

Book IV.¹
Title LXVI.

Concerning emphyteutic right.
(De emphyteutico jure.)

Headnote.

Emphyteusis was ordinarily a perpetual lease, in return for the payment of a yearly rental. The holder of the emphyteusis is called emphyteuta or emphyteuticary. It originated in the so-called *ager vectigalis*, which, in the early empire, meant land of the state or a city, granted either in perpetuity or for a long term, at a rent fixed in kind. In the fourth century the name emphyteusis was applied to grants of imperial domains, particularly for waste land (note C. 11.59.1) to bring them under cultivation, for long terms on like conditions. So these institutions were fused, and by its end the method was adopted by private owners.

The leases were, as stated, ordinarily in perpetuity. In fact, C. 11.73.3, a rescript written about 400 A.D., apparently directed all imperial lands and municipal lands to be let for that term. Justinian, however, in legislating for property belonging to churches and other charitable institutions, provided in Novel 7, c. 3, that such property should be granted only for the life of the emphyteuticary and that of his children and grandchildren. The same provision was made in Novel 120, c. 1, except that in cases where the property had fallen into such condition as to make return therefrom hopeless, the property might be let in perpetuity. The limitation probably meant little, since, at the death of the grandchildren, no one would be likely to question the right of their children to the possession of the property. In other portions of the law, the emphyteusis is treated the same as a perpetual lease. D. 2.8; D. 6.3; Inst. 3.24.3. And accordingly, it has in this translation been designated as a perpetual lease, though it must be born in mind it was not necessarily so.

The holder of the emphyteusis was practically the owner and all the burdens of ownership fell on him. He was required, of course, to pay his yearly dues. He was bound to pay the taxes. C. 4.66.2; C. 10.16.2. In C. 11.62.3, it is stated that he could not renounce it; neither could it be taken from him even by imperial rescript. It descended to his heirs. Inst. 3.24.3; Nov. 7, c. 3; Nov. 100, c. 6.

It might be mortgaged or pledged, subject, of course, to the burdens against it. D. 13.7.16.2. It is doubtless true, however, that private owners did not, for some time at least, go to the extent of leasing the property in perpetuity, and that for some time, in any event, leases of this kind were simply made by them for long term. The advantage of a short lease at first was that in the case of an emphyteusis, the rent could be increased, which was not true in the case of a perpetual lease. But the right to increase the rent was, according to 4 Pauly-Wissowa 2514 to have been forbidden. Hence it is not surprising that the emphyteusis supplanted the so-called perpetual lease entirely.

Surface leases. In this connection we may mention surface leases, in which case the lessee of a long term or in perpetuity, lease the surface of the ground on which to build in return for a ground rent paid to the owner of the soil. We might call this kind of lease a building lease. D. 6.1.73 and 74; D. 43.18.2. These leases, too, originated with building leases granted by the State and by cities. The legal position of the owner of the

¹ Blume wrote at the top of this page: "Revise—see Pauly-Wissowa."

lease—the superficiary—was much the same as that of the emphyteuticary. See generally, 2 Sherman 180; 2 Roby 176; Buckland 275; Mackeldy §§ 331-333.

4.66.1. Emperor Zeno to Sebastianus, Praetorian Prefect.

An emphyteutic right is not to be classed either as a contract of hire or of alienation, but is another right, separate from and dissimilar to either of them; it has its own nature and character; it is a just and valid contract, in which everything agreed on by the contracting parties in writing, even as to fortuitous matters, must be constantly and strictly observed. And if the contract shall not provide for fortuitous circumstances, and the property embraced in the emphyteusis shall entirely be destroyed, the loss does not fall on the emphyteuticary, to whom nothing is left, but on the owner of the title, who would have been the loser as a result of the fatality, if he had had no contract at all. If only a partial or slight damage occurs, not involving the destruction of the substance of the property, such loss must be borne by the emphyteuticary. (476-484).

4.66.2. Emperor Justinian to Demosthenes, Praetorian Prefect.

We ordain that agreements contained in the document evidencing an emphyteutic contract are binding in every other respect as well as in respect to the evicting of the emphyteuticary in case he fails to pay the customary rent or to produce receipts for public taxes.

1. If no agreement is made in regard thereto, but the emphyteuticary fails, for a period of three years, to pay the rent or turn the receipts for the taxes over to the owner, the latter may eject him from the property, and the emphyteuticary cannot in such event make any claim for improvements or betterments or for any penalty, but he may, at the owner's wish, be expelled, without the right to say that he was not warned, but should come forward voluntarily and pay his debt, as was generally provided in a former law of our majesty.²

2. In order, however, that owners may not in this connection, have an opportunity to expel their emphyteuticaries by resorting to the trickery of refusing to receive the rent, so that the emphyteuticary might lose the property after the lapse of three years, the latter may tender the money in the presence of witnesses, seal and deposit it according to law, and be in no danger of eviction.³

Dated at Chalcedon September 17 (529).

Note.

Note C. 4.65.3 refers to the matter of ejecting a tenant for the non-payment of rent. Conditions in a contract providing against eviction or ejectment, even when penalties were provided as a protection against unlawful ejectment, were subject to the implied condition that the tenant would comply with the terms of his contract and pay the rental as required. If he did not do so, he could be ejected and could not recover any penalties. It will be noted in the foregoing law that the contract might provide as to the time when the tenant could be ejected, and the period of default of three years applied only in case no other provision was made to the contrary.

By Novel 120, c. 8, Justinian, legislating in regard to property belonging to the church and other pious institutions, provided that if the emphyteuticary should deteriorate

² C. 8.37.12.

³ As to the manner of tender and place of deposit, see C. 4.32.19.

the property, or should be in default of his rent for the period of two years, he might be ejected and the back-rental and the damages be recovered from him. Ejectment was not, however, made compulsory, but a time was to be set within which the emphyteuticary could pay all arrears.

4.66.3. The same Emperor to Julianus, Praetorian Prefect.

Since there was doubt whether an emphyteuticary could, without the owner's consent, sell his betterments—which in Greek are called *emponemata*—or could transfer his emphyteutic right without the owner's consent, we ordain that if the instrument evidencing the emphyteutic right contains any agreement in reference thereto, this must be observed; but if there is no such agreement, or such instrument is perchance lost, the emphyteuticary shall not be permitted to sell his betterments to others without the consent of the owner, or transfer his emphyteutic right.

1. In order, however, that the owners may not make this the occasion for not permitting their emphyteuticaries to receive the offered value of their betterments, but to cheat them and deprive them of a benefit, we order that the emphyteuticary shall send a certificate to the owner advising him of the price which he is able to get from another.

2. If the owner is willing to give this, and pay as great a price as the emphyteuticary can get from another, he shall have the preference right of purchase.

3. But if the period of two months elapses and the owner refuses to purchase, the emphyteuticary may sell his betterments to whom he wishes without the consent of the owner, provided it be to persons who are not forbidden to enter into emphyteutic contracts and make such purchase; and if the betterments were sold to another in the manner aforesaid, the owner must accept such purchaser as his emphyteuticary; that is to say, he must not refuse (the new emphyteuticary), if the (old) emphyteuticary wants to transfer the emphyteutic right to persons not forbidden, but permitted (to take), and who are able to pay the rent, but he must accept the new emphyteuticary, not through a tenant or procurator, but in person or by letter, or if he cannot or will not to this, then, if he is in this city, he may do so by a statement in writing before the master of the census, or by a certificate in the presence of a notary (*tablulariis*); if he is in the provinces, he may do so before the president or defender.

4. And lest the owners, tempted by avarice, demand a great amount of money on this account, which we know has been done up to this time, we order that they shall not receive for their consent more than the fiftieth part of the price or value of the place which is transferred to another.

5. But if the owner will not accept the new emphyteuticary or purchaser of the betterments, and has failed to do this within two months after notice, the emphyteuticary may transfer his right or betterments to others without the consent of the owner.

6. But if he proceeds otherwise than directed by our constitution, he shall lose his emphyteutic right.

Given at Constantinople March 18 (530).

Note.

An emphyteusis could be left by will, and, as noted in this law, could be sold, subject to the right of preemption in the owner, and a fine or premium of two per cent on the price, if the option given the owner was not exercised. Notice of such sale was required to be given the owner, and he was bound to exercise his option within two months or give his consent in order to get the fine or premium. It is somewhat uncertain who the *tabularii* were, referred to in the law. They generally were clerks in the

provincial municipalities. The term ordinarily used for “notary” was tabellio, who was a semi-public officer. 9 Cujacius 395, in referring to this matter, said that the tabularii were “public persons.” It is possible that the persons intended to be referred to were clerks in the office of the master of census. The latter was a registration officer for documents in general.

4.66.4. The same Emperor.

If, during a period of three years, an emphyteuticary offers the rent of the emphyteusis to the owner, but the owner, living in this imperial city or in the provinces, fails to accept it, the emphyteuticary may offer him the rent, and unless the owner desires to accept it, may, as the end of the three-years’ period is approaching, put it under seal and cause the facts to be attested before the glorious prefect of the city, or the glorious praetorian prefect or other proper magistrate under whose jurisdiction the owner of the land is, or if the owner is in high position, before the patriarch. In the provinces he may do this before the president, or, in his absence, before the defender of the place, or before the bishop of the city in which the owner lives, so that the testimony of one of these persons may be had to the transaction.

1. And if the owner will not even then accept the proffered payment, the emphyteuticary shall keep it as his own, and the owner shall have no cause of action to recover it.

2. The emphyteusis will not (on the one hand) be released (from the payment of rental), nor (on the other hand) can the owner collect the customary rent of the subsequent years, until he sends to the emphyteuticary an attested demand asking the rent, and then the owner may not claim the rent of the time elapsed, since it was his fault that he did not receive it, but only from the time of the attested demand. If during three years after the time of such demand of the owner, the emphyteuticary fails to voluntarily pay the rent, the owner may expel him from the emphyteusis, according to the provisions of another constitution under this title (C. 4.66.2).

Note.

The same law is found at C. 1.4.32. The foregoing law shows, of course, that at the time of its enactment, no all leases here in perpetuity, and that owners who had made such leases repented of their acts and wanted to rescinded what they had done.