Hire-Lease in Roman Law and Beyond

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Paul J. du Plessis. Letting and Hiring in Roman Legal Thought: 27 BCE - 284 CE.
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Paul du Plessis is the author of numerous specialized studies on the subject of the Roman law of hire-lease (*locatio conductio*), with a particular emphasis on urban lease.[1] In this book he offers a broad survey of various applications of this important contract, focusing primarily on the articulation of the legal rules themselves but with an eye cast toward their implications for Roman social and economic life.[2]

A brief introduction situates the book in the tradition of the twentieth-century scholarship and sets forth its purpose. With notable economy, du Plessis usefully summarizes some of the main approaches to hire-lease taken in this period in terms of both their substantive contributions to knowledge and the methods they employ. There are important monographs by Emilio Costa in 1915 and Theo Mayer-Maly in 1956, followed by a longish article reacting to the latter published by Luigi Amirante in 1959. A common thread is that all of these works are concerned exclusively or virtually so with the legal rules. A change in emphasis occurs with the books by Horst Kaufmann (1964) devoted to an examination of the contract in the early preclassical period and above all by Bruce Frier (1980) on urban lease in imperial Rome. Both scholars view *locatio conductio* in the larger context in which these rules were created and applied. Subsequent works by Pieter de Neeve on private farm tenancy during the mid- to late Republic and the very early Principate (1984), Susan Martin on private construction in the late Republic and early Empire (1989), and Dennis Kehoe on farm tenancy during the Principate (1997 and 2007) have developed this approach further.

The studies by Frier, Martin, and Kehoe have had a particular influence on the book under review, as has an important monograph by Roberto Fiori (1999). The latter represents, at minimum, a reinvention of the traditional approach of Costa and Mayer-Maly, offering not just an analysis of the rules but also of the thought of the jurists who made them, with full attention to developments over time. The result is a fuller, more complex account, a conception of the law as more dynamic than the earlier doctrinal approaches had allowed.[3]

Unlike most of his predecessors, including those working well into the second half of the twentieth century, Fiori is free from the burden of radical assumptions about the degree to which the sources that have come down to us were recast in late antiquity so that they no longer represent classical law, assumptions that lie at the root of a method commonly known as "interpolation criticism". Fiori takes this intellectual history down to the modern period.

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[1] For a sample, see du Plessis 2006; 2007; 2012.

[2] The reader should know that Professor du Plessis is a valued friend and colleague of the author of this review. I would like to thank the editors and readers of this journal for their assistance in its preparation.

[3] See the useful review by Piro 2001.

His central argument is that the Roman jurists took a unitary rather than an analytical approach to *locatio conductio*. In other words, the three commonly recognized "forms" of *locatio conductio rei* (hire-lease of property), *locatio conductio operarum* (hire-lease of services), *locatio conductio operis* (hire-lease of a specific project) are not, as such, the creation of the ancient legal experts but represent the re-elaboration of their work in later ages.[4] The unitary nature of the contract depended on a single type of obligation contracted between the two parties, while the three categories just named existed merely as "transactional models ("modelli negoziali"), that were not intrinsic to the nature of the contract itself. Whatever view one takes of this thesis, and it has much to commend itself in my view, Fiori's book is a milestone in the study of the subject.

Du Plessis offers (6) as the aim of this work a consideration of the rules in light of a particular approach developed by Martin and Kehoe in their books, namely, the uncovering of certain common underlying ideas, amounting in general terms to a kind of "normative reality", found in the work of the jurists. What these means, in their view, is that juristic writings do not represent actual contemporary conditions in any literal sense, but offer a simplified and idealized version of that reality. At the same time, the rules they develop and discuss are hardly divorced from the latter. The jurists, as upper-class Roman males, were hardly uninterested in or disengaged from certain key areas of the economy and social life that were constant preoccupations of members of the elite, such as tutelage, agricultural tenancy, and succession.[5] They had more than just a professional interest in developing workable solutions to problems under these and other headings. So it is not unreasonable, the argument goes, to use these texts, with due care and circumspection, of course, as a way of understanding the reality they were meant to address.

It will be obvious that the book under review does not present itself as a full-scale treatment of Roman law and society with reference to the contract of hire-lease. Such a project would be impossible, given its scale and scope. For example, while the works of Frier, Kehoe, and Martin just cited do offer something of the sort, each is devoted to only a certain circumscribed aspect of the whole, and it is further worth noting that three of the four are actually longer than the book under review. What du Plessis offers is the deployment of a sophisticated and proven method in service of a broad survey of the contract in a manner that is economical and accessible. This a reasonably ambitious goal, and the results should interest both specialists and non-specialists, serving as a useful point of departure for future examination of individual aspects in greater detail.

Four chapters follow. The first is itself a kind of introduction, in that it sets up the substantive discussions that come after. Here we are introduced to the contract's terminology,

[4] For a fascinating discussion of the history of the scholarship on this matter, see Fiori 1999, 305-319 (see also 1-10). The debate over the ancient pedigree of the trichotomy has been raging over many years. For a radical statement of the unitary thesis, see Schulz 1951/1992, for whom the "terminological differences" used to identify the different varieties "were matters of linguistic convenience and usage and nothing more" (543).

[5] See Kehoe 1997, 138.

history, structure, and process. By the last is meant the requirements and procedures that allowed Romans to enter into legally enforceable agreements for hire-lease. The second chapter deals with contracts for services and specific projects, the third with contracts regarding property. Chapter Four sets forth briefly and briskly a series of conclusions. There follows a bibliography, an index of sources and another of subjects. The bulk of the discussion offers a survey structured by a series of inset texts, each accompanied by a translation as well as a brief discussion that takes some account of previous scholarly opinion.

Chapter One ("Letting and Hiring in Context") takes its point of departure from the contract's terminology, above all the verbs *locare* and *conducere*, and its origins. The two are related in that scholars have shown great interest over the years in using etymology to develop various theories about its early history. The evidence is so scant, however, that more recent studies have been inclined to show greater caution, recognizing, for example, that the terms may, in historical terms, reflect a practice of economic exchange that held before they acquired a legal significance, meaning that - strictly as terms of art - they can serve as evidence only for what we know as the classical contract of hire-lease.[6] At the same time, more general considerations have encouraged an earlier dating than has usually been accepted in the past.[7]

Next is a consideration of "Structure", namely, the long-debated question of whether the three subdivisions of the contract (*locatio rei*, *operarum*, *operis*) existed in classical law, an idea that has fallen out of favor in recent years thanks in large part to the work of Roberto Fiori, as noted above. Fiori's unitary thesis itself depends on a flexible dichotomy in which the underlying single reciprocal obligation created by agreement consists of two parts, the *merces* (rent, fee, wages) and a thing (*res*) or person (*homo*). So under the contract of hire-lease the parties agree that a *merces* is to be exchanged either for the use and enjoyment (*uti frui*) of a thing for a defined period of time or of the services (*operae*) of a person for a defined period of time (sometimes articulated in terms of the completion of a project). Du Plessis continues with a consideration of the requirements of capacity (age, status, sex, and mental capability) and consent (the presence of mutual agreement) essential to the formation of the contract. The lack of any process requirements heightens the importance of those governing capacity and consent.[8] Here begins to emerge the significance of the reciprocal but distinct roles of the two parties to the contract, the *locator* and the *conductor*.

The implications of the Fiori thesis for future research are potentially of great significance. For example, it allows in my view for greater insight into the difficult problem of the origins of *locatio conductio*. While its origins are unrecoverable in strictly historical terms, it may be possible to say more about its early development on a doctrinal level, even if some

[6] See Fiori 1999, 21-22.

[7] De Ligt 2008.

[8] Worth noting is that a similar phenomenon can be observed with Roman marriage: see Frier and McGinn 2004, 26.

degree of speculation cannot be avoided. I would argue that the Fiori thesis allows a better understanding of how the three "transactional models" of *locatio conductio rei*, *operarum*, and *operis* came to be regarded as aspects of hire-lease. The identification of the essence of the contract as the exchange of a *merces* for the *uti frui* of something allowed for a flexibility that facilitated incorporation of these different possibilities, no matter exactly when this identification occurred or which of the three came first.

If we consider the matter simply on a conceptual level, hire-lease of a *res* seems easiest, in terms of standing as a simple and straightforward arrangement, followed at not too long a remove perhaps by that for *operae*. What helps these two align so neatly is that for both cases the roles of the *locator* and the *conductor* run along parallel lines, in that the former provides the *uti frui* of something and the latter the *merces* in exchange for this. As both Fiori and du Plessis well recognize, assignation to the parties of the roles of *locator* and *conductor* has significant consequences in terms of the reciprocal but asymmetrical configuration of rights and duties between them. When we come to the more complex arrangement of hire-lease of an *opus*, we find the roles reversed. Now it is the *locator* who provides the *merces* and the *conductor* who offers the *uti frui* of the "work" - itself a rather complicated concept, especially when compared to what we see with the first two "models".[9] While it is hardly impossible to imagine this leap taking place in the context of other theories apart from Fiori's, his makes it easier to understand how the jurists reconfigured the contract to allow for this vitally important "transactional model", and the point would hold, I believe, even if we were to postulate a movement, again in doctrinal terms, in reverse, that is, from the more complex category of *opus* to the simpler ones of *res* and *operae*.

The last and by far the longest section of the first chapter concerns litigation over the contract of *locatio conductio*. The initial focus is on the remedies available to the contracting parties, meaning the *actio locati* for the *locator* and the *actio conducti* for the *conductor*. These were "personal" in nature, meaning that they addressed an obligation existing only between the parties to the contract, were founded on good faith *(bona fides*), and were aimed at the recovery of damages arising from breach. There follows a discussion of the *formula* for each action, meaning the stereotyped instructions the Praetor gave to the *iudex*, the lay finder of fact hearing a case. Du Plessis shows how a very simple form might accommodate a wide variety of transactions.

The standard of liability under these two actions was in principle fault-based, meaning that the plaintiff had to show the defendant was guilty of conduct in breach of the contract that was intentionally wrongful (so characterized by *dolus*) or negligent (marked by *culpa*). In situations where the loss arising from the breach of the contract could not be attributed to the fault of either party, a regime of strict liability applied, meaning that the financial consequences were assigned according to a pre-established set of rules that might, all the same, be altered by agreement of the parties. Du Plessis characterizes the rules on fault

[9] For these reasons one might resist assimilating *locatio conductio operis* to *locatio conductio operarum*: see further below.

broadly as relating to "liability", and those concerned with the absence of fault as relating to "risk", while conceding that such simplified categorizations can conceal certain complexities of juristic thought.

There follows a fascinating discussion of these subjects, which are often treated separately in scholarly discussions of hire-lease. I want to emphasize first the salutary manner in which our author manages the (enormous as ever) scholarly literature, a hallmark of the book as a whole. Even the most casual reader of this review will be aware that Roman law is a discipline that stands apart in many important respects from other fields devoted to the study of classical antiquity - further apart, I think it fair to say, than they tend to stand from each other. Many non-initiates find the scholarship rather forbidding, so that having a reliable guide can be a great help. Here du Plessis distinguishes usefully between a level of "macro-narrative" which deals with the concepts he identifies as "liability" and "risk" as a historical development on a general level and a level of "micro-narrative" which examines this problem within the context of a specific contract. He then turns to examine the rubric of "liability", meaning liability based on fault, taking *dolus* first, then *culpa*, in which, for reasons that may be obvious, the jurists showed a higher level of interest.

The subject of *culpa* is a complex one, and here our author relies chiefly on an important article by Bruce Frier published some thirty-five years ago on the subject of tenant's liability for damage to landlord's property.[10] A couple of arguments made by Frier are central to the analysis before us. One is a three-stage doctrinal development he posits regarding tenant's generalized liability under the contract. In the first stage rules are elaborated in the context of particular cases. In the second, this continues while *culpa* is increasingly recognized as the common element. In the third, *culpa* becomes the "overriding principle" while its various applications serve as "illustrations".[11] Frier insists that this development should not be understood as taking place in a given arc of time: "The following schema is offered more as a framework for discussion than as a historical description...No weight is laid on the temporal significance of this disposition."[12] Here du Plessis takes his point of departure from Frier, in

[10] Frier 1978.

[11] Du Plessis (26-7) attempts to reconcile Frier's views with the argument of Geoffrey MacCormack 1996 that *dolus* and *culpa* were never viewed by the Roman jurists as "standards or criteria of liability" but this seems difficult to me. Du Plessis himself (30) accepts that *dolus* by the first century AD has a "general meaning that does not require explanation", that it shows "a well-defined meaning and is applied in the context of the contract to denote the idea of 'liability'"; elsewhere (31) he describes it as a "concept". For *culpa*, he accepts Frier's argument that this develops into a "notion" or "principle" so that even by the second stage of doctrinal development "[a]lthough the facts are still important, it is clear that the reasoning is based on principle rather than fact" (35). Frier 1978, 243 summarizes the development as "a transition from specific rules to a *culpa*-standard", a view that seems to me to be radically at variance with that of MacCormack. See also the earlier work by MacCormack 1971, 1972a, 1972b, 1975, that is sharply criticized by Frier (at 234, 243, 245, 253, 259, 262, 263, 264, 265, 268).

[12] Frier 1978, 242 n. 30.

that he very firmly links this development to "real time". He dates the first stage to "the first century BCE to roughly the end of the first century CE" (33), the second to "roughly during the course of the second century CE" (34), and the third "during the third century CE" (35).

In the same article, Frier argues for a four-stage development of a specific aspect of the tenant's liability, meaning his *vicarious* liability. Unlike with the question of the generalized liability of tenants, he places this within a fairly well-defined chronological context, the span of time ranging from the first to the early third centuries. In the first stage, the landlord has only the noxal action (where appropriate) on the delict for wrongful damage committed by a tenant's slaves. In the second, the early to mid-first-century jurist Proculus evidently (that is, on Frier's reconstruction of a couple of very uncertain texts)[13] allows not just a noxal action on delict but a noxal action on the contract for wrongful damage. One might quibble over the extent to which this represents a true "stage", in that Proculus' view remains an outlier for the subsequent history of classical jurisprudence, being cited only by Ulpian, and adopted by no one, as far as we know.

The third stage is marked by an opinion of the late first / early second-century Neratius Priscus,[14] who provides a remedy on the contract beyond the noxal one, so that the tenant is fully liable where the slave of a tenant farmer has fallen asleep at a furnace and the farmhouse burns down; *culpa* both on the part of the slave and on the part of the master in choosing the slave is required to give liability. As one might expect, the principle of vicarious liability, at the point of its introduction, comes to be applied only in narrow circumstances. A century later its application broadens, to judge from some very difficult texts of Ulpian (as reconstructed by Frier).[15] Ulpian appears to have allowed liability beyond the noxal when the tenant admitted onto the grounds his slave (or a free person) who committed wrongful damage, when the tenant knew (or ought to have known) that this was a likely consequence of the miscreant's presence on the property.

Having chosen to place Frier's theory on the doctrinal development of tenant's *culpa* (meaning, of course, generally, and not in terms of the specific application of vicarious liability) in a chronological framework, du Plessis goes on to integrate this (37) with Roberto Fiori's hypothesis that there were three phases of juristic thought on the nature of the contract of *locatio conductio* itself, the first ranging from its beginnings (which Fiori places c. 150 BC) to the end of the Republic, in which he sees the jurists as establishing its foundation as a reciprocal obligation in which a *merces* was exchanged for *uti frui* of *res* or *operae*, the second, spanning much of the first century AD, in which the jurists discuss the extent to which the

[13] These are two variants of the same original source, one pre-Justinianic, the other from the *Digest*: Sab.-Proc.-Urseius-Ulp. (18 *ad edictum*) *Coll.* 12.7.9; Proc.-Ulp. (18 *ad edictum*) D. 9.2.27.11.

[14] Again there are two variants of the same original text: Ner.-Ulp. (18 *ad edictum*) *Coll.* 12.7.7; Ner.-Ulp. (18 *ad edictum*) D. 9.2.27.9.

[15] One is Pomp.-Ulp. (32 *ad edictum*) D. 19.2.11 pr., while the other appears in the same two variants that show the view of Proculus just discussed: Sab.-Proc.-Urseius-Ulp. (18 *ad edictum*) *Coll.* 12.7.9; Proc.-Ulp. (18 *ad edictum*) D. 9.2.27.11.

parties' interests can be accommodated in the context of their contractual obligations, and a third, consisting of the remainder of the classical period, in which the jurists explore the boundaries of the contract in relation to other legal arrangements.

Frier does not explain the reasons for his disclaimer against viewing the development of the juristic treatment of *culpa* in the context of *locatio conductio* as historical description. The fact that his reconstruction of the three stages puts Labeo in the first, Neratius and Gaius in the second, and Pomponius, Marcian, Ulpian, and Paul (the latter through a text of the *Pauli Sententiae*) in the third certainly would seem to encourage a mapping of this process onto a specific chronological context that is more or less coterminous with the classical period of Roman law as this is commonly understood, as does the fact that Frier himself explicitly does this for the development of the tenant's vicarious liability. Du Plessis' adaptation thus has a certain inherent plausibility to it. There is some reason, however, why we might hesitate to follow him in this one particular.

My reason for caution lies in the fact that, here as elsewhere, most of the evidence for the views of earlier jurists we owe to later ones. In other words, the thought of Labeo on this subject we find reported in the work of Iavolenus and Ulpian, that of Neratius in that of Ulpian, that of Pomponius in that of Marcian. As a consequence, the fact that the opinions of the jurists associated with Stage 1 and Stage 2 are found embedded in the texts of their successors means that we cannot be absolutely certain that the earlier jurists did not also regard *culpa* as an "overriding principle". The one exception to this pattern of "embedding", a Stage 2 jurist whose words come down to us evidently as he wrote them (because excerpted from one of his own works and interpolation not being an issue with this passage), is Gaius:

> Gaius (10 *ad edictum provinciale*) D. 19.2.25.3-4: 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.
>
> (Gaius in the tenth book on the Provincial Edict): 3. The lessee ought to do everything in accord with the terms of the lease. And above all a tenant of a farm ought to take care that he not only carry out the tasks related to agricultural work but do so at the appropriate time, so that he not reduce the value of the farm by failing to cultivate in the proper season. Moreover, he ought to take care of the farmhouses so as to maintain them in good condition. 4. This too is reckoned as his fault if, because of a quarrel he has started, a neighbor cuts down trees.

One might reasonably raise the question of whether this text is better attributed to Stage 2 or to Stage 3. Does it show that the rules are elaborated in the context of particular cases while *culpa* is recognized as the common element, or does it show that *culpa* has by now become the overriding principle while its various applications serve as illustrations? Or does it in fact belong to Stage 1? The fact that the second fragment refers to *culpa* while the first does not might be used to argue for any of the three possibilities.

A second challenge emerges from the fact the Republican jurists evidently developed a conceptual category for *culpa* under the delict of *damnum iniuria datum*. Scholars disagree over precisely when this occurred, but most by far would date this development to the first century BC or before.[16] Why then would it have taken so long to elaborate such a category for contract?

The point to make is that Frier's reconstruction makes good sense on a doctrinal level. The creation and population of conceptual categories through the use of specific examples is a common juristic procedure, which can be contrasted with that of definition, for example. It is frankly hard to see how the jurists might have proceeded differently than the manner he describes, given the state of the evidence. When we try to assign a specific historical context to this process we encounter certain challenges, however. From the relevant evidence it is difficult to be certain, for example, that Labeo was not employing the same means of category-building as was Ulpian.[17]

The discussion turns to a consideration of "risk" or situations in which loss arises from a cause that falls into one of two categories that do not allow the consequences to be ascribed to the fault of either party, meaning those of *vis maior* ("superior force"; sometimes described as *casus*, "chance") and *vitia ex ipsa re* ("flaws inherent in the object itself").[18] The central question is where liability for such loss must lie.

Du Plessis (40-41) prefers to translate the key term *periculum* as "chance of loss", which perhaps suits some contexts better than others, though it is difficult to see why in several instances "risk" should not be preferred to "chance".[19] This is by way of observing that a single translation is unlikely to suffice in all instances, for the reason that *periculum*, like a number of other Latin words, can show different meanings in different contexts. The same

[16] See, for example, Cursi 2002; Valditara 2005, esp. 36-40; Corbino 2008, esp. 171-6, who calls attention to the fact that, from the point where we can follow the thought of the jurists, namely, with the work of Q. Mucius Scaevola in the late second to early first century, discussion of Aquilian liability constantly refers to *culpa*; Corbino 2009; Valditara 2009.

[17] On Labeo, see, for example, Bretone 1984, 162-167, 174-180; Schiavone 1987, 157.

[18] Amid a vast literature, see the works by Ernst 1994; Müller 2002; Sitzia 2007. As to the nature of this liability, the view that the regime is one of strict liability is preferable to that which holds for a fault-based standard akin to the common law *res ipsa loquitur*: see the discussion in Fiori 1999, 85-98; Capogrossi Colognesi 2005, 47-53; Sitzia 2007, 5218.

[19] Du Plessis relies on MacCormack 1979a, who begins by pointing out, correctly, that *periculum* sustains potentially a broad range of meanings and can be found, for example, in contexts of discussions not only of strict liability but also of fault. In the end (168), he somewhat arbitrarily seizes upon "chance of loss" as "the basic notion conveyed by *periculum* (in legal contexts)". More acceptable is his formulation in MacCormack 1979b, 34 where "[i]n the area of contract *periculum* expresses primarily the chance of financial loss consequent upon the destruction or loss of, or damage to, some specific object." But while "primary" should be preferred to "basic", the considerations cited in the text still apply. I note that in some of the inset translations du Plessis offers (140) the word "risk" is given in order to render "*periculum*", while none have "chance". This raises a more general difficulty that is discussed below.

word is used as a technical term in some contexts but not in others, or it is used now in a technical sense, now with a meaning consonant with general usage, or it appears in other contexts with more than one technical sense.[20] An example is *lex*, which can of course mean a statute but also the term of a contract (for the latter usage see 185). Perhaps an even more striking example is found with the terms *pignus* and *hypotheca*, which are sometimes used respectively to denote pledge and hypothec, as we would expect, but also vice-versa, so that *pignus* can refer to hypothec and *hypotheca* to pledge.[21] Similar considerations hold for the discussion of *vis maior*, *casus*, and *vitia* (43-51). To be clear, the fact that a given word does not possess a strictly technical sense in some contexts does not prevent it from showing this in others.

In Chapter Two, "Letting and Hiring of *Operae*", our author discusses what we might describe as employment or labor contracts. After a brief introduction, he organizes his presentation under five main rubrics that include 1) hire-lease of *operae* (which he translates as "tasks") involving the transformation of the property of one of the contracting parties, 2) those regarding the movement of the property of one of the contracting parties, 3) *operae* traditionally classified as *artes liberales*, 4) other *operae* often tainted by social opprobrium, and 5) *operae* involving the *familia* ("household"). Here we find a wealth of evidence suggesting how the legal rules for the contract of hire-lease might have operated in the context of the Roman economy. So we have texts dealing with fullering and tailoring, apprenticing, goldsmithing and engraving, construction, carriage by land, water, and situations where the mode of transport cannot be determined. Under the heading of "*artes liberales*" we find doctors, land-surveyors and architects, advocates (meaning in essence "trial lawyers", to be distinguished from the legal experts we know as "jurists"), school teachers, teachers of civil law, and philosophers. The discussion about *operae* and the household turns of course on the hired labor of slaves and freed-persons.

In the introduction to the chapter, du Plessis sets forth the implications of his adoption of the Fiori thesis, noted above, according to which the trichotomy traditionally seen by the scholarship in this contract, *locatio conductio operarum*, *rei*, and *operis*, resolves itself into a dichotomy of *locatio conductio operarum* and *rei*, so that *operis* conflates with *operarum*. In blunt, perhaps oversimplified terms, contracts for labor, objects, and projects are now reduced to those for labor and objects. What this means in concrete terms is that under the older view if you hired a boat and crew this would likely fall under *locatio conductio operis*, just the crew, *operarum*, and just the boat, *rei*, but under the Fiori dichotomy hire of a boat would still fall under *locatio conductio rei* but boat and crew or just crew would fall under *operarum*.

Whatever view one takes of the new thesis, it has certain implications that might have been fleshed out in greater detail. Many who are not specialists in Roman law will want to

[20] See, for example, the observations of Filip-Fröschl 1993, 105-106; Bannon 2009, 150-151; McGinn 2013, 613-615.

[21] Sturm 1993, 32, and below.

know what is at stake in practical terms. Above all, does the distinction between the older and newer views matter only for the purpose of doctrinal discussion or are there implications for real life? My own expectation would be that the law, in its simplicity and flexibility of form, was ready and able to respond to the needs of society and the economy. Of course this must be demonstrated and not simply assumed. On the other hand, even on the level of doctrine, hire-lease of a person's labor, as measured in daily *operae*, and hire-lease of a project that requires the labor of one or more persons, though at times very close, do not seem to amount to quite the same thing.[22]

Of no small interest is the discussion concerning labor contracts with workers in disreputable professions. The section entitled "Letting and Hiring of Other *Operae* Often Tainted with Social Opprobrium" is divided into "Named *Operae*" (104-113) and "Unspecified *Operae*" (114-115). Under the first heading we find "scribing", acting, gladiatorial combat, and mining. One might invoke in this regard the following text:

> Call. (3 *ed. mon.*) D. 38.1.38 pr. : Hae demum impositae operae intelleguntur, quae sine turpitudine praestari possunt et sine periculo vitae. nec enim si meretrix manumissa fuerit, easdem operas patrono praestare debet, quamvis adhuc corpore quaestum faciat: nec harenarius manumissus tales operas, quia istae sine periculo vitae praestari non possunt.
>
> (Callistratus in the third book on the Monitory Edict): Only those services are understood to have been imposed that can be performed without disgrace and without endangering life. For if a prostitute has been manumitted, she is not held to performing the same services for her patron, although she still earns a living with her body. Nor should a gladiator be held to such services after manumission because they cannot be performed without endangering life.

Of course, the *operae* Callistratus discusses are not those of a contract for *locatio conductio*, our author's proper subject, but those that are owed to a former owner after manumitting a slave.[23] All the same, the text perhaps sheds some light on the social opprobrium in which some "*operae*" were held, and so of potential relevance here.[24] We focus

[22] See Iavol. D. 19.2.51.1. Some, to be sure, have no difficulty in collapsing these categories: Schulz 1951/1992, 542-544.

[23] A standard reference is Waldstein 1986; for brief discussions of this passage see Waldstein, 244-5; McGinn 1998, 330-1.

[24] That Callistratus' position is no outlier is suggested by a text of Ulpian, which holds that *operae* offered by freed-persons can be of any kind, provided they are imposed in a manner that is moral ("probe") and lawful ("iure licito"): Ulp. (28 *ad Sabinum*) D. 38.1.7.3. Paul lays down that they must be offered honorably and without risk to life ("honeste et sine periculo vitae"); if the freed-person begins to practice *turpes operae* subsequent to manumission, he or she ought to provide to the ex-owner those practiced at the time of manumission: Paul. (40 *ad edictum*) D. 38.1.16 pr. This does not mean that Callistratus' rule aimed to benefit either prostitutes or gladiators: below.

first on the gladiator,[25] whose *operae* the jurist might easily have identified as "disgraceful" along with those of the prostitute, but instead characterizes as life-threatening: this introduces a category that would seem to beg for the application of Occam's razor. It is beyond question that gladiators were held in low esteem. They were one of a small number of professions that formed part of a core category of social and legal disgrace. We might be tempted to conclude from this text that this category was not lightly to be extended to other professions.

This conclusion seems at first glance to sit ill with the evidence of other elite sources, especially Cicero, who regards most forms of work as servile in nature because of the relationship of dependency that characterizes them.[26] Of course, any *operae* performed by ex-slaves might well qualify as "servile" for obvious reasons.[27] Worth pointing out however is that Cicero does not mean simply to characterize the work in question as that done by slaves but as something to be despised, that is, as disgraceful, and so not as "servile" because slaves (or ex-slaves) perform it, but owing to its inherent nature.[28] Given this, it is difficult to explain Callistratus' point, meaning either his characterization of prostitution, which he appears to present as exemplary of a larger category, as too disgraceful to qualify as *operae* owed to a former owner, or the implicit distinction he draws with the gladiator, whose profession is not disqualified as disgraceful but because too dangerous.

It is important to note the default rule regarding the content of *operae libertorum* concerning the nature of the work promised by freed-persons in exchange for their freedom. This holds that they were obligated in principle to perform work only in connection with the profession they practised.[29] This introduces a subjective element that comes to be reflected in other ways. Neratius declares that the performance of *operae* depends on the *existimatio*, the reputation/status of the person performing them:[30]

> Ner. (1 *resp*.) D. 38.1.50 pr. Operarum editionem pendere ex existimatione edentis: nam dignitati facultatibus consuetudini artificio eius convenientes edendas.
>
> (Neratius in the first book of *Responses*): The performance of *operae* depends on the reputation/status of the person performing them. For they ought to be performed in a manner consistent with his or her social rank, capabilities, habits, and skills.

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[25] The word *harenarius* in the *Digest* almost certainly referred to gladiators for the classical jurists, and perhaps to beast-fighters as well, while it can only have meant the latter for Justinian's compilers, given the cessation of gladiatorial games, evidently by the early fifth century: see Wiedemann 1992, 151-160. This cessation in late antiquity also explains the absence of wholly unambiguous references to gladiators in the *Digest*.

[26] The key text is Cic. *Off*. 1.150-1.

[27] Du Plessis acknowledges (105-106) that many actors and gladiators were slaves.

[28] See Bodel 2011, 315 for this point.

[29] Waldstein 1986, 382.

[30] The jurist Callistratus defines *existimatio* in terms of social status: Call. D. 50.13.5.1.

Further details are given by Paul, who holds that the former slave-owner cannot demand *operae* that are not supported by the age or physical condition of the freed-person, or the performance of which would diminish his or her lifestyle or values (so I would render "institutum vel propositum vitae").[31] Elsewhere[32] he says that the *operae* offered to the former owner ought to be evaluated in terms of age, social rank, health, necessities dictated by circumstances,[33] values, and the other considerations of this kind as they relate to both parties.

So the standard is neither a strictly objective one, since it is tied to the circumstances of the individual freed-person, nor one determined by the values and practices of the elite. Even so, it is clear that the rule for prostitutes still requires some explanation. If a woman earns a living through prostitution, her performing *operae* through the sale of sex would not at first glance seem contrary to what both Neratius and Paul lay down in these texts. Whether or not provision of her sexual services is to be recognized as *operae*, there is nothing to exclude its continuation after manumission.

The solution might be that Callistratus is not looking at the matter strictly from an upper-class perspective but takes into account views that prevailed among certain broad sectors of the sub-elite. If the jurist allowed Cicero's ideas of what qualified as respectable work to influence his holding, conceivably very little would be left over for the category of acceptable services. This outcome in itself would seem to offer a motive to restrict that reasoning as much as possible. But why not lump the *operae* of gladiators with those of prostitutes if he was going to exclude them anyway? My suggestion is that while most members of the "respectable" sub-elite, however this is defined (certainly anyone whose opinion mattered),[34] likely regarded prostitution as disgraceful, the same was not inevitably true - or not as true - for fighting in the arena as a gladiator. This allows for a relatively narrow construction of "disgraceful" in this context. On the other hand, to ask a freedman to risk his life in this connection seemed egregiously unfair.[35] Thus Callistratus' double justification.

One further observation is in order. The passage of Callistratus might seem at first glance to fall in line with some of the other juristic texts adduced above that evince a concern both with the health and safety of the freed-person performing *operae* and with what we might describe as threats to his or her social personality. For the jurists, evidently, the rules relating

[31] Paul. (*lib. sing. de iure patr.*) D. 38.1.17.

[32] Paul. (40 *ad edictum*) D. 38.1.16.1.

[33] On the word *necessitas* in this text see Waldstein 1991, 186-187.

[34] That certain respectable sectors of the sub-elite had views on the value of work that distinguished them from the upper classes has long been recognized. See Kampen 1981; Kampen 1982; Joshel 1992; McGinn 1997, esp. 107-112; Mayer 2012.

[35] So Waldstein 1986, 245 appears to view Callistratus' holding as a manifestation of a concern with equity. For me this holds perhaps for the gladiator, while the case of the prostitute is more complicated. I think it virtually certain that the jurist takes for granted that both will continue in their respective professions regardless of the services they are deemed to owe their former owners.

to both types of concern operated in a similar manner, so that they form part of a single general category of norms that offered freed-persons some basic protections against exploitation, however we might choose to characterize this.[36] Callistratus' ruling, however, does not seem to have offered any benefit to the women who formed its object - if anything, it may have been aimed in part at discouraging the manumission of prostitutes.[37] The same would hold true for gladiators. This suggests significant limits were in place regarding the rules just described. At most they would seem to protect freed-persons from working in such professions in the sense that, for example, a non-prostitute could not be forced into prostitution as part of an agreement to provide *operae* to her former master. This seems like a relatively unlikely scenario, however, and is clearly not one contemplated by Callistratus.

Du Plessis does not explain why he has chosen for closer examination the four professions named above. By "scribing" he appears to mean acting as a copyist or stenographer (*exceptor*) - to judge from the one text he discusses - and not holding the position of *scriba*, which was about as high as one might rise in Roman society and still remain beneath the level of the elite.[38] There is no doubt that members of the upper classes regarded acting and fighting as a gladiator as highly disgraceful activities, though there is reason to distinguish them all the same. Mining is more of a puzzle. This was hardly respectable work from an elite point of view, but, as with "scribing", it is difficult to see what sets it apart as such in this context. In none of the four cases do the legal sources cited shed light on how the alleged taint of social opprobrium concerned the contract of *locatio conductio*. That appears to be the point (see 106). No matter how despised a profession or how lowly its practitioner, contracting through hire-lease was available. The contrast with post-manumission *operae*, where considerations of social rank and moral worth played a conspicuous role in rulefinding, is notable.

Indeed, with "scribing" and mining we are given no indication of precisely why either of these professions were disparaged socially or how this was reflected anywhere in the law, not just with the contract under discussion. The evidence discussed here does not address this point. In any case, I found the discussion to be of inherent interest, and this holds as much for the two examples that were without doubt despised, certainly by the elite, and subjected to various disabilities at law, though not under the contract of *locatio conductio*, namely,

[36] For discussion, see Waldstein 1991; Masi Doria 2011, with further literature.

[37] McGinn 1998, 330-331.

[38] Being a *scriba* was not inconsistent even with equestrian status, in fact. On *scribae*, see Purcell 1983. Among them ranked the poet Horace, who was also an *eques*: Armstrong 1986. For the difference between *scribae* and *exceptores*, see Winsbury 2009, 79-82, who assimilates the latter to a *notarius*, described (at 81) as "something akin to a shorthand note-taker or speedwriter who took down dictation from his owner [i.e. when a slave] and made sense of it by later writing it out in full." For a collection of instances of *notarii* in the ancient sources, see Morgione 2011.

performing on stage or in the arena.[39] It is fair to say that our author provides a useful opening for future discussion of this fascinating topic.

Chapter Three, "Letting and Hiring of a *Res*", opens with an introductory section that seeks to clarify what is meant by the *uti frui* - the use and enjoyment - of the object under lease. Du Plessis focuses on the second term to argue that in this context *frui* started as a reference to the tenant's rights to the fruits in an agricultural setting and later found application in an urban one, where it enabled a middleman to lease from the owner an entire apartment house and then to sublet individual apartments for a profit. He then turns to the lease of movable property, discussing cases devoted to storage jars, scales, vehicles and vessels, slaves and animals. The next section, on immovable property, is divided between rural and urban contexts. The discussion of the former is structured around the Latin terms *ager*, *fundus*, *praedium*, and *villa*. These are not always easily distinguishable from each other, a problem that holds also for the vocabulary relevant to urban contexts, where the treatment revolves around the terms *cenaculum*, *insula*, and *domus*.[40] For example, there is considerable overlap in the use of the terms *praedium* and *fundus*, as our author himself recognizes (146). My own view is that it would be preferable to organize the discussion around easily definable modern terms, and then to discuss the Latin usage, along with its attendant challenges, as appropriate. This approach helps to avoid depending on unstated assumptions about the semantic content of such terms while attempting to tease out the nuances of juristic discussion. It can also be of some service to a reader who does not know, for example, what a *domus* is, or has at best an imperfect sense of this.

Of great interest in this chapter is the section devoted to problems related to urban lease, a subject to which du Plessis has devoted much attention in the past.[41] He focuses above all on the legal relationship(s) between primary and secondary tenants, meaning middlemen and the residents, or end users, and between the owner and both of these types of "tenant". Not surprisingly, the thrust of juristic discussion of these matters is revealed as a complex balancing of interests. To take just one detail, an important distinction emerges in the hire-lease contract between property-owners and primary tenants, or middlemen, on the one hand, and middlemen (primary tenants) and residents (secondary tenants), on the other (158), so that the contract's grant of the right to take up residence (*habitare*) does not amount to a right to the use and enjoyment (*uti frui*) of the property, but only to its use (*uti*). Only the middleman had the right of *uti frui* in urban lease, which meant that only he could sublet the property. This was denied to the actual residents, though otherwise the right of *uti frui* was commonly guaranteed to the lessee of a *res*.

[39] For what it is worth, I have a different view about the liability of actors under the adultery law: see McGinn 1992.

[40] It is somewhat easier to distinguish among the terms *taberna*, *balneum*, *horreum*, though even in these instances the terminology is not entirely free from difficulties: on *taberna*, for example, see Ligios 2001; McGinn 2013, 613-620.

[41] An important influence here, as elsewhere in du Plessis' work on this subject, is Frier 1980.

A very brief Chapter Four lays out the main conclusions (191-3). Of particular interest is the emphasis on the availability of the labor for hire of both slaves and freed-persons. This suggests an important reason why the contract of *locatio conductio*, precisely in its function as a labor contract, lacks an obvious bias in favor of the employer over the employee as one finds in modern common law. Above all in the case of slaves, the interests of members of the upper orders were potentially engaged, as slave-owners, on the side of the employee, which had the effect of leveling the playing field, at least as far as the formulation of the legal rules were concerned.[42] In this concluding chapter the interest of the jurists in reducing transaction costs, evident throughout the book, rises closer to the surface than ever. This theme can serve as yet another point of departure for future investigators. Du Plessis has certainly made his point that paying attention solely to the legal rules, while ignoring the larger social and economic context, is bound to lead to misunderstanding of the rules themselves.

Our author takes pains throughout the book to make his exposition of the ancient sources accessible to non-specialists. One sign of this interest is the provision of English translations for the Latin sources found in the text and in the notes. These are largely taken from standard, widely available editions (as set forth at xv). Where such are not available, he supplies his own version. One might wish he had done this in all cases, since the accuracy of the standard translations, particularly those of Monro and Watson for the *Digest* of Justinian, is uneven at best.[43] Another tactic might have been to modify the versions already available where needed, above all when the translation clashes with du Plessis' own interpretation of the text.[44] An example (183-4) concerns a text of Cervidius Scaevola (D. 20.4.21.1) dealing with a loan made to a marble dealer. The latter has arranged a security interest with the lender consisting of the marble slabs acquired with the money obtained from that source. The Watson translation renders the key term *pignus* as "pledge", which would require that ownership of said slabs remain with the debtor but that possession pass to the creditor, but our author seems right to understand it here as "hypothec", meaning that both ownership and possession stay with the debtor.

Other difficulties are found on 57 and 93, where the inset Latin text and English translation do not align completely. On 86, 124, 130, and 143, there are significant discrepancies between text and translation that might have been corrected or at least noted. On 167 and 168, Monro's translation of *insula* as "block of chambers" has a nineteenth-century ring to it.

Worth signaling is that two versions of the book have been issued, and the reader ought to make certain of getting hold of the right one. Some months after the first review copy arrived, the publisher sent out a second one. While the first contained an uncomfortably high

[42] For more on this subject, see McGinn 2012, 10-11.

[43] Monro 1891 (a translation of just one title: D. 19.2); Watson 1985; Watson 1998 (a translation of the entire *Digest*).

[44] Du Plessis does this in one instance at 28.

number of typographical errors, many if not most of these are corrected in the new version. The Press deserves a great deal of credit for taking this step. To tell the difference, one might for example check for the correct spelling of Geoffrey MacCormack's surname on 33. Some mistakes remain, a few of which I note here. At 27 n. 92, a missing verb should be inserted to read "it is my belief". On 48 read "significant" for "significantly". On 73 in the inset Latin text *eti deo* should read *et ideo*. On 92 read "to split the loss"; on 93, there are problems of spelling and punctuation in the inset Latin text. On 131 Aquileia should be Cyrene. On 151 *cenaculi* should be *cenacula*. At 158 n. 160 read "seem" for "seems".

On 147 we are told that "[t]here only two legal texts which mention *praedia urbana* explicitly". In fact a third is quoted and translated at 146 n. 111. The inset texts and translations in the text on 162 are repeated for no obvious reason in 163 nn. 179-180. I would very much like to know why the author thinks the women cited at 171, n. 203 are "former prostitutes".

The commentary in this review, a great deal of which reflects quibbling of potential interest largely or exclusively for students of Roman law, ought not detract from the important contribution this book makes. Both specialists and non-specialists will find it a useful point of entry into both the primary sources and the secondary literature devoted to the contract of hire-lease. It ought to result in increased attention paid to the contract of *locatio conductio*, leading, above all, to a better understanding of the legal rules in their social context.

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