REVISTA INTERNACIONAL DE DERECHO ROMANO

THE CONTROVERSY ON THE TRICHOTOMY "RES, OPERAE, OPUS" AND THE ORIGIN OF THE "LOCATIO-CONDUCTIO*[1]

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The *locatio-conductio* usually is explained in the immense majority of institutional texts through a trichotomy of leasing forms (*loc.- cond. rei, operarum,*

[1] **These in the lecture that I,ve pronounced in some place of english language. The original text written in my own language (spanish) has been publisched in *Teoria e storia del diritto privato,* IV (2011) 1-51.**

operis), as if the roman lawyers would have coined these expressions and carefully outlined these types endowing them with a certain conceptual autonomy. The way of explaining could perhaps be valid for a first year student in the Law faculty, but at a scientific level it can´t resist even the slightist criticism, because neither the roman lawyers nor the medieval interpreters working with the roman sources explained the leasing deferentiating conceptually those types.

In any case there are a series of indisputable points: in clasic law these three types are framed inside of the consensual contracts as a unitary category[2] (at least in unitary terms, says Talamanca[3]); another indisputable point is that they are under guardianship by the same action. Intending to put in order in the controversy on the trichotomy open since the end of the 18th Century Voet would give the baptism

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? According to F. WUBBE, *Opus selon la définition de Labéon (D. 50,16,1,5)*, in *TvR* 50 (1982) 242 nt. 8, "le language de nos sources montre clairement que leurs auteurs ont consideré la *locatio-conductio* comme une unité". This unitary conception had already been emphasised by U. BRASIELLO, *L'unitarietà del concetto di locazione in diritto romano,* in *RISG* 2 (1927) 529 ff; 3 (1928) 3 ff.

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? M. TALAMANCA, *Istituzioni di diritto romano,* (Milano 1990) 593.

certificate to the trichotomy, Arangio-Ruiz[4] since the first edition of his Instituctions in 1921, he put on the table the tripartition which doesn´t respond to the roman conception that they never thought explicitly in these distinctions; consequently Arangio-Ruiz thought of the unitary contract as the procedural test of the existence of the unique *actio locati* and the unique *actio conducti*, and subsequently because in all the said subtypes they always find a *res* given or restituted, something obvious in the *loc. rei,* but also applicable in the *loc. operis* in which they would give one thinking so that it would be transported, cleaned and utilised as constuction material, and in the *loc. operarum* which in general they would give a slave, and therefore *res* in the roman conception, or which activity they paid a *merces* to the owner of the slave, and at the very end of the Republic a freeman that himself didn´t give it as *res* but they contracted his *operae* understood as *res*[5], tools that were used very frequently with enormous number of manumissions (by which that intended to put a stop to the limiting augustean laws[6] to take

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? V. ARANGIO-RUIZ, *Istituzioni di diritto romano,* 14 ed. (Napoli 1960) 346.

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? ARANGIO-RUIZ, *Ist.* 345 ff.

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? Vid. with lit. L. RODRÍGUEZ ALVAREZ, *Las leyes limitadoras de las manumisiones en época augústea,*

advantage of the *patroni* the free work of the freemen, or the payment when those considered freemen began to provide their services. In summary, the majority doctrine that had dealt with the topic monographically, in which I include myself[7], they declare themselves in favor of a unitary concept of the *loc.-cond.,* that they superimpose an eventual different discipline of the diverse situations of the romans who didn´t know the tripartition, neither the medieval lawyers nor the humanists, and they had to reach the end of the XVII century for the dutch lawyer Johan Voet[8], professor at the University of Leiden, to endorse the baptism certificate in the tripartition.

Without pretensions of creating controversy in the discussion of birth, operational capability and anatomy

(Oviedo 1978).

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? **TORRENT, *Manual de Derecho privado romano,* 13 reed. (Madrid 2008) 463.**

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? **Johannis VOETII, *Commentarius ad Pandectas. In quo praeter Romani iuris principia ac controversias illustriores, ius etiam hodiernum et praecipue Fori quaaestiones excutiuntur.* The first edition is from 1698; the most accesibe was published in two volumes in 1773.**

of the tripartition[9] in the roman lawyers[10], I consider undoubtedly the form to understand it could shine light upon and give an understanding of the originary journey of the *loc.-cond,* whose fundamental rules admitted very diverse events that if they didn´t receive the autonomous treatment by the roman lawyers, yes they have received it in the modern romanistic that pleases in analising situations very particular of *loc.-cond.* without renouncing the majority doctrine of the

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? In general all of the romanistic doctrine agrees that the tripartition isn´t found in the sources; on the contrary we find the isolated case of A. D. E. LEWIS, *The Trychotomy in locatio conductio,* in *The Irish Jurist* 8 (1973) 164 ff., that having realised an palingenésic analysis of the appropriate texts of the *Pandectas* justinians, not only did he try to demonstrate that the classic lawyers knew the tripartition but that they also treated each of the subtypes in different books. It is obvious that in his thesis there isn´t certain evidence found and it has been left without followers in the romanistic science.

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? With certain exageration A. GUARINO, *Diritto privato romano,* 12 ed. (Napoli 2001) 903 nt. 79.1.3 notes: "a nostro avviso è pura fantasia (o quasi) precisare quale sia potuto essere la struttura originaria dell'istituto e come si siano formate le singole derivazioni". Obviously I don´t share this opinion one hundred percente, of course there are many times explanations that could be a product of imagination, but others that share the study of the sources are more adherent to the reality.

idea of substantial unity of figures that in the modern legislation have a treatment of all self-employed (supply contracts, transport, property, promotional real estate, etc.). As a starting point, I will share the assertion of Kaser[11] that if the romans didn´t know the tripartition[12], they developed particular rules for the different types of activity: *res, operae, opus.* Also the glossators studied the *loc.-cond.* as a unitary figure, and they had to arrive to Ugo Donello[13] (1527-1591) to begin to recognise that the roman lawyers had a certain consciousness of the distinction between those subtypes of the contract that therefore are suitable of being analised separately[14].

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? M. KASER, rec. to L. AMIRANTE, *Ricerche sulla locazione* (*BIDR* 62, 1959, 9-119), in *IVRA* 11 (1960) 229, 233.

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? Cfr. F. OLIVIER-MARTIN, *Des divisions de louage en droit romain,* in *RHD* 15 (1936) 419 ff.

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? Vid. TORRENT, *Diccionario de derecho romano,* s. h. v. (Madrid 2005) 293.

14

? DONELLO, *Commentarius de iure civili,* XIII. 6. 1, in *Opera omnia* III (Lucae 1763) 813. A well researcher italian who has completed an excellent analitical job with the romanistic doctrine and criticism of the sources, R. FIORI, *La definizione della "locatio conductio". Giurisprudenza romana e tradizione romanistica,* (Napoli 1999) 8 nt. 31, notices how with a distance of four

It´s evident that the tripartition doesn´t appear in Gayo´s 3,142-147 nor in D. 19,2: *locati conducti,* being that the tripartition terminology was unknown until the same justinian compilation, which also isn´t surprising given the scarce roman tendency to the abstraction and the formation of subcategories when the legislation counts on general concepts capable of covering diverse situations that could be included inside the *loc.-cond.,* one of the most important legal-economic institutions in roman law (and in all legislations) that covers situations as many in public law as in private. In consideration it must highlighted that the roman studies most relevant ib the subject, except some few dedicated to the *loc. censoriae,* respond fundamentally to private approaches[15]. In this stage, I intend to trace the origin of our contract halfway between public materials[16] and private, given as disregarded the complex and delicate

centuries coincide Donello and KASER, *Das römische Privatrecht,* I, 2ª ed. (München 1971) 563 ff.: both of them defend a unitary definition of *loc.-cond.,* "ma poi, passando a trattare in modo più analitico il contratto, sottolineano con parole quasi identiche la necessità di discutere separadamente le tre ipotesi".

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? C. LONGO, *La locazione conduzione,* (Pavia 1921); T. MAYER-MALY, *Locatio conductio. Eine Untersuchung zum klassischen römischen Recht,* (Wien-München 1956); L. AMIRANTE, *Ricerche* cit.; A. BISCARDI, *Il concetto romano di location nelle testimonianza epigrafiche,* in *SSE* (1960).

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confines between both parts of the legislation that as Ulpiano calculates they aren´t but *duae positiones* in the *studium iuris.* In any case, and however lacking direct testimonies of the pre-XII tables period being themselves meager in the republic, this doesn´t constitute a valid reason to abandon the intent to formulate, however it be only as a conjector point, a hypothesis of the origins of the *loc.-cond.* The utility to overcome the origines the studies of the legal institutions today is out of doubt[17], in so far as the origins can contribute important facts for the resolution of other problems of the *de qua loquitur* institution, and for the comprehension and reconstruction of all the

[?] Opposit of the old thesis of MOMMSEN the XX century doctine has abandoned the idea of a public origin of the *loc.-cond.;* vid. H. KAUFMANN, *Die altrömische Miete,* (Köln-Graz 1964) 265; A. GUARINO, *Dir. priv. rom.* 902 i. nt.

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[?] Vid. P. DE FRANCISCI, *Primordia civitatis,* (Roma 1959) 13; G. BROGGINI, *Coniectanea. Studi di diritto romano,* (Milano 1966) 133 ff.; R. ORESTANO, *I fatti di normazione nell'esperienza romana arcaica,* (Torino 1967) 40; R. SANTORO, *Potere e azione nell'antico diritto romano,* in *AUPA* 30 (1967) 116 ff.; G. NICOSÌA, *Il processo privato romano.* I. *Le origini,* (Catania 1980) 27 ff.; G. PUGLIESE, *Poteri negotia actiones nell'esperienza romana arcaica,* in *Atti del Convegno di dir. rom. Copanello,* (Napoli 1984) 271 ff.

articulated and complex succesive evolution as in the case of the *loc.-cond.*

As I have said in another place[18], they continue arguing the question of when they recognized the *loc.-cond.* as a consensual contract. The majority of the doctrine understands that they were produced at the end of the Republic, and from that moment backwards everything are conjectures, which still is problematic in determinating the first advances. Another clear fact is that they had already reached a certain consolidation in the XII Tables according to Gayo´s information in the

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[?] **TORRENT, *Derecho privado romano,* 461.**

4,28[19]. Fiori[20] is of the opinion that in Caton´s formulars (by the way the III century B.C.) we find the first definite testimonies of a responsibility for content in the leasing relations, and that precisely in Catón we can capture the moment of transition from one phase in which the relationship still was orchestrated by means of a

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? XII Tab. 12,1 = Gayo 4,28 : *Lege autem introducta est pignoris capio velut lege XII Tabularum adversus eum… quod quis mercedem non redderet pro eo iumento, quod quis ideo locasset, ut inde pecuniam accipere acceptam in dapem, id est in sacrificium, inpenderet* The XII Table rule recalled granted that the *pignoris capio* against he who had bought a victim for a sacrifice and hadn´t paid for it, and against he who had taken in lease an oath and hadn´t paid it to the *locator,* however resulting very strange the final part since *ut inde,* which appears to point to the practice of the *pignoris capio* on the credit´s side he was conditions to assign the *pretium* in the contract of sale *merces* in the *loc.* to acquire at the same time another object for sacrifice. But leaving aside these archaisms, and taking into account that citations of the XII Tables are always later re-elaborated of their originary tone that even can be produced in various historical moments (cfr. O. DILIBERTO, *Materiali per la palingenesi delle XII Tavole,* I, (Cagliari, 1992); vid. con lit. FIORI, *Definiz.* 14 nt. 7; 16). I shall say because it´s more relevant the mention alltoghether of the *emptio-venditio* y la *loc.-cond.,* that some doctrinal sector has settled of relief for explaning the origins of these contracts they have a history with big paralelisms, matter on which I shall

verborum obligatio, an intermediate phase in which they used instruments of indirect guarantee (*satisdatio, pignus* regarding the *invecta et illata*), until a third phase of protection of simple consent that has made Gayo include the composition within the four consensual contracts of *ius gentium.* This isn´t the problem that we must deal with at the moment, instead the appearance of the *loc.-cond.* in Rome, a topic about which Mommsen is known to predict that the first leasing figure occured in the public leases that would have served as a model for the private configuration, in such a way that the oldest figure, the *loc.-cond. rei,* they would have derived from the leasing by the leasing of the *agri vectigales.* At the same time the *loc.-cond. operarum* would have derived from the leasing by the judges of people services like *apparitores* and *lictores* (carrying out auxiliary tasks of the judges), and the original *loc.-cond. operis* had consisted in the carrying out of public words entrusted by communal administrative authorities.

Until the XIX century and the first decades of the XX, dominated the idea [21] that the term *loc.-cond.* was

return later on.

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? FIORI, *Definiz.* 11 ff.

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? Cfr. A. MASI, *Locazione.* I. *Locazione in generale. Storia,* in *ED* 24 (1974) 908.

common to three types of diverse contracts: 1) the *loc.-cond. rei*: surrender of temporary use and benefit of a thing against the payment of a *merces* (it left out also the price problem, since they could pay *in pecunia* and *in specie;* 2) the *loc.-cond. operarum:* put at the disposal of another of some labour activities against the payment of a quantity of money; 3) the *loc.-cond. operis:* the service consisted in the complex activity directed to obtaining a certain result, which we call in the current law leasing of work, (contracted in the written spanish law). Provoking in this way, as we have said, the problem of unity of the *loc.* and its growth spreading to types of similar contracts with a necessity of a specific regulation and of this the romans lawyers were conscious. Since the issue interests the object of our investigation, it´s convenient to stop something concerning the tripartition, recognising obviously that the main doctrine is prone to the unitary character of the *loc.-cond..* As Amirante[22], has said, the need to reach a unitary construction of the figure isn´t new as suggested and imposed by the undeniable unity of the terminology.

I am not going to enter into the terminological discussion of the *locare* and *conducere* for which I refer to the exhaustive investigation and well documented by

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[?] **AMIRANTE, *Ricerche* 10.**

Fiori, but I would like to share my opinion of the dogmatic reconstruction level. The initial type in the primitive roman economy pre-XII tables had to be the *loc. rei,* which isn´t any "mia scoperta" but in the XIX century Degenkolb[23] already sensed, and soon after Bechmann[24], would widely confirm it, which proposed redirecting the origen of the *species* to the unitary concept of the *loc. rei,* an affirmation that Fiori[25] saw didn´t expect to support the inexistence in roman law of the traditional tripartition, without simply finding a common historical justification for the distinct cases. Bechmann noticed that the object of the oldest *loc. operarum* was the slave, for which before the powers spoke (to eachother) of the self employement *loc. operarum* which originally wasn´t anything else but a *loc. rei,* and the same was supported by the *loc. operis*

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? H. DEGENKOLB, *Platzrecht und Miethe. Beiträge zu ihrer Geschichte und Theorie,* (Berlin, 1867) 134.

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? A. BECHMANN, *Der Kauf nach gemeinen Recht.* 1. *Geschichtge der Kaufs im römischen Recht,* ·(Erlangen 1876) 420 ff. Without a doubt his explanations open up a new enriching way to clarify the tripartition and the unitary origins of the *loc-cond.,* and his thesis was shortly continued in his "Habilitationsvorlessung") by Chr. BURKHARDT, *Zur Geschichte der locatio conductio* (Basel 1889) 31 ff.

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? FIORI, *Definiz.* 2.

only possible in its oldest phase when the *locator* supplied to the *conductor* the materials for construction. Bechmann noticed especially that among other texts that stand out the *dare rem* in the original leasing relations, in D. 18,1,20 (Pomp. 9 *ad Sab.*), that in reality treated the differences between *loc.-cond.* and *emptio-venditio*. From Bechman´s lecture, they derive from the substancial unity of the leasing relations in Rome that they are not so distinct from eachother the different types of *loc.*; for example the unique difference that is noticed between the *loc. rei* and la *loc. operis* is in the first the *conductor* pays the *merces,* meanwhile in the second they are obligated to convert the thing and pay a symbolic sum (*nummus unus*), paying the *locator* a sum of money for its transformation. In short, at the base of all the hypothesis of the *loc.* there was a *dare,* and from there the reconduction of all the figures within the *loc. rei.* From this point they have noticed one fault in the thesis, because if one can admit to the *loc. rei* and *operarum,* it is difficult to accept the *loc. operis;* furthermore in some cases they surrender the *datio rei* in interest of the *locator* and in other cases in interest of the *conductor*[26].

[26] **? Cfr. the critical observations of AMIRANTE, *Ricerche* 10-11.**

As I see it , Bechmann´s thesis, that since 1921 would be widely developed by Arangio-Ruiz, that with a central role granting to the *datio rei* situated the *loc.* closer to the dogmatically called real contracts that from the consensual contracts, as known, the last contracts category configured by the roman lawyers at the end of the Republic and widely developed in the clasical period. In any case, Bechmann´s thesis in Germany at the end of the XIX century that had produced the suprising results of the Pandectist[27] to which in the field interests us we owe the steller role of the *loc. rei* as surrender of the use of something against the corresponding of the service (economic or in kind) by the *conductor*, he found a tremendous adversary in Pernice[28] who, contrary to Bechmann, denied the unitary construction of the *loc.* not admitting the *datio rei* in the *loc. operis*: it is absurd that the utility of this

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? Vid. with lit. and from a more amplified point of veiw, TORRENT, *Fundamentos del derecho europeo. Derecho romano, "ius commune", ciencia del derecho europeo,* (Madrid 2007) 308 ff. One can situate it in the initial and final point of the Historical German School in Savigny and Windscheid.

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? A. PERNICE had outline his thinking firstly in *Labeo,* I (Halle 1873) 466 ff., but above all developed the core of his thinking in *Zur Vertragslehre der römischen Juristen,* in *ZSS* 9 (1988) 195 ff. He always was contradicted by the Bechmann thesis in LONGO, *La loc. cond.* 14 ff.

contract would be in favor of the *dans,* that must pay a stipulated quantity to the contractor, that this payment could be configured *nummo uno,* absurd that it had already been used as evidence by Ulp. (69 *ad Ed.*): *Si quis conduxerit nummo uno, conductio nulla est, quia et hoc donationis instar inducit*[29]*.* Reaching this point, the German science of the XIX century and the first two decades of the XX now they weren´t up to much anymore. Yet, Karlowa[30] continued declaring that the unique types of the *loc.* didn´t fit in the unitary concept still in his great conceptual vicinity Rabel[31] who didn´t renounce the three aspects ("Abarten") of the *loc.*

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? From a current point of view, setting aside the dogmatic problems that Ulp.´s text provokes ahow the nullity of the *loc.* and the assimilation of payment *nummo uno* to the donation, continues repeating in the present (I am referring fundamentally to the spanish situation but also been produced in other countries of the EU) causing events of corruption that are reaching our Courts, numerous facts of this type in thoe which the politicians interviene that practially pay *nummo uno* to the real estate promotors and contractor no only refurbishment but also cases of new construction.

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? O. KARLOWA, *Römische Rechtsgeschichte,* 2 (Leipzig 1901) 632 ff.

31

? F. RABEL, *Grudzüge des römische Privatrechts* (1915, 2ª ed. Basel 1955) 110 ff.

focusing on the inversion of the terminology in the *loc. operis,* pointing to the derivation (as the term of the corresponding greek institution) of "körporlichen Hingeben der Sache", in the definition of the *loc. rei.*

The controversy concerning the unitarism or tripartition of the leasing relationships was suitable, and it can be said that they have continued to consider the same terms in the later literature. The study of Arangio-Ruiz contributed a lot to the revival of the controversy who, as I have previously said, since 1921 until the last edition of his *Istituzioni* in 1960[32] intented to demonstrate that the controversy of the artificial product of the romanistic tradition in how Rome didn´t know the distinctions between the three types of the *loc.* in a way that the leasing contract was essentially unitary[33], how in every type the necessity of fulfillment (like the reponsability and the problems of contractual risk in every type that are the preferred topics of the romanists of our time), they channel through a unique action (*actio locati* and *actio conducti* depending the claimant), and in all cases of the *loc.* there was always a *res* that should be given or restored. Arangio-Ruiz

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? ARANGIO-RUIZ, *Ist.* 345 ff.

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? The thesis of a unitary character of our contract was made a majority in the romanística; vid. the largest citation of unitarist lit. in FIORI, *Definiz.* 7 nt. 28.

defended however the substancial unity of the *loc.*, thesis followed by his disciple Ugo Brasiello[34] who realized a profound exegetical contribution to the unitary thesis, and that since then can be understood as an almost unanimos doctrine, whose diferenciation is owed to the Refined Holland School of the XVII century (Voet) as proven by Olivier-Martin[35], who considers the tripartition to have arisen outside the limits as much in the french legal tradition as in the iusnaturalism of the period[36]. In regards to the searching of the historical evolution of the Glossa and the medieval canonists , the notes prided by Bussi[37] are sufficient, however as much as I know about the issue I am afraid that investigations about the argument cannot throw great light upon what interest us in this stage. As I have just said, the unitary thesis expressed by Arangio-Ruiz was amplified by

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? BRASIELLO, *L'unitarietà,,* cit.

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? OLIVIER-MARTIN, *Divisions* 419 ff. AMIRANTE notes, *Ricerche* 12 nt. 10, that given the range of material analised by Olivier-Martín, perhaps it would be something framented with the need to look at it with reservation.

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? About the rationalist iusnaturalism of the XVII and XVIII centuries, vid. the synthesis that I offer in my *Fund.* 285 ff.

37

? E. BUSSI, *La formazione dei dogmi di diritto privano nel diritto comune,* 2 (Padova 1939) 44 ff.

Brasiello who understood the *loc. operarum* as leasing of things and slaves, within which could stand out when they gave the slave as a slave, and when they gave a slave as a producer of *operae,* a distinction which would acquire a great relief when at the end of the Republic they developed the *loc.* of *operae* of the freemen, even though they still continued following the *loc.* of *res*[38]*,* as well as the *loc. operis*[39]*.*

Amirante[40] also follows the unitary thesis that provides an interesting innovation to the explanation of Arangio-Ruiz who didn´t see in the *res* the unifying element of the three types of *loc.,* he saw an obligation of the parties *dare* and *reddere*[41]*,* going beyond the problem to other angles within the characterization of the *loc.* Amirante understood that the *loc.* as approached by the roman lawyers fundamentally in relation to the *emptio venditio,* in such a way that

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? BRASIELLO, *Unitarietà* 1, 544.

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? BRASIELLO, *Unitarietà* 1, 554 ff.

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? AMIRANTE, *Ricerche* 9 ff.; *Locare usum fructum,* in *Labeo* 8 (1962) 206 ff.; *Locazione (diritto romano),* in *NNDI* 9 (1963) 49 ff.; *Locare habitationem,* in *Studi Biondi* 1 (Milano 1965) 455 s.; *In tema di "opus locatum",* in *Labeo* 13 (1967) 49 ff.

41 **Vid. FIORI, *Definiz.* 3.**

differently from the sale of the *loc.,* the thing should be given but moreover and above all, something obvious in the *loc. rei,* given that the *locare* – differently from the sale - doesn´t contain within it the surrender of use or the benefit. According to Amirante[42] the seller as much as the leaser are obligated to deliver the *res* to the *emptor* or to the *conductor,* but meanwhile in the *emptio-venditio,* that which is at the disposal of the thing has got a definite character, in the *loc.* independently from the end expected in the contract, it had a temporal character. This obligation of restitution is the minimum characterization that if on one hand distinguishes the *loc.-cond.* from the *emptio-venditio,* but on the other hand permites reuniting all the diverse posibilites contained within the concept of the *loc.-cond.* In the *loc. operarum* an important disgression is introduced because in its conception the *operae* of slaves and freemen shouldn´t qualify themselves as *res* but better as *fructus* for which they don´t give these but the person of the *operarius*[43]*.* Regarding the *loc. operis* he thought that the object of the contract wasn´t the activity of the architect without the constructional material subject to *reddere,* and it was this way until

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? AMIRANTE, *Ricerche* 47 ff.; Id. *Locazione* 992 ff.

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? AMIRANTE, *Ricerche* 60 ff. It is based upon Ulp. (32 *ad ed.*) D. 19,2,13,3 y 4; Paul. (13 *ad ed.* D. 19,2,42; id. (21 ad ed.) D. 2,43; Marcell. (8 *dig.*) D. 19,2,48,1.

Labeón[44]; since then they contemplated the return of the fruit of labour they waited for the return of an ideal *opus* expected in the moment of hiring[45]; this is confirmed by the hyposthesis of *insulam aedificandam loco* (Paul. D. 19,2,22,2) pointing out Amirante[46] that "l'idea di una consegna della *res* da parte del locatore al conduttore giunge al suo limite di rottura… esistendo solo idealmente la *res* al momento della conclusione dell'accordo". This idea implicates a daring conception of the *opus locatum,* a difficulty that claims to exceed[47] profoundly in Labeon´s concept of *opus locatum*, to which from the foundation of Paul. D. 50,16,5,1 attributes "l'idea arditissima che proprio l'*opus*, e cioè l'*insula* da costruire o la statua da scolpire, fosse consegnagta, in senso meramente ideale, ben s'intende, dal locatore al conduttore". Certainly this is the great obstacle the *loc. operarum* presents as much as the *loc. operis:* What do they restitute? Because Cervenca[48] had already said that the *loc.* of the *operae*

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? AMIRANTE, *Ricerche* 533 ff.; 554 ff; 566 ff.

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? Vid. a magnificent synthesis of the AMIRANTE thoughts about the *loc. operis* in FIORI, *Definiz.* 4 nt. 9.

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? AMIRANTE, *Ricerche* 102; *Locaz.* 993.

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? Cfr. MASI, *Locaz.* 909.

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of a free worker was leasing without obligations of restitution of the thing leased[49], and regarding the *opus* Wubbe[50] had advanced that the object and core of the contract should be "l'effort accompli" and not "l'objet matériel qui résulte éventuallemente de l'*opus factum*".

As we see, Amirante´s explanations developing Arangio-Ruiz´s presentation, from a dogmatic point of view and from the same reconstruction from the roman legal idea, leaving open various critical flanks. In reality this concept had already been criticised by Betti[51] who considered the materialistic factor in the sense of understanding the *res locata* as a "materially co-*locata* thing". On the contrary, Betti defended that the *res locata* was the composition of interest put to life by the parts to acquire this type of obligation.

? **G. CERVENCA, *In tema di "locatio-conductio. (A proposito di un recente studio),* in *Bull. della Scuola di perfezionamento in dir. del lavoro dell'Univ. di Trieste,* (1963) 7.**

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? **Cfr. DE ROBERTIS, *I rapporti di lavoro nel diritto romano,* (Milano 1946) 24.**

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? **WUBBE, *Opus selon Labéon* 246. Cfr. also A. BISCARDI, *Quod Grace "apotelesma" vocant,* in *Labeo* 35 (1989) 163 ff.**

51

? **E. BETTI, *Istituzioni di diritto romano,* II;1 (Padova 1960) 220.**

Other authors also participated in the unitary theory (dation-restitution) to which they add small variants. In the case of Pinna Parpaglia, he proposes that the *loc. rei* of the farm for its crop thought that they didn´t lease the farm (*res* in a material sense) so much as the crop itself[52]. Another unitarist author is Vigneron, however he understood the unifying factor as economic[53] before dogmatic, without which steps following the line of thought of the majority that takes into account the essencial value of the *loc. rei*. Given his economic approach, Vigneron sees in all the hypothesis of *loc.* the valuation of a good by means of work of another[54] (here he coincides with Pinna Parpaglia in the exaltation of the value of work). Vigneron is reffering to an original situation offereing the well known explanations regarding the *loc. rei* and *personarum*, admitting to the *loc. operis* the idea of *paterfamilias* that every year shared with a pastor or

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? **P. PINNA PARPAGLIA, *Vitia ex ipsa re. Aspetti della locazione in diritto romano,* (Milano 1983) 131.**

53

? **R. VIGNERON, *La locatio conductio secondo i Romani,* in *Labeo* 34 (1988) 361 ff. (rec. a PINNA PARPAGLIA, *Vitia*).**

54

? **VIGNERON, *La conception originaire de la "locatio conductio" romaine,* in *Mélanges Wubbe,* (Fribourg, Suiss. 1993) 509 ff.**

farmer the fruits of labour of the crops. All types of the *loc.* always had an economic foundation and he thought it useless to look for a dogmatic unity: "l'habillage juridique est secondaire"[55]. The objections to this thesis are obvious: firstly, because it gives as established that for a very long time the tree types of the *loc.* already had a function as *loc. rei*; secondly, because his explanations for the *loc. operis* in strictly legal sight they approach more to the contract *societas* than the *loc.* (it´s sufficient to read agricultural contracts of Catón).

It wasn´t unanimously received Arangio-Ruiz´s thesis which came across with some detractors like Niedermeyer[56], and in the same sense delivered by Mayer-Maly[57]. They both deny that the unity of a contract can hold up when it lacks common rules with respect to its aim, *periculum,* payment in favor that if

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? VIGNERON, *Conception* 513.

56

? H. NIEDERMEYER, rec. to U. von BOLLA, *Untersuchungen zur Tiermiete und Viehpacht Altertum,* (München 1940), in *Gögttingische Gelehrte Anzeigen* 203 (1941) 319 ff.

57

? MALYER-MALY, *Loc. cond.* 15 ff., reaffirming his comprehension of the problem in the rec. to AMIRANTE, *Ricerche,* cit., in *Tipicità e unità della locatio conductio,* in *Labeo* 5 (1959) 390 ff.

the *loc. rei* and *operarum* corresponds to the *conductor,* in the *loc. operis* it corresponds to the *locator.* Niedermeyer is very clear: "die römische Einheitsvorstellung von der *loc. cond.* beruht nicht auf einem wesentlich herausgearbeiten Kontraksbegriff der *loc. cond...* sondern auf der alten usuell gehandhabten und fertgebildeten *actio locati* und der Gegenklage *actio conducti".* These actions were key for the *loc.-cond.* to reach the category of a contract remaining since the free men from its "Klagefundamenten" in much less of a degree then the *emptio-venditio;* in this way if the "Hauptnachteil" of Arangio-Ruiz, from a dogmatic point of view, split from a unitary concept of the *loc.-cond.*, his thesis cannot base itself in any significant legal elemente like the unity of the aims of the contract, risk support, payment of the *merces,* these are precisely the objective elements that make the classic law distinguish between the *loc. rei, operarum* and *operis.* This explanation from Niedermeyer in his day received a short response from Arangio-Ruiz[58] himself, which he opposed that in the training field of the roman dogmas, the testimony of the *duo genera locatorum* of Alfeno (D. 19,2,31) had more weight than the *factum quod locari solent* of D. 19,5,5,2 that the compilers attributed to Paul., and that they didn´t gain anything replacing the controversy of the

58

? ARANGIO-RUIZ, en *SDHI* 8 (1942) 319 nt. 1.

leasing contract with the actions of the *locati* and *conducti.*

It appeared that Niedermeyer´s criticism was going to stay isolated from the doctrine, when it re-ignited the battle of established grounds by Mayer-Maly. The important monography of Mayer-Maly published in 1956 received important criticism from Kaser, De Robertis, Burdese and Voci[59]. Also breaking from the devaluation of the termonological and procedural scaffolding, on one hand he shared Niedermeyer´s arguments; on the other hand, he appeared to admit the historical reality of the unitary concept in a way that when the leasing figures were directed through the *bonae fidei iudicia,* the previous appearance of the three types of *loc.* wasn´t altered, nor its process of diferentiation in the classical period, and a little later Kaufmann, to whom we owe an economic and social study of the origin of our contract, intended to demonstrate that the termonological and procedural aspect of the *loc.-cond.* derived from the previous linguistical uses in its configuration as a consensual contract. Kaufmann didn´t believe in the fundamental character of the *loc. rei* because he denied

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? Cfr. the recensions to MAYER-MALY, *Loc. cond.* cit., of KASER, cit.; F. M. DE ROBERTIS in *TvR,* 25 (1957) 398 ff.; A. BURDESE in *IVRA* 8 (1957) 481 ff.; P. VOCI in *SDHI* 23 (1957) 371 ff.

that the three types already existed in the archaic period[60]. In reality, Kaufmann tried to resolve the *vexata quaestio* from which we come from occupying by means of the *formulas* of the *actiones locati* and *conducti* and especially by its *demonstrationes,* but since we haven´t got consistency in them, he appeals to the linguistical uses supposing that they gathered diverse types of the *loc.* When the pretor, once generalizing the *bonae fidei iudicia* and not being able to refer to the typical uses of language except *locare* y *conducere,* should have excluded the constant reference to the *res* in a way that he gathered under one action the economically diverse (leasing) relations, relationships only united by the same terminological umbrella. Without a doubt Kaufmann´s contribution is witty, but we mustn´t forget that it is not based on facts, but conjectures.

Another intent to clarify the problem was realised by Alzon[61] who begins from a different chronology for

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? KAUFMANN, *Altröm. Miete* 148 ff.; 180 ff. (*opera*); 205 ff. (*opus*).

61

? C. ALZON, *Reflexions sur l'histoire de la "locatio conductio",* in *RH* 41 (1963) 553 ff.; *Problémes relatifs à la location des entrepôts en droit romain,* (Paris 1965) 220 ff,; *Les risques dans la "locatio conductio",* in *Labeo* 12 (1966) 311 ff.

each of the types that would have been born in the diverse periods and with different aims also, in a way that the unique possibility that the pretor had to admit the same *actio* in all cases was to use the dogmatic instrument of the tripartition[62]; like this, both parties being free to negotiate in the way that it was more convenient for them, the *iudex* respecting their will and in the base of the *bona fides* would lead to that neither the *partes* nor the judge needed to rationalise in tripartition terms for that which the roman lawyers would have seen *loc.-cond.* as a contract lacking in characterization except in its unique categories. Alzon focuses on the relationships between *emptio-venditio* and *loc. cond.;* both contracts have in common the change of *res* for *pretium*[63]*, reddere* being the discriminating factor between both contracts. On can stand in the way of Alzon with the same objections as others studied; what Alzon says could be applied to the *loc. rei* and *operarum,* but what do they restitute in the *loc. operis*? Amirante[64] is right in pointing out the multiple contents and economic-social aims that could have been realised with the *loc.* implicating a great difficulty to understand in a unitary way the historical

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? **ALZON, *Location d'entrep.* 224 ff.**

63

? **ALZON, *Location d'entrep.* 224; *Histoire* 554 nt. 8.**

64

? **AMIRANTE, *Locaz.* 994.**

precedents of the consensual *loc*. Beneath them all lie the same difficulties to get to know the origin of the *loc.* before its recognition as a consensual contract.

The last great intent to clarify our issue has been undertaken by Fiori who after performing a meticulous study of the sources and doctrine, he considers the problem open, not being totally satisfactory neither the theories of unitarism nor the theories of the tripartition[65] however he substantionally defends a unitary doctrine: the roman laywers had before their eyes the unitary structure of the *loc. cond.* in the reciprical obligations of the parts of *praestare mercedem* and *praestare uti frui,* and in virture of this unitary structure to protect the interests of the parts using the same actions, from which derives the "characterization" of the *loc.* in the roman contractual system, resides in the similar obligatory and procedural unity[66]. Within each type however the lawyers individualized a series of "negociable models" that don´t reach a type in the sense that they don´t determine a fundamentally different structure, and therefore don´t require a distinct action, but make up figures of reference for the parties, lawyers and pretor. For this

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? **FIORI, *Definiz.* 10.**

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? **FIORI, *Definiz.* 286 ff.**

reason Fiori[67] concludes that the *loc. cond.* is one and multiple: unity of type in how it always underlies the synallagma *merces-uti frui;* multiplicity from the negociable models that vary with time the diverse comprehension of the *uti frui.* The plane of the "characterization" directs the *locati et conducti* actions*;* the plane of the "negociable models" permits choosing between the *actio locati* and the *actio conducti* according to the activity to be carried out.

These three types, or "negociable models" as Fiori prefers to call them, have they all got the same antiquity?, or said in another way, what would be the first model in the pre-consensual period? In what way were they differenciating some types from others? Did roman *iurisprudentes* notice their differences? Did they notice that the they required specific regulation for each type? The answer to all of these questions is very problematic, firstly because there is a total lack in the lawyers a definition of the *loc.-cond.,* and from there the doctrinal discusion that we have see by the way of the trichotomy that probably prevents the unitary definition overshadowing the problem of the origins of the *loc. cond.* with a very old story being connected to its unitary character with the late recognition of its consensual nature. The great effort of dogmatic

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[?] **FIORI, *Definiz.* 362.**

reconstruction of the Pandectist stage established the generic definition of the *loc.- cond.* as a contract that changed the use (*frui*) and the things or people (energy of labour) against *pretium,* from which appeared the first bipartition: *loc. rei* and *loc. operarum.* The problem is actually proposed by the *loc. operis,* what is called today the leasing of work that at the same time opened diverse aims or possibilities: a contract directed to the *opus* as such *opus,* and contract directed to the final result of the execution of the *opus,* with the difficulty added that in the last method they reversed the position of the *locator* and *conductor.*

I am not going to go into the problem of the roman definition of the *loc.-cond.* about which they have poured out rivers of ink. I am referring to the well documented work of Roberto Fiori, but I do want to make something clear: the roman lawyers noticed that the *loc. cond.* had a great vicinity to the *emptio-venditio*[68], and perhaps the present day romanistic problem could be to search the possible common origins sharing a *dare rem* that they translate in mutual terms reciprocally between both figures. Examples of what I have just mentioned are suficiently eloquent and

68

? Vid. BRASIELLO, *L'unitarietà,* 542 ff.; MAYER-MALY, *Loc. cond.* 63 ff.; AMIRANTE, *Ricerche* 51 ff.; FIORI, *Definiz.* 285 ff.

range from Catón´s treatise *de agri cultura* that considers the *loc. fundi* as the sale of farm products[69], until five centuries later Gayo 3,145: *emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahitur an locatio et venditio.*

Granting its similar economic-social function since the pre-consensual moments, both contracts share a minimum characterization centered in the *dare rem* that is difinitive in the buy-sell and temporary leasing, *dare* that in the XIX century, they lead to a sector of the Pandectist stage in the real character of the lease which Degenkolb would defend the real originary character of the lease.

Regarding the problem of the origins of the *loc. cond.,* Mommsen[70] had advanced the solution thinking

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? Vid. A. BURDESE, *Studi sull'ager publicus,* (Torino 1952) 47.

70

? T. MOMMSEN, *Die römischen Anfänge von Kauf und Miethe,* en *ZSS* 6 (1885) = *Gesammelte Schriften* III (Berlin 1907) 132 ff. U. von LÜBTOW follows him, *Catos* leges *venditioni et locationi dictae,* in *EOS* 48 (1956) 227 ff. = *Symbolae Taubenschlag,* 3 (Varsovia 1957) 229 ff, 241 ff. Also F. CANCELLI had intended to revitalise the

in the greatest antiguity of the public *loc.* over the private; therefore it would be the public *loc.* that would provide not only the terminology but also the fundamental lines of our contract. Mommsen breaks from the point that there were two great sectors in the roman inheritance law from the oldest period: on one had the *stipulari spondere* of private law; and on the other hand the *dare locare* and *emere conducere.* This is a generalisation of Mommsen with large glints of truth, because when the late-republican *ius civile* recognised the buy-sell and lease as consensual agreements, the clasic lawyers didn´t stop noticing the great similarities between both; it is significant that Gayo finishes his explanation with buy-sell in 3,141 and immediately following in 3,142 saying: *Locatio autem et conductio similibus regulis constituitur...,* to which must be added Paul. (34 *ad ed.*): *Locatio et conductio cum naturalis sit et omnium gentium non verbis sed consensus contrahitur, sicut emptio et venditio.*

According to Mommsen the *loc. cond.* had its roots in the contracting characteristic of the administration of a community that perhaps initially the two consuls dealt with these topics, and differed from tasks between the

mommsenian thesis, *L'origine del contratto consensuale di compraventita nel diritto romano,* (Milano 1963) 9 ff., and P. LEUREGANS, *L'origine administravie du terme "locatio" dans la "locatio-conductio" romaine,* in *Eos* 65 (1977) 303 ff.

new judges in such a way that the state was organising itself, they started to take on economic functions the censors and the questors. From the administration of communal inheritancy, as much active as passive, the censors dealt with them, lacking in these the censors and pretors. Of the contracts with people to occupy subordinate fuctions, each judge dealt with them, in such a way that it would be the community who for the first time through their judges *res et personae locare* (*loc. rei* and *operarum*). Likewise it would be the community that originally would end the *loc. operis.* The *loc. rei* and *operis* would be censor job, meanwhile the *loc. operarum* corresponded to each judge for the best function of the services that they had entrusted. All these communal contracts (including what Mommsen called "Gemeindevermögensrecht") weren´t formal; the formalisms would be typical of the leasing relationships that followed the public model, began to practice the parties when the *conductor* responded *spondeo* to the question of the *locator.* The consensuality would come centuries later.

It cannot be said that Mommsen´s thesis would have been followed except a very minitory doctrinal sector and in general has been widely rejected[71]. As I

71

? Vid. for example, and so much more interesting as it proceeds from a historian, the critcism of Mommsen from

see it, it must stand out this public connection that demands that the political life and the administrative authority of the roman judges would have reached a degree of development and certain perfection of the administrative authorites and the mecanisms of interrelation *inter homines* that one doesn´t find in the primitive periods. As I see it, the *loc. cond.* as a phenomenon primarily economical directed at one benefit more rational of the goods, to take advantage of the labour activity of men in an economy that began to count on specialised craftsmen, claiming to benefit from the contracted work, that they were expanding to the supply activities (to the cities, to the military) they are phenomenons that didn´t necessarily produce in the public area before the private. Mommsen´s thesis presents a bonus overvaluing the public activity in the economic field (it could be said from this point of view that he beat Keynes by sixty years, as it´s known, praised the managerial role of the public investment), putting into the hands of communal authorities a prevailing function in the legal economic relations providing models to the following private economic activity, and from there the temporal priority of the *publicae* over the *pivatae,* but there isn´t any evidence of it. The economic science (with distinct ideological explanations, the Austrian School focused on Hayek,

G. DE SANCTIS, *Storia dei Romani,* IV.2.2 (Firenze 1958) 114 ff.

and the Chicago school personified in Milton Friedman) has demonstrated that the initiatives in the field always were taken by the individual emperors, and what I dare the most to say is that the *loc.* was utilised to from the beginning as much by the private individuals as by the public authorities, however clearly there is no evidence. Cuyacio´s[72] mention explained the leasing for five years: *id faciebant exemplo censorum et consulum qui etiam publica locabant in quinquennium,* it doesn´t seem like a decisive test of the original public character of the *loc. cond.,* besides that it is very adventurous to claim that the romans distinguished between *publicus* and *privatus* in moments where the the state hadn´t assumed other tasks that weren´t in defense in the exterior and the maintance of the *pax deorum* in the interior. It doesn´t make much sense therefore to turn to the *loc. censoriae* and the text which Cuyacio refers to (D. 19,2,20,2) not at all inferring that these *loc.* change direction of the *loc. fundi* between the parties.

Despite the little weight of the Cuyacio´s text, Esmein[73] had claimed to demonstrate that the private leases are indebted to the public, and among other

72

? **J. CUIACII, *In libros Pauli ad edictum,* in *Opera,* V (Neapoli 1758) V col. 518 about the *locati* law.**

73

? **P. ESMEIN, *Les baux de 5 ans du droit romain,* in *NRHD* (1896) 134-137 and 149 nt. 2.**

arguments cited the *loc. censoriae* for a five year period. In my opinion, this appeal doesn´t make sense, because when the *loc.* appears as a consensual contract, it´s the parties that establish freely the period of execution and the termination date of the contract, and there isn´t any evidence that it wasn´t as such in previous periods, where to define the duration of the contract there isn´t any reason to adjust it according to the censor leases. Leuregans also follows Mommsen´s thesis and insists on demonstrating the movement of the so called *loc.* of administrative law to private law[74]; they don´t appear to be convincing arguments to me.

Neither does Perozzi´s[75] thesis appear to be more convincing which defended the real character of the *loc. cond.* including in classic law; the sources tell us that, at least since the II centuy b.C., it already was a consensual contract and if we pay close attention to Catón, it was already fully consolidated as a personal obligation in the IV century. Certainly that in the first muttering of the roman legal regulations in which the legal-economic powers were exclusively in the hands of the *patresfamilias,* many institutions that later develop what were simply admitted as obligations or real figures

74

? LEUREGANS, *L'origine* 304.

75

? S. PEROZZI, *Istituzioni di diritto romano,* II, 2ª ed. (Roma 1928) 289.

in their case, they couldn´t differentiate themselves according to these terms that still had´t been qualified as real obligations or rights. But from this primitive ambivilance, it can´t be derived just like the value supposed from real rights of the primitive *loc.-cond*.

Not any more convincing is the thesis that stems from Degenkolb[76] and is followed by Costa, Perozzi and Scherillo[77] that the *loc. cond.* has its starting point in the *precarium.* But the *precarium*[78] is a free relationship that the post-classics fit into the contracts with not nominated titles by the *actio praescriptis verbis,* and as I see it, there isn´t any coincidence the *loc.-cond.* nor then nor in the primitive period, in which it consisted of the free concession of the patricians to their land clients for their crops to be revocable at any moment (*ad nutum*). Its name comes from *praeces,* a request of the precarist to the *dominus* so that he would permit the

76

? **DEGENKOLB, *Platzrecht und Miethe,* 188 ff.**

77

? **E. COSTA, *La locazione di cose nel diritto romano,* (Torino 1915) 2 ff.; PEROZZI, *Ist.* I, 880; G. SCHERILLO, *Locazione e precario,* in *Rendiconti dell'Istituto Lombardo di scienze lettere e arti,* 52 (1929) 389 ff.**

78

? **Vid. TORRENT, s. h. v. in *Diccionario de derecho romano,* (Madrid 2005) 968-969.**

use and benefit of a gracious concession (Ulp. 1 *Inst.* D. 43,26,1 pr.), and the same Ulp. 69 *ad ed.* D. 41,2,10,2 offers elements to distinguish between *loc.* and *precarium: si quis et conduxerit et rogaverit precario, uti possideret, si quidem nummo uno conduxit, nulla dubitatio est*, *quin ei precarium solum teneat, quia conductio nulla est, quae est in uno nummo: sin vero pretio, tunc distinguendum, quid prius factum est.* Dealing with the applicability of the prohibition *unde vi* the lawyer sees the necessity to discern whether the assumption of fact was precarious or a *loc.-cond.* capturing the core differencial element[79] in the *merces*. I don´t see any affinity in these figures however, except the *utendum dare* in these figures, and one doesn´t have to reach the classic period to see the difference between free (precarious) legal transactions and burdensome (*loc.-cond.*), from which the romans had to be conscious of before the tecnical configuration of leasing as a consensual contract typical of *ius gentium*, which also is significant because before it had to be contemplated in the *ius civile vetus.*

79

? Vid. in this sense MAYER-MALY, *Loc. cond.* 128 ff; I. MOLNAR, *Rechte und Pflichten der Subjekte der "locatio conductio",* in *Index* 12 (1983-84) 169. About the post-classic vicinity between both figures vid. with lit. P. ZAMORANI, *Precario habere,* (Milano 1969) 75 ff. About the differences with the commodatum and the *donatio* vid. FIORI, *Definiz.* 276 ff.

By way of concluding, I would say that I believe that the autonomy of the *loc. cond.* from the moment in which the economic world demanded going on clarifying situations that at the first moment could appear amalgamated beneath an extremely general concept. The pontificial jurisprudence, firstly, later the secular along with the indispensable jurisdictional function had to go on clearing up the characteristics of the *loc.-cond.* starting from - as Betti[80] says - from a general notion of the *locare* whose fundamental sense was to put at disposal, to set, and to situate, with that which comes together with the correlative *conducere:* to accept, to take with itself or upon itself. The bilaterality of the assumed obligations between the parties[81] (substantially *ultro citroque obligatio*) would be theorised much later, but in the XII Tables[82] (Gayo 4,28) they couldn´t speak about it. Another idea that can be

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? E. BETTI, *Istituzioni di diritto romano,* II.1 (Padova 1960) 21 ff.

81

? Vid. G. GROSSO, *Schemi giuridici e società nella storia del diritto privato romano,* (Torino 1970) 389 ff.; A. SCHIAVONE, *Studi sulle logiche dei giuristi romani. Nova negotia e transactio da Labeone a Ulpiano,* (Napoli 1971) 88 ff.

82

? About the value of the language in the XII Tab. vid. with lit. FIORI, *Definiz.* 14 ff.

given as certain is that in the pre-XII table´s period in a contract like sales that so many coexistances always had with it *loc.-cond.* sharing two precise structural elements: *res* y *pretium* (*merces*), both with the extremely important economic-social function that had to be legally formalised from a very old period[83], as likewise they had to recieve adequate procedual protection. Obviously the *loc.* didn´t have to wait to be configured as a consensual contract. Still there are some that defend that it already has been recognised as such in the period of *legis actiones*, however they aren´t in agreement on the means of precedural guardianship. Wlassak and Mitteis thought in general in the *actiones in factum*; Kaser, without completely excluding the *actiones in factum,* thinks that they didn´t constitute the only form of guardianship, but that the consensual contrcts before being protected by their respective typical actions, they had been protected by actions of the pretor modeled according to the *legis actio per iudicis arbitrive postulationem.* Also Broggini[84] understands that before the *actio locati* of good faith, the relative process actions would be directed through

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? Vid. TALAMANCA, *Vendita* (*diritto romano*), in *ED* 46 (1993) 371.

84

? G. BROGGINI, *Iudex Arbiterve. Prolegomena zum officium des römischen Privatrichters,* (Köln-Graz 1957) 218 ff.

the *arbitria bonae fidei* based on the *imperium* of the judge.

The core of the legal reflection had to be *locare* and probably the oldest figure would have been the *loc. rei,* a model suitable for the other subtypes that go on implicating by themselves a more evolved idea of the *locare;* the same existence of diverse subtypes within a unitary category already is indicative of how these combined situations, seen from a legal point of view drive to systematical centers organised around the *dare rem-merces* correlation and however in the majority of the cases the utility of the *datio rei* is directed to whom receives it, in the *loc. operis* once overcome that which had to be the first phase of its evolution as it was the delivery of materials, the utility of whom gives the thing for it to be handled and restored, or of whom receives the finished work that hadn´t even given anything being in charge of the principle, the search of materials, points to the benefits of some global results whose results common legal scaffolding were noticed by the roman lawyers, as shown by the attempt to explain the *probatio operis*[85]*.* The roman lawyers didn´t theorise

85

? The *probatio operis* exonerated the responsibility to the *conductor* for the construction defects and the loss in the construction; vid. C. A. CANNATA, *Per lo studio della responsabilità per colpa nel diritto rromano,* (Milano 1969) 204 ff.

about the *loc. operis*, but from the texts derive two hypothesis that Masi[86] synthesises in the following manner: 1) That the *res* would be *lacata* so that the *conductor* could carry out a service of the same and return it; 2) that the object of the *loc.* would be *opus faciendum.* In the first case, the *locator* they obligate the delivery of the thing to the *conductor* and payment of the *merces*, and the fulfillment of the activity that they would have compromised (being able to serve as auxilariary people) and return of the manipulated or re-elaborated thing to the *locator*. Regarding the lease of *opus faciendum,* the *locator* was obligated to agree with the *conductor* in plan, model and project of work to be realised, and to pay them the *merces* agreed upon[87]. The *loc. operis* is the most complete figure within the *loc.-cond.* in general, and from there the classical jurisprudence argued its configuration as lease or as sales when the *conductor* obligated the *locator* to carry out a work with the proper materials; according to Gayo (3,147; cfr. I. 3,24,2) the majority (*plerique*) leaned towards seeing sales, but Sab.-Pomp. 9 *ad Sab.*D. 18,1,20 understood it as lease[88]. This is one of the most

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[86] **MASI, *Locaz.* 914.**

[87] **? Jav. (11 *epist.)* D. 19,2,51,1 anticipated even the payment for working shifts.**

[88] **? Cfr. FIORI, *Definiz.* 50 ff.**

disputed topics in the Romanistica where they noticed different ways of aproximating the consideration of the *loc.-cond.* that go from Quinto Mucio that according to Amirante[89] still had a strongly materialistic conception, in such a way that it could only be about the *res* that could have reintegrated itself into its identity, to Alfeno (and perhaps Servio hypothesised Fiori[90]) 5 *dig. a Paul. epit.* D. 19,2,31 that permits a glimpse at the possibility of *duo genera locatorum:* in the first they should have restored the same thing; in the second, the *idem genus,* and finally to Lab. (Paul. 2 *d ed.* D- 50,16,5,1) who contemplated the *opus locatum conductum* as *ex opere facto corpus aliquod perfectum,* which expresses an "ideal" conception of the *opus* (Fiori) which doesn´t exist in the moment of the contract.

I believe that the controversy of whether or not the unity of leasing is only terminological, procedural fact or a conceptual unit. It has contributed many facts for a better understanding of the *loc.-cond.,* but sometimes in the Romanistica it has received too specialised attention on each type that in such a way overshadows an overall vision of the argument focusing on some terms and some concepts that the romans never raised,

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? **AMIRANTE, *Ricerche* 65 ff.**

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? **FIORI, *Definiz.* 4 nt. 9.**

which some basic common theoretical lines of the three known types were enough to understand the connections between them. The strict adherence of the roman lawyer in everyday reality, their understanding of the economic aspects in the human relationships in the town that had in trade one of their vital aims, they were sufficient motives for them to be able to break away from the common notion of the *locare* and notice the specific differences of each subtype, in such a way that within the unitary concept of *loc-cond.* they knew how to plan a specific regulation for each type in a full view of their distinct economic-social functions, and of course one cannot say absolutely that the roman lawyers didn´t have an economic vision that could be noticed as the base of the solutions contributed to the legal problems, or if it is preferred, consciousness of the economic aspects of the social problems[91]. The dogmatic diferentiations will come many centuries later.

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? TORRENT, *Moneda crédito y derecho penal monetario en Roma (s. IV a.C. –IV d.C.),* in *SDHI* 73 (2007) 112. Cfr. G. MELILLO, *Categorie economiche nei giuristi romani,* (Napoli 2000).