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The Classical Review / Volume 10 / Issue 07 / October 1896, pp 341 - 344

DOI: 10.1017/S0009840X00204605, Published online: 27 October 2009

Link to this article: http://journals.cambridge.org/abstract_S0009840X00204605

How to cite this article:

H. J. Roby (1896). The Classical Review, 10, pp 341-344 doi:10.1017/S0009840X00204605

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MONRO'S EDITION OF TITLES OF THE *DIGEST*.

Digest xix. 2, *locati conducti*. Translated with notes by C. H. MONRO, 1891. *Digest* xlvii. 2, *de furtis*. Translated with notes by C. H. MONRO, 1893. 5s. each.

THE editions of separate titles of the *Digest* for the Cambridge University Press, which were commenced by the late Dr. Walker, have been continued by Mr. Monro. The Syndics of the Press may be congratulated on their persistence in what is probably an unprofitable undertaking, and on the much improved manner in which these two titles have been edited. Mr. Monro has brought to the task much greater knowledge of law and better scholarship than Dr. Walker did, and I think the later of his two books even shows an advance upon the former. I have read both through carefully, and though those titles were not strange to me before, I have found benefit from Mr. Monro's labour and should be very glad of the like help in other titles as well. For it must be remembered an 'edition' of titles of the *Digest* is quite a different thing from a treatise on particular parts of Roman law. There are many of the fragments which are passed over without notice in a systematic treatise, and many difficulties in the precise language and allusions of the Roman jurists, which are ignored by modern writers and are very unsatisfactorily dealt with by the older writers. If I proceed to make comments on some passages where I disagree from Mr. Monro, it is in the hope of criticism being found both more useful than generalities and not in any way incompatible with a favourable judgment on the whole. What edition of a classical author leaves no room for objection to details?

D. LOCATI CONDUCTI, l. 1. Mr. M. thinks there is a difficulty because the consensual character of *loc. cond.* is not fully recognized in *D. xix. 5 l. 5 § 2. At cum do ut facias, si tale sit factum quod locari solet, puta ut tabulam pingas, pecunia data locatio erit.* Says Mr. M. 'When the money is paid there is a *locatio*. Why not before the money is paid?' He has not caught the point. Translate 'When it is money which is transferred, we have *locatio*', and the difficulty vanishes. If it was not money, but something else, the *actio locati* does not apply; we must resort to the *actio prae-scriptis verbis*.

ll. 7, 8. I have no doubt that *ei qui* (l. 8) should not be separated, and that both denote the lessee. The middleman would

have been *sibi*. Nor do I see the difficulties which Mr. M. finds. Tryphonin rightly corrects Paul's somewhat crude dictum. A lessee is liable to his underlessee for the loss the latter sustains by eviction. *Prima facie* this loss is measured by the rent payable by underlessee to lessee, but special circumstances may make the underlessee's interest in retaining the house larger than is measured by his rent. Mr. M. refers to the final sentence of l. 33. But that fragment is dealing with evictions due to *vis major* natural or political. The position is quite different when the original lessor had a bad title. Whether he let, in knowledge or in ignorance of his title's being bad, he is liable for the whole interest of the lessee (l. 9, pr.; l. 15 § 8): and the underlessee, apart from special circumstances, can get from the lessee what the latter can get from his lessor.

l. 9 § 6. Mr. Monro is perhaps too prone to draw inferences from what is said to what is not said. Here he puts cases of purchase of the property out on lease and raises questions of notice and absence of notice. But the object of this section is very simple. A contract, whether foolish or not, binds according to its terms, and subsequent events do not affect it unless they are inconsistent with its nature or with the good faith of the parties. If a lessee acquires the ownership, by gift or legacy, of property to which his lessor had really no title, there is nothing in this to disturb his enjoyment (*frui licere*); and he has been at no cost to secure it, so that he has no claim on his landlord under the contract. Why then should he not pay rent as he covenanted? Julian tells us that he can sue, not on some other ground but on his contract (*ex conducto*), for a discharge for the future, but the contract (adds Ulpian) is good for his past occupation, and for that he must still pay any rent in arrear. Rents do not of themselves shift with the ownership (*D. xix. 1 l. 13 § 11*).

l. 13 pr. Mr. M. evidently takes this as a hire of the gig. I think it is a case of *operarum conductio*. The master of the slave *locat servum vehendum*, i.e. contracts for the conveyance of his slave: the slave is killed or hurt: and the master therefore sues the carriage-owner *ex locato*.

In § 2 *vectores* is 'passengers' not 'merchants.'

§ 4. This case, of a shoemaker striking his apprentice so violently with a last on

the neck (not 'head') that his eye was knocked out, occurs in *D. ix. 2 l. 13 pr.* with only this difference that his eye is there said *perfundi*, not *effundi*. A very competent surgeon tells me the case seems to him impossible. The only explanation which occurs to me is that the shoemaker aimed at the neck or back of the head and the lad turning round received the blow in his eye. Of course this is not accordant with the language of the report.

§ 10. The reason why the contractor, who fails to complete in time, is liable only if the work is relet on the same terms, may sometimes be, as M. Monro, following the *Basilica*, suggests, in order to test the possibility of performing the contract, though if the work be construction of some sort and partly done, no such test seems possible. But I suppose the measure of the first contractor's liability is dependent in some degree on the cost of completing the work, and for this purpose the same lines must be adhered to.

l. 15 § 7. The words *supra denique damnum seminis ad colonum pertinere declaratur* are mistranslated by Mr. M. who does not see that *supra* simply refers to § 2: 'I have said above that the loss of the seed falls on the farmer,' i.e. he cannot claim anything from the lessor on this account.

l. 19 § 3. Mr. M.'s translation is at best ambiguous. I should translate: 'If the owner in letting the property bargains to take in lieu of part of the rent a certain quantity of corn at a certain price, and afterwards refuses to take corn or to deduct any money from the rent, he can no doubt sue on the contract for the whole sum; but of course we consider it to be the duty of the judge that he should take into account the interest of the lessee to pay the excepted part of the rent in corn rather than in money.' As regards the following words *simili modo* etc. I am aware that Glück agrees with Mr. M. in understanding it of a converse right to force the lessor to take all in money with a certain addition. But I think it only means that in the case supposed the lessor can assert his right to pay part in corn by means of a direct action as well as by a plea.

ib. § 5, *deteriorem causam aedium facit*, 'makes the house dangerous to live in,' Monro. I should translate 'damages' or 'depreciates the house.' I do not think the *damni infecti cautio* here is used in the regular technical sense or is limited to the case of danger. It is simply a natural security for the landlord to require in case of alterations by the tenant.

l. 21. Mr. M. says he does not understand Javolen's answer. The explanation is this. The agreement was made by stipulation for a fixed rent. Payment of the purchase money is completed before the time in contemplation when the rent was fixed. Purchaser asks for a formal release from the stipulation (cf. *D. xlvi. 4 l. 8, § 3*). If he got this, he would pay nothing: but, says Javolen, the stipulation should be enforced so far as good faith requires, i.e. the purchaser must pay a part of the rent, proportionate to the time for which he actually occupied as tenant.

l. 22 § 2. In Appendix i. Mr. M. accounts for this apparent departure from the rule given in l. 2 § 1. The rule is given better in *D. xviii. 1 l. 20*. It is not, as suggested, because in the case of buildings the remuneration for labour and skill is a larger proportion of the whole payment than in the case of a goldsmith who makes a ring from his own gold, but because the ownership of the soil carries with it the ownership of the building. In our case the locator clearly contracts for a building on his own ground. When I *loco insulam aedificandam* I really *conduco* the builder's services, which, as the Digest adds, he *locat*.

l. 30. Mr. M. is puzzled by '*pro portione quanti dominus praediorum locasset quod eius temporis habitatores habitare non potuissent rationem duci*' and I think misled by a conjecture of Mommsen that *et* should be inserted before *quod*. I have no doubt that Alfen (one of the oldest of the *Digest* lawyers) has used here the old style of speech, which is found in laws and in Cicero and others (see my *Gram.* § 1297 and a very full account in Jordan's *Krit. Beitr.* p. 336 foll.). Thus the edict in *D. iv. 6 l. 1 fin.* *quod eius per leges licebit* 'so far as the laws will allow'; *xxi. 1 l. 1 § 1 quod eius praestari oportere dicatur* 'so far as it shall be said to deserve to be made good.' So here I translate 'that a calculation be made in proportion to the rent fixed by the landlord for so much of the time as the lodgers have not been able to occupy.'

l. 36. I do not see so much difficulty as Mr. M. seems to do. The rule is that a building or construction is at the risk of the contractor, until it is finished (if nothing else is said), or until approval either of the whole or of a portion, according as the agreement is *per aversionem* or *per mensuras*. But in all cases of building, etc., the loss by *vis major* falls on the locator. And why? Because he in all cases furnishes the site, to which the building is an accession: and *vis*

major as a natural phenomenon is a consequence, not of what the contractor does, but of what the *locator* supplies, viz. the site or situation. On completion or approval, the owner of the site takes over the building or the approved part of it: before that time it is understood to be the property, and therefore at the risk, of the contractor.

The words *onus aversum* and *aversio* are from different verbs *avertere* and *averrere*: *onus aversum* is 'cargo diverted from its proper destination,' i.e. made away with: *per aversionem* is 'at a sweep,' as opposed to taking bit by bit.

D. DE FURTIS, l. 1, § 3. Mr. Monro in his first appendix discusses well the two modes in which the definition may be translated. I do not believe in such a combination as *contractatio usûs*; and think the change of *lucri faciendi gratia* into *l. faciendae gratia* so easy that I have no hesitation in preferring the second interpretation. Tribonian with all his merits was in too great a hurry to care for the small points of grammar.

l. 7 pr. Mr. M. misses the point in *origo furti*, etc., and mistranslates accordingly. A slave steals something: he is not caught until after manumission. Is it theft manifest? No, says Pomponius, because the detection was not immediate. When the theft was committed, it was the act of a slave, and as such he could not be sued. His manumission altered this; and, as he was caught with the stolen goods, he might have been a thief manifest, had this been the first act. 'But the commencement of the theft was not a commencement of theft manifest.' This is simply the application of l. 6 to a case where, owing to the change of status, it might have been thought by some that a fresh commencement was made.

l. 13. Mr. M. translates 'if it is stolen at a time when you can say, etc.' I doubt this translation, and think that, had it been intended to lay stress on the time, Paul would have used *eo tempore quo* or *posteaquam* or something of that kind. '*cum stetitisset*' is merely 'seeing that it was the debtor's fault' or 'its being the debtor's fault.' But my main objection is that at no time would the stipulator have had such an interest as would entitle him to bring an *actio furti*. His remedy is on the contract: he has no hold over, and therefore no legal interest in, the thing itself. See l. 86, where Mr. M.'s note is mistaken, as also on l. 14, § 10.

l. 14, § 5, § 7. In both these sections Mr. M. calls attention to the difficulty arising from the fact that, in the ordinary case of

theft by a stranger, the unit of calculation for damages claimed is not the amount of the debt for which the slave is pledged, but the value of the slave himself, the creditor however having to account for all excess over the debt. Yet it is clear that it is the debt which is divided in § 5, and that *totum* in § 7 is the debt also. I do not think that the solution is to be found in supposing, as Mr. M. does, that both cases refer only to thefts by the debtor. The creditor has a right to sue for the theft, only if he has an interest, and the amount of such interest would, I suppose, have to be shown in the course of the proceedings. His effective interest in ordinary cases is simply the amount of the debt, and whatever he gets by his action is liable (if there is no additional claim for expenses, etc.) to be cut down to this in account with the debtor. And when, as in this section, he is spoken of as having an action for so much, it is not the damages themselves which are regarded but that portion of them which the creditor will be able to retain. Both slaves being pledged for the whole debt, if one slave be lost, neither the defendant can object that the creditor has no interest, because there is another slave still in pledge who is worth the whole amount (else why was the other pledged?), nor can the debtor, when the account is taken, say that the creditor must restrict himself to one half the debt.

In § 7 you must allocate your debt in some proportion to the two slaves, if you are going to sue the thief on both heads; else, if you put the whole on one, you have no case on the other. But there is no reason for treating a thief with any greater consideration, because the thing stolen was in pledge. He is liable for the whole value: the distribution of the proceeds is a matter to be settled between the creditor and the debtor, whose joint rights cover the whole value of the slave. When the thief is the debtor himself, he has really stolen only that part of the slave which is equivalent to the creditor's claim; the rest is his own property. And the penal character of the action is satisfied by his being obliged to forfeit this amount, and not being allowed to set it off against his debt (h. t. l. 80, l. 88; xiii. 7, l. 22 pr.).

l. 21, § 4. The difficulty about the words '*si vere fuit*' seems to me to be solved by the assumption that the handle was only soldered to the cup. In this case, no doubt, the owner of the cup can vindicate it, handle and all, from third parties and truly call it his own as a whole. But the owner of the handle

can sue him *ad exhibendum* and thus regain his property. Paul in *D. vi. 1, l. 23, § 5* uses *dominus* of a handle in such a condition, and *vere fuit* means no more. He is owner but cannot for the time vindicate. If the handle were ferruminated, the case were different: the handle is for ever part of the cup, and even if separated does not revert to its former owner (*ib.*, cf. also *xli. 1, l. 27, § 2*).

l. 31. This law appears to have puzzled Mr. M. and yet I suppose he has referred to *D. iii. 4* though his reference is wrong. I have no doubt that *de ceteris rebus publicis* means other communities than that of a municipium; and that *societates* refers to the large public companies (cf. *D. xvii. 2, l. 59*). I see Savigny takes this view (*System* § 87, note *e*; § 88, note *h*).

l. 52, § 11. Mr. M. is not unnaturally puzzled by the decision in the case of the wheat-dealer. But I think '*nomine ejus*' does not mean 'using his name' but 'on his account'; and the wheat-dealer did not take sufficient care to ascertain this fact. This is practically the gist of the words '*non enim mihi negotium sed sibi siliginarius gessit.*' 'He was not, as it happened, acting for me but for himself,' like a banker who pays a forged cheque.

ib. § 12. Mr. M. in his comments seems not to have considered the possibility of the man who got the slave out of custody being perfectly honest in believing the slave to be his own. The fact of his giving sureties shows him probably not to be a mere thief.

l. 54, § 3. This is another of the sections in which Mr. M. shows an imperfect conception of the principle on which the *actio furti*

is granted. It is limited to cases in which the plaintiff holds the thing as owner or by consent of the owner (l. 86). A voluntary *negotiorum gestor* is of course liable to him with whose business he has chosen to intermeddle; and by the cession of the owner's action he may obtain compensation for what he has to pay: but it is entirely for the owner to say whether he will use the action himself or not. A mere volunteer cannot occupy property where he chooses, and have an action for theft if the property be stolen. That is the owner's right, or the right of those to whom he gives a legal and responsible position in reference to it.

There are other sections on which I have noted some disagreement with Mr. Monro's views, but I have said enough, and perhaps more than enough, for the readers of this *Journal*. May I plead that the *Digest* is one of the most important literary monuments of the world and lies at the foundation of most civilized legislation? For us now in England it is chiefly matter for antiquarian study: its students are not as numerous as are found for Homer or pre-historic monuments, but perhaps all the more on that account respect is due to those who, like Mr. Monro, honestly and capably try to make rough places smooth, and to shed light on the somewhat hurried but most precious and fruitful labours of Tribonian. He has preserved to us a building which would otherwise have perished, and, if he adapted it to the practical wants of the time, he has in so doing freed it from much that otherwise would have hindered its continued life.

H. J. ROBY.

WEDD'S EDITION OF THE ORESTES.

The Orestes of Euripides edited with Introduction, Notes, and Metrical Appendix by N. Wedd, M.A., Fellow and Assistant Tutor of King's College, Cambridge. The University Press. 1895. 4s. 6d.

It is to be hoped that this excellent book will be largely used. The chief of its many merits seems to me to lie in the introduction, which treats in a masterly way of the poet's attitude towards his subject, showing how in the matter of bloodguiltiness the public for which he wrote had 'become more moral than its gods,' and how the large space which the difficulties of the moral problem occupied in the poet's mind led him

to 'sacrifice art to ethics.' It concludes with some useful remarks on the 'bearing of the play on contemporary events.'

Of the explanatory notes, too, there is little but good to be said. They are a thorough and scholarly guide to the text. Perhaps too many *alternative* interpretations are given. One could almost imagine that an inexperienced learner would thereby be encouraged to think that in Greek ambiguity was a virtue.

Critical questions are only slightly touched. The metrical appendix gives Dr. J. H. H. Schmidt's schemes of the choric passages; the necessary alterations having been made where the reading adopted is not that