Theory and Practice in the Roman law of contracts

Handout: P.J. du Plessis

1. D.43.32.1pr Ulpianus libro septuagensimo tertio ad edictum 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 eoque 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.

   The Praetor says: "If the man in question is not included in the agreement between you and the plaintiff, according to which ~~all~~ things introduced or imported into the dwelling in question, or born or made there, should be a pledge [read hypothec] to you for the rent of the dwelling; or if he is included among those things but the rent has been paid to you, or security given, or if it is your fault that security has not been given, I forbid the use of force so as to prevent the person who brought him in by way of pledge from taking him away from there."

   <u>The interdict and the contract of lease</u>:

2. a) D.20.4.9pr Africanus, Questions, book 8: A man who rented baths from the first of the following month agreed that a slave Eros should be hypothecated to the lessor until the rent was paid. Before the first of July he hypothecated Eros to another creditor for a loan. Asked whether the praetor should protect the landlord against the latter creditor in a suit for Eros, he answered that he should. Although, when Eros was hypothecated, nothing was yet owing for rent, even then the position of Eros was that he should not be released from the hypothec without the landlord's consent. So the landlord should have priority.

   b) D.20.1.15.1 Gaius libro singulari de formula hypothecaria Quod dicitur creditorem probare debere, cum conveniebat, rem in bonis debitoris fuisse, ad eam conventionem pertinet, quae specialiter facta est, non ad illam, quae cottidie inseri solet cautionibus, <u>ut specialiter rebus hypothecae nomine datis cetera etiam bona teneantur debitoris, quae nunc habet et quae postea adquisierit, perinde atque si specialiter hae res fuissent obligatae</u>.

   When it is said that the creditor should verify, when he makes an agreement, that the thing is in the debtor's estate, this applies to a special mortgage, not to the clause commonly inserted in deeds that <u>beside the property specially hypothecated</u>, the debtor's remaining assets, present and future, are bound as if especially mortgaged.

3. a) D.20.2.6 Ulpianus libro septuagesimo tertio ad edictum Licet in praediis urbanis tacite solet conventum accipi, ut perinde tenantur invecta et inlata, ac si specialiter convenisset, certe libertati huiusmodi pignus non officit idque et Pomponius probat: ait enim manumissioni non officere ob habitationem obligatum.

   Although it is understood that in urban tenancies property brought onto the premises is impliedly hypothecated as if it had been specifically agreed, yet a hypothec of this sort is no bar to the grant of liberty. Pomponius agrees. He says that security for rented accommodation is no bar to freeing a slave.

   b) D.20.2.9 Paulus libro singulari de officio praefecti vigilum Est differentia obligatorum propter pensionem et eorum, quae ex conventione manifestari pignoris nomine tenentur, quod manumittere mancipia obligata pignori non possumus, inhabitantes autem manumittimus, scilicet antequam pensionis nomine percludamur: tunc enim pignoris nomine retenta mancipia non liberabimus: et dirisus Nerva iuris consultus, qui per fenestram monstraverat servos detentos ob pensionem liberari posse.

   There is a difference between property hypothecated for rent and property secured by an express agreement. We cannot free slaves subject to an express hypothec, but we can free slaves living on rented premises, until we are locked out for non-payment of rent. After that we cannot effectively free slaves detained by way of security. The jurist Nerva was mocked for holding that we can free slaves detained for rent by pointing at them through a window.

4. D.43.32.1.5 Ulpian libro septuagensimo tertio ad edictum Illud notandum est praetorem hic non exegisse, ut in bonis fuerit conductoris, nec ut esset pignoris res illata, [sed si pignoris nomine inducta sit]. Proinde et si aliena sint et si talia, quae pignoris nomine teneri non potuerit, pignoris tamen nomine introducta sint, interdicto hoc locus erit: quod si nec pignoris nomine inducta sint, nec retineri poterunt a locatore.

   It must be noted that the praetor has not here insisted that the property should be *in bonis* of the lessee or that it should be a pledge [read hypothec], but that is should have been brought in by way of a pledge [read hypothec]. So even if the property is different and of the kind that may not be retained by way of a pledge [read hypothec], still if it has been brought in by way of pledge, the interdict will have scope. But what has not even been brought in by way of pledge cannot be retained by the landlord either.

5. a) D.20.2.4 Neratius libro primo membranarum Eo iure utimur, ut quae in praedia urbana inducta illata sunt pignori esse credantur, quasi id tacite convenerit: …

We accept that property brought on to an urban leasehold is hypothecated, as if it had been impliedly agreed. …

b) D.20.2.3 Ulpianus libro septuagesimo tertio ad edictum Si horreum fuit conductum vel deversorium vel area, tacitam conventionem de invectis et illatis etiam in his locum habere putat Neratius: quod verius est.

If a warehouse, hotel, or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view.

c) D.2.14.4pr Paulus libro tertio ad edictum Item quia conventiones etiam tacite valent, placet in urbanis habitationibus locandis invecta illata pignori esse locatori, etiamsi nihil nominatim convenerit.

Likewise, on the ground that even agreements by implication are valid, it is settled that in the letting of urban dwellings, the movables [of the tenant] are constituted a pledge [read hypothec] for the landlord even though nothing is expressly agreed.

d) C.4.65.5 Imp. Alexander A. Aurelio Petronio Certi iuris est, quae voluntate dominorum coloni in fundum conductum induxerit, pignoris iure dominis praediorum teneri. Quando autem domus locatur, non est necessaria in rebus inductis vel illatis scientia domini: nam ea quoque pignoris iure tenentur. [a. 223]

It is settled law that things which tenant farmers bring onto a farm, if their owners have agreed, are bound by the law of pledge to the owners of the property. But where a house is leased, the owner's knowledge is not required in the case of things brought in or moved in; for these things too are held by the law of pledge.

e) Quae in his horreis invecta inlata [erunt, pignori erunt horreario, si quis pro pensionib]us satis ei [non fecer]it.

Whatever is brought or imported into these warehouses shall be regarded as being hypothecated to the *horrearius* as long as someone has not provided surety for the payment of rent.

[Quae in his horreis i]nvecta inla[ta importata erunt, horreario pig]nori erunt d[onec satis ei factum non sit aut pensi]o solvatur.

Whatever is brought or imported into these warehouses, shall be regarded as being hypothecated to the *horrearius* as long as surety has not been provided or the rent has been paid.

Issues of Procedure:

6. D.19.2.56 Paulus libro singulari de officio praefecti vigilum Cum domini horreorum insularumque desiderant diu non apparentibus nec eius temporis pensiones exsolventibus conductoribus aperir et ea quae ibi sunt describere, a publicis personis quorum interest audiendi sunt. Tempus autem in huiusmodi re bienii debet observari.

When lessees do not show up for a long time and do not pay the rent during this period, if the owners of storerooms and apartment buildings wish to open them and inventory what is there, they should receive a hearing before the public officials charged with this. In a matter of this kind, a period of two years should be observed.

7. D.43.32.1.4 Ulpianus libro septuagesimo tertio ad edictum Si pensio nondum debeatur, ait Labeo interdictum hoc cessare, nisi paratus sit eam pensionem solvere. Proinde si semenstrem solvit, sexmenstris debeatur, inutiliter interdicet, nisi solverit et sequentis sexmenstris, ita tamen, si conventio specialis facta est in conductione domus, ut non liceat ante finitum annum vel centum tempus migrare, idem est et si quis in plures annos conduxerit et nondum praeterierit tempus. Nam cum in universam conductionem pignora sunt obligata, consequens erit dicere interdicto locum non fore, nisi liberata fuerint.

   Even if the rent is not yet due, Labeo says that this interdict is inapplicable unless the lodger is prepared to pay the rent. Furthermore, if he has paid the rent for six months and six months' rent is owing, he will not effectively invoke the interdict unless he pays the following, always provided that a special agreement has been made in renting the house that he may not move before the end of a year, or of a certain period. The same applies if someone has rented a house for several years and the time has not yet elapsed. For since pledges are given for the entire lease, it follows that one should say the interdict does not apply unless they are released.

Two examples:

8. D.13.7.11.5 Ulpianus libro vicensimo octavo ad edictum Solutam autem pecuniam accipiendum non solum, si ipsi, cui obligata rest est, ed et si alii sit soluta voluntate eius, vel ei cui heres exstitit, vel procuratori eius, vel servo pecuniis exigendis praeposito. Unde si domum conduxeris et eius partem mihi locaveris egoque locatori tuo pensionem solvero, pigneraticia adversus te potero experiri (nam Iulianus scribit solvi ei posse): et si partem mihi, partem ei solvero, tantundem erit dicendum. Plane in eam dumtaxat summam invecta mea et illata tenebuntur, in quam cenaculum conduxi: non enim credibile est hoc convenisse, ut ad universam pensionem insulae frivola mea tenebuntur. Videtur autem tacite et cum domino aedium hoc convenisse, ut non pactio cenacularii proficiat domino, sed sua propria.

   It is correct to say that the money is paid not only where it is paid to the creditor himself to whom the thing is charged but also when it is paid with his consent either to someone whose heir he is or to his procurator or to a slave in charge of collecting debts. Hence, if you rent a house and sublet part of it to me and I pay my rent to your lessor, I will have an action on *pignus* against you (for Julian writes that it is permissible to pay him). And if I pay part to you and part to him, the same will be clear *pro tanto*. It is clear that my own furniture and movables

will be charged only with the sum for which I took my lodging; for it is not to be believed that my odds and ends were agreed to be charged for the rent of the whole block. However, this agreement is impliedly taken to have been made with the owner of the building as well, so that it is not from the bargain of the primary tenant that the owner derives advantage, but from his own.

9. 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. Sed hoc ita verum est, si non alius pro eo in priore conductione res obligaverat: huius enim novus consensus erit necessarius. …

   When a man remains in the leasehold after the term of hire is over, not only will he be construed as having rehired, his pledges are considered to remain obligated. This is true except if a third party obligated property on his behalf during the earlier lease; his agreement will be required afresh. …

10. D.20.4.13 Paulus libro quinto ad Plautium Insulam mihi vendidi et dixi prioris anni pensionem mihi, sequentium tibi accessuram pignorisque ab inquilino datorum ius utrumque secuturum. Nerva Proculus, nisi ad utramque pensionem pignora sufficerent, ius omnium pignorum primum ad me pertinere, quia nihi aperte dictum esset, an communiter ex omnibus pignoris summa pro rata servetur: si quid superesset ad te. PAULUS: facti quaestio est, sed verisimile est id actum, ut primam quamque pensionem pignorum causa sequatur.

    I sold you and apartment block on terms that the first year’s rent accrued to me, the second to you, and that we should both have the benefit of the securities given by the tenants. Nerva and Proculus hold that unless the securities are sufficient for the rents of both years, the whole goes to me, because there was no express agreement that the amounts should be secured proportionally on all the property secured. If anything is left over, it goes to you. Paul: It is a question of fact, but probably the intention was that the rents should be secured in the order in which they fell due.

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