

# The *Interdictum de Migrando* revisited

Paul DU PLESSIS

(*Université d'Edinburgh*)

## *Introduction*

D.43.32.1pr. (Ulp., *l.73 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<sup>1</sup>.*

The Praetor says: "If the man in question is not one of the objects included in the agreement between you and the plaintiff, according to which things introduced or imported into the dwelling in question, or born or made there, should be a 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 hypothec from taking him away from there<sup>2</sup>."

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<sup>1</sup> See O.LENEL, *Das Edictum Perpetuum*<sup>3</sup>, Leipzig 1927, §265 for a full reconstruction of the text of the interdict with literature. A *utilis* version of the *Interdictum de Migrando* is also mentioned in the texts, but its sphere of application seems to have been different. See, for example, D.43.32.1.3 (Ulpianus, *l.73 ad edictum*) *Si tamen gratuitam quis habitationem habeat, hoc interdictum utile ei competet*. Contrast D.20.2.5pr.

<sup>2</sup> English translations of all Digest texts in this article are taken from A.WATSON (ed.), *The Digest of Justinian* 2 vols. [Revised English Language Edition] (Philadelphia 1998) as adapted where the author does not agree with the translation. It is important to note that the original Roman-law texts alternate between the phrases *pignus* and *hypothec* without discrimination possibly owing to the interference of the

The *Interdictum de Migrando* was a Praetorian remedy only available to tenants of urban property<sup>3</sup>. It was a prohibitory interdict created in the late Republic, possibly by Servius Sulpicius Rufus<sup>4</sup>. The text of the interdict is preserved in a single passage from the Digest which forms part of a short title *De Migrando* (D.43.32). This passage was used by Lenel to reconstruct the wording of the interdict and it does not appear to have been altered by the compilers, though the term *actor* and the phrase *ei ... induxit* have formerly been suspected of interpolation<sup>5</sup>.

Before the working of this remedy can be explored, its context needs to be explained. When a tenant of urban property failed to pay rent on the agreed date, he breached the terms of the contract of lease between himself and the landlord. This breach entitled the landlord unilaterally to lock the tenant out of the property with a view to obtaining possession of the movables hypothecated by the tenant for the payment of rent in terms of the lease contract. Where the tenant wished to challenge the landlord's acquisition of possession over certain movables located in the rented property, he could use the *Interdictum de Migrando*. This remedy enabled the tenant in four circumscribed cases to remove certain movable property detained by the landlord on account of unpaid rent<sup>6</sup>. The four grounds on which the tenant could invoke the interdict were as follows:

- a. The object(s) detained by the landlord does not form part of an agreement with the landlord in terms of which "things introduced or imported into the dwelling in question, or born or made there" are hypothecated for the rent of the dwelling.

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compilers. I have attempted to translate all instances of a pledge without possession as a hypothec since this is not accurately reflected in the Watson translation.

<sup>3</sup> D.43.32.1.1 (Ulpianus, *l.73 ad edictum*) ... *nam colono non competit*.

<sup>4</sup> B.W.FRIER, *Landlords and Tenants in Imperial Rome*, Princeton 1980, p.106-107, suggests that the interdict was created c. 27 B.C.E., a plausible date given the appearance of the first commentary on it by the Augustan jurist, Labeo († c. 11 C.E.) in D.43.32.1.4.

<sup>5</sup> For a survey of possible interpolations, see F.WUBBE, *Res Aliena Pignori Data*, Leiden 1960, p.178-179, FRIER (as in note 4) p.106, note 117, R.MENTXAKA, *La Pignoracion de Colectividades en el Derecho Romano Clasico*, Bilbao 1986, § 34 and F.LA ROSA, *La Protezione Interdittale del Pignus e L'Actio Serviana*, in *Studi in Onore di Cesare Sanfilippo* vol 7, Milan 1987, p.281-307. All of the concerns about possible interpolations have since been resolved and the authors agree that the text is basically sound.

<sup>6</sup> On the prohibitory nature of the interdict, see WUBBE (as in note 5) p.178, p.183.

- b. The object(s) detained by the landlord forms part of such an agreement, but the rent has been paid.
- c. The rent has not been paid, but sufficient alternative security has been provided.
- d. It is the defendant's fault that security has not been provided.

The interdict was designed to cover a variety of circumstances. Logically, the first two grounds are concerned with the consequences of an agreement between landlord and tenant concerning the hypothecation of goods, while the final two grounds deal with issues of alternative security for payment of rent.

Among a number of studies on this legal remedy, two are particularly important<sup>7</sup>. In 1980, Bruce Frier in *Landlords and Tenants in Imperial Rome* argued that the legal rules of urban tenancy represent a body of specialist law largely developed for upper-class tenants who had the means and the social connections to enforce their tenancy rights in a court of law<sup>8</sup>. Frier used the interdict to demonstrate that the Roman law of urban tenancy did not operate solely in favour of landlords, but also supported (upper-class) tenants wishing to use the legal process to enforce their rights in tenancy<sup>9</sup>. Thereafter in 1986, Rosa Mentxaka in an extensive study, *La Pignoracion de Colectividades en el Derecho Romano Clasico*, examined the interdict in the context of a broader investigation into pledge arrangements in urban and agricultural tenancy in classical Roman law. Unlike Frier, Mentxaka's study did not use the interdict to prove a larger hypothesis, but it did much to establish the broader context in which it should be understood. While Frier's and Mentxaka's studies have contributed greatly to modern understanding of the *Interdictum de Migrando*, both focused almost exclusively on the legal theory underlying the interdict. More specifically, neither of these two authors examined the relationship between the interdict as

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<sup>7</sup> See also F.BETANCOURT, *Sobre la Pretendida Transmisibilidad de los Interdictos*, AHDE 53 (1983) p.45–76 at p.59–60, P.APATHY, *Mora Creditoris und Pignus*, in BENÖHR et al. *Iuris Professio – Festgabe für Max Kaser*, Vienna 1986, p.9–20 at p.10–11 and LA ROSA (as in note 5) p.281–307 on this interdict.

<sup>8</sup> FRIER (as in note 4) Chapter 5.

<sup>9</sup> FRIER (as in note 4) p.105–135. For an alternative view, see WUBBE (as in note 5) p.183.

an expression of the legal rules governing urban tenancy and glimpses of everyday practice visible from the sources<sup>10</sup>.

This article will revisit the theory and practice of the *Interdictum de Migrando* to establish its scope and function in the Roman law of urban tenancy by examining the relationship between the interdict and the contract of lease, the procedure used to enforce the interdict and by investigating two “cases” mentioned in Roman legal sources.

### 1. *The Interdictum de Migrando and the Contract of Lease*

The first two grounds on which the tenant could invoke the interdict referred to an agreement between the parties concerning the hypothecation of goods. It therefore seems prudent to investigate the Roman contract of lease as the larger context in which such an agreement would have functioned. Letting and hiring, one of the four named consensual contracts in Roman law, could be created with little formality. The parties merely had to achieve consensus on three essential points, namely the object of lease, the term and the amount of rent<sup>11</sup>. Details could be regulated at will, as long as it did not render the main agreement illegal and ancillary agreements (e.g. penalties for non-performance) could be added in the form of contractual pacts. Writing was not a requirement for lease and the agreement could remain entirely (or partially) unwritten. Non-legal sources show, however, that some forms of lease, e.g. building contracts, were commonly recorded owing to their complexity<sup>12</sup>. No written account of a lease of urban tenancy has survived, though various legal texts allude to clauses contained in such contracts<sup>13</sup>. Even though Roman leases could legally exist in an unwritten form, a written version of a

<sup>10</sup> Although the interdict was never replaced, it seems to have been used less frequently in the third century C.E. In D.43.32.1.2 Ulpian states: “*Cui rei etiam extra ordinem subveniri potest: ergo infrequens est hoc edictum.*” Compare FRIER (as in note 4) p.105–135 who argues that the increasing administrative jurisdiction of the *Praefectus Vigilum* may have contributed to the decline of the interdict.

<sup>11</sup> Consent could be expressed in a number of ways, not necessarily verbally or in the presence of the other party, see D.45.1.35.2, D.44.7.48 and D.19.2.14.

<sup>12</sup> A prime example is the famous “contract” for the construction of a wall in Puteoli, see P.J.DU PLESSIS, *The Protection of the Contractor in Public Works in the Roman Republic and Early Empire*, *JLH* 2004, p.287–314 at p.291–295. For the significance of the recording of contracts and other legal instruments, see E.A.MEYER, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice*, Cambridge 2004. For an interesting example, see the letter in Greek recorded in D.20.1.34.1.

<sup>13</sup> See, for example, the clauses mentioned in D.19.2.11.1, D.19.2.30.4 and D.19.2.29.

lease must have had some evidentiary value in a legal dispute as proof of the good faith underpinning the agreement for example. Consequently, it can be safely stated that the Roman conception of the “contract” (*lex contractus*) must have been rather complex and included both verbal and written elements<sup>14</sup>.

The tenant’s ability to pay the rent would have been the prime concern of the landlord when entering into a contract of urban tenancy<sup>15</sup>. Before agreeing on the amount of rent and the dates on which the rent had to be paid, the landlord had to ensure that the tenant was solvent and possessed sufficient (future) financial means to ensure the payment of rent. One way in which Roman law protected the landlord from the potential insolvency of the tenant was to provide a legal mechanism to establish a hypothec over his goods. This legal device seemingly first evolved in agricultural tenancy, but was already established in urban tenancy by the end of the first century B.C.E<sup>16</sup>. To understand the form and content of the hypothec, its historical antecedent in the contract of pledge needs to be understood. Pledge was classified in Roman law as one of the real contracts which came into existence when a debtor handed over possession of a piece of property as security for the repayment of a debt. During the course of the Republic, a variant of pledge (hypothec), which did not require the transfer of possession of the movable or immovable object, came to be recognised. It is conventionally agreed that the first case of a pledge without possession occurred in agricultural tenancy when tenants started to pledge their farm implements and future crops for payment of rent<sup>17</sup>. Given the appearance of the *Interdictum de*

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<sup>14</sup> See P.J.DU PLESSIS, *Between Theory and Practice: New Perspectives on the Roman Law of Letting and Hiring*, *Cambridge Law Journal* 65 (2006) p.423–437. Examples of such documents are the two *Sulpicii* Tablets recording the lease of spaces within a warehouse, TpSulp. 45–46 in G.CAMODECA, *Tabulae Pompeianae Sulpiciorum (TPSulp.) Edizione critica del’archivio puteolano dei Sulpicii* 2 vols., Rome 1999, p.122, p.125.

<sup>15</sup> This financial concern is, for example, visible in Cicero’s correspondence to Atticus about the choice of tenants for his tenement buildings, see B.W.FRIER, *Cicero’s Management of his Urban Properties*, *The Classical Journal* 74/1 (1978), p.1–6.

<sup>16</sup> MENTXAKA (as in note 5) § 38.

<sup>17</sup> See M.KASER and R.KNÜTEL, *Römisches Privatrecht* 17<sup>th</sup> ed. (*Juristische Kurz-Lehrbücher*) Munich 2003, § 31 III. An argument could be made that the hypothecation of farm implements (specific objects) together with future harvests

*Migrando* in c. 27 B.C.E., it can be safely concluded that this practice had migrated to the developing law of urban tenancy by the first century B.C.E.

Legal sources show that a hypothec could be created in one of two ways. First, the parties could make a secondary agreement in which certain goods were specified as the object of the hypothec. Thus, for example, in D.20.4.9pr.<sup>18</sup>, the jurist Africanus recounts a case where someone rented baths and contracted that a specific slave, named Eros, would form the object of the hypothec to secure payment of rent. Similarly in D.20.3.4<sup>19</sup>, the jurist Paul mentions a case of a money loan where the debtor listed specific assets which formed the object of the hypothec. Apart from an agreement listing specific goods to be hypothecated, Gaius, a jurist of the second century C.E., mentions another way in which a hypothec could be created:

D.20.1.15.1 (Gaius, *l. sing. 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, 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.*

When it is said that the creditor should verify, when he makes an agreement, that the thing is *in bonis* of the debtor, this applies to a special

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(speculative objects) may be the origin of the two different forms of hypothec later visible in urban tenancy.

<sup>18</sup> 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 mortgaged (i.e. hypothecated) to the lessor until the rent was paid. Before the first of July he mortgaged 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 mortgaged, nothing was yet owing for rent, even then the position of Eros was that he should not be released from mortgage without the landlord's consent. So the landlord should have priority.

<sup>19</sup> D.20.3.4 Paul, Replies, book 5: As Titius wanted to borrow money from Maevius, he promised to repay Maevius the amount, listing certain assets to be mortgaged (i.e. hypothecated). He sold some of the listed property and then received the loan. The question was whether the property sold before the loan was also bound to the creditor. Paul answered that since, even after he had promised to pay Maevius, the debtor was free not to take the loan, the mortgage must be taken as entered into at the time when the loan was made. Hence one must enquire what property was part of the debtor's estate at that moment.

agreement, not to the [contractual clause] commonly inserted in *cautiones* that beside the property specially hypothecated, the debtor's assets, present and future, are also bound as if especially hypothecated.

This text does not seem to have undergone extensive alterations and reflects classical Roman law<sup>20</sup>. Gaius is describing two different types of hypothec: a) one specially made where it is important to establish whether things are *in bonis* of the tenant at the time of its creation and b) a general contractual clause which served to hypothecate the debtor's remaining assets and where the question of whether the goods are *in bonis* of the tenant was unimportant<sup>21</sup>. There can be little doubt that the first type described by Gaius refers to a specific agreement where assets were listed by the parties as the object of the hypothec. The second type, the contractual clause, requires further investigation. Gaius does not appear to be quoting the precise wording of such a common contractual clause (in as much as standard contractual clauses may be said to have existed in Roman law), but merely giving the gist of it. The key to understanding this clause is the phrase *cetera ... adquisierit*. The function of the contractual clause was to hypothecate the assets (present or future) of the tenant to ensure payment of the debt. When the gist of this clause is compared to the wording of the earlier *Interdictum de Migrando* in D.43.31.1.1, striking similarities appear:

“...*de quibus inter te et [factorem] convenit, ut, quae in eam habitationem qua de agitur introducta importata ibi nata, factave essent, ea pignori tibi pro mercede eius habitationis essent,...*”

“... the agreement between you and the plaintiff, according to which things introduced or imported into the dwelling in question, or born or made there, should be a hypothec to you for the rent of the dwelling...”

There can be little doubt that the agreement mentioned in the first two grounds on which a tenant could invoke the *Interdictum de Migrando* referred to the general contractual clause mentioned by Gaius which served to hypothecate the (current and future) assets of

<sup>20</sup> See MENTXAKA (as in note 5) § 68.

<sup>21</sup> For two further examples of this type of contractual clause, see D.20.1.32 and D.20.4.11.2. MENTXAKA (as in note 5) § 34 observes that the motive for the statement about goods being *in bonis* of the tenant may be that Ulpian was drawing a comparison between the requirements for the *Interdictum de Migrando* and those for the *Actio Serviana*.

the urban tenant to secure payment of rent<sup>22</sup>. In fact, given the similarity of the language, it may even be speculated that Gaius used the wording of the interdict as the basis of his discussion.

It is not possible to date the appearance of this contractual clause, since the available sources do not provide sufficient information. With that said, though, a rough guess may be ventured. It is conventionally assumed that the consensual contract of lease (*locatio conductio*) arose in the second half of the second century B.C.E. if not before (c. 150 B.C.E.)<sup>23</sup>. This leaves a relatively short period of time in which much of the Roman law of letting and hiring came into existence. If the *Interdictum de Migrando* was created c. 27 B.C.E. and the contractual clause on hypothec is mentioned in it, this means that such a clause must have come into existence between c. 150 – c. 27 B.C.E. It is impossible to narrow down this period further, since not enough information is available, though it may be pointed out that many developments in the Roman law of urban tenancy seem to have occurred in the first century B.C.E.<sup>24</sup>.

It may well be asked why such a clause was required if parties could create an agreement listing specific objects hypothecated to ensure payment of rent. The listing of a specific object to be hypothecated for the payment of rent has various drawbacks. While hypothecation did not deprive the debtor of the use or ownership of his property, it secured a preferential real right for the creditor. This limited the debtor's ability to dispose of the property without notification. Furthermore, listing specific goods as the object of a hypothec did not take account of fluctuations in value, which could render the hypothec deficient or worthless (e.g. through the death of a slave). Thus, the inclusion of a contractual clause hypothecating the debtor's current and future assets beside a specific agreement of hypothec would have provided added financial security for the creditor.

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<sup>22</sup> MENTXAKA (as in note 5) § 34 argues that these contractual clauses reveal some similarity with those found in agricultural tenancy. Compare LA ROSA (as in note 5) p.293.

<sup>23</sup> A.WATSON, *The Law of Obligations in the Later Roman Republic*, Oxford 1965, p.100–101. Compare A.WATSON, *Law Making in the Later Roman Republic*, Oxford 1974, p.31–82.

<sup>24</sup> See P.J.DU PLESSIS, *Subletting and the Roman law of Letting and Hiring: Interpreting C.4.65.6*, *RIDA* 52 (2005) p.131–144.



Given that the issue of hypothecation was not one of the essentials on which the parties had to agree for the contract of lease to come into existence, it must be assumed that the contractual clause took the form of an ancillary agreement which was created at the same time as the contract of urban tenancy<sup>25</sup>. Initially an explicit agreement was required, but by the end of the first century C.E., the jurist Neratius (in D.20.2.4.) indicates that it had become an implied contractual term. Thus, in the space of approximately one century, this contractual clause had changed from an express agreement to an implied term read into all contracts. This raises two questions. First, if an explicit agreement about the hypothecation of the tenant's goods was initially required, what would the content of such an agreement have been? Secondly, what motivated the change from express to implied agreement?

The first question relates to the content of the contractual clause governing the hypothec. The best evidence is the wording of the interdict provided by Ulpian in D.43.32.1.1<sup>26</sup>. There must have been an agreement (*conventio*) between landlord and tenant whereby goods ... *introducenda importata ibi nata, factave essent, ea pignori tibi pro mercede eius habitationis essent*<sup>27</sup>. The text of the interdict suggests that this clause was of a general nature and that goods were not specified. Does this therefore mean that this clause served to hypothecate all present and future goods of the tenant to secure payment of rent? The answer to this question seems to be no and there are two pieces of evidence to support this contention. First, as the wording of the interdict shows, the contractual clause was concerned with certain goods (...*ex his rebus...*). Secondly, the wording of the

<sup>25</sup> No doubt one of the reasons why the pledge (and hypothec) could be created with such ease was as Gaius observed in D.20.1.4 "Gaius, Action on Mortgage, sole book: A mortgage is made by consent, when someone agrees that his property will be bound by way of a mortgage for some obligation. As in consensual contracts, it does not matter what words are used. So if an agreement for a mortgage not in writing can be proved, the property will be bound as agreed. ...".

<sup>26</sup> LENEL (as in note 1) also largely relied on this text for his reconstruction of the wording of the interdict.

<sup>27</sup> The requirement of an explicit agreement also suggests that parties could "opt-out" or could employ alternative means to secure the payment of rent, see D.20.6.14. An example of such an "opt-out" is visible in a related issue on subletting, an implied contractual term from the start, which was regulated differently in the *leges horreorum* (number 145) in S.RICCOBONO *et al.* (eds.), *Fontes Iuris Romani Antejustiniani*, Florence 1940 – 1943, 3 vols, III p.456–457.

clause as visible from the text of the interdict refers to the term *invecta et illata*. Although this term was not defined in Roman legal sources, its content was specific and legal sources list various objects which did not count as such<sup>28</sup>. Research has also shown that this term had a specific content in urban tenancy<sup>29</sup>. The term *invecta et illata* etymologically referred only to movable property, but not all movable property was included *per se*<sup>30</sup>. The object described in the *Interdictum de Migrando* is a “homo”, that is a slave belonging to the tenant. The use of this term (and the economic function of the interdict) suggests that the interdict was concerned with valuable movable property, but it is worth noting that a number of minor items could also collectively make up a valuable asset. Goods casually introduced into the rented property did not fall into this category<sup>31</sup>, nor did (by analogy) things which did not belong to the tenant, but which were kept under contract for their owners<sup>32</sup>. Things that the owner was unlikely to hypothecate specifically (e.g. household equipment, clothing, slaves employed in essential services or with whom the owner was on affectionate terms including a mistress, a natural or foster child) were also excluded<sup>33</sup>. Finally, property which could not be privately owned<sup>34</sup> and certain types of protected property (e.g. property which formed part of a dowry or belonged to a ward) could not be hypothecated. Thus, the term *invecta et illata* referred to a clearly circumscribed category. The *conventio* mentioned in the interdict therefore must have referred to an agreement to include this hypothec provision, which applied to a circumscribed category of objects, in the contract of lease<sup>35</sup>.

If the contractual clause which served to hypothecate the tenant’s current and future assets did not list individual objects, but merely referred to *invecta et illata* - an undefined, but circumscribed category

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<sup>28</sup> For a survey of the different terms used in Roman legal sources to describe *invecta et illata*, see MENTXAKA (as in note 5) § 19 and LA ROSA (as in note 5) p.283, p.290. An entire Digest title (D.20.3) is devoted to exceptions.

<sup>29</sup> LA ROSA (as in note 5) p.290s.

<sup>30</sup> D.20.2.6.

<sup>31</sup> D.20.2.7.1. See FRIER (as in note 4) p.109.

<sup>32</sup> See D.43.32.2 and FRIER (as in note 4) p.110–111.

<sup>33</sup> D.20.1.6, 8.

<sup>34</sup> D.20.2.6 – Freed slaves.

<sup>35</sup> WUBBE (as in note 5) p.186. Compare LA ROSA (as in note 5) p.287 who suggests that the content of the *conventio* was not to permit “lock-out” in case of non-payment.

of goods – did it affect the way in which the tenant could utilise property falling within this category? The answer to this question is visible from two texts:

D.20.2.6 (Ulpianus, *l. 73 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.

D.20.2.9 (Paulus, *l. sing. de officio praefecti vigilum*):

*Est differentia obligatorum propter pensionem et eorum, quae ex conventionem 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.

Both D.20.2.6 and D.20.2.9 are essentially free from interpolation<sup>36</sup>. These texts, attributed to Ulpian and his contemporary Paul, refer to a period when the contractual clause governing the hypothecation of the tenant's current and future assets had long since become an implied contractual term. As both texts show, the clause created nothing more than a type of "floating charge". Even though an object fell within the agreed category of *invecta et illata*, this does not mean that the tenant could not use it or indeed dispose of it as he saw

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<sup>36</sup> FRIER (as in note 4) p.113, p.119s.

fit. It was only once the tenant had been locked out on account of non-payment of rent and the contractual clause had come into effect that the tenant was no longer entitled to dispose of the property. Furthermore, it could be argued that Paul's reference to the Republican jurist, M. Cocceius Nerva († 33 C.E.) shows that even before this contractual clause had become an implied term, the tenant was already free to deal with the goods covered by it as he saw fit. It seems that Nerva was derided for not observing the proper procedure used for the interdict (i.e. raising the matter in front of the Praetor using the *Interdictum de Migrando*) or for freeing a slave.

A crucial point in the wording of the interdict is the phrase "goods brought in as hypothec" (... *ei, qui eum pignoris nomine induxit, ...*)<sup>37</sup>. Ulpian defines this term as follows:

D.43.32.1.5 (Ulpianus, *l.73 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 tenant or that it should be a hypothec, but that it should have been brought in by way of a hypothec. So even if the property belongs to someone else and of the kind that may not be retained by way of a hypothec, still if it has been brought in by way of hypothec, the interdict will have scope. But what has not even been brought in by way of hypothec cannot be retained by the landlord either.

This text is generally sound, though the phrase *sed ... sit* has been suspected of interpolation<sup>38</sup>. Ulpian states that the wording of the

<sup>37</sup> LA ROSA (as in note 5) p.293s. argues that the phrase *pignoris nomine inducere* is in opposition to the *conventio* mentioned at the start of the text. Thus, while the *conventio* still refers to the initial position where the parties had to make an explicit agreement about *invecta et illata*, the phrase *pignoris nomine inducere* refers to the later position existing in the time of Ulpian when an explicit agreement was no longer required. While there is some merit to this argument, the wording of the text (i.e. the absence of any linguistic markers indicating that Ulpian was trying to draw a distinction between the *conventio* and the phrase *pignoris nomine inducere*) makes it difficult to prove.

<sup>38</sup> FRIER (as in note 4) p.112, LA ROSA (as in note 5) p.292s.

interdict does not require the goods a) to be *in bonis* of the tenant or b) to be the actual hypothec. Neither of these two examples are controversial if read in light of Gaius' statement in D.20.1.15.1. The contractual clause to which the interdict referred did not require the listing of specific goods to be hypothecated for the payment of rent. The parties merely agreed on a certain broad "category" of objects (i.e. the *invecta et illata*). Thus, it did not matter whether the goods were *in bonis* or were not the actual hypothecs. It was only in cases where specific objects had been hypothecated that the creditor had to ascertain whether these goods were *in bonis conductoris*<sup>39</sup>. Failure to ensure this would render the hypothec (of specific property) worthless. Ulpian's final example presents more of a challenge. Goods which are a) *aliena* and b) of the kind which may not be retained *pignoris nomine*, will still fall within the scope of the interdict's application if they have been brought into the rented property *pignoris nomine*. The term *res aliena* has been translated in the Watson edition of the Digest as "property which is different", but Frier's translation as "property belonging to someone else" is preferred in light of D.43.32.2<sup>40</sup>. The second example, goods which may not be retained *pignoris nomine*, but which has been introduced in such a way is more difficult to explain. In Frier's view, this scenario referred to a case of fraud perpetrated by the tenant. Thus, for example, if goods were introduced *pignoris nomine* even though the tenant knew that they could not be held as such, since they fell outside the category of things allowed as *invecta et illata*, he would still be able to use the interdict to secure their release<sup>41</sup>. Thus, it seems reasonable to conclude that the phrase "goods brought in by way of a hypothec" referred to the broad "category" of goods collectively covered by the term *invecta et illata*.

The final question relates to the reasons why the contractual clause creating the hypothec changed from one requiring an explicit agreement to an implied contractual term. The change may be observed in a number of legal texts, the earliest of which is ascribed to Neratius:

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<sup>39</sup> Compare D.20.3.4 quoted in note 19.

<sup>40</sup> FRIER (as in note 4) p.110–112. This is also the sense of the Bas.60.20.5 in G.HEIMBACH (ed.) *Basilicorum Libri LX*, Leipzig 1833–1897.

<sup>41</sup> FRIER (as in note 4) p.112.

D.20.2.4 (Neratius, *l.1 membranarum*):

*Eo iure utimur, ut quae in praedia urbana inducta illata sunt pignori esse credantur, quasi id tacite convenerit: ...*

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

This text appears to be free from interpolation<sup>42</sup>. Neratius' view on the matter was followed by Ulpian and his contemporary, Paul, in the third century C.E. and was also confirmed in law by an Imperial rescript from the reign of the Emperor Alexander Severus in a time when Ulpian is known to have played an important role in the Imperial bureaucracy.

D.20.2.3 (Ulpianus, *l.73 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, inn, 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.

D.2.14.4pr. (Paulus, *l.3 ad edictum*):

*Item quia conventiones etiam tacite valent, placet in urbanis habitationibus locandis invecta illata pignori esse locatori, etiamsi nihil nominatim convenerit*<sup>43</sup>.

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 deemed hypothecated for the landlord even though nothing is expressly agreed.

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 hypothec to the owners

<sup>42</sup> MENTXAKA (as in note 5) § 3.

<sup>43</sup> Although the text is possibly abbreviated, its content does not appear interpolated, see MENTXAKA (as in note 5) § 25.

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 hypothec<sup>44</sup>.

Although there is some evidence of manipulation in D.2.14.4pr., the core of the text reflects classical Roman law<sup>45</sup>. C.4.65.5 seems to be free from interpolation<sup>46</sup>. When these texts are read chronologically, there is a suggestion that what started out as juristic opinion (...*eo iure utimur*...) in the early second century C.E. finally became settled law (...*certi iuris est*...) in the third century C.E. It is also interesting that Neratius' original view is expanded by Ulpian to include warehouses, inns and (urban) areas<sup>47</sup>. The fact that Ulpian ascribes the view also (*etiam*) to Neratius indicates either that he was relying on a further statement (the original of which has not been preserved in the Digest<sup>48</sup>) or that he was interpreting Neratius' use of the term *praedia urbana* to include these specific types of urban property. Ulpian's statement also contains a hint of a scholarly dispute about the matter. The fact that he deems it necessary to include the statement that Neratius' view is the better one (...*quod verius est*...) suggests that not everyone agreed with him on the matter. To that end it may be useful to consider epigraphic evidence setting out commercial practice in Roman warehouses. Two citations from *leges horreorum* dating from the reign of the Emperor Nerva (96–98 C.E.) state the following:

*Quae in his horreis invecta inlata [erunt, pignori erunt horreario, si quis pro pensionibus]us satis ei [non fecer]it<sup>49</sup>.*

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.

<sup>44</sup> English translation of C.4.65.5 taken from FRIER (as in note 4) p.229.

<sup>45</sup> MENTXAKA (as in note 5) § 25.

<sup>46</sup> FRIER (as in note 4) p.110.

<sup>47</sup> LA ROSA (as in note 5) p.298 argues on the basis of D.20.1.34pr. that the application of the legal rule on *invecta et illata* was extended in the classical period from cases of urban tenancy involving space rented for personal use to those involving space rented for commercial use. This seems plausible.

<sup>48</sup> See, for example, D.20.2.4.1 where Neratius speculates whether stables which are not adjacent to a house classify as urban property. Compare MENTXAKA (as in note 5) § 20.

<sup>49</sup> FIRA, 3 (as in note 24) p.455s.

*[Quae in his horreis i]n vecta in la[ta importata erunt, horreario pig]nori erunt d[onec satis ei factum non sit aut pensi]o solvatur<sup>50</sup>.*

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.

If these *leges* reflect the law of the period (and there is no reason to suspect otherwise), then they provide a glimpse of the law in the time when, as Neratius stated above, hypothec in urban tenancy was becoming an implied term in all contracts. It is clear that neither of these two provisions can be said to regulate the matter fully. In fact, they are nothing more than general statements. As argued elsewhere, such general statements contained in these *leges* governing the letting and hiring of stalls in a warehouse must have been supplemented by individual agreements between the *horrearius* and his customers containing specific issues<sup>51</sup>. Thus, for example, the clauses mentioned above do not contain an agreement which enabled the landlord to sell the goods in lieu of unpaid rent (the *pactum de vendendo*<sup>52</sup>). The transition from express to implied provision is thus already visible in these clauses.

No clear answer can be given why the landlord's hypothec over the tenant's goods became an implied contractual term, since the available sources do not provide any indications of the motives for legal change<sup>53</sup>. Any investigation into this question therefore can be little more than speculation. Mentxaka has suggested that the clause governing hypothec became an implied contractual term because the law of pledge became more generalised and because the declining socio-economic position of tenants forced them to accept such a contractual term as standard<sup>54</sup>. The first part of this hypothesis appears to hold some elements of truth. If the contractual clause did not require the identification of specific goods and the "categories" of permissible objects included in the scope of such a provision became fixed in law over time, a change from an explicit agreement to an

<sup>50</sup> *FIRA*, 3 (as in note 24) p.457.

<sup>51</sup> P.J.DU PLESSIS, *The Roman Concept of Lex Contractus, Roman Legal Tradition* 3/1 (2006), p.79–94.

<sup>52</sup> It only became an implied term in the late classical period according to KASER/KNÜTEL (as in note 17) § 31.5.bb.

<sup>53</sup> Compare A.WATSON, *The Spirit of Roman Law*, Athens, Ga./London 1995, p.206.

<sup>54</sup> MENTXAKA (as in note 5) § 38.



implied term would not have caused any major legal complications. An explicit agreement only has value as long as there are parties choosing to modify it or to “opt out” of it. Once it becomes standard, an explicit agreement becomes unnecessary, since most parties will accept it as a matter of course. The second part of Mentxaka’s hypothesis is more difficult to sustain, since it relies on a grand narrative about the declining social status of tenants and their ability to use legal remedies to protect their rights in tenancy. The link between hypothecation becoming an implied contractual term and the socio-economic status of tenants is tenuous at best. A myriad of other reasons may be listed (e.g. commercial needs, ease of use) why this could have occurred.

## 2. *Issues of procedure*

Establishing the point in the contractual process where a tenant would have used the *Interdictum de Migrando* also sheds light on the contractual clause at the heart of this legal remedy. The wording of the interdict shows that it was triggered by the non-payment of rent<sup>55</sup>. Although much is known about the practice of rental payment in urban tenancy, e.g. that contracts were usually concluded for a period of five years (the *lustrum*) and that rent could be paid weekly, monthly or annually, the legal sources do not divulge whether non-payment of rent was in itself sufficient to trigger the circumstances leading to the application of the interdict or whether the landlord was legally required to notify the tenant who went into arrears<sup>56</sup>. Frier has argued that since the payment of rent was one of the essentials on which the parties had to agree for the lease to come into existence and since the legal sources do not indicate any system of notification, it must be assumed that the non-payment of rent on the agreed date constituted a sufficient breach of the contract to enable the landlord to act unilaterally<sup>57</sup>. Although it is not explicitly stated in the wording of

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<sup>55</sup> The application of the interdict seems to have been extended in the second century C.E. to include other contractual obligations which the tenant had to fulfil, see D.20.2.2. It is difficult to see how the non-fulfilment of these would have triggered the application of this interdict unless time-limits were attached to their fulfilment.

<sup>56</sup> See W.LITEWSKI, *Die Zahlung bei der Sachmiete (vor oder nach Ablauf der Mietzeit) im römischen Recht*, *TvR* 70 (2002) p.229–249.

<sup>57</sup> His argument is largely based on a reading of C.4.65.3 which lists non-payment of rent as a ground for expulsion of the tenant, see FRIER (as in note 4) p.70–82.

the interdict, it is clear that the tenant would use it to release goods detained by the landlord. This has led to the conclusion that non-payment of the rent on the agreed date gave the landlord the right to self-help in the form of a lock-out. The practicalities of a lock-out (albeit in a different context) are mentioned in passing in D.19.2.56:

D.19.2.56 (Paulus, *l. sing. de officio praefecti vigilum*):

*Cum domini horreorum insularumque desiderant diu non apparentibus nec eius temporis pensiones exsolventibus conductoribus aperiri 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.

This text contains some traces of manipulation<sup>58</sup>. It is taken from Paul's commentary on the office of the *Praefectus Vigilum*, a public official who was involved in the general administration of cities. The context of this text points to the existence of an administrative forum for matters relating to urban tenancy which could deal with related matters outside the normal forum of the court room. Unfortunately, too little information exists to speculate about the duties of the *Praefectus Vigilum* in the context of urban tenancy. The text focuses on the consequences of a lock-out. If, after a period of two years, a tenant has not returned, the landlord may open up the locked premises to take an inventory of its contents. It is interesting to note that while the lock-out apparently did not require any formality, the law required the landlord to observe a period of two years as well as to attend a preliminary hearing in front of the *Praefectus Vigilum* before the apartment could be opened. It is important to note, however, that the lock-out discussed in this text would probably not have applied in the same form in the case of non-payment of rent. The case described here deals with a specific scenario where the tenant has been absent for a protracted long period of time.

The next stage in the process depended on the nature of the hypothec arrangements included in the contract of lease. If the parties

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<sup>58</sup> See FRIER (as in note 4) p.133.

made a hypothec agreement listing specific goods, these would be attached (presumably using the *actio serviana*) and would be dealt with in terms of the agreement between landlord and tenant. The important question is whether such a hypothec agreement listing specific goods would have been supported by a general contractual clause stating that current and future assets of the tenant were hypothecated for the payment of rent. Since no written contract of urban tenancy has remained to support such a contention, it must remain little more than speculation. With that said, though, it would have made financial sense to include both in a contract of urban tenancy (especially where the agreement required the payment of a significant sum of money e.g. the renting of baths or an entire tenement building) as suggested by Gaius in D.20.1.15.1 (... *etiam bona teneantur debitoris* ...). Merely relying on the contractual clause would have rendered the landlord financially vulnerable (especially where specific objects listed turned out to be less valuable), since he would have had no way of establishing whether the tenant had sufficient goods to cover the remainder of the debt owed until such time as non-payment of the rent forced the landlord to lock the tenant out and to take an inventory of the goods inside the rented apartment.

A statement by Ulpian sheds light on the next stage in the process:

D.43.32.1.4 (Ulpianus, *l.73 ad edictum*):

*Si pensio nondum debeatur, ait Labeo interdictum hoc cessare, nisi paratus sit eam pensionem solvere. Proinde si sexmenstris 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*<sup>59</sup>.

Even if the rent is not yet due, Labeo says that this interdict is inapplicable unless the tenant 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

<sup>59</sup> There is evidence of some manipulation in this text, see FRIER (as in note 5) p.116.

has not yet elapsed. For since hypothecs are given for the entire lease, it follows that one should say the interdict does not apply unless they are released.

Thus, following the lock-out, the tenant must pay the rent before he will be entitled to use the interdict. The text also makes it clear that not only the rent owing needs to be paid, but all the rent outstanding for the remaining period of the lease<sup>60</sup>. The reason for this lies in the purpose of the interdict as stated in D.43.32.1.1. The function of the interdict was to aid those tenants wished to move. Thus, by paying not only the rent due, but also the rent outstanding for the remainder of the term of lease, the tenant indicated his intention to terminate the contract and to move elsewhere. This would also entitle him to invoke the *Interdictum de Migrando* to have the goods detained by the landlord released.

### 3. Two examples

The *Interdictum de Migrando* lists four grounds on which a tenant of urban property may could it. Three of these grounds involve claims that a) the rent has in fact been paid, or b) the rent has not been paid, but alternative security has been provided, or c) that it is the defendant's fault that security has not been provided. When these three scenarios are read together, there is a suggestion that the wording of the interdict may have been drafted to deal with complex contractual chains involving not only landlord and tenant, but also third parties. More specifically, a claim that the rent had in fact been paid (to a third party e.g. a contractual middleman or a slave collector), but without the knowledge of the owner of the rented property, who then proceeded to lock the tenant out or that a third party (*actor*) had taken alternative security for the payment of rent from the tenant (or had neglected to do so when offered) without relaying the state of affairs to the owner of the property may conceivably all fall within the scope of these three grounds. To that end, two "cases" mentioned in the legal texts will be analysed in an attempt to shed light on the working of the interdict.

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<sup>60</sup> Compare D.20.1.14pr.

The first example is taken from D.13.7.11.5, a difficult text attributed to the late classical jurist Ulpian<sup>61</sup>.

D.13.7.11.5 (Ulpianus, *l.28 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, pignericia 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 conduxit: 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*<sup>62</sup>.

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 landlord, 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.

The first part of this text states a general rule, namely that money is deemed to have been paid by law if it is paid either to the creditor personally or with his consent to persons legally bound to him. This is followed by two examples from the realm of urban tenancy, one where someone had rented a room within a house rented by a third party from the owner, the other where someone had rented an apartment within an apartment building which had been rented by a primary tenant *en bloc* with the view to make a profit by renting the

<sup>61</sup> See FRIER (as in note 5) p.124–132 for an extensive discussion of this text with an overview of earlier literature on its interpretation.

<sup>62</sup> There is some evidence of manipulation in the text, see FRIER (as in note 5) p.124–132.

spaces to individual secondary tenants at a profit. This text explores whether the *invecta et illata* of secondary tenants (with whom the owner/landlord has no contractual relationship) may be said to be pledged (hypothecated?) for the payment of the primary tenant's rent. Ulpian concludes that the goods of secondary tenants are only bound in proportion to their liability for rent of their respective flats. His rationale, stated at the very end of the text, is both a financial and a legal one. The owner/landlord should derive benefit from his contract with the primary tenant, not from the latter's contracts with secondary tenants.

While it seems likely that Ulpian's example is a theoretical one, the practical consequences of this business arrangement require closer inspection. For the purposes of this article, the second example will be given more prominence. Primary tenants generally rented the entire tenement building for a period of five years (the normal duration of such contracts) with an agreement to pay the annual rental instalment at the start of the Roman "financial year" (1 July)<sup>63</sup>. The contracts between the middleman and the secondary tenants could stipulate diverse dates of rental payment (daily, weekly, monthly), but the cumulative effect of this was that the primary tenant paid out a significant amount of rent to the owner at the start of the year and then had to ensure that he collected sufficient rent (and profit) during the course of this year to pay next year's instalment as well as to recover his expenditure. This was part and parcel of the "financial risk" inherent in such contracts and was a method whereby the owner/landlord ensured a steady income on his investment.

At this point it becomes necessary to investigate the nature of the hypothec to which Ulpian is referring in this text. In the context of urban tenancy a hypothec could be created in one of two ways, namely either by entering into an agreement listing a specific object to be hypothecated to secure the repayment of the debt or by including a general contractual clause into a tenancy agreement whereby certain categories of goods were deemed to be hypothecated for the payment of rent. The text under discussion does not provide sufficient information to establish with certainty what the hypothec arrangements between owner and primary tenant were, but Ulpian's use of the term *frivola mea* (my odds and ends) would suggest that a

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<sup>63</sup> FRIER (as in note 5) p.34–39.

general contractual clause existed in contracts between primary and secondary tenants. If we assume that by the time of Ulpian in the third century C.E., such general hypothecs over the *invecta et illata* had become implied contractual terms, the primary tenant would therefore have secured a real right over the movables of his (secondary) tenants residing in the tenement building to the extent of their debts for rent owed through the working of the implied contractual term. The question remains whether such a theoretical right would have served any purpose to the owner. This is where the text becomes ambivalent as it stresses that the owner should obtain benefit from his contract with the primary tenant, not indirectly from the contracts between primary and secondary tenants. It seems safe to conclude that such a right would not have been of any value to the owner, nor would it have been to his benefit to rely purely on such a contractual clause in any contract between him and the primary tenant. It seems unlikely that the personal goods of the primary tenant would have been sufficiently valuable to cover a significant annual rental payment due to the owner at the start of the financial year. While in theory the owner/landlord would of course have a hypothec indirectly over the cumulative goods of all the secondary tenants, it is debatable how readily enforceable such a hypothec would have been, especially since the value of the goods would not have been known until it were enforced through lock-out. The hypothec which the owner/landlord had over the *invecta et illata* of the primary tenant was nothing more than a theoretical right. In practice, the security for the payment of rent would have been obtained in a different manner as demonstrated by the following text:

D.19.2.13.11 (Ulpianus, *l.32 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. ...*<sup>64</sup>

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

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<sup>64</sup> There are some evidence of manipulation in this text, see FRIER (as in note 5) p.165–167.

obligated property on his behalf during the earlier lease; his agreement will be required afresh. ...

Nothing in the palingenetic context of this text suggests that it is in any way concerned specifically with urban tenancy or indeed with the case of subletting mentioned in the previous text<sup>65</sup>. However, the possibility that third parties could guarantee rental payment on behalf of the tenant as described in this text may have served as one of the alternatives to securing a general hypothec over the (potentially invaluable) property of the primary tenant or indirectly over the cumulative property of the secondary tenants living in the tenement building.

The final example is:

D.20.4.13 (Paulus, *l.5 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*<sup>66</sup>.

I sold you an 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 pledges (hypothecs?) 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.

This text deals with a provision in a contract of sale of a tenement building. A clause in the contract provided that the income generated by the tenement building in the year following the sale should go to seller, while the income of the year thereafter would go to the purchaser. The question occupying the jurists is the interpretation of

<sup>65</sup> See O.LENEL, *Paligenesia Iuris Civilis* 2 vols., Graz 1960.

<sup>66</sup> Although there is some evidence of manipulation in this text, its core seems sound, see MENTXAKA (as in note 5) § 28.



this clause. Nerva and Proculus make two observations on the matter, both of which rely on the premise that the parties had not regulated the matter in detail. Where the cumulative value of the pledges of the tenants living in the tenement is sufficient to cover the rental income of the tenement for two years, there will be no issue. Where the cumulative value of the pledges is insufficient, however, it should cover the loss of the seller first and, if anything is left over, the purchaser's loss will be covered. Paul adds that the interpretation of this verbal provision will be a question of fact. One point made in this text is the issue of the cumulative value of the pledges of the tenants residing in the tenement. It may well be asked what the nature of the pledge arrangement in this example would have been. It could either have been an agreement listing a specific object or merely a contractual clause. The fact that the text contains the phrase... *pignorisque ab inquilino datorum* ... suggests that the pledge arrangement referred to in this case is not one involving a contractual clause. In fact, the phrase *pignoris datio* suggests actual pledges physically handed over as security for the payment of rent. This text is therefore important for at least two reasons. First, it demonstrates a different commercial practice whereby actual pledges were handed over instead of relying on a general contractual clause. Secondly, it shows that an agreement lacking detail could be detrimental to one of the parties.

#### *Conclusions*

An analysis of the *Interdictum de Migrando* has brought new information to light. It has shown that this interdict was, among other things, introduced to deal with difficulties arising from a contractual clause generally inserted in contracts of urban tenancy which served to hypothecate the tenant's current and future assets for the payment of rent. Although the precise date when this clause was first introduced into urban tenancy cannot be established, it seems to have been created somewhere in the period c. 150 – 27 B.C.E., possibly from an earlier model used in agricultural tenancy. Such a clause did not list specific goods to be hypothecated for the payment of rent. Instead, it merely referred to *invecta et illata*, a circumscribed category of goods which could be introduced into a rented property *pignoris nomine*. Although the parties agreed that such a category of goods would be hypothecated for the payment of rent, this did not

affect the tenant's ability to dispose of goods falling within this category during the course of the term of lease. It was therefore nothing more than a "floating charge". Only once the tenant defaulted on the payment of rent and the landlord enforced his right of lock-out did it become impossible for the tenant to dispose of objects falling within this category. If he wished to liberate objects from the rented property, he had to use the *Interdictum de Migrando*. The contractual clause hypothecating the tenant's current and future assets did not exist *in vacuo*. There is evidence to suggest that it was always included alongside an agreement listing specific goods to be hypothecated. This would suggest that it only ever came into effect when the sale of the goods listed in the primary agreement did not yield enough money to cover the tenant's debt. By the mid-second century C.E., this contractual clause had become an implied term. The reason for this change cannot be fully explained, but it seems to be related to the concretisation of the category of *invecta et illata*.