their property (*omnia bona*, a concept widely construed: Paul, D. 17.2.3.1) into a joint ownership. Although in the Roman Empire such a merger may well have been rare, the institution has a long history, and may, in fact, have been the original form of partnership. A fragment of Gaius’ *Institutes* (3.154a-b), known only from an Egyptian parchment first discovered in 1933 and published a year later, describes an archaic partnership in which the heirs of a deceased *paterfamilias* by tacit agreement remain together on their undivided familial property; this is called *consortium erecto non cito* (“community in an undivided inheritance”). Scholars widely suppose that this institution, which Gaius treats as obsolete and is only passingly mentioned in other sources, nonetheless had, through *societas omnium bonorum*, a considerable influence on the later (2nd cent. BCE?) development of Classical *societas*, although that contract has a far more individualistic cast.

3. The Action On Behalf of a Partner (*pro Socio*). The model *formula* for the action ran approximately as follows: “Whereas the plaintiff entered a partnership (for all their property) with the defendant, this being the matter under litigation, whatever on this account the defendant ought to give to or do for the plaintiff in accord with good faith (*ex fide bona*), let the *iudex* condemn the defendant to the plaintiff for this; if it does not appear, let him absolve.” (Lenel, *EP*³ 297.) The action, brought by one partner against another, has the effect of dissolving the partnership: Ulpian, D. 17.2.63.10; Paul, D. 17.2.65 pr. (But see Paul, D. 17.2.65.15, noting an exception for public contractors.) As discussed in the following Cases, the action covered any claim rising out of the *societas*. Condemnation led to the ex-partner being branded with *infamia*; see Discussion 3 on Case 62.

Case 170: The Common Fund

D. 17.2.58 pr.-1 (Ulpianus libro trigensimo primo ad Edictum)

pr. Si id quod quis in societatem contulit extinctum sit, videndum, an pro socio agere possit. Tractatum ita est apud Celsum libro septimo digestorum ad epistulam Cornelii Felicis: cum tres equos haberes et ego unum, societatem coimus, ut accepto equo meo quadrigam venderes et ex pretio quartam mihi redderes. Si igitur ante venditionem equus meus mortuus sit, non putare se Celsus ait societatem manere nec ex pretio equorum tuorum partem deberi: non enim habendae quadrigae, sed vendendae coitam societatem. Ceterum si id actum dicatur, ut quadriga fieret eaque communicaretur tuque in ea tres partes haberes, ego quartam, non dubie adhuc socii sumus. 1. Item Celsus tractat, si pecuniam contulissemus ad mercem emendam et mea pecunia perisset, cui perierit ea. et ait, si post collationem evenit, ut pecunia periret, quod non fieret, nisi societas coita esset, utrique perire, ut puta si pecunia, cum peregre portaretur ad mercem emendam, periit: si vero ante collationem, posteaquam eam destinasses, tunc perierit, nihil eo nomine consequeris, inquit, quia non societati periit.

Ulpian in the thirty-first book on the Edict:

pr. If property that one person contributed to the partnership is lost, let us see whether he can sue on partnership. Celsus, in the seventh book of his *Digests*, handled the matter thus in responding to a letter of Cornelius Felix: You have three horses and I have one. We enter a partnership for you to take my horse and sell a four-horse team, and (then) to return to me a fourth of the price. If my horse then dies before the sale, Celsus says that he does not think the partnership continues, nor is a share owed (to you) from the price of your horses, since the partnership was not formed to have a four-horse team, but to sell it. But if the arrangement is said to have been that a four-horse team be created and shared, with you to have a three-quarter share in it and me a quarter, we are undoubtedly still partners (after my horse dies).

1. Celsus also discusses (this problem): if we had contributed money for purchasing goods and my money had been lost, who bears this loss? He says that, if the money is lost after its contribution (to the common fund), which would not occur unless the partnership had been formed, both bear the loss; e.g., if money, when it is carried abroad for buying goods, is lost. But if it is lost before its contribution but after you set it aside (for this purpose), you will get nothing on this account, he (Celsus) says, because it was not the partnership that suffered loss.

Discussion:

1. **A Four-Horse Team.** This contract is typical of the one-off partnerships mentioned by Gaius in Case 169 (section 148: *societas ... unius alicuius negotii*); see also Ulpian, D. 17.2.52.7 and 12-13; Paul, D. 17.2.65.2, 71 pr. The partners' premise here is that a quadriga, sold as a team, will be more valuable than the four horses sold separately; see, e.g., Paul, D. 9.2.22.1.

Although there is no requirement that partnerships have a "common fund," *res communis*, that is comprised of money or material property contributed by the partners, such a fund seems to have occurred quite often (Ulpian, D. 17.2.14, 45, 47 pr.; Paul, D. 17.2.38.1; *et al.*), and doubtless almost invariably when a business partnership was capitalized. When I add my horse to your three horses, Celsus, whom Ulpian follows, holds that, if my horse dies (presumably of natural causes and not owing to any fault of yours) before the quadriga can be sold, I bear the loss because our

aim was only to sell the team, not to use it for, e.g., chariot racing in the Circus. Does this effectively mean that, because of our intent to sell the team, my horse and yours were not melded into a common fund despite the horses being grouped together for purposes of the sale? Reconstruct, if you can, Celsus' reasoning. Did he get it right?

2. Contributions of Money. Celsus' example here illustrates the different treatment given to money. Here, so long as the money is being used for partnership purposes (and, as we shall see, so long as the partner handling it acts with reasonable care), its loss is apportioned to the partners; the money must, however, have been actually contributed, and not just committed for this purpose. (See further Case 174.) Money is a standard example of a fungible, and its passage into the common fund evidently results in the contributing partner's loss of ownership; it becomes common property, out of which all partnership debts can be paid (Case 173). Ulpian, D. 17.2.14, indicates that an agreement between partners barring division of the common fund before an agreed date is ineffective if for whatever reason their partnership is subsequently dissolved before that date.

During the partnership, the partners each have "ownership of the entirety, undivided (and) *pro parte*" (Ulpian, D. 13.6.5.15, citing Celsus). Upon dissolution, partners have available, besides the action on partnership, an action for dividing common property, the *actio communi dividundo*: Paul, D. 10.3.1, 17.2.17 pr. Division, which is largely discretionary with the *iudex*, is based upon the actual property held in common, any damage it has sustained, and any loss or gain a partner has had from the common fund: Ulpian, D. 10.3.3 pr. For the jurists' efforts to separate the concept of common property from *societas*, see Paul and Gaius, D. 17.2.31-34.

Case 171: The Standard of Conduct for Partners

D. 17.2.52.1-3 (Ulpianus libro trigensimo primo ad Edictum)

1. Venit autem in hoc iudicium pro socio bona fides. 2. Utrum ergo tantum dolum an etiam culpam praestare socium oporteat, quaeritur. Et Celsus libro septimo digestorum ita scripsit: socios inter se dolum et culpam praestare oportet. Si in coeunda societate, inquit, artem operamve pollicitus est alter, veluti cum pecus in commune pascendum aut agrum politori damus in commune quaerendis fructibus, nimirum ibi etiam culpa praestanda est ... Quod si rei communi socius nocuit, magis admittit culpam quoque venire. 3. Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare: ideoque si pecus aestimatum datum sit et id latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit eius, qui aestimatum pecus acceperit: quod si a furibus subreptum sit, proprium eius detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. Haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa pascenda data sunt quamvis aestimata.

Ulpian in the thirty-first book on the Edict:

1. In the lawsuit on partnership (*pro socio*), at issue is good faith (*bona fides*). 2. Question arose whether a partner should be liable just for deceit (*dolus*) or also fault (*culpa*). Celsus wrote in book 17 of his *Digests* as follows: partners should be liable between themselves for deceit and fault. If, he says, in entering a partnership, one person promised a skill or services—e.g, when we give a herd for common grazing, or land to a cultivator for joint raising of crops—obviously here there is liability also for *culpa* ... But if a partner harmed common property, he (even) more allows that *culpa* is at issue here.

3. Partners are not forced to bear losses that are unforeseeable, i.e., unavoidable losses. And so if a flock is given along with an assessment (of its value) and it perishes through brigandage or conflagration, the loss is shared if this does not occur by the *dolus* or *culpa* of the person receiving the flock with an assessment. But if it was stolen by thieves, the loss falls on the person who ought to provide safekeeping (*custodia*) and took it with an assessment. These rules are correct and there will be an action on partnership, provided that the animals, although with an assessment, were given for pasturing on the basis of a partnership contract.

Discussion:

1. **Liability for Deceit and Fault.** It is certain that a partner was liable at least for *dolus*, deceitful conduct: Paul, D. 2.13.9 pr., apparently referencing the Praetor's Edict; also Pomponius, D. 17.2.59.1. Gaius, D. 17.2.72, also describes a liability for *culpa*, "i.e., idleness and carelessness" (*desidia atque neglegentia*), but not "extreme carefulness" (*exactissima diligentia*). Other late sources, including this Case, support this view: see Paul, D. 17.2.65.9; *Pauli Sent.* 2.16 (postclassical); Justinian, *Inst.* 3.25.9 (from Gaius). However, also as in this Case, these sources concentrate on potential harm to common property or to the material interests of other partners: a common herd, land given over to joint cultivation, and so on. So it may be that a higher duty was imposed only when such property was involved. Recall the general "Benefit Principle" discussed in Case 64, where *societas* is mentioned. To some extent, for instance, a bailment element is present when one partner's property is consigned to another. What should the Classical rule have been with regard to such property? It's worth noting that a partner who harmed common property might also be liable in delict for wrongful loss: Ulpian, D. 17.2.47.1.

If this limitation is correct, a partner's liability for *culpa* may not have extended to, for instance, conduct of partnership business with third parties. Should it have? See the following Case. Is it fair to say (as Gaius does in the fragment cited above) that: "Anyone who takes on a less than diligent partner has only himself to blame"?

2. Liability for *Custodia*? The logic in section 2 of this Case may strike you as more than a bit strange. Ulpian starts out by deriving from Celsus a partner's liability for *dolus* and *culpa*. Then he goes on to say that if "one person promised a skill or services ... obviously here there is liability also for *culpa*" (*nimirum ibi etiam culpa praestanda est*). But what does the "also" mean, if the partner is already liable for *culpa*? And the following sentence ("But if a partner harmed common property, he (even) more allows that *culpa* is at issue here.) has the same problem. Romanists have long supposed that Justinian's compilers altered this text, and that Ulpian established an even higher liability for *custodia*, namely that a partner in these two situations was liable for all property loss short of unavoidable force; the compilers then replaced *custodia* with *culpa*, in line with their general view that this should be the limit on liability (see Justinian, *Inst.* 3.25.9). What do you think? Should one partner be liable to the others for lack of skill if he holds himself out as having that skill, or for enhanced responsibility if he deals with common property?

3. Liability and *Bona Fides*. At least in this fragment as it is preserved, Ulpian, without further explanation, links the personal liability of partners to the good faith action on partnership. What is the legal connection between the two ideas?

4. Limits on Liability. The liability of *socii omnium bonorum* was restricted to what they could afford, with no account taken of money owed to them but still unpaid: Ulpian, D. 42.1.16. However, Ulpian, D. 17.2.63 pr., citing Sabinus, restricts the liability of all types of partners "to what they are able to do, or to what they do not deceitfully obstruct their own ability to do," i.e., their liability is usually restricted to their means to pay. Ulpian justifies this by arguing that: "*societas* has a certain inherent law of brotherhood, *ius fraternitatis*." Is this justification sufficient?

Case 172: Liability for One's Slaves

D. 17.2.23.1 (Ulpianus libro trigesimo ad Sabinum)

Idem quaerit, an commodum, quod propter admissum socium accessit, compensari cum damno, quod culpa praebuit, debeat, et ait compensandum. Quod non est verum, nam et Marcellus libro sexto digestorum scribit, si servus unius ex sociis societati a domino praepositus negligenter versatus sit, dominum societati qui praeposuerit praestaturum nec compensandum commodum, quod per servum societati accessit, cum damno: et ita divum Marcum pronuntiasse, nec posse dici socio: "Abstine commodum, quod per servum accessit, si damnum petis."

Ulpian in the thirtieth book on Sabinus:

He (Pomponius) asks whether the profit accruing because a partner has been admitted should be offset by the loss he causes through his fault (*culpa*). He says it should be offset, but that is incorrect. For Marcellus also writes, in book 6 of his *Digests*, that if one partner's slave was set in charge of the partnership by his owner and (then) acted carelessly, the owner who set him in charge is liable to the partnership, nor should the profit accruing to the partnership through the slave be offset by the loss; and so, too, the deified Marcus (Aurelius) determined. Nor can a partner be told: "If you claim (compensation for) loss, surrender (through offset) the profit that accrued through the slave."

Discussion:

1. Offset of Gains with Losses. Although the situation described by Marcellus is not entirely clear, the likeliest scenario is that a number of free persons formed a partnership and one partner then placed his slave in charge of partnership business. The slave made money for the partnership (the profit), but also caused it some loss through his carelessness (*neglegentia*). (The nature of the loss, *damnum*, is unfortunately indeterminate, but it probably involved damage to common property.) The question raised by Marcellus, and partially answered also by the pronouncement of Marcus Aurelius, is this: If the other partners seek their shares of the profit, must this profit be offset by the loss the slave caused?

The answer is no. The slaveowner must make up the loss, thereby replenishing the common fund; and afterwards the other partners can take their shares. The implication is that the slaveowner is liable for his slave's act, ostensibly because it was he who picked the slave for this role (*culpa in eligendo*); compare Discussion 2 on Case 153, and also Ulpian, D. 17.2.19, 21. Do you get the logic behind this decision? How does this logic carry over into the hypothetical posed by Pomponius, in which a partner himself causes the loss through his *culpa*? Compare Paul and Ulpian, D. 17.2.25-26.

Case 173: Compensation for Partnership Debts

D. 17.2.27 (Paulus libro sexto ad Sabinum)

Omne aes alienum, quod manente societate contractum est, de communi solvendum est, licet posteaquam societas distracta est solutum sit. Igitur et si sub condicione promiserat et distracta societate condicio exstitit, ex communi solvendum est: ideoque si interim societas dirimatur, cautiones interponendae sunt.

Paul in the sixth book on Sabinus:

All debt that was contracted while the partnership continued must be paid from the common fund (*de communi*), even if it has to be paid after dissolution of the partnership. Therefore if he (a partner) promised under a condition and the condition occurred after the partnership was dissolved, it must be paid from the common stock; and so, if a partnership is dissolved in the meantime, guaranties (*cautiones*) should be interposed (for eventual payment of the debt).

Discussion:

1. “Debt.” Ulpian, D. 50.16.213.1: “Debt (*aes alienum*) is what we owe to other people.” In this Case, Paul intends all the legitimate debts owed by the partnership to third parties, even if they were arranged by individual partners. As he says, these debts remain the partnership’s even if they do not become due until after its dissolution. In practical terms, the third-party creditor who became entitled to collect when the condition occurred would seek it from the partner who made the promise, and, if payment was declined, would sue that partner, not the partnership as an entity nor other partners individually. But the debt would ultimately be paid from the partnership’s common fund, which might well require contributions from the other partners or, if the common fund had already been distributed, from the ex-partners. In this sense, the common fund can have a “virtual” existence even while the partnership lasts (see Discussion on Case 170) and extending beyond it.

2. Some Examples. In D. 17.2.65.14, Paul describes a partnership in which the common fund consists of money held by one partner, while a second holds none of it. So Paul determines, a third partner who sues *pro socio* must direct his suit only against the partner holding the money. After the claimant is paid (assuming his claim is legitimate), “all the partners can sue for what is owed to each from the remainder.” That is, the second partner’s claim for recompense has priority over all the partners’ claims to their shares. Is this consistent with the present Case?

What happens if the holder of the common fund makes use of it for non-partnership purposes? Paul, D. 17.2.67.2, discusses a partner who lends common fund money at interest to a third party. If he lent it on behalf of the partnership, he must share the interest from the loan; but if on his own account, he can keep the interest but bears the risk of the principal being lost. Does this outcome make sense? Compare Pomponius, D. 17.2.59.1: “Any loss a partner sustains from gambling or adultery he will not recover from the common fund. If, indeed, a partner incurs some loss through our deceit (*dolo nostro*), he may reclaim it from us.”

After the partnership’s dissolution, a partner’s contribution to the common fund cannot be recovered by an action *pro socio* because there is no longer a partnership; but the partner can use the action for division of property: Paul, D. 17.2.65.13, see also D. 10.3.1.

Case 174: Compensation for Expenses

D. 17.2.52.4: (Ulpianus libro trigensimo primo ad Edictum)

4. Quidam sagariam negotiationem coierunt: alter ex his ad merces comparandas profectus in latrones incidit suamque pecuniam perdidit, servi eius vulnerati sunt resque proprias perdidit. Dicit Iulianus damnum esse commune ideoque actione pro socio damni partem dimidiam adgnoscerere debere tam pecuniae quam rerum ceterarum, quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur. Sed et si quid in medicos impensum est, pro parte socium agnoscerere debere rectissime Iulianus probat. Proinde et si naufragio quid periit, cum non alias merces quam navi solerent advehi, damnum ambo sentient: nam sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contingit.

Ulpian in the thirty-first book on the Edict:

Some men formed a cloth business. One of them, while travelling to buy goods, met up with brigands and lost his own money; his slaves were wounded, and he lost his own property (as well). Julian says that the loss is shared, and so by the action on partnership (*pro socio*) the (other) partner should take responsibility for half of the money and also of other things that the partner would not have taken with him had he not travelled to buy goods on the common account. But also if there was some expense on doctors, Julian quite rightly approves the (other) partner taking responsibility for a share. Hence if something was lost in a shipwreck, both (partners) experience loss if the goods were not usually conveyed except by ship. For just as profit must be shared, so too (must) such loss as does not occur because of a partner's fault (*culpa*).

Discussion:

1. **The Victim of Brigandage.** Gangs of brigands (*latrones*) the jurists treat as a form of *vis maior*, "higher force," that individuals cannot successfully resist: e.g., Gaius, D. 13.6.18 pr.; Maecian, D. 35.2.30 pr.; so also the emperor Alexander, C. 4.34.1 (234). (It is reasonable to infer that this was an enduring problem in the Roman empire.) The cloth buyer who was waylaid lost his own property, including money presumably intended for the purchase as well as for travel expenses, as well as other personal property; and his slaves were also wounded in the attack. Ulpian, citing Julian, makes the other partner liable to the victim for half of all of these losses, including the expenses for the slaves' medical expenses. Is Julian presuming that the partners had agreed on an even division of losses? What is the meaning of "things that the partner would not have taken with him had he not travelled to buy goods on the common account"? Is the test here simply a "but for" one, such that, for instance, the victim's baggage is included? Or must the property be clearly related to the partnership?

Pomponius, D. 17.2.60.1, citing Labeo, posits that a partner in a slave-trading venture was wounded when the slaves attempted to escape and the partner resisted. Labeo's view is that the partner cannot charge his medical expenses to the partnership "because the expenditure, although made because of the partnership, is not for the partnership" (*quia id non in societatem, quamvis propter societatem impensum sit*). Here, it seems, "but for" causation is not enough. Is this holding consistent with the present Case? Could the partner argue that his attempt to stop the escape was essential to the partnership's goals?

Compare Ulpian, D. 17.2.52.15 (a partner travelling on partnership business can receive compensation for the cost of fares and for hotel or stable outlays, plus the hire of pack animals and carts for himself, his baggage, and his goods); Paul, D. 17.2.67.2 (he also is compensated for interest paid on necessary loans, or the interest lost if he pays with his own money).

Case 175: Ending a Partnership

Gaius, *Institutiones* 3.151-154

151. Manet autem societas eo usque, donec in eodem <con>sensu perseuerant; at cum aliquis renuntiauerit societati, societas soluitur. sed plane si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati, ut hereditatem solus lucri faciat, cogetur hoc lucrum communicare; si quid uero aliud lucri fecerit, quod non captauerit, ad ipsum solum pertinet. mihi uero, quidquid omnino post renuntiatam societatem acquiritur, soli conceditur. **152.** Soluitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi eligit. **153.** Dicitur etiam kapitis deminutione solui societatem, quia ciuili ratione kapitis deminutio morti coaequatur; sed utique si adhuc consentiant in societatem, noua uidetur incipere societas. **154.** Item si cuius ex sociis bona publice aut priuatim uenierint, soluitur societas. ...

Gaius in the third book of his *Institutes*:

151. A partnership lasts so long as they continue with the same agreement. But if one (partner) renounces the partnership, it is dissolved. Obviously, if one renounces the partnership in order that he alone have some impending profit—e.g., if a partner in entire estates (*socius totorum bonorum*), when he has been left as heir from someone, renounces his partnership with me so that he alone profits from the inheritance—he is forced to share the profit with me. But if he otherwise profits, he alone acquires what he does not obtain (deceitfully). But whatever is acquired after the partnership is renounced is allotted to me alone.

152. Additionally, a partnership is also dissolved by a partner’s death, since a person contracting a partnership chooses a specific person for himself. **153.** It is also said that a partnership is dissolved by change in citizen status (*capitis deminutio*), since by Civil Law reasoning a change in citizen status is equivalent to death; still, if the parties still agree on the partnership, a new partnership is held to arise (in that event). **154.** Likewise, if one partner’s property is publicly or privately sold, the partnership is dissolved. ...

Discussion:

1. Renunciation. Paul, D. 17.2.1 pr.: “A *societas* can be entered either permanently, i.e., for their lifetime, or for a period of time or from a time or under a condition.” However, during its existence it is terminated, as Paul indicates, by a partner’s death (see below), but also by one partner “renouncing” the partnership. (On opportunistic renunciation, see the following Case.) In section 151 Gaius ties renunciation closely to cessation of the agreement, *consensus*, on the basis of which the partnership was originally formed; so also Diocletian and Maximian, C. 4.37.5 (294); Justinian, *Inst.* 3.25.4. However, if the partnership involved more than two persons, would Gaius allow for its more or less automatic renewal through the agreement of the remaining partners (see 153)? Renunciation cannot be barred through the terms on which the *societas* was formed, and it is effective even when it is made at an inopportune time, although it may result in liability: Ulpian, D. 17.2.14, citing Pomponius; Paul, D. 17.2.65.3-6. Obviously, a partnership is also dissolved if the partners fall into irreconcilable disagreement, *dissensus*: *ibid.* 3.

Renunciation is not a formal legal act; it may be accomplished fairly casually, for instance through one’s representative such as a *procurator* (see Chapter VII.C): Paul, D. 17.2.65.7-8.

2. Death. Paul, D. 17.2.65.9, elaborates Gaius' point: "By one partner's death a *societas* is dissolved even though it was formed with everyone's *consensus* and the other partners survive, unless they agreed otherwise in forming the *societas*. A partner's heir does not succeed him; but subsequent gain from the common fund must be provided to the heir, who is also liable for (the decedent's) deceit and fault (*dolus et culpa*) in prior acts." (The 'unless' clause is probably interpolated.) Are you convinced by Gaius' rationale for this rule, that the other partner or partners chose the decedent for himself? Why should the death of one partner automatically lead to the dissolution of the entire partnership? Partners were actually barred from agreeing that the eventual heir of one of them could join the partnership: Pomponius, D. 17.2.59 pr.; Ulpian, D. 17.2.35.

What might be thought of as a partner's "civil death"—his loss of freedom or citizenship, or his bankruptcy—has the same consequence; see also Modestinus, D. 17.2.4.1. Ulpian, D. 17.2.58.2, citing Julian, has an interesting discussion of the possible complexities that can arise from a change in a partner's status. A partnership is also ended if one partner sued another *pro socio*: see Discussion 3 on Case 169.

The abiding question, in this long list of ways in which partnerships could come to an untimely end (see also Ulpian, D. 17.2.63.10), is whether the Roman law of *societas* founders on its overt, highly individualistic voluntarism, the belief that individual resolve should be the fundamental, or at least the dominant, factor in constructing the law. The counterargument is mainly one of practicality, that business organizations are thereby rendered transient and vulnerable to chance. What do you think?

Case 176: Untimely Renunciation

D. 17.2.65.3-5 (Paulus libro trigensimo secundo ad Edictum)

3. Diximus dissensu solvi societatem: hoc ita est, si omnes dissentiunt. Quid ergo, si unus renuntiet? Cassius scripsit eum qui renuntiaverit societati a se quidem liberare socios suos, se autem ab illis non liberare. Quod utique observandum est, si dolo malo renuntiatio facta sit, veluti si, cum omnium bonorum societatem inissemus, deinde cum obvenisset uni hereditas, propter hoc renuntiavit: ideoque si quidem damnum attulerit hereditas, hoc ad eum qui renuntiavit pertinebit, commodum autem communicare cogetur actione pro socio. Quod si quid post renuntiationem adquisierit, non erit communicandum, quia nec dolus admissus est in eo. **4.** Item si societatem ineamus ad aliquam rem emendam, deinde solus volueris eam emere ideoque renuntiaveris societati, ut solus emeris, teneberis quanti interest mea: sed si ideo renuntiaveris, quia emptio tibi displicebat, non teneberis, quamvis ego emerem, quia hic nulla fraus est: eaque et Iuliano placent. **5.** Labeo autem posteriorum libris scripsit, si renuntiaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione: nam si emimus mancipia inita societate, deinde renunties mihi eo tempore, quo vendere mancipia non expedit, hoc casu, quia deteriores causas meam facis, teneri te pro socio iudicio. Proculus hoc ita verum esse ait, si societatis non intersit dirimi societatem: semper enim non id, quod privatim interest unius ex sociis, servari solet, sed quod societati expedit. Haec ita accipienda sunt, si nihil de hoc in coeunda societate convenit.

Paul in the thirty-second book on the Edict:

3. I held that partnership is dissolved by disagreement; this is true if they all disagree. But what if (only) one person renounces it? Cassius wrote that a person who renounces a partnership does indeed free his partners from himself, but does not free himself from them. This should be the rule, in any case, if the renunciation was made deceitfully (*dolo malo*); for instance, if we created a partnership of our entire estates (*omnium bonorum societas*) and an inheritance came to one person, on account of which he renounced. And so if in fact the inheritance brings loss, it is borne by the person who renounced; but by the action on partnership he is forced to share (any) profit. But if he acquired it after the renunciation, it will not have to be shared, since there is no *dolus* in this.

4. Likewise, if we enter into a partnership to buy something, and you then decide to buy it alone and therefore renounce the partnership in order to buy it alone, you will be liable for the extent of my interest. But if you renounce it because you disliked the purchase, you will not be liable even if I buy it, since there is no fraud here. This is Julian's view as well.

5. But in his *Posthumous Writings*, Labeo wrote that if one partner renounced a partnership at a time when (another) partner had an interest in the partnership's not being dissolved, he is liable in an action on partnership. For if we create a partnership to buy slaves, and you then renounce it to me at a time when it is inconvenient to sell slaves, in that case you are liable in an action on partnership because you made my situation worse. Proculus says that this is correct if there was a partnership interest in their partnership not dissolving. For what is always protected is not the private interest of one partner, but the benefit to the partnership. These rules should be accepted unless they (the partners) agreed (otherwise) about this matter in forming the partnership.

Discussion:

1. Opportunism and Continuing Liability. Paul gives two examples. The first concerns a *societas omnium bonorum* in which the partners share their entire estates; one partner learns that he has received, although he has not yet accepted, a fat inheritance, and he repudiates the partnership so he can keep it all to himself. If the inheritance is in fact profitable, he is obliged to share it even though the partnership has already ended; but if the inheritance is overburdened with debt, he bears the loss himself. How does this illustrate Cassius Longinus' maxim that: "a person who renounces a partnership does indeed free his partners from himself, but does not free himself from them"? Is the partnership also dissolved as to the remaining partners?

The second and more telling example involves a partnership to buy something (say, a work of art being sold at auction), where one partner then repudiates in order to buy it for himself; his conduct is treated as fraud (*fraus*) and he is then liable for the other party's interest. But this would not be true if the partner simply had second thoughts about the desirability of the purchase—in which case, of course, presumably he would not then buy it. The central question, therefore, is whether the repudiator's conduct can be described as *dolus*, a deceitful attempt to seize advantage that properly belongs to the partnership. As elsewhere Julian is also cited as observing, much here may depend on whether the original agreement to cooperate is interpreted as an actual *societas*, rather than just a casual coalescence of desires: Ulpian, D. 17.2.52 pr.

In many circumstances, however, a partner may be justified in pursuing his own interests when renouncing the partnership. Some examples are given by Ulpian and Pomponius, D. 17.2.14-16 pr.: failure of a condition for the partnership; the injurious conduct of another partner; not receiving enjoyment of the benefit that the partnership was formed to provide; or the necessity of going abroad on state business.

2. Ill-timed Renunciation. Even when renunciation is justified, it may come at a time when the erstwhile partnership was already executing its plan in reliance on the repudiating partner's participation, so that the other partners suffer loss as a consequence. In section 5, Paul, citing Labeo and Proculus, requires the repudiator to pay compensation for this loss, so long, at any rate, as a "partnership interest" in repudiation not occurring can be identified; the interests of the partnership take priority over those of individual partners. Likewise, if the partnership had a definite term and a partner renounced before the term had expired, the repudiator receives no subsequent profit but is responsible for his share of any resulting loss unless his renunciation arose out of some necessity: Paul, D. 17.2.65.6. Paul suggests that this early repudiation is deceitful (*dolus*) unless justified.

Part C: Mandate (*Mandatum*)

A mandate (*mandatum*) is, in principle, a request by one party (the mandatory) that another party (the mandatary) perform a gratuitous act on the mandator's behalf. If the mandatary agrees to perform, the contract becomes binding on both parties. At least in theory, the performance has to be gratuitous, in the sense that the mandatary does not receive pay for the service (which would be *locatio conductio*). However, the parties understand, at least tacitly, that the mandatary will be reimbursed for any expenses in carrying out the service, and that the mandatory will have a right to the proceeds from the service, as well as a claim if the service is not rendered or is performed unacceptably. Thus the contract is bilateral, although it does not result from a true exchange in the way that the other consensual contracts normally do.

The essentially gratuitous nature of mandate meant that it normally arose from an agreement between friends, who were most commonly social equals; and this theme of friendship, *amicitia*, is often emphasized (e.g., Cicero, *Rosc. Amer.* 111; Paul, D. 17.1.1.4). Many of the legal rules for mandate closely reflect this presumption of friendship and social equality. However, the jurists gradually broadened the concept of mandate until it came to include what we would describe as professional employment, where a highly skilled professional (e.g., a teacher, lawyer, or doctor) received, not pay but an "honorarium" that in theory is only incidentally connected to the service rendered. In late Classical law the emperors even allowed the professional to bring suit for this payment, although not under the action on mandate. Since such a professional acts not only on the mandator's behalf, but also on his or her own behalf, the required standard of performance is correspondingly raised. The gratuitous contract of mandate has little significance in modern law, although it still survives in Civil Law systems. It had, however, long-lasting influence on legal conceptions of professional employment.

The gradually widening concept of mandate was also instrumental in the later juristic recognition of the *procurator* as a mandatary; see Chapter VII.C.

Case 177: On the Mandator's Behalf

Gaius, *Institutiones* 3.155-156, 162

155. Mandatum consistit, siue nostra gratia mandemus siue aliena; itaque siue ut mea negotia geras siue ut alterius, mandauerim, contrahitur mandati obligatio, et inuicem alter alteri tenebimur in id, quod uel me tibi uel te mihi bona fide praestare oportet. **156.** Nam si tua gratia tibi mandem, superuacuum est mandatum; quod enim tu tua gratia facturus sis, id de tua sententia, non ex meo mandatu facere debes; itaque si otiosam pecuniam domi tuae <te> habentem hortatus fuerim, ut eam faenerares, quam<uis> iam ei mutuam dederis, a quo seruare non potueris, non tamen habebis mecum mandati actionem. Item si hortatus sim, ut rem aliquam emeris, quamuis non expedierit tibi eam emisse, non tamen tibi mandati tenebor. et adeo haec ita sunt, ut quaeratur, an mandati teneatur, qui mandauit tibi, ut Titio pecuniam faenerares. Seruius negauit: non magis hoc casu obligationem consistere putauit, quam si generaliter alicui mandetur, uti pecuniam suam faeneraret. <Sed> sequimur Sabini opinionem contra sentientis, quia non aliter Titio credidisses, quam si tibi mandatum esset. ... **162.** In summa sciendum <est, si faciendum> aliquid gratis dederim, quo nomine si mercedem statuisssem, locatio et conductio contraheretur, mandati esse actionem, ueluti si fulloni polienda curandaue uestimenta <dederim> aut sarcinatori sarcienda.

Gaius in the third book of his *Institutes*:

155. A mandate (*mandatum*) arises if we give a mandate on our own behalf or on that of a third party (*nostra gratia sive aliena*). So if I give a mandate that you administer either my affairs or a third party's, an obligation of mandate is contracted, and we will both be liable to each other for what I must provide to you, and you to me, in good faith (*bona fides*).

156. If I give you a mandate on your own behalf (*tua gratia*), the mandate is superfluous, since what you do on your own behalf you should do based on your own belief, not on my mandate. So if you had money lying idle at home and I urged you to lend it at interest, you will not have an action on mandate against me even if you lent it to someone from whom you cannot recover it. Likewise, if I urged you to buy something, I will not be liable to you on mandate even if it does not profit you to have bought it.

To such an extent is this true that question arises whether someone is liable on mandate if he gives you a mandate to make an interest-bearing loan to Titius. Servius said no; he thought that no more obligation arises in this case than if a general order is given that he lend money at interest. But we adopt the contrary view of Sabinus, because you would not have lent to Titius unless you received the mandate. ...

162. In conclusion it should be noted that whenever I give the performance of something without pay, as to which, if I had set a wage, lease and hire (*locatio conductio*) would be contracted, there is an action on mandate, e.g., if I give clothing to a fuller for cleaning or tending, or to a cloth-mender for mending.

The Problem:

I'm moving from one apartment to another, and I ask for your unpaid help with the move. You agree, but you then either fail to show up on moving day (you forgot), or you do show up but carelessly damage my furniture while moving it. Are you liable to me in either case?

Discussion:

1. The Basic Model. Gaius notes a number of characteristics of traditional mandate: 1) it takes the form of an “order” (often directly called a *iussum*, e.g., Case 183) coming from the mandator who directs it to the mandatary; 2) the order instructs the mandatary to do something; 3) this act benefits the mandator; 4) the mandatary accepts the order (Gaius omits this step, but *consensus* is obviously required; see Paul, D. 17.1.1 pr.. 22.11); 5) thereby a bilateral contract is created (the reciprocal duties are spelled out in subsequent Cases); and 6) the mandatary’s performance is gratuitous, “without pay” (*gratis*) beyond, as we shall see, compensation for the mandatary’s expenses in executing the order. The order can encompass almost any act (even one granting discretion to the mandatary: Neratius, D. 17.1.35; Celsus, D. 17.1.48.1-2; Paul, D. 17.1.3.1, 59.6), but the jurists most frequently speak of selling or buying for the mandator, or of supporting his or a third party’s financial transactions as a surety or otherwise.

Before going further, it is worth pausing to consider this model closely. Why would the Romans have made mandate a major consensual contract? What sort of social and economic system does it imply? (For instance, does it seem likely that mandate arose in a world where markets were still weak, and where persons therefore often depended on help from friends? See Paul, D. 17.1.1.4.) Note also the very sharp distinction Gaius draws in section 162 between mandate and *locatio conductio operarum*: often the very same act may be involved, but the crucial difference between the two contracts is the presence or absence of “a fee” (*merces*). See also Case 168 for a possible explanation. But numerous problems obtrude. For instance, is Gaius assuming that the fuller will clean your clothes for free?

After you puzzle all this out, go on to think about how the jurists could proceed if they wished to adapt this contract to the needs of a more sophisticated and complex economy.

2. “My Interest” and “Your Interest.” Gaius’ model uses an analysis of the “interest” underlying a contract. In principle, the mandate will usually be in the “interest” of the mandator, even if it does not materially benefit him (this concept of “interest” is much broader than Anglo-American consideration as a contract requirement). In a fuller analysis from a later edition of his *Institutes*, Gaius (D. 17.1.2.1) gives examples: I order you to manage my affairs, or buy a farm for me, or go surety on my debt. In each case, the mandate, if accepted, produces a binding contract.

On the other hand, a mandate that is solely in “your interest” (e.g., that the mandatary should invest money in buying land rather than lending at interest, or vice versa: Gaius, D. 17.1.2.6; Justinian, *Inst.* 3.26 pr.-6) does not lead to a binding contract; the mandate is treated as simple “advice” (*consilium*), which, so long as it is not offered maliciously, results in no liability for the mandator, since, as Gaius explains, “everybody is free to examine for themselves whether advice is advantageous to them.” Deceitful advice, however, may result in an action on the delict of *dolus*: Ulpian, D. 4.3.9.1, 50.17.47 pr. Even without *dolus*, Ulpian, D. 17.1.6.5, suggests that “my interest” is present if you would not have acted except for my advice.

More complicated is a third situation where the mandate is in the interest of a third party (*gratia aliena*): for instance, a mandate to buy a farm for that person (Gaius, D. 17.1.2.2). In this situation the third-party beneficiary cannot enforce the contract (compare Case 10 on stipulation; also Q. Mucius, D. 50.17.73.4, for contracts generally). But the jurists regularly treat the arrangement as at least binding between mandator and mandatary (e.g., Ulpian, D. 17.1.6.4), meaning that the mandatary can recover any expenditures. Ulpian, D. 17.1.8.6, states that the action on mandate will only lie when the mandator also begins to have an interest in the mandate—an interest that might possibly arise only after the mandate is given. Conversely, says, Ulpian, if the mandator’s interest lapses, so too does the action. In general, then, it looks like the mandator’s interest is required for the action, even if this interest overlaps with that of the mandatary or a third party. Thus, for example, the mandate will be binding if, for instance, I order you to lend

money at interest to a third party who needs it to complete a transaction with me: Gaius, D. 17.1.2.4.

3. Problem. Ulpian, D. 17.1.16, citing Celsus, gives the following problem: Aurelius Quietus was accustomed to spend part of every year at the Ravenna country estate of his doctor. Quietus gave the doctor a mandate to build, on the doctor's Ravenna estate and at the doctor's expense, a ball court, a sauna, and other aids to health. If the doctor carries out this mandate, can he recover his expenses from Quietus? Must the doctor deduct any increase in the estate's value?

Case 178: The Duty to Perform the Mandate

D. 17.1.6.1-2 (Ulpianus libro trigensimo primo ad Edictum)

1. Si cui fuerit mandatum, ut negotia administraret, hac actione erit conveniendus nec recte negotiorum gestorum cum eo agetur: nec enim ideo est obligatus, quod negotia gessit, verum idcirco quod mandatum susceperit: denique tenetur et si non gessisset. 2. Si passus sim aliquem pro me fideiubere vel alias intervenire, mandati teneor et, nisi pro invito quis intercesserit aut donandi animo aut negotium gerens, erit mandati actio.

Ulpian in the thirty-first book on the Edict:

1. If someone is given a mandate that he manage affairs, he will be liable through this action (on mandate), nor is suit properly brought against him on (unauthorized) administration of affairs (*negotiorum gestio*). For he is not obligated (only) because he administered affairs, but because he undertook a mandate; and so he is liable also if he failed to administer them.

2. If I allowed someone to be a surety (*fideiussor*) for me or otherwise to assume liability (by taking on my obligations), I am liable on mandate, and, unless someone assumes liability for an unwilling person either with a donative intent or by managing his affairs (without authorization), there will be an action on mandate.

Discussion:

1. **Executing the Mandate.** Once the mandate has been accepted, the mandatary is expected to fulfill it promptly, and, as Ulpian says in section 1, failure to do so may result in liability; see also Paul, D. 17.1.22.11. Further, as Paul, D. 17.2.20 pr., observes, the mandate must be carried out in its entirety: “From the mandate, nothing (of the profit) must remain with the mandatary, just as he should not suffer loss if (e.g.) he cannot collect money he loaned (on the basis of the mandate).” However, so long as the mandatary uses best efforts, he need not actually succeed in carrying out the request: Papinian, D. 17.1.56.4.

The mandatary’s duty is distinguished from unauthorized administration of affairs (*negotiorum gestio*), in which the administrator acts without an order (or subsequent ratification) from the beneficiary; Roman law treats this as non-contractual, a form of what came to be called quasi-contract, see Chapter VIII.A. The distinction here is, it appears, largely the work of later Classical jurists, who clarified what had earlier been a significant ambiguity in legal procedure.

It needs stress, once again, that the mandatary is not an agent for the mandator. When a mandatary purchases on behalf of a mandator, for instance, the sale produces in itself no legal relationship between the seller and the mandator, but only one between the seller and the mandatary; and this is so even if the seller was aware that the mandatary was acting at the mandator’s request. As we shall see, ways were eventually found to circumvent most of the awkwardness of this legal construction, but it remained an obstacle to economic complexity.

2. **Suretyship.** On going surety (usually by stipulation), see Cases 41-46. There is a considerable difference here from Gaius’ basic model in the preceding Case, in that the mandator is described as passively “allowing” (*patior*) the mandatary to act as a surety, with no mention of his giving a direct order (only his awareness is presumed). Accordingly, Ulpian’s attention shifts to the mandatary’s motives, which, so long as his intent was not to make a gift to the principal or to aid him without an order, result in a binding contract of mandate; compare Papinian, D. 17.1.53 (the mandator “is present and does not object”). Can an order be implied simply from the circumstances of a relationship?

3. Lapse of a Mandate. Time may intervene between issuance of a mandate and its execution by the mandatary. During this interval, so long as “the matter is still fresh” (*re integra*; i.e., neither party has relied as of yet), the mandate may lapse without further liability on either side if, e.g., the mandator revokes it, the mandatary renounces it, or either party dies: Gaius, *Inst.* 3.159-160; Ulpian, D. 17.1.12.16 (citing Marcellus); Paul, D. 17.1.22.11; *Pauli Sent.* 2.15.1. To be sure, the mandatary might already have acted while unaware of the mandator’s revocation or death, but the jurists permit a reliance claim in this situation: see Gaius, 3.160, as well as Paul, D. 17.1.26 pr.

Under limited conditions, a mandatary might renounce a mandate even after the matter was no long “fresh,” e.g., in the event of ill health, or if the mandator brings a frivolous lawsuit against him, or for some other just cause: Hermogenianus and *Pauli Sent.*, D. 17.1.23-25. If unjustified, however, the mandatary’s abandonment of performance is a breach of contract, resulting in liability for the mandator’s interest; but, if the mandatary finds he cannot perform, he must still inform the mandator as soon as possible so that substitute performance can be arranged: Gaius, D. 17.1.27.2.

Case 179: The Standard of Performance

D. 17.1.8.9-10 (Ulpianus libro trigensimo primo ad Edictum)

9. Dolo autem facere videtur, qui id quod potest restituere non restituit: **10.** Proinde si tibi mandavi, ut hominem emereres, tuque emisti, teneberis mihi, ut restituas. Sed et si dolo emere neglexisti (forte enim pecunia accepta alii cessisti ut emeret) aut si lata culpa (forte si gratia ductus passus es alium emere), teneberis. Sed et si servus quem emisti fugit, si quidem dolo tuo, teneberis, si dolus non intervenit nec culpa, non teneberis nisi ad hoc, ut caveas, si in potestatem tuam pervenerit, te restitutum. Sed et si restituas, et tradere debes. Et si cautum est de evictione vel potes desiderare, ut tibi caveatur, puto sufficere, si mihi hac actione cedas, ut procuratorem me in rem meam facias, nec amplius praestes quam consecuturus sis.

Ulpian in the thirty-first book on the Edict:

9. A person who does not deliver up what he can deliver appears to act deceitfully (*dolo*). **10.** So if I gave you a mandate to buy a slave, and you made the purchase, you will be liable to me for delivering him (to me). But also if you deceitfully (*dolo*) failed to buy him—e.g., if you accept money to let a third party buy him—or if (you acted) with gross fault (*lata culpa*)—e.g., if you are influenced by a third party to let him buy him—you will be held liable.

But also if the slave you bought then fled, you will be liable if (this occurred) through your *dolus*. If *dolus* is not involved, nor fault (*culpa*), you will not be held liable except for giving a guarantee (*cautio*) that you will deliver him (to me) if he comes (again) into your power.

Further, if you deliver him, you should also hand him over (to me); and if a guarantee is given (by the seller) about eviction, or you can seek that the guarantee be given to you, I think it suffices if you cede (the guarantee) to me through this action (on mandate), so that you make me a *procurator* for my own business; nor will you be liable for more than you would obtain (if you yourself had sued).

Discussion:

1. Liability for Deceit (*Dolus*). Because mandate is a gratuitous contract, one might expect that, as with deposit (Case 64), the conduct expected of a mandatary would be set quite low, at avoidance of deliberate misconduct (*dolus*). Even in the late Classical period, there are sources that take this default position: Modestinus, *Collatio* 10.2.3 (“But a trial on mandate involves *dolus*, not also fault, *culpa*”); so also Alexander, C. 2.12.10 (227 CE). However, some juristic holdings, like this one from Ulpian, indicate particularly egregious fault could be counted as *dolus*. Compare Ulpian, D. 17.1.29 pr., arguing that “lax carelessness (*dissoluta neglegentia*) is tantamount to deceit” when a surety is sued and fails to plead an exculpatory defense.

2. Liability for Non-Deliberate Fault (*Culpa*). Some situations, however, seem to cry out for more rigorous conduct from the mandatary. Paul, D. 17.1.22.11, discusses a hypothetical in which the mandatary is to buy something and fails to do so “through his own fault (*culpa*), not that of a third party”; the mandatary is liable, since, if he was merely inconvenienced by having to execute the mandate, he could have begged off. Similarly, Papinian, D. 20.1.2, of a possibly misbehaving surety. Whether Classical jurists ever proceeded to impose on mandataries a general standard of *culpa* (as Ulpian, D. 50.17.23, states) remains uncertain, since it is quite possible the Digest compilers have altered Classical texts. What is your view on what a mandatary’s liability should be?

3. The Guarantee Against Eviction. The seller normally gives this express warranty through a stipulation; see Case 47. At the end of this fragment, the mandatary (and not the mandator) is treated as the purchaser who either receives the warranty or should receive it, but who has no personal interest beyond the confines of the mandate. In later Classical law a third party in this intermediate position quite frequently “cedes” the right to the warranty to the principal through a process called *cessio*; see Case 215. Here this is accomplished when the mandatary appoints the mandator as his judicial representative “for his (the mandator’s) own benefit” (*in rem suam*), meaning that the mandator can then bring the claim more or less directly: *Fragmenta Vaticana* 317. See Cases 212-213.

Case 180: Overstepping the Mandate

Gaius, *Institutiones* 3.161

Cum autem is, cui recte mandauerim, egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest inpluisse eum mandatum, si modo implere potuerit; at ille mecum agere non potest. Itaque si mandauerim tibi, ut uerbi gratia fundum mihi sestertiis C emeris, tu sestertiis CL emeris, non habebis mecum mandati actionem, etiamsi tanti uelis mihi dare fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit. Quod si minoris emeris, habebis mecum scilicet actionem, quia qui mandat, ut C milibus emeretur, is utique mandare intellegitur, uti minoris, si posset, emeretur.

Gaius in the third book of his *Institutes*:

If I gave a valid mandate to someone who overstepped the mandate, I have an action on mandate against him for the extent of my interest in his fulfilling the mandate, provided he could fulfill it; but he cannot sue me (for expenses). So if I gave you a mandate to buy, e.g., a farm for one hundred thousand sesterces, and you bought it for one hundred fifty thousand sesterces, you will not have an action on mandate against me even if you wish to give the farm to me for as much as I gave you the mandate to buy it for; and this was the view especially of Sabinus and Cassius.

But if you buy for less, you will obviously have an action against me, since someone who mandates to buy for one hundred thousand is in any case understood to give a mandate to buy for less if possible.

Discussion:

1. Sticking to the Mandate. Paul, D. 17.1.5 pr.-1 is emphatic: “The boundaries of the mandate must be carefully maintained; for a person who has exceeded them seems to have done something else and is liable if he does not fulfill what he undertook.” The example he gives (ibid. 2) is a mandate to you to purchase Seius’ house for 100,000 sesterces; if you instead purchase Titius’ house, which is worth a great deal more, for 100,000 or even less, you are not held to have fulfilled the mandate. The mandatary’s guess about what the mandator would want, had he known of this unusual opportunity, is not good enough; the mandatary cannot substitute his own judgment. In practice, however, this simple rule causes difficulties.

2. A Mandated Purchase. The mandatary was ordered to purchase a farm for 100,000, and purchased it for 150,000. No one whatsoever will require the mandator to compensate him for the full purchase price. But what if the mandatary only seeks recompense for 100,000? Gaius’ discussion in this Case reflects a school controversy in the early Empire (reported by Justinian, *Inst.* 3.26.8). The Sabinians, Gaius’ own school, stuck strictly to the letter of the mandate and disallowed an action when the mandate had been violated. But, as Gaius, D. 17.1.4, shows, he was also aware of, and may even have come to approve, the “more liberal” Proculian view that allowed the mandatary to recover up to the set price. Is this the right outcome? Justinian thought so. But Paul, D. 17.1.3.2, points to a problem with the Proculian view: it is unfair that the mandator does not have an action against a mandatary who is unwilling to give up the difference, but does have one with him if he is willing to do so. Gaius, D. 17.1.41, proposes a solution: “An action on mandate can be just one-sided; for if a mandatary exceeds the mandate, he himself has no action on mandate, but the mandator has one against him.” Convinced?

If the mandatary gets a better price than the mandator had set, the problem appears to vanish, since the mandator benefits; so also Paul, D. 17.1.5.5. How is this situation different from

the hypothetical above, where the mandatary buys a different but better house for the mandated price or even less?

3. A Mandated Sale. Suppose that I give you a mandate to sell my farm for 100,000 sesterces, but you sell it for 90,000 and convey the farm to the buyer. Can I recover the farm? Paul, D. 17.1.5.3, indicates that I can get it back unless the mandatary makes up the difference to me and holds me completely harmless. But *Pauli Sententiae* 2.15.3 (postclassical) takes a different view: “by the action on mandate the amount of the price will be made whole (by the mandatary); for the view that the sale is dissolved did not prevail.” This text has been much discussed; does it give the preferable view? What if the mandatary is bankrupt?

4. Varying the Mandate. Julian, D. 17.1.33, has the following problem: A person is asked to go surety for the debt of a mandator. The mandatary accepts, but (by stipulation) guarantees less than the full amount of the debt. Julian says that he is nonetheless liable at least for the smaller sum. He contrasts a situation in which the mandatary accepts for a larger sum than he had been asked to do. In that event, “the mandator is deemed to have relied on his credit (only) up to the amount that was asked for.” Is this distinction in accord with other sources cited in this Case?

5. Shame (*Infamia*). Condemnation in mandate led to a mandatary being branded with *infamia*; see Discussion 3 on Case 62.

Case 181: Claims of the Mandatary

D. 17.1.12.9 (Ulpianus libro trigensimo primo ad Edictum)

Si mihi mandaveris, ut rem tibi aliquam emam, egoque emero meo pretio, habebō mandati actionem de pretio recipiendo: sed et si tuo pretio, impendero tamen aliquid bona fide ad emptionem rei, erit contraria mandati actio: aut si rem emptam nolis recipere: simili modo et si quid aliud mandaveris et in id sumptum fecero. Nec tantum id quod impendi, verum usuras quoque consequar. Usuras autem non tantum ex mora esse admittendas, verum iudicem aestimare debere, si exegit a debitore suo quis et solvit, cum uberrimas usuras consequeretur, aequissimum enim erit rationem eius rei haberi: aut si ipse mutuatus gravibus usuris solvit. Sed et si reum usuris non relevavit, ipsi autem et usurae absunt, vel si minoribus relevavit, ipse autem maioribus faenus accepit, ut fidem suam liberaret, non dubito debere eum mandati iudicio et usuras consequi. Et (ut est constitutum) totum hoc ex aequo et bono iudex arbitrabitur.

Ulpian in the thirty-first book on the Edict:

If you give me a mandate that I buy something for you, and I buy it with my own money, I will have an action on mandate to recover the price. But also if (I buy it) with your money, but spend something in good faith (*bona fide*) in order to buy the object, a counteraction on mandate will lie; and likewise, if you refuse to accept the purchased object. And similarly if you give some other mandate and I have expenses on it.

I will obtain not only what I spent, but interest (on it) as well. But (a jurist held) that interest should be granted not just after default (*mora*); the *iudex* should assess (interest) if he (the mandatary) collects (money) from his own debtor and pays (it to a third party in executing the mandate), when he could obtain high interest (by not collecting from the debtor), since it will be very fair to take account of this. Likewise, if he paid after borrowing at high interest.

Further, I do not doubt that he should also obtain interest through a suit on mandate if he did not release the principal debtor (the mandator) from interest, but does not himself receive the interest; or if he did release (the mandator) from interest at a lower rate but himself took a loan at a higher rate. As has been laid down (by the emperor), the *iudex* will decide all this in accord with what is right and proper (*aequum et bonum*).

Discussion:

1. Duties of the Mandator. As Ulpian says, the mandator is generally expected to accept the mandatary's satisfactory performance and to assume the rights that were created for him; see, e.g., *Pauli Sent.* 2.15.2 (absent timely revocation, it is immaterial that the mandator no longer wants performance; compare Case 178 above). Certainly the mandator's principal duty is to compensate the mandatary for his expenses. In the case of a mandate to buy something, for instance, the mandatary may have *bona fide* expenses in arranging and executing the sale. Gaius, D. 17.1.27.4, notes that it is irrelevant that the mandator could have saved money by arranging the transaction himself. But surely the mandatary's expenses ought at least to be commercially reasonable, no?

Ulpian, D. 17.1.29.1, discusses a situation in which the mandatary (as a surety) pays off the mandator's alleged debt because the mandator had not informed him that the supposed debt never actually arose. What outcome if the mandatary sues the mandator for compensation?

2. Raising Money to Execute the Mandate. The mandatary was not necessarily on his own; the mandator might initially give him all or part of the required funds. But the legal sources do suggest that otherwise mandataries did occasionally face problems arranging the finances. In Ulpian's scenario, the mandatary either 1) calls in a debt and uses the proceeds for the

mandate, thereby forgoing interest from the debt; or 2) borrows the money at interest; or 3) uses his own money to pay and thereby loses interest on it, but has not freed the mandator from paying interest to him on this amount; or 4) has in fact freed the mandator from paying interest to him, but borrows money at a still higher rate, the liability being for the difference. As is evident, these “expenses” mainly involve lost opportunities, and the law gives a *iudex* discretion to impose interest on them not only for when a mandator is in default for non-payment of expenses, but from when they were incurred.

What if executing the mandate is simply beyond the mandatary’s means? In a bravura passage, Paul, D. 17.1.45 pr.-5, goes off from this hypothetical: You buy a farm on my mandate; can you sue me to get me to pay you before you yourself have paid the farm’s price? Paul says yes; the action can compel me as the mandator to assume the payment obligation directly to the seller, in return for your ceding to me any actions on purchase against the seller. (All this is necessary because of the absence of agency.) The same is true if you are managing the mandator’s affairs and make a promise to one of the mandator’s creditors. As the passage continues, Paul gives a different answer when, on my mandate, you undertake a lawsuit for me; then you must await the outcome. What explains this difference?

Case 182: Limits on the Mandatary's Claims

D. 17.1.26.6-7 (Paulus libro trigesimo secundo ad Edictum)

6. Non omnia, quae impensurus non fui<sse>t, mandator<i> imputabit, veluti quod spoliatus sit a latronibus aut naufragio res amiserit vel languore suo suorumque adpraehensus quaedam erogaverit: nam haec magis casibus quam mandato imputari oportet. 7. Sed cum servus, quem mandatu meo emerat, furtum tibi fecisset, Neratius ait mandati actione te consecuturum, ut servus tibi noxae dedatur, si tamen sine culpa tua id acciderit: quod si ego scissem talem esse servum nec praedixissem, ut possis praecavere, tunc quanti tua intersit, tantum tibi praestari oportet.

Paul in the thirty-second book on the Edict:

6. He will not claim from the mandator all that he would not have spent (if he had not received the mandate): e.g., that he was robbed by bandits or lost property in a shipwreck, or paid something when he was overcome by his own illness or that of his household; for these things should be ascribed more to accident (*casus*) than to the mandate. 7. But when you bought a slave on my mandate and he stole from you, Neratius says that in an action on mandate you will obtain the slave's noxal surrender to you, provided that this occurred without your fault (*culpa*). But if I knew the slave was like this and gave no warning so that you could take precautions, then (you will obtain) the extent of your interest.

Discussion:

1. The Unlucky Mandatary. A mandatary undertakes travel in order to execute a mandate, and on the way is robbed by bandits or is shipwrecked. Can the resulting losses be recovered from the mandator? Paul says no, but how sound is his reasoning? Why should it not matter that the losses would not have occurred except for the mandate? The sense seems to be that truly accidental losses should be borne by the person on whom they first fall; but the list of such accidents seems quite broad. Ulpian, D. 50.17.23, reasons as follows: "Accidents and the deaths of animals occurring without (anyone's) *culpa*, the flights of slaves who are not normally kept under guard, robberies, uprisings, conflagrations, floods, and pirate attacks are no one's responsibility." Is this convincing?

Paul, D. 46.1.67, gives an even more startling example. A mandatary, litigating on behalf of a mandator, loses a lawsuit because of a judge's clearly erroneous decision. The mandatary cannot recover the adverse judgment from the mandator, "for it is fairer that the injustice done to you remain with you rather than being transferred to another." Is an incompetent judge like a conflagration?

2. The Theftuous Slave. Section 7 gives what seemed to the jurists a more difficult problem: a mandatary, acting on the mandate, purchases a slave who steals from him. If the mandator was unaware of his propensity to steal, Neratius gives the mandatary a "noxal" action against the mandator on the slave's misdeed, meaning that the mandator must either pay to the mandatary the damages for theft or surrender the slave (mandator's choice); of course, if the damages are higher than the slave's worth, the mandator will surrender the slave, meaning that the mandatary will not be fully compensated.

Africanus, D. 47.2.62.5, reports his teacher Julian's views on this hypothetical. Julian holds that the innocent mandator should be fully (not just noxally) liable, on the ground that the mandatary "would not have incurred the loss had he not undertaken the mandate" (i.e., just the

logic rejected above). Julian concedes it may seem unfair to burden the mandator for the acts of his purchased slave; nonetheless, he thinks it “atill more unfair that a duty causes loss to someone who undertook it on behalf of a contractual partner, not for his own benefit.”

Case 183: Training a Slave

D. 17.1.26.8 (Paulus libro trigensimo secundo ad Edictum)

Faber mandatu amici sui emit servum decem et fabricam docuit, deinde vendidit eum viginti, quos mandati iudicio coactus est solvere: mox quasi homo non erat sanus, emptori damnatus est: Mela ait non praestaturum id ei mandatore, nisi posteaquam emisset sine dolo malo eius hoc vitium habere coeperit servus. Sed si iussu mandatoris eum docuerit, contra fore: tunc enim et mercedem et cibaria consecuturum, nisi si ut gratis doceret rogatus sit.

Paul in the thirty-second book on the Edict:

On a mandate from a friend, an artisan bought a slave for ten (thousand sesterces) and taught him a craft; he then sold him for twenty, which he was forced to pay (to the mandator) in an action on mandate. Soon thereafter, he was condemned to pay the buyer because the slave was unhealthy. Mela says that the mandator will not be liable to him for this unless, without his deceit (*dolus malus*), the slave began to have this defect after he bought him. But if he (the craftsman) taught him on the mandator's order, the opposite will be true; for then he will obtain a fee (*merces*) as well as the cost of (the slave's) board, unless he was asked to teach for free.

Discussion:

1. A Curious Decision. The facts are a good deal less than clear, perhaps because of later abridgement. The artisan (*faber*) received a mandate from a friend and, based on it, purchased a slave for 10,000 sesterces. This mandate must have been in the mandator's interest, since the artisan was later condemned in an action on mandate (Case 177). Perhaps the slave was a sort of investment, but he remained for a time with the artisan, who taught him a craft and then sold him for double the initial purchase price, with the increase in value presumably stemming from the slave's training. In the lawsuit that followed, the artisan must have asserted at least a right to the "value added" (the 10,000), while the mandator sought the full resale price. Is the mandator's position justified?

The answer appears to depend on whether the mandator had requested the training, and, if so, whether it was supposed to be for free or not. If the training was requested and not gratis, then the artisan is entitled to a fee (*merces*) for his training and also to basic board for the slave during the time the artisan was holding him. Is this ruling consistent with the two previous Cases on compensation? The implication of the final sentence, however, is that the teaching was actually not requested and so the mandatary has no claim to the increase in the slave's value; it accrues to the mandator, like a gift. (But the mandatary may perhaps sue on unauthorized administration of affairs, see Chapter VIII.A, since the training was plainly useful.)

All this is further complicated by the discovery, after the mandatary's re-sale, that the slave was unhealthy, with the result that the slave's buyer sought a remedy from the mandatary (see Cases 143-144). The mandatary has already restored the 20,000 repurchase price to the mandator; can he now get recompense from the mandator for this further charge? Paul cites the Augustan jurist Fabius Mela as ruling against the mandatary unless the defect arose after the original purchase, and even then only if it did not result from the mandatary's deliberate misconduct (*dolus*). So if the slave was defective already at the time of the original purchase, the mandator bears that risk as against the mandatary. Why is the mandatary's liability confined to *dolus*?

See if you can straighten out the finances. Does Paul assume, e.g., that the artisan used the mandator's money to pay for the initial purchase?

Case 184: The Honorarium

D. 11.6.1 pr. (Ulpianus libro vicensimo quarto ad Edictum):

Adversus mensorem agrorum praetor in factum actionem proposuit. A quo falli nos non oportet: nam interest nostra, ne fallamur in modi renuntiatione, si forte vel de finibus contentio sit vel emptor scire velit vel venditor, cuius modi ager veneat. Ideo autem hanc actionem proposuit, quia non crediderunt veteres inter talem personam locationem et conductionem esse, sed magis operam beneficii loco praebere et id quod datur ei, ad remunerandum dari et inde honorarium appellari: si autem ex locato conducto fuerit actum, dicendum erit nec tenere intentionem.

D. 50.13.1.10 (Ulpianus libro octavo de omnibus tribunalibus):

In honorariis advocatorum ita versari iudex debet, ut pro modo litis proque advocati facultia et fori consuetudine et iudicii, in quo erat acturus, aestimationem adhibeat, dummodo licitum honorarium quantitas non egrediatur: ita enim rescripto imperatoris nostri et patris eius continetur. ...

Ulpian in the twenty-fourth book on the Edict:

Against a land surveyor, the Praetor established an action on the facts (*in factum*). We ought not to be deceived by this person; for it is in our interest not to be deceived in the declaration of a land measure, should, say, either a dispute arises about boundaries, or a buyer or seller wish to know the measure of land being sold. Therefore he established this action because the Republican jurists did not believe there was a lease and hire (*locatio conductio operarum*) with such a person; rather, his work is provided as a favor (*beneficii loco*), and what is given to him is given as recompense (*ad remunerandum*), and so it is called an honorarium. Further, if suit were brought on lease and hire (*ex locato conducto*), it must be held that the claim fails.

Ulpian in the eighth book on *All Tribunals*:

As regards the honoraria of advocates, the *iudex* should pay attention to setting the amount according to the type of lawsuit, the advocate's skill, and the custom of the venue and court in which he will bring suit, so long as the amount does not exceed the permitted honorarium. This is contained in a rescript of our emperor and his father (Caracalla and Septimius Severus, 198-212). ...

The Problem:

Sempronia asks Cassius to represent her as her advocate in an upcoming trial. Preparation will take substantial amounts of time and effort, but Cassius is unwilling to accept a fee because he regards paid advocacy as demeaning. Can the two parties arrive at some legally binding arrangement whereby Sempronia can pay Cassius without it being seen as a fee?

Discussion:

1. Must Mandate Always Be Gratuitous? High and late classical sources repeatedly insist that mandate must be gratuitous: Javolenus, D. 17.1.36.1; Gaius, *Inst.* 3.162 (Case 177); Paul, D. 17.1.1.4 ("A mandate is void unless gratuitous."); and this remains the view of Justinian, *Inst.* 3.26.13. But other sources, all from the late Classical period, speak of mandataries receiving a form of compensation, usually called an *honorarium* or *salarium* apparently to distinguish it from the fee (*merces*) associated with *locatio conductio operarum* (see Case 168): Papinian, D. 17.1.7 (Case 207); Severus and Caracalla, C. 4.35.1 (198-211 CE); Ulpian, D. 17.1.6 pr.; and Paul,

D. 17.1.26.8 (the previous Case). Most importantly, the mandatary had a legal right to this agreed-upon honorarium and is described as seeking it not through an action on mandate, but *extra ordinem*, that is, in imperial courts that operated outside the ancient courts of the Praetor and other traditional magistrates. All these sources can probably be reconciled if we suppose that the older Republican courts, by not enforcing a claim to compensation within the action on mandate, maintained the illusion that mandate was entirely gratuitous.

2. The “Higher Professions.” However, it is unlikely that all workers were able to use this dodge. Ulpian, D. 50.13.1 pr.-8, lists a variety of professions that are allowed to seek compensation through imperial courts: the teachers of the liberal arts, including rhetoricians, grammarians, and geometers (but not teachers of philosophy); doctors, obstetricians, ear and throat specialists, and dentists (but not witch doctors or exorcists); and, by custom, elementary school teachers, archivists, stenographers, accountants, and secretarial aides (but not other ordinary workers or craftsmen). This list probably grew by accretion. Already the emperors Marcus Aurelius and Verus (161-169 CE; in Ulpian, D. 50.13.1.9) had ordered imperial officials to accord all these professions the same consideration.

To this list must be added courtroom advocates, *advocati*, who ever since the early Empire had usually been allowed to charge (Tacitus, *Ann.* 11.5-7). Ulpian in this Case sets down the criteria imperial judges are to use in determining their honoraria. Advocates may not, however, take a share in a damage award: Ulpian and Papinian, D. 17.1.6.7, 7; Ulpian, D. 50.13.1.12. (Professors of law, by contrast, are excluded altogether from seeking pay: D. 50.13.1.5.)

Finally, there is the case of surveyors (*mensores agrorum*), on whom Romans heavily relied for settling boundaries; through the Praetor they had established a cause of action, including a lawsuit for compensation, independent of *locatio conductio*. In the first passage, Ulpian explores the logic and social values behind this lawsuit, which probably influenced later law in this area.

Although the general course of this development is relatively clear, much less certain is whether practitioners of these various professions were actually treated as mandataries. The clearest source suggesting that they were is Ulpian, D. 17.1.6 pr.: “If an honorarium is given as recompense, there will be an action on mandate.” (*Si remunerandi gratia honor intervenit, erit mandati actio.*) The wording is admittedly obscure, but indicates, at the very least, that the two means to recovery stood side by side, one on mandate and one for the fee, as in a rescript of Severus and Caracalla, C. 4.35.1 (198-211 CE). Scholars therefore usually assume that the practitioners of these professions entered a contract of mandate with their clients, and certainly that is a reasonable inference.

It remains puzzling, though, that surviving legal sources never unequivocally describe any of these professionals as suing or being sued in mandate. On the contrary, Ulpian, D. 9.2.7.8, citing Proculus, states that a doctor who operates unskillfully on a slave may be sued either on the delict (under the Lex Aquilia) or on the lease of a job (*ex locato*), with no mention of mandate; and Gaius, D. 9.3.7, holds that when a free person is injured by something dropped or poured from an upper-story window, damages include not just medical expenses, but also “the wages paid to doctors” (*mercedes medicis praestitae*), again probably pointing to *locatio conductio*. The deeper question, then, is whether, if a doctor administered care with no fixed fee but at most just a strong tacit expectation of an honorarium, there was any contractual action if he failed to carry through or misperformed.

What confuses the situation still further is that, for their part, in the late Classical period *procuratores* were definitely considered mandataries, although they could also sue for compensation *extra ordinem*; see Chapter VII.C. Both Papinian, D. 17.1.7 (Case 207), and C. 4.35.1 clearly refer to *procuratores*, not to practitioners of the higher professions. No entirely convincing explanation has been devised for this discrepancy.

Whatever the answer, the idea that “higher professions” can work without their compensation being contractually linked to their work has a long subsequent life in the law. Still today, for instance, professors are often invited to give lectures in exchange for honoraria, without any supposition that this is a direct wage. Similarly, ministers officiate at marriages or funerals and are compensated by honoraria. Such payments are today regularly treated as wages for tax purposes. Is this just a holdover from an earlier patriarchal era?