SALE BREAKS HIRE – OR DOES IT?
MEDIEVAL FOUNDATIONS OF THE ROMAN-DUTCH CONCEPT

by

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The Roman-Dutch law of land-lease is composed of two elements: Roman law as it was taught by the Glossators, the Commentators and the humanist jurists from the 12th century onwards, and, secondly, the prevailing local Dutch law, mainly formulated in statutory law. In the works of the Roman-Dutch jurists we find numerous references to these Glossators and Commentators, both collectively under headings such as *glossa* or *doctores communes*, and to individual authors, such as Bartolus or Baldus, as well as to the leading 16th-century humanists, such as Cujacius, Donellus, Hotmannus and Wesenbecius. As far as the legal practice of the Netherlands is concerned, numerous references are to be found to collections of decisions, e.g. P. Christinaeus, *Practicarum quaestionum* . . . *decisiones*, first edition Antwerp 1626, second edition 1633 – 1636, or C. Neostadius, *Utriusque Hollandiae, Zelandiae Frisiaeque Curiae decisiones*, the Hague 1667.

The combination of these two elements gave rise to a new type of scholarly literature: systematic treatises covering a certain coherent part of the actual law: *compendium*, *syntagma* or *tractatus*. This type of more or less monographical literature found its material in the earlier commentaries of the *Corpus Juris Civilis*, local statutes, legal opinions (*consilia*) and judicial decisions.

As the aim of this paper is to discuss the Roman-Dutch concept1 of the relation between the lessee of an immovable and the singular successor of the lessor, I will have to deal with the medieval interpretation of the Roman law, especially of C. 4.65.9, the local statutes in Holland in the 16th and 17th century and the synthesis of both made by the Roman-Dutch jurists.

I. – Medieval Roman Law

Classical Roman law2 can easily be left aside, since the Glossators and the Commentators only dealt with the text of the Justinian Codification as they

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found it. C. 4,65,9 is of special interest in this respect as it has become the *sedes materiae* to which the medieval jurists subscribed in developing their doctrine; it runs:

\[\text{C. 4,65,9: Emptorem quidem fundi necesse non est stare colono cui prior dominus locavit, nisi ea lege emit. Verum si probetur aliquo pacto consensisse ut in eadem conductione maneat, quamvis sine scripto, bonae fidei iudicio ei quod placuit parere cogitur.}\]

The interpretation of Emperor Alexander’s rescript presents us with few or no problems: in the case of a landlease reciprocal obligations arise between the landlord and the tenant. The latter does not acquire a real right: his (personal) right cannot directly be maintained against a third party. Since he lacks the quality of possessor he cannot avail himself of any possessory remedy: he does not dispose of *interdicta*, nor does he have any real action against a third party. Therefore, the lessor or his successor, be it a universal or a singular successor, e.g. a purchaser of the land, may easily eject the lessee.

This was once so in English law, but for many centuries a lessee of land has been reckoned as having a possession that the law will protect. In Roman law, however, the lessee had no real protection against such disturbances in his use and enjoyment, but since the ejection is attributable to an act of the lessor, the latter is liable in all the lessee’s damages: *interesse*, which the lessee could claim by means of his *actio conducti*.

The purchaser’s right to eject the lessee is not affected by any pact in favour of the lessee agreed upon by the purchaser while buying the land. The contract of sale establishes reciprocal obligations between the seller and the buyer, but it does not confer a right (or even a defence) upon the sitting tenant. Therefore, if the purchaser of the land ejects the lessee in open violation of the pact agreed upon, the lessee had to claim his damages from the lessor. The latter, in his turn, could bring an action against the buyer because of violation of the contract of sale. This action, brought upon the contract of sale, is the *actio venditi*, which is the *iudicium bonae fidei* the text refers to. It enables the plaintiff to claim his damages, in this case the amount of money he had to pay to the ejected lessee.

**II. – Medieval Interpretation**

In their teaching at the University of Bologna the medieval jurists gave a very remarkable interpretation of this text, C. 4,65,9. The text is explained as containing a rule: ‘sale breaks hire’\(^4\). The concept of tenant (*colonus*) was already generalized to every lessee by a scholar of the second generation: Joannes Bassianus, as appears from a gloss in Ms. Bamberg, Jur. 22 (fo. 85 ra):

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2. J.A. Ankum, *De voorouders van een tweehoofdij twistziek monster, Beschouwingen over de ontwikkeling van het beding ten behoeve van een derde* [Intereerde Amsterdam GU 1967], Zwolle 1967.