

Book IV.
Title LXV.

Concerning letting and hiring.
(De locato conducto.)

Bas. 20.1.63; D. 19.2; Inst. 3.25.

Headnote.

Letting and hiring was, like purchase and sale, mandate and partnership, a contract that is commonly called consensual, and what has been said as to the manner of entering into a contract of purchase and sale is largely applicable here. The contract was valid when agreed to by the parties and when the price or consideration was fixed. The rules relating to purchase and sale when the price was to be fixed by a third party also applied to the contract in question. If a man left clothes to be fixed or cleaned by a fuller without the price for the work being fixed, there was no contract for letting or hiring; there was then what has been called an innominate contract (C. 4.64), with the special form of action (formerly) of enforcing it. If a man had an ox, for instance, and he let it to someone else for the period of ten days, and such other party in turn was to let his own ox in turn for the same period, this transaction was not a contract for letting or hiring, but an innominate contract, in the nature of exchange. It was difficult to tell at times what sort of a contract a certain transaction was. It was disputed, for instance, whether a contract whereby a goldsmith agreed to make rings for another out of his own gold for ten gold pieces was a contract of sale or of letting and hiring. It was finally settled that it was the former, unless the purchaser himself furnished the gold and agreed to pay the goldsmith for the work. Inst. 3.24 pr 4.

The contract now discussed naturally divides itself into three divisions, namely (1) where land or personal property was let to another, to be used and enjoyed by the latter; (2) where a job or contract was let, and (3) where services were let. Laws on each of these divisions are found in the foregoing title. Only some additional remarks remain to be made at this place.

Letting of land or other property. The lessor did not need to be the owner of the property let. He might be chief-tenant who sublet to others. The lessor was, of course, required to hand over to the lessee the property that was let, and he was responsible if the lessee lost it either from defect of title or some act of the lessor. Gaius 3.144; D. 19.2.15.1; D. 25.1. The lessee was required to keep the premises in good condition, but he was entitled to be reimbursed for any necessary or useful expenditures on the property (D. 43.10.1.3; D. 19.2.55.1), and a curious and interesting piece of legislation in this connection is Novel 64, relating to gardeners. He was required to restore the property at the end of the term in its original condition subject to ordinary wear and tear. D. 19.2.11.2. The risk of the accidental destruction of the property was on the lessor; he could not thereafter claim any rent, although he was not obligated to restore the property. D. 19.2.9.1; D. 19.2.33; D. 19.2.60 pr. If sureties had been taken for the rent, they ceased to be responsible for any rent accruing after the expiration of the term, even though the lessee continued to occupy the property thereafter, and as will be seen, under the same terms and conditions. Any pledges, however, given by the lessor, remained security for the additional rent. D. 19.2.13.11; C. 4.65.16. The contract ended by expiration of the term, renunciation of either party, if there was no agreed term, destruction of the subject matter, and forfeiture

for certain lawful reasons. Buckland 499-500. Death of either party did not end the contract, unless that was agreed on.

Letting of job or contract. This included particular pieces of work, as the erection of a house, the teaching and training of a slave, tending and feeding cattle, carriage of merchandise, the making of a ring or the cleaning of clothes. The person who undertook to do the work was required to exercise the greatest care. When he had done his work he was entitled to his pay.

Letting of services. This applied to the letting of services of a free person, since slaves were property, and to let out their services, was to let property. The hirer of the services, or his heir, was bound to pay for the full term agreed on, whether he used the services or not, if the person hired was ready to render them. Thus lawyers were not bound to restore any fees, if it was no fault of theirs that they did not argue a case. D. 19.2.38. On the other hand, the man who hired out his work could be compelled to perform it. C. 4.65.22. He was responsible for his negligence. D. 19.2.60.7. A special contract of this kind was when a man hired himself out to fight in the arena. 2 Roby 174.

Carriers, etc.¹ In laws 1 and 4 of this title it is shown that while warehousemen were liable for negligence, they were not absolutely liable in all cases of loss of property. But the liability of shipmasters, innkeepers, and stable keepers was greater; they were bound to re-deliver the goods entrusted to them in any event, even where they were lost or damage happened to them through no fault of theirs.² They were not, however, responsible for unavoidable mischief, shipwreck or attack by pirates. D. 4.9.1 pr; D. 9.1.3.2. The reason for the enlarged liability of such parties is stated as follows: "This edict (making them so liable) is highly beneficial as it is very often necessary to rely on the engagements of the persons mentioned and to commit things to their custody. And no one need think that the above edict bears hardly on them, as it is open to them, if they like, to refuse to receive anyone, and unless this were laid down, they would have it in their power to conspire with thieves against the persons they took in; in fact even as it is, they are not always innocent of dishonest machinations of this kind." It is stated in D. 9.4.7 pr, that if a shipmaster gave notice to the passengers that they should look after their own goods, and that he would not be answerable for damage or loss, and the passengers agreed to the terms of the notice, then the shipmaster could not be sued. The provision is indefinite and as it stands would seem not to mean much, and seems to be limited to loss occurring through the acts of the employees of the shipmaster. Nevertheless, it hints at the fact that, perhaps, it was usual for shipmasters to require a written release from liability from passengers in such cases, and that the law recognized such contracts as valid. Such provision apparently would not apply to goods received for carriage of parties not passengers, or to loss occurring otherwise than through acts of employees. Special provisions were made in the case of loss of goods in charge of a shipmaster, innkeeper or stable keeper through theft committed by the employees of a shipmaster or stable keeper, or the employees or lodgers of an inn. In such case the action was for

¹ Blume penciled in here: 12 Z.S. 66-74; Jors, p. 124, 184.

² Blume has penciled in above this, without striking the original, "liability was for double the damages. D. 4.9.7.1; D. 47.5.1.2. See next page" (at which point he has again questioned himself on this point and wrote "See MacKeldy §505."). Blume's citations do appear to be accurate.

double damages.³ The same rule of double liability existed when damages were caused by such persons. That is true at least when such damages were caused by acts of the employees of a shipmaster. This action did not lie against the heirs of the shipmaster, innkeeper or stable keeper. D. 4.9.6 and 7; D. 47.5. In other cases, the action was for simple damages, and lay against heirs, and this action, doubtless, was applicable in all cases where the action for double liability could not be brought. See generally, Buckland 593-595; 2 Roby 178-179; headnote to C. 6.2 (relating to theft).

Absolute responsibility for theft of goods entrusted to the care of others existed in a few other cases, as in that of a fuller (Inst. 4.1.15), a person who had a loan of another's property for use (D. 13.6.5.5), a usufructuary (D. 7.9.2). See Buckland 555-556.

4.65.1. Emperor Antoninus to Julius Agrippinus.

The owner of a warehouse is not responsible to the hirer for the risk of an overpowering force or for burglary. But nothing of that kind having happened, he is responsible for the damage otherwise caused to deposited property, by an extrinsic force, when the warehouse is left uninjured.⁴

Promulgated January 4 (213).

4.65.2. The same Emperor to Epidius Epictetus.

You have an action on hire, which is an equitable action, and recover the debt with the usual interest, against those for whom you contracted to erect buildings.

Promulgated July 1 (213).

Note.

In law 1 of this title the letting of property for use was considered. In the foregoing law the letting out of a job on contract is contemplated. The contractor in this case was the hirer, and he had the right to recover the money due him, with interest, in an action on the contract, which in his case was called an action ex conducto—on the contract of hire, as contradistinguished from the action ex locato, given the man who let the job. Both actions were on the contract, but the rights of the respective parties were distinguished, just as in action of sale—the seller having an action on the sale, the purchaser on the purchase. The action was one in which all equities between the parties were considered. Interest was allowed on money due, after default, even though no special contract for interest was made. This was in accordance with the general rule, which allowed interest on equitable contracts after default.

4.65.3. The same Emperor to Flavius Callimorphus.

You should not be expelled, against your will, from the room which you say you hired, if you pay the rent to the owner of the apartment house, unless such owner proves that it is necessary for his own use, or that he wants to improve it, or that you conducted yourself badly in the rented room.

Promulgated January 6 (214).

Note.

The law here translated states that if the owner of the premises needed the property for his own use, the lessee was required to vacate. That is a provision not in use

³ Blume penciled a question mark in the margin next to this and added “see Mackeldy § 505.” See also note 2 above.

⁴ [Blume] See law 4 h.t.

with us. Again, if the owner wanted to renovate the premises, the lessee was required to vacate, but only temporarily, while the renovation was made, and not permanently. 9 Cujacius 376.⁵ The tenant could be ejected if he did not pay the rent or use the property properly, and any agreement for a definite term was subject to these implied conditions. D. 19.2.54.1; C. 4.65.34; C. 4.66.2. 9 Cujacius 376, and Monro on D. 19.2.54.1 appear to think that the landlord could not eject the tenant unless the rent was in arrears for two years. It is true that where a perpetual lease was given, the holder of such lease could not be ejected for non-payment of his yearly rental until he was in default for three years. C. 4.66.2. But this rule could be varied by contract. And it would seem that if the two years' period applied in any case, that it would have been a harsh rule, if applied, for instance to lessees of tenement houses. D. 19.54.1, upon which opinion of Cujacius and Monro is based, applied to a farm, and impliedly, perhaps, states that the ejection could take place only after the rent was in arrears for two years. But it would seem that without further evidence, we cannot come to the conclusion that the rule also applied to other property. In any event, it would seem clear from C. 4.66.2 that the rule could be changed by contract and that was doubtless generally made.

4.65.4. Emperor Alexander to Arrius Sabinus.

The rule laid down in the letter of the divine Pius Antoninus is to the effect that the owners of warehouses which are broken into must, if complaint is made thereof, produce the guards, but they are not subject to any further risk.

1. This will be granted to you, if you go before the president of the province. If he shall learn that the matter needs greater punishment, he will take care that the accused are sent to Domitius Ulpianus, praetorian prefect, my relative.

2. And if the owners have specifically guaranteed the custody of the property, they are responsible for it.

Promulgated December 1 (222).

Note.

A warehouseman, just as any other lessee (law 28 h.t.) was bound to use exact care. He received money for the custody of the property, and was bound to see that it was guarded. So, it seems, he was absolutely responsible, if the property was stolen. Law 1 h.t.; D. 19.2.40. But he was not liable otherwise for unavoidable casualty, unless he made a contract to that effect. The actual custodians were generally slaves. They were required to be delivered up, so they might be punished, if they were implicated in having the warehouse burglarized. D. 1.15.3.2. See C. 4.34.1 note.

4.65.5. The same Emperor to Aurelius Petronius.

The law is certain that landlords have a lien on things which tenants (coloni) bring onto a rented farm with the consent (voluntate) of the former. Moreover, when a house is let, such knowledge (scientia) of the owner of things brought into it, is not necessary; the landlord has a lien also on such property.

Promulgated March 1 (223).

Note.

⁵ Blume wrote in the adjacent margin "See Stinzling 8."

A tenant of urban property was called *inquilinus*, of rural property *colonus*, the latter in later times being mostly bound to the soil and being, therefore, serfs, although some free tenants continued to exist.

That there was an implied landlord's lien is abundantly attested in the Code. C. 8.14.5 and 17. The question is what was the extent thereof. D. 20.2.7 indicates that a landlord of rural property had a lien only on crops and not on any other property unless by special agreement, and this is the view taken by some authors, generally. See Hunter 444; contra, 2 Roby, 173; Vangerow, Pand. § 376; Windscheid, Pand. § 231. Cujacius says that the words "voluntas," consent, and "scientia," knowledge as used in the present rescript, must be construed to mean "agreement." 9:378. See Vangerow, Pand. § 372. All the property of a tenant in a city, which he brought onto rented property, were subject to a lien without express agreement. This might possibly account for the fact, if it is a fact, that a tenant could not be ejected for a period of two years after default in payment of rent.

4.65.6. The same Emperor to Lucilius Victorinus.

A person is not forbidden, if no agreement to the contrary is made, to sublet property which he has hired, for use by the sub-lessee.
Promulgated February 25 (244).

4.65.7. The same Emperor to Septimius Terentianus, a soldier.

If, when Hermes had the contract for the collection of the customs dues of one-eighth, for a period of five years, you guaranteed his contract, and afterwards, at the expiration of that period, when the same Hermes was retained as sub-lessee (receiving a renewal of his contract), you did not give your consent (to guarantee that also), but demanded that your guaranty be returned to you, the proper judge will know that you can not be bound for any risk under the later contract.⁶
Promulgated January 9 (227).

4.65.8. The same Emperor to Sabianus Hyginus.

Although you rented the farm for a definite, annual sum, still if it was not stated in the contract of letting, or the custom of the country does not demand, that damages which occur through destruction of storm or other bad weather should be at your risk, then if the meagerness of the crop is not shown to have been offset by the abundance of other years, you rightly and equitably demand that consideration be given you on that account, and the appellate judge will apply that rule.
Promulgated August 1 (231)

Note.

It was a general rule that small damages, either to a landlord's urban or rural property were to be borne by the tenant, but that the landlord was to bear any heavy damages or losses. D. 19.2.5.6. And if the crops of a tenant were destroyed or badly damaged, the same principle applied. D. 19.2.15.2.3; D. 19.2.15.3; D. 19.2.27. That rule might, however, as shown by the foregoing law, be varied by express agreement or by the custom of the country. If a rebate was allowed, and later years proved profitable, the arrears which had been released, were required to be paid, even though such release had been made as though in the form of a gift. D. 19.2.15.4. This last authority states that if

⁶ [Blume] As to customs due, see generally C. 4.61.

the bad year was the lease, no account was taken of previous profitable years. But that seems hardly consistent with the foregoing law, which makes no such exception.

Buckland 498.

A tenant who deserted a house or farm rented for a definite period of time before the expiration of the lease was liable, and could be sued at once, for the balance of the rent due for the remaining period. D. 19.2.24.2; D. 19.2.55.2. So a tenant ejected before the expiration of the lease could sue the landlord for his damages. D. 19.2.24.4.

4.65.9. The same Emperor to Aurelius Fuscus, a soldier.

It is not necessary for a purchaser of a farm to retain a tenant (colonus) to whom the former owner let it, unless he bought it with that condition; but if it is shown that he in some manner, though not in writing, agreed that the lease should continue, he will be compelled in an equitable (bonae fidei) action to comply with the agreement.

Promulgated December 7 (234)

Note.

The rescript here translated, too, states a principle peculiar to Roman law, namely that a purchaser of a property which was under lease was not bound by the lease, but could eject the tenant. While this was the rule, yet the landlord who let the property to the tenant was liable in damages to the tenant if the new owner in any way interfered with or ejected him. D. 19.2.25.1. Hence, it was usual to make the transferee agree to respect the tenant's rights. Buckland 499.⁷

4.65.10. Emperor Gordian to Pomponius Sabinus.

You are unaware of the truth in thinking that the heirs of a lessee do not succeed to the rights of a lease, since, if the lease is perpetual, it is transmitted to the heirs, if for a limited time, the obligation of the contract rests on the heir for the period of the lease. Given February 22 (289).

Note.

The rescript appears to be addressed to a Greek. It was Greek law that death ended the lease. 18 Z.S.S. 188.

4.65.11. Emperor Phillip to Aurelius Theodorus.

A rescript has often been issued that lessees or their heirs cannot be compelled against their will to continue as lessees after the expiration of the lease.

Promulgated August 8 (244).

4.65.12. The same Emperor and Caesar Philip to Aurelius Nica.

You ask with no good reason that the damage which you state is inflicted on your property on leased premises by the attack of robbers should be made good by the mistress of the property, who, according to your statement, was guilty of no fault.

Promulgated October 29 (245).

Note.

⁷ In the adjacent margin, Blume wrote: "Stintzing 9; see C. 8.4.7, 19 Z.S.S. 89.

Not even a warehouseman was responsible for what housebreakers did. Law 1 of this title. Nor was the owner of the ordinary house that was hired out responsible for damages that robbers inflicted on the property of tenants.

4.65.13. Emperors Valerian and Gallien and the Caesar Valerian to Aurelius Heraclids.

If your lease is not joint, but the several parcels were rented to separate persons, you cannot be sued on account of another. But if all who rented are jointly liable to the lessor, he cannot be deprived of the right which he has to sue whom he wishes. 1. You have the right, of course, to pay the debt to the lessor, and to demand that the property pledged as security for the lease by those on whose account trouble is made you, to be transferred to you.

Promulgated March 8 (259).

Note.

For joint and several liability, see headnote C. 8.39. In the foregoing case the parties were jointly and severally liable, if they leased the property in common, otherwise not. Bas. 20.1.75.

4.65.14. The same Emperors and Caesar to Julius.

If those who contracted to haul wheat and barley for the public food supply (annona), failed to keep faith after they had received money, you can sue them in an action on the contract (ex locato).

Promulgated December 25 (259).

Note.

Bas. 20.1.76 states this law as follows: "The paymaster (erogator) of the military food supply (Annonae), shunning that burden (of hauling it), made a contract with another to do that work for a compensation. If the agreement is not carried out, an action on hire may be brought against him."

4.65.15. The same Emperors and Caesar to Aurelia Euphrosyna.

If you are expelled from the farm by the lessor, you can sue on the lease (ex conducto) and demand and retain the penalty agreed to be paid on breaking the contract. Promulgated August 13 (259).

Note.

The rescript assumes, of course, that the ejectment was unlawful. In such case the penalty agreed on might be recovered, or might be retained from the amount owing the landlord. If no penalty was agreed on, an action could be brought for the damages. Bas. 20.1.77 note.

4.65.16. The same Emperors and Caesar to Aurelius Timotheus.

The terms of the lease must be observed, and no rent beyond the amount agreed on can be demanded. And if the time for which the farm was leased has expired, and the lessee holds over under the same lease, the agreement, which carries with it the right of the landlord's lien, must be considered as impliedly renewed.

Promulgated July 29 (260).

Note.

The law here translated states a principle very usual in common law jurisdictions, that a tenant holding over his term without any express renewal of a lease holds over under the same terms under which he held previously.

4.65.17. Emperors Diocletian and Maximian to Hostilius Hectarius.

The president of the province will take care that the amount due under the lease be paid without delay, and he is not unaware that in an action on the lease, which is an equitable action, legal interest is allowable after default.
Promulgated March 18 (290).

4.65.18. The same Emperors to Annius Ursinus.

Excepting the time when there was a failure of crops by reason of the pernicious destructiveness of locusts, the president of the province will order payment to you of the fruits due you, according to past custom, for the time subsequent thereto.⁸
Promulgated September 21 (290).

4.65.19. The same Emperors and the Caesars to Julius Velentinus.

In letting and hiring, good faith must be strictly maintained, unless a special agreement which runs counter to the custom of the country is made. But if some persons have remitted rents contrary to the terms of the contract or contrary to the custom of the country, that fact cannot prejudice others.
Subscribed April 27 (293 at Heraclea.

Note.

By stating that good faith was required to be observed was meant that force was to be given to the local customs, unless there was an agreement to the contrary⁹. Bas. 20.1.81 and note.

4.65.20. The same emperors and the Caesars to Aurelius Carpophorus.

Whoever hired his own property thinking it to be property of another, does not transfer ownership thereby, but makes an ineffectual contract of hire.
Subscribed February 27 (219) at Heraclea.

4.65.21. The same Emperors and the Caesars to Antonia.

If you let the year's fruits for a certain quantity of oil (to be delivered to you) the contract made in good faith cannot be broken solely because someone else offered a greater quantity of oil as rent.
Dated October 8 (293) at Sirmium.

4.65.22. The same Emperors and the Caesars to Papinianus.

⁸ [Blume] Law 8 of this title and note.

⁹ Blume wrote "contract" here but his intent seems more likely to be as I have given it in the text.

If the persons against whom you direct your petition hired you to do their work for a definite time, the proper judge will, upon investigating the cause, order the agreement to be carried out as far as equity permits.

Note.

According to this rescript, a man who hired out his work could be compelled to carry out his contract, that is to say, could be compelled to continue his work against his will.

4.65.23. The same Emperors and the Caesars to Aurelius Priscus.

The fact that you let the property to the party who thereafter contended that he owned it, does not suffice for proof or defense that you own it, since consent is lacking where there is want of knowledge, and error as to such ownership; and if you are defeated in the suit, the lease will rather, by reason thereof, be declared never to have had any validity; for no one can change the nature of his possession by himself.

Note.

Here a lessee first gave up possession in accordance with law 25 h.t. and then brought a real action to recover. Proof of the lease was itself not sufficient to show that the former lessee was not owner or that the former lessor was owner. Comp. C. 7.16.18 if the former lessee recovered in his action, it merely showed that the lease had been void. Law 20 h.t. The last sentence is but an attempted application of the rule that no one could, by himself, change the legal ground under which he held possession. C. 7.32.5. See Siber, *Passilegitimation* 62.

4.65.24. The same Emperors and the Caesars to Aurelius Antoninus.

A contract of letting and hiring may be valid without writing. You should, accordingly, sue the heirs and not the wife of the lessee, although no contract in writing was executed. As to the subsequent time, of course, during which you say she (the wife) herself was the lessee, you can, by proving the truth of your petition, claim the whole of the rent as to that time from her.

Promulgated December 25 (293).

Note.

The contract of "letting and hiring" mentioned in this rescript was evidently nothing but a lease of property, as appears from the latter portion.

4.65.25. The same Emperors and the Caesars to Aurelius Epagathus.

If a person receives land or other property as a tenant, he must first restore possession before he can sue for the ownership thereof.

Given at Sirmium December 30 (293).

Note.

This states the principle familiar to the common law that a tenant cannot dispute his landlord's title. See C. 4.65.33; C. 8.4.10. The rule evidently did not obtain prior to this time. Siber, *Passilegitimation* 61.

4.65.26. The same Emperors and the Caesars to Aurelius, Opilio and Hermius.

If you have carried out the contract of hire, the written contract made on that account becomes a nullity. And if there is anything on the farm that belongs to you or it

was taken from you by force, the president of the province will order it to be restored to you.

Given April 29 (294).

4.65.27. The same Emperors and the Caesars to Maximianus Agopodea.

If the owner of the farm promised by stipulation to pay you what you advanced for the tenants of his farm, the proper judge will order it to be paid back to you. But if the contract consists of an informal agreement only (*placitum*), you know that a right of action could not by our law arise out of a mere pact.

(294).

Note.

C. 4.25.13 shows that a landlord or owner of premises could not be held liable for money loaned to tenants or other occupants of the premises except by express direction. The foregoing law provides that a landlord should not be liable except pursuant to stipulation. An ordinary contract was but a naked pact (C. 2.3) and was not binding.

4.65.28. The same Emperors and the Caesars to Tuscianus Neo.

In cases of letting and hiring, account is taken of fraud and want of care in guarding the property, but not of accidents which could not be obviated.¹⁰

Given September 17 (294).

Note.

Inst. 3.24.6 says: "Where a man has promised to give hire for the use of clothes, silver or beast of burden, he is required to charge of it to show as much care as the most diligent father of a family shown in his own affairs; if he do this and still accidentally lose it, he will be under no obligation to restore either it or its value." For a fuller to lose property put in his charge by theft was considered to be due to his negligence, Ins. 4.1.15, and that was true also when a farmer fell out with his neighbor, who, in consequence cut down trees. D. 19.2.25.4. A farmer was bound to look after the farm buildings and take care to keep them in good repair; also to perform the regular agricultural operations in proper season. A man who undertook to do anything for hire was bound to do the work properly; a want of skill was negligence; if a man engaged to take in calves to pasture, or to mend or clean something, he was bound to answer for negligence, and any mismanagement from want of skill implied negligence; in fact it was apart of the contract that he warranted his skill as a workman. D. 19.2.9.5. He was not, however, liable for unavoidable casualty, as for instance, robbery. Laws 1 and 4 of this title; D. 19.2.9.4. In short, the hirer, or lessee, or contractor, was required to fully perform his contract in proper manner, as was true also on the part of the opposite party.

4.65.29. The same Emperors and the Caesars to Aurelius Julianus.

Since you say that the renter destroyed buildings which he received in good order, the president of the province will order the heirs, after an accounting between you is had, to restore them.

Note.

¹⁰ Blume penciled in after this rescript: "Also of culpa D. 13.6.5.15."

The age and condition of the building was to be taken into account in determining the damages. Bas. 20.1.91 note.

4.65.30. Emperors Theodosius and Valentinian to Florentius, Praetorian Prefect.

A curial shall not become a procurator or tenant of another's property, or a surety or guarantor (mandatory) of a tenant. We ordain that no rights shall accrue from such a contract to either a lessor or lessee.

Given at Constantinople April 7 (439).

Nov. Th. 9.

Note.

Curials, decurions, were members of the municipal senate. As such they had many duties during the later empire, and their position ceased to be an honor. In order to preserve them for performing their public functions, many things were forbidden them. The subject is fully considered in C. 10.32, and subsequent titles. Like and additional reasons led to forbidding soldiers to do what curials were forbidden to in the foregoing law. C. 4.65.31.

4.65.31. Emperor Leo to Aspar, Master of the Soldiery.

We forbid our soldiers to become tenants or procurators of another's property, or sureties, or guarantors (mandators) of tenants, lest they neglect their arms, betake themselves to rural work, and presuming upon the advantage which their military girdle gives them, become troublesome to the neighbors. They should be occupied with their arms, and not with private affairs, so that they may protect the state by which they are nourished from the hardships of wars, by being constantly with their troops and standards.¹¹

Given July 6 (458).

4.65.32. Emperor Zeno to Adamantius, City Prefect.

No one who received another's house, place, or workshop under lease is permitted to enter into litigation with another, who, subsequently (after the expiration of his lease) rents the same property from the owner, as though (such later lessee) were doing something illegal or prejudicial to the complainant; but owners may freely let their houses, workshops, or places to whomever they wish, and lessees shall be free from all molestation by reason thereof, unless, perchance, the claims of the complainant (the first lessee) are supported by a special agreement, in writing, recognized by law, and entered into with the owner or subsequent lessee. 1. And if anyone shall think to stir up a controversy contrary to these imperial commands, he shall, if he is a person in private station, be severely punished and suffer exile; if he is in the service of the state, he shall be punished by a fine of ten pounds of gold.

Note.

Bas. 20.1.93. says: "No one who has hired (leased) a house or shop or other place shall, after he has ceased to be a tenant, go to those who rented the property subsequently and say that they have damaged him, unless they have a contract with the owner of the premises, or with the subsequent tenant. If a man brings an action in violation hereof, he shall be severely punished and sent into exile; a man in the public service shall pay ten pounds of gold." Hunter 610, apparently wrongly interprets this law to mean that the

¹¹ [Blume] See also law 35 of this title; and C. 12.36.13.

offense here stated consisted of contesting the title of the landlord without yielding up possession. The next law and C. 8.4.10, deal with that subject.

4.65.33. The same Emperor to Sebastianus, Praetorian Prefect.

If lessees of another's property or persons who detain another's land by sufferance, or the heirs of these parties, do not restore such property to the owners who want it back, but wait until the final judgment in a lawsuit, they shall not only lose the property leased but shall also pay to the winning party the value thereof, as in a case where a party invades the property of another.

Given March 28 (484) at Constantinople.

Note.

Tenants by sufferance. A holding by sufferance is commonly treated as an innominate contract. It seems, says Buckland, Roman Law 522, to have originated in gifts by patrons to freedmen and clients of property which they might hold and enjoy, but not alienate, revocable at will. It was a gratuitous grant of land or goods, revocable at will. Though it had been agreed that the party might be held for a certain length of time or to a definite date, the grantor had a right to change his mind and recover the property when he wished. D. 43.26.2.2; 12. It had more the character of a gift or benefit than a contract, and differed from the former only in that it might be taken back at any time. D. 43.26.1.2; D. 43.26.14.

As it was a personal matter, it ended in a strictness on the death of the holder. In later law it was deemed continuing, and the heirs were bound, upon demand to restore it. C. 8.9.2. In classical law the remedy for recovery was by a special interdict (C. 8.9.2; D. 43.26), but later the action for instantaneous possession (C. 8.4.8 and 10) came to be applied. The instant law is stated more fully in C. 8.4.10.

4.65.34. (Synopsis in Greek).

The constitution grants permission to the lessor as well as to the lessee, both in Italy and in all the provinces, to cancel a lease within a year, without any penalty, for non-observance of the contract, unless they specially, by a pact, have released such right at the beginning of the lease, or unless they have renounced such right orally.¹²

4.65.35. Emperor Justinian to the Senate.

Although it is clear that former emperors enacted many laws as to soldiers who undertake to manage lands or houses of others, still since these laws have been disregarded, and soldiers, unmindful of the threats contained in the imperial constitution, have dared to undertake sordid ministrations of this kind, abandoning their public duties and the victorious standards, have gone to manage the property of others, and exhibit the terror of arms not to the enemy, but to their neighbors, or perchance to the pitiable tenants (colonos), whom they have undertaken to oversee, we have deemed it necessary to enact this imperial constitution in order to correct this situation fully and completely.

1. We, therefore, order that everyone serving under arms, whether above or below age—calling by the name of soldiers those who do service those who do service under the masters of the soldiers, and those who are enrolled in the eleven devoted schools (scholis) and those who serve as confederates under different adjutants (optiones)—shall in the future entirely abstain from managing another's property, and

¹² [Blume] See law 3 of this title and note.

they must know that from the very beginning of such contract, without any other act, or any decree, their military service shall cease, and they cannot regain their former grade, even by imperial favor or by the consent or permission of the (military) judge under whom they serve; to that when they undertake to manage rented property of others, they lose their service and their standing, having become rustics instead of soldiers, and persons without instead of with honor. And whatever they shall receive from the public treasury after undertaking to do so—which we entirely forbid—must be returned without delay or procrastination.

2. And persons who hereafter shall let their property to them must know, since our law is violated thereby, that they have no right of action against them, so that those who seek the property of others, by selecting a soldier as procurator, shall lose his own income.

3. Everyone shall have the right to make an accusation of the violation hereof before the property judge, and such an accuser shall be praised rather than decried. The punishment fixed for soldiers who disregard our orders and for those who shall permit them to manage their property shall apply in all future causes.

Note.

It is apparent in this constitution that reference is here made to head-tenants, conductors, lessees on a large scale, who acted as middlemen between the owners and the tenant or serf who cultivated the land, the latter of whom, after the third century, became virtually serfs, although, no doubt, some free tenants continued to exist. Most of the lands had accumulated in the hands of large landholders, and this tendency had been observed even under the Republic. See Reid, Municipalities of the Roman Empire 319-324; Buckland, Roman Law 91, 92, and 495, note 9. See further as to serfs C. 11.48 and subsequent titles. The constitution here speaks of soldiers managing the possessions of others “conductionis titulo” (by lease), which seems to imply that they actually rented the property, acting as middlemen, and again that they were hired as procurators. Hence, both terms must be understood to refer to one and the same thing. See also law 31 of this title.