

# The Creation of Legal Principle

P. J. du Plessis\*

Abstract – This article examines the process whereby legal principle was created in the formative period of the *ius commune* (1100–1400). It uses a specific example from the realm of the law of letting and hiring to argue that distinct phases can be identified in this process. An appreciation of the existence of these phases, in turn, casts new light on the variety of specialized cognitive techniques employed by medieval jurists to transform Roman legal rules into the “common law” of Europe.

---

## 1. Introduction

Civil law systems historically influenced by Roman law through the process known as “reception” are essentially made up of general principles (*regula*) distilled through centuries from a common historical source and modified over time to suit the needs of a specific jurisdiction.<sup>1</sup> While much has been written about the external history of the *ius commune*, the process whereby these general principles were created remains largely unexplored.<sup>2</sup> This

---

\* Lecturer, University of Edinburgh School of Law. English translations from the Digest taken from A. Watson, ed., *The Digest of Justinian*, 2nd ed. (Philadelphia 1998). English translation from the Institutes of Justinian taken from P. Birks and G. McLeod, ed., *Justinian's Institutes* (London 1987). English translation of texts from the Code of Justinian are my own, but are influenced by the translations of S. P. Scott, and those of F. H. Blume, ed., *Annotated Justinian Code*, rev. T. Kearley, recently published on the website of the University of Wyoming College of Law. All translations of medieval sources are my own.

<sup>1</sup> On the phenomenon of reception, see generally P. Vinogradoff, *Roman Law in Medieval Europe* (London 1909); P. Koschaker, *Europa und das römische Recht* (Munich 1947); F. Wieacker, *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed. (Göttingen 1967); M. Bellomo, *The Common Legal Past of Europe 1000–1800*, trans. L. Cochrane (Washington D.C. 1995); and P. Stein, *Roman Law in European History* (Cambridge 1999).

<sup>2</sup> Some work has been done on possible methods of enquiry, see E. J. H. Schrage, *Utrumque Ius: eine Einführung in das Studium der Que-*

article will shed light on this process by focusing on the development of a single legal principle from an area of private law which still resonates in modern law. This principle, the hereditability of letting and hiring, is similar in all civil law systems whether purely civilian or mixed. Thus, for example, in French law death of one of the parties does not terminate the contract.<sup>3</sup> A similar principle exists in mixed legal systems such as Scots law,<sup>4</sup> the civil code of Louisiana<sup>5</sup> and South African law.<sup>6</sup> The reason for the similarity of these provisions may be attributed largely to the common historical source (Roman law) underlying these legal systems, but the process whereby this principle was received during the development of these systems undoubtedly also played a major role.

In order to demonstrate how the notion of the hereditability of letting and hiring became rooted in modern civilian systems,

*llen des mittelalterlichen gelehrten Rechts* (Berlin 1992); H. Lange, *Römisches Recht im Mittelalter*, 1 (Munich 1997).

<sup>3</sup> *Code Civil*, art. 1742: “Le contrat de louage n’est point résolu par la mort du baillieur ni par celle du preneur.” See art. 1751 about the death of co-lessees.

<sup>4</sup> A. McAllister, *Scottish Law of Leases*, 3rd ed. (East Kilbride 2002), § 8.1. In Scots law, the issue of the hereditability of a lease is regulated by The Succession (Scotland) Act of 1964, which replaced the common law principle. Where a tenant dies during the course of the term of lease, the lease vests in the executor who has to dispose of it lawfully. Whether the lease will transfer to the heirs depends on whether the tenant made a bequest to that effect. Where the tenant has not made such a bequest, the matter becomes more complicated. There are special statutory rules about the hereditability of certain types of leases.

<sup>5</sup> Art. 2731 of the *Louisiana Civil Code*: “A contract for letting out is not dissolved by the death of the lessor, nor by that of the lessee; their respective heirs are bound by the contract” (replaced by art. 2717 in 2004. The wording of the new article has not changed substantially, but also now includes juristic persons.). See V. Palmer, *Leases: The Law in Louisiana* (Norcross 1982), §§ 5–22. The historical inspiration for this rule seems to be Pothier’s *Traité du contrat de louage* § 317 (English: *Pothier’s Treatise on the Contract of Letting and Hiring*, trans. G. A. Mulligan (Durban 1953)).

<sup>6</sup> South African law, being uncodified, relies on Roman-Dutch authority for this rule, among these Hugo Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid*, 2nd ed. F. Dovring, H. F. W. D. Fischer and E. M. Meijers (Leiden 1965), bk. 3, tit. 19, §§ 9, 16; Simon van Leeuwen, *Censura Forensis* (Leiden 1678), bk. 1, tit. 4, § 22.18; *Het Roomsche Hollandsch Recht*, bk. 4, tit. 21, § 6 (English: Simon van Leeuwen, *Commentaries on Roman-Dutch Law*, trans. J. G. Kotzé, 2nd ed. rev. C. W. Decker (London 1921–1923)); Johannes Voet, *Commentarius ad Pandectas* (Leiden 1698–1704), bk. 19, tit. 2, § 1.14. See W. E. Cooper, *Landlord and Tenant*, 2nd ed. (Cape Town 1994), 325–26, especially note 93.

this article will focus on two formative periods in the history of the *ius commune*. First, the historical foundations underlying the principle of the hereditability of the contract of letting and hiring in Roman law will be investigated. This will be done primarily to demonstrate the state of the legal principle in Roman law and to identify the texts subsequently used by medieval jurists to construct their own interpretations. The second part of this article will focus on the transformation of the Roman law rule into a general legal principle during the foundational period of the *ius commune*, that is the period 1100–1400 when the intellectual study of law resurfaced as an academic discipline at Italian and French universities and when the intellectual endeavours of these jurists led to the creation of a pan-European body of law consisting of Roman, customary, canon and feudal law.<sup>7</sup> While it would be possible to trace the history of this general principle in subsequent periods of the *ius commune*, this article will focus on medieval interpretations as these proved particularly influential in the creation of a general principle.

## 2. Historical foundations

There are seven Roman law texts in which the issue of the hereditability of this contract is discussed.<sup>8</sup> In most of these, hereditability is not at the forefront of the discussion, but is mentioned as the background to a specific *casus*. The texts may be grouped into two categories, namely those dealing with the death of the *conductor* and those with the death of the *locator*. In each case, the texts have been arranged chronologically.

### *Death of the conductor:*

1. D.19.2.15.9, *Ulpianus libro trigesimo secundo ad edictum*. Interdum ad hoc ex locato agetur, ut quis locatione liberetur, Iulianus libro quinto decimo digestorum scripsit. Ut puta Titio fundum locavi isque pupillo herede instituto decessit et, cum tutor constituisset abstinere pupillum hereditate, ego

---

<sup>7</sup> Stein (note 1), ch. 4. On the sources of this period, see H. Coing, ed., *Mittelalter, 1100–1500: die gelehrten Rechte und die Gesetzgebung* [*Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1] (Munich 1973). See also Schrage (note 2); Lange (note 2).

<sup>8</sup> See P. J. du Plessis, “The Hereditability of Locatio Conductio,” in J. W. Cairns and P. J. du Plessis, ed., *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007), 139–53, for a full discussion of the position in Roman law.

fundum pluris locavi: deinde pupillus restitutus est in bona paterna. Ex conducto nihil amplius eum consecuturum, quam ut locatione liberetur: mihi enim iusta causa fuit elocandi.

Sometimes a man will have an action on hire to discharge from a lease, as Julian wrote in the fifteenth book of his Digest. For instance, I leased a farm to Titius and he then died leaving a *pupillus* as an heir; the tutor arranged that the *pupillus* refuse the inheritance and I then leased the farm for more money. Later the *pupillus* won a *restitutio* to his father's property. [Julian held that] he will obtain nothing in an action on hire except that he be discharged from the lease; for I had a legally acceptable reason for leasing, . . .<sup>9</sup>

2. D.19.2.19.8, *Ulpianus libro trigesimo secundo ad edictum*. Ex conducto actionem etiam ad heredem transire palam est.

It is obvious that an action on hire also passes to the [lessee's] heir.

3. C.4.65.10, *Imp. Gordianus A Pomponio Sabino*. Viam veritatis ignoras in conductionibus non succedere heredes conductoris existimans, cum, sive perpetua conductio est, etiam ad heredes transmittatur, sive temporalis, intra tempora locationis heredi quoque onus contractus incumbat. 239 CE.

He who reckons that a lease does not transmit to the heirs of the tenant ignores the way of truth. Irrespective of whether the lease is temporary or perpetual it will transmit to the heirs and for the remaining period of the lease the heir will also be burdened by the contract.

4. C.4.65.24, *Imp. Diocletianus et Maximianus A A Aurelio Antonino*. Contractus locationis conductionisque non intervenientibus etiam instrumentis ratus habeatur: secundum quod heredes conductoris, etsi non intervenerit instrumenta, non uxorem convenire debes. Sane de posteriore tempore, quo conductricem ipsam proponis fuisse, adesse fidem precibus tuis probans pensionem integras ab ea pete. 293 CE.

A contract of letting and hiring, even though not reduced to writing, shall have effect. Accordingly, you should sue the

---

<sup>9</sup> The text appears to have been edited without finishing the final sentence. The possible options are explored in the subsequent texts.

heirs of the tenant, rather than his wife even though the contract has not been reduced to writing. Clearly, for the subsequent period which you allege the woman has been your lessee, having proved the statements in your petition, notify her to pay the rent in full.

5. J.3.24.6. *Mortuo conductore intra tempora conductionis heres eius eodem iure in conductionem succedit.*

If someone who has something on hire dies before the period of hire expires, his heir steps into his shoes with the same rights.

*Death of the locator:*

6. D.19.2.24.5, *Paulus libro trigesimo quarto ad edictum.* Qui in plures annos fundum locaverat, testamento suo damnavit heredem, ut conductorem liberaret. Si non patiat heres eum reliquo tempore frui, est ex conducto actio: quod si patiat heres nec mercedes remittat, ex testamento tenetur.

A man leased out a farm for many years, and then in his will he condemned the heir to discharge the lessee [from paying rent]. If the heir does not allow him enjoyment for the remainder of the term, an action on hire lies; but if he should allow this without remitting the rent, he is liable on the will.

7. D.19.2.9.1, *Ulpianus libro trigesimo secundo ad edictum.* Hic subiungi potest, quod Marcellus libro sexto digestorum scripsit: si fructuarius locaverit fundum in quinquennium et decesserit, heredem eius non teneri, ut frui praestet, non magis quam insula exusta teneretur locator conductori. Sed an ex locato teneatur conductor, ut pro rata temporis quo fructus est pensionem praestet, Marcellus quaerit, quemadmodum praestaret, si fructuarii servi operas conduxisset vel habitationem? Et magis admittit teneri eum: et est aequissimum. Idem quaerit, si sumptus fecit in fundum quasi quinquennio fructurus, an recipiat? Et ait non recepturum, quia hoc evenier posse prospicere debuit. Quid tamen si non quasi fructuarius ei locavit, se si quasi fundi dominus? Videlicet tenebitur: deceptus enim conductorem: et ita imperator Antoninus cum divo Severo rescripsit. In exustis quoque aedibus eius temporis, quod aedificium stetit, mercedem praestandum rescripserunt.

Here can be appended what Marcellus wrote in the sixth book of his Digest: "If a fructuary leases out a farm for five years

and then dies [before the term is over], his heir is not liable for providing the [tenant's] enjoyment, no more than the lessor is liable to the lessee when the apartment house burns down." But Marcellus asks if the lessee is liable on lease for providing rental payment prorated to his [actual] time of enjoyment, just as he would owe had he hired the services of a slave held in usufruct or a dwelling. He prefers to allow liability, and this is the fairest position. He then asks whether he may recover outlay on the farm under the assumption that he would enjoy it for five years. He says that he may not recover this, since he should have foreseen the possible outcome. However, what if he [the fructuary] leased it to him while posing not as a fructuary, but as the farm's owner? Obviously he is liable, since he deceived the lessee; and so the Emperor Antoninus together with the deified Severus replied in a rescript. Likewise in the case of a building destroyed by fire they replied that rent was due for the time when the building stood.

Two initial conclusions may be drawn from a survey of these texts. First, of the seven texts listed above, four are concerned with one form of letting and hiring (*locatio conductio rei*). Apart from the remaining general statements, there are no texts suggesting that this principle applied to the remaining two forms of letting and hiring (*locatio conductio operis* and *operarum*). This has led some to conclude that not all forms of letting and hiring were heritable.<sup>10</sup> Secondly, the texts provide no information about the origin of the notion of the heritability of letting and hiring. The dating of the texts may provide some evidence. The texts range in date from the second century CE to the sixth century CE, but this merely indicates that the matter of the heritability of letting and hiring was the subject of juristic discussion during this period. It may well be that it was already established law before the second century BCE, since non-legal sources show that the issue of the heritability of the contract of letting and hiring was already discussed in the first century BCE.<sup>11</sup> Given the fact that the consensual contract of letting and hiring is generally presumed to have arisen in the second half of the second century BCE (if not before), this suggests that the heritability of letting and hiring either formed part of the contract from its creation or

---

<sup>10</sup> See the authorities cited in Du Plessis (note 8), 140–41.

<sup>11</sup> Du Plessis (note 8), 141–43 (citing Cic. *Verr.* 2.1.51.130–150 and Cic. *Att.* 13.45.2–3, 13.46.3, 13.37.4).

that it was introduced somewhere between this *terminus* and the first century BCE.<sup>12</sup>

It is furthermore evident that although the drafters of the *Corpus Iuris Civilis* claimed to have eliminated the background information surrounding most of the text fragments, the majority of these can at best be described as casuistic, i.e. dealing with a specific situation, and leaving it to the individual to extrapolate the principle behind it.<sup>13</sup> Looking at the matter from the perspective of legal doctrine, three general statements may be derived from these texts. First, both the actions arising from the contract of letting and hiring were available to the heirs of the respective parties where either the *locator* or *conductor* died during the course of the term of the contract. In second place, this principle seemingly applied both to letting and hiring for a fixed term and those regarded as being perpetual. Finally, the legal position of the *locator* could affect the hereditability of the letting and hiring. Where the *locator* was a usufructuary (i.e. the beneficiary of the personal servitude known as usufruct) who let out the object with a view to drawing civil fruits by way of rental income, his death terminated the contract as usufruct is a personal servitude which was attached to a specific person.

### 3. The creation of a general principle

A number of medieval texts dealing with the issue of the hereditability of letting and hiring will be discussed in this section. They are, in chronological order, the *Summa Trecensis*, *Lo Codi*, the *Summa Codicis* of Placentinus, the *Summa* of Goffredus de Trano, both the *Lectura* and the *Summa* of Azo on the Code, Odofredus' *Lectura* on the Code, Accursius' Gloss on the Code, Jacques de Revigny's *Lectura* on the Code, Henricus Hostiensis' *Summa*, Cynus de Pistoia's *Lectura* on the Code, Albericus de Rosate's Commentary on the Code, and Baldus de Ubaldis' Commentary on the Code. The grounds on which these have been selected are threefold.<sup>14</sup> First, of the extant medieval juristic

---

<sup>12</sup> See A. Watson, *The Contract of Mandate in Roman Law* (Oxford 1961), 9–10. See also A. Watson, *The Law of Obligations in the Later Roman Republic* (Oxford 1965), 100–101.

<sup>13</sup> The instruction to remove all ancillary context from the texts is stated in the C. *Deo auctore* 7.

<sup>14</sup> The only major drawback of this methodology is that manuscripts have not been taken into account. While these are an important source of information about the development of the *ius commune*, they are predominantly used to make larger claims about “lines of influence” from

writing, the works selected here discuss the contract of letting and hiring most comprehensively. Secondly, they provide a sample of the different “schools” of jurists (Glossators, *Ultramontani*, Canonists, and Commentators) which contributed to the creation of the *ius commune*. Finally, these works also present a cross-section of the different types of juristic literature such as *summae* (summaries of a specific component of the *Corpus Iuris Civilis*, most commonly the Code), *lecturae* (lecture notes reflecting the teaching of Roman law at medieval universities) and *commentaria* (learned commentaries on specific topics within the *Corpus Iuris Civilis*).<sup>15</sup>

There are three discernible phases in the development of this general principle. Phase one (roughly covering the twelfth century) consists of introductory discussions. Phase two (covering the thirteenth century) contains complex discussions focusing on the interaction between the principle of the heritability of letting and hiring and other rules/areas of law. This phase also witnesses the creation of a general principle based on Roman (and other) foundations. The final phase (covering the latter part of the thirteenth century and continuing until the end of the fourteenth century) focuses on the application of the principle in practice. It will be apparent throughout that, even though different forms of literature are discussed in this section, they all demonstrate a remarkable knowledge of Roman law.

a. *Phase one*

One of the earliest indications that the issue of the heritability of the contract of letting and hiring formed part of medieval legal thought is a statement in the *Summa Trecensis*, a work thought to include the views of a number of medieval jurists produced between c. 1135–1140.<sup>16</sup>

[§§ 3–4] H[a]ec actio locatori heredive eius competit in eum qui conduxit vel heredem eius: et hoc, sive perpetua sive temporalis fuit. Veniunt autem in hac actione qu[a]jedam ex natura contractus, qu[a]jedam iure actionis. . . . [§ 6] Ex conducto actio conductorum heredive eius competit in locatorem

---

teacher to pupil. Since this article does not make any such claims, only printed sources have been consulted.

<sup>15</sup> On these forms of literature, see Schrage (note 2), 35.

<sup>16</sup> An alternative view is that it was produced c. 1140–1159 in Bologna. On the *Summa Trecensis* and the debate over its authorship, see Coing (note 7), 198–99, as well as Lange (note 2), § 45.



eiusve heredem. In qua similiter spectandum est, quid ex natura contractus seu actionis prestandum sit.<sup>17</sup>

This action is available to the *locator* or his heir against him who rented [it] or his heir whether the contract is for a limited period of time or perpetual. For in this action some [elements] from the nature of the contract and some from the nature of the action unite. . . . The *actio ex conducto* is available to the *conductor* or his heir against the *locator* or his heir. Similarly, in this action it ought to be investigated what has to be performed in terms of the nature of the contract or the action.

Though this appears to be nothing more than a standard summary of the Roman law position, this text is significant for at least two reasons. First, the hereditability of letting and hiring is explained in terms of actions (a sophisticated concept) and it is clear that the unnamed authors were familiar with C.4.65.10 given the use of the phrase *sive perpetua sive temporalis*. This is to be expected since the *Summa* was essentially a summary of Books 1–9 of the Justinianic Code.<sup>18</sup> Secondly, the statement about the varying elements of the action suggests a thorough understanding of the contract of letting and hiring, even though all aspects of the legal principle were not explored. Thus, for example, the implications of the principle were not examined nor were the boundaries contemplated.

The hereditability of letting and hiring is also treated in the Provençal treatise, *Lo Codi*, produced in southern France around 1170 at the latest, seemingly for use by lay judges who did not have a detailed knowledge of the law.<sup>19</sup>

§ 15 Ista petic[t]iones quas habent ille qui locavit et ille qui conduxit possunt habere heredes eorum usque ad xxx annos.<sup>20</sup>

---

<sup>17</sup> Hermann Fitting, *Summa Codicis des Irnerius mit einer Einleitung* (Berlin 1894; repr. 1971), bk. 4, tit. 57, §§ 3–4, 6. Errors in typography silently corrected.

<sup>18</sup> On the content of the *Summa* as a form of juristic literature in medieval learned law, see Lange (note 2), § 45.III.1.

<sup>19</sup> On the target audience of *Lo Codi*, see Coing (note 7), 200–201, as well as Lange (note 2), § 49.

<sup>20</sup> Hermann Fitting, ed., *Lo Codi in der lateinischen Übersetzung des Richardus Pisanus* (Halle 1906), bk. 4, tit. 69 *in fine*. The Latin translation of this work, produced in 1176 by Richard of Pisa, has been used

The heirs can have these actions which are available to the lessor and lessee for a period of thirty years.

Like the authors of the *Summa Trecensis*, the drafter of this treatise was primarily concerned with the transmissibility of actions. Thus, the text states that both actions are available to the respective heirs for a period of thirty years. The origin and meaning of this time period is unclear. Roman-law texts indicate that the actions were generally only available to the heirs of the deceased parties for the remainder of the original term of letting and hiring.<sup>21</sup> Two explanations may be offered for the inclusion of this time period in the text. First, it could represent an example of local custom which had been incorporated into the text of this work, since it is known to have been drafted for use by lay-judges. Secondly, it may well be that the thirty-year period was linked to the notion that some actions in Roman law were perpetual. Actions were regarded as perpetual when they endured for thirty years.<sup>22</sup> A general feature of such perpetual actions is that they transmitted to the heirs of the parties. Unfortunately, the drafter of this treatise did not list the sources used to compile this statement nor is it clear from the context whether the notion of a perpetual action was at the basis of the author's argument. If this is the case, however, it would suggest an early attempt to synthesise Roman law with elements from other areas of law to enhance understanding.

This view on the transmissibility of the actions arising from the contract of letting and hiring to the heirs of the parties seems to have appeared in juristic discussions until the end of the twelfth century as is evident from the *Summa Codicis* of Placentinus (fl. until 1192) compiled c. 1165.<sup>23</sup>

Locati autem competit locatori, & eius heredi, contra conductorem & eius heredem.<sup>24</sup>

[The *actio locati* is available to the *locator* and his heir, against the *conductor* and his heir.

---

instead of the original Provençal as it has been standardized and edited. Errors in typography silently corrected.

<sup>21</sup> Compare C.4.65.10 above.

<sup>22</sup> C.7.39.3.2 = C.Th. 4.14.1.3 = *Brev. (Lex Rom. Visigoth.)* 4.12.1.3.

<sup>23</sup> Coing (note 7), 201–202. See also Lange (note 2), § 23.

<sup>24</sup> *Placentini Summa Codicis*, ed. F. Calasso (Turin 1962) (anastatic reprint of the 1536 Mainz edition), bk. IV, tit. 64 (*De locato et conducto*), 190 *in fine*.

Actio *conducti* competit conductori, & eius heredi, in locator-em & eius heredem.<sup>25</sup>

The *actio conducti* is available to the *conductor* and his heir against the *locator* and his heir.

b. *Phase two*

Since different strands of legal thought (Roman, canon, and feudal) contributed to the formation of the medieval *ius commune*, it is important to establish whether other academic views on the subject existed during this time, since they may have affected the formation of the principle. As far as canon law is concerned, Goffredus de Trano (fl. until 1245), who studied in Bologna and who was the teacher of prominent medieval jurists such as Azo and Accursius, followed the civilian view on the matter.

§ 6 Et si moriatur conductor infra tempus conductionis, succedit haeres in iure conductionis, secus in usufructu, qui personalis est, & extinguitur cum persona, ut [C.eod.tit.l.sī unam<sup>26</sup>], & C.3.33.10<sup>27, 28</sup>

And if the *conductor* should die during the period of the contract, the heir inherits the right in tenancy. This situation is different in [the case of] usufruct, which is personal and is extinguished with the person, as in [spurious reference], & C.3.33.10.

<sup>25</sup> Placentinus (note 24), 191 *in medio*.

<sup>26</sup> This reference could not be resolved. There is no *l.sī unam* in C.4.65, the Codex title on letting and hiring, nor does such a title exist in C.3.33, the Codex title on usufruct mentioned in the text.

<sup>27</sup> C.3.33.10:

*The Emperors Diocletian and Maximian to Pomponius.* If the (female) owner of the property leased the usufruct of the same to your wife, subject to the payment of a certain sum every year, the *causa* of the use and enjoyment should not be denied to her (the owner), even after the death of the (female) tenant. 293 CE.

The final sentence of this text is particularly problematic "... morte conductricis ei quae locavit etiam utendi fruendi causa non est dene-ganda." Fred Blume has interpreted this phrase to mean (in a rather roundabout way) that death of the usufructuary terminates the lease, while death of the owner does not. In support of this view he cited C.3.33.3 and 12. As far as could be ascertained, this text has never been suspected of interpolation.

<sup>28</sup> Goffredus de Trano, *Summa in titulos decretalium* (Padua 1667), 229–30.

Goffredus not only acknowledged that the heir succeeds to the rights in tenancy, but also contrasted the position to the personal servitude, usufruct, which though similar to letting and hiring, could not transfer to the heirs. This indicates that the issue of the hereditability of letting and hiring was no longer merely discussed in terms of the transmissibility of actions, but that the boundaries of the concept were being tested by comparing it to similar areas of law.

As for civilian scholarship, the jurist Azo (fl. until 1220/1230) in his lectures on the Code of Justinian examined C.4.65.10 in detail.<sup>29</sup>

[*Viam veritatis*]: Intellige de veritate de qua hic loquitur. Alias enim Deus dicitur via, veritas, & vita. Assignatur contra supra [C.3.33.10<sup>30</sup>] solve ut ibi. *Herediti quoque onus contractus incumbat*. Licet & de eo in locatione non sit facta mentio: quia plerumque tam heredibus nostris quam nobismet ipsis cavemus: ut [D.22.3.9<sup>31</sup>]. Si tamen ita fiat locatio ut inhabites quamdiu mihi placebit, morte locatoris finitur: ut [D.19.2.4<sup>32</sup>].<sup>33</sup>

It should be understood [to refer to] the truth which is discussed here. For it is different where God states [I am] the way, the truth and the light. It is assigned a contradictory [text] above [C.3.33.10] and let it be resolved as [demonstrated] there. “The burden of the contract also lies upon the heir.” It is permitted/lawful and it is not mentioned in the contract, since generally we provide for our heirs as well as for ourselves, as in [D.22.3.9]. If, however, the agreement is

<sup>29</sup> For more information about the life of this jurist, see Coing (note 7), 180, and Lange (note 2), § 30, and the extensive literature cited there.

<sup>30</sup> As in note 28.

<sup>31</sup> D.22.3.9, Celsus, *Digest*, book 1:

If there is a pact in which the heir is not mentioned, the question is put whether it applies only to the original party. Although one who raises a defense must indeed prove it, the plaintiff must show that the agreement applied only to the other party and not to his heir, since we generally provide for our heirs as well as ourselves.

<sup>32</sup> D.19.2.4, Pomponius, *Sabinus*, book 16: “A contract of ‘lease or grant on *precarium*,’ if concluded for as long as the object’s lessor or grantor may desire, is dissolved when the lessor dies.”

<sup>33</sup> Azo, *Lectura super Codicem*, in M. Viora, ed., *Corpus Glossatorum Iuris Civilis*, 3 (Turin 1966) (anastatic reprint of a Paris 1577 edition), on C.4.65.10. This work was produced from a manuscript created by an otherwise unknown student of Azo, Alexander de Sancto Egidio.

such that you inhabit as long as it pleases me, it is terminated by the death of the lessor, as in [D.19.2.4].

Item morte locatoris non extinguitur locatio nisi ego locaverim tibi quod ad vellem finitur locatio morte mea ut [D.19.2.4<sup>34</sup>]. In rebus immo ecclesiasticis forte fiet locatio usque ad xxx annos cum dicat lex an fieri in perpetuum . . . . A vasallis atque propter consuetudinem regni sit usque ad xx annos et dicit libellus. . . .<sup>35</sup>

Similarly the letting and hiring is not terminated by the death of the *locator*, unless I let it out to you [with the proviso] that I wish it to be ended through my death [D.19.2.4]. More correctly, in ecclesiastical objects the letting and hiring will per chance continue for thirty years, since the *lex* states “an fieri in perpetuum” . . . . But for vassals according to the custom of the kingdom let it be for twenty years and the booklet states thus. . . .

Sunt autem istae actiones perpetuae heredibus dantur et in heredes ut [D.19.2.19.8<sup>36</sup>].<sup>37</sup>

However, these actions are perpetual and given against heirs and to the benefit of heirs as in [D.19.2.19.8].

Like Goffredus de Trano, Azo contrasted C.4.65.10 with a text on usufruct (C.3.33.10) and resolved the apparent conflict between them in a similar fashion. Azo also mentioned that it need not be explicitly stated in the contract of letting and hiring that both the parties and their heirs are bound under the contract. Where it had been stipulated that the contract only endures as long as the *locator* wishes, that is a tenancy-at-will, it was terminated by his death. Finally, in his *summa* on the Code, Azo mentioned that letting and hiring was normally not terminated by death unless stipulated as such. The significance of Azo’s treatment of the issue is threefold. First, he introduced a new element to the discussion by enquiring whether the statement about the hereditability needed to be recorded in writing in the contract of letting and hiring. Secondly, the circumstances of a tenancy-at-will were also added to the discussion. Finally, a comparison was

<sup>34</sup> As in note 32.

<sup>35</sup> Azo, *Summa super Codicem*, in M. Viora, ed., *Corpus Glossatorum Iuris Civilis*, 2 (Turin 1966), 170, right-hand column towards the top.

<sup>36</sup> D.19.2.19.8, Ulpian, *Edict*, book 32: “It is obvious that an action on hire passes to the [lessee’s] heir.”

<sup>37</sup> Azo (note 35), 173 *in medio*.

drawn with feudal tenants, thus indicating an attempt to draw parallels with other areas of law and possibly with legal practice.

Odofredus de Denariis (fl. until c. 1265), a student of Azo, raised similar questions in his analysis of C.4.65.10.<sup>38</sup>

[*Viam*] In lege ista dicitur quod heres conductoris succedit in conductione, sicut heres locatoris in locatione et qui aliter credunt viam veritatis ignorat. Textus viam veritatis ignorant dicit Imperator interroganti ut patet ex legis subscriptione. Textus in conductione f[ecit] proprietatis secus in conductionibus usufructis. Et sic solvetur contra. Unomodo supra [C.3.33.10<sup>39</sup>]. Textus enim sive perpetua conductio est infra usque ad xxx annos quod et actiones dicuntur perpetuae, quae durant usque ad xxx annos ut [J.4.12<sup>40</sup>]. Vel potest dici, cum sive perpetua conductio est, id est quamdiu solvatur pensio et sic sumitur [J.3.24.3<sup>41</sup>]. Vel potest dici, cum sive perpetua conductio est f[ecit] usque ad vitam et tunc non transiret usque ad heredes.<sup>42</sup>

In this *lex* it states that the heir of the *conductor* succeeds in the tenancy just as the heir of the *locator* succeeds in letting and hiring and it states that he who believes differently ig-

---

<sup>38</sup> See the entry on Odofredus by Coing (note 7), 181, and Lange (note 2), § 39.

<sup>39</sup> As in note 27.

<sup>40</sup> A generic reference to the entire title. It will therefore not be cited.

<sup>41</sup> J.3.24.3:

The relationship between hire and sale is so close that on some facts it has been difficult to say which of the two contracts is made. Take, for example, the case where land is transferred to be enjoyed in perpetuity. That is to say, the agreement is that if the owner receives his rent or other return he will always be barred from disturbing not only the tenant and his heir but also any assignee from them, whether the alienation arises from sale, gift, dowry or any other reason. Doubts about this contract, with some of the classical jurists coming down for hire and others for sale, led the Emperor Zeno to establish its independence under the name of emphyteusis. It no longer leans towards sale or hire, but stands apart, with its own implied terms. Zeno's enactment also provided for express terms to be given effect, as in other contracts recognized by the law of nature. It also ruled that in the absence of an express provision as to risk the owner bears the risk of total destruction, while partial loss is borne by the emphyteutic tenant.

<sup>42</sup> Odofredus, *Lectura super Codice*, in D. Maffei, E. Cortese and G. Rossi, ed., *Opera Iuridica Rariora*, 5 (Bologna 1968–1969) (anastatic reprint of a Lyons 1552 edition), on C.4.65.10.

nores the truth. The text “viam veritatis ignorant” states “Imperator interroganti” which is clear from the subscript of the *lex*. The text was concerned with the hiring of property, the matter is different in the letting and hiring of a usufruct. The contradictory [text] is resolved in this way. In one way above [C.3.33.10]. The text states “whether the letting and hiring is perpetual” [that is] is for a period of thirty years and the actions are called perpetual, which last for thirty years as in [J.4.12]. Or it could be said that “whether the letting and hiring is perpetual,” [that is] as long as the rent is paid and it is interpreted in this way [J.3.24.3]. Or it could be said that “whether a letting and hiring is perpetual” [that is] it endures for life and then it does not transfer to the heirs.

Odofredus’ analysis, following an initial discussion of the difference between letting and hiring and usufruct, focused on the circumstances in which letting and hiring could be said to be perpetual. Although this is essentially a philological analysis of the text, the three possibilities mentioned in light of statements made in various Roman law texts indicate that Odofredus attempted to define this term using a variety of different legal texts. It is also worth mentioning that Odofredus’ treatment of this latter point resembles that of Azo.

The combined Glossatorial interpretation of the issue of the hereditability of letting and hiring was laid out in the Gloss of Accursius (d. 1263), a student of Azo at Bologna.<sup>43</sup>

[*Viam veritatis*] Est ergo veritas quod succedit ut hic subiicit et [D.19.2.60.1<sup>44</sup> et D.19.2.19.8<sup>45</sup> et C.5.12.18,<sup>46</sup> J.3.24.6<sup>47</sup> et

<sup>43</sup> On Accursius, see the entry by Coing (note 7), 173–75.

<sup>44</sup> D.19.2.60.1, Labeo, *Posthumous Works, Epitomized by Javolenus*, book 5: “I think that a tenant farmer’s heir, though not himself a tenant farmer, nonetheless possesses for the owner.”

<sup>45</sup> See note 36.

<sup>46</sup> C.5.12.18:

*The Emperors Diocletian and Maximian to Menestratus.* If your mother-in-law donated a tract of land to your wife with the reservation of the usufruct, and your wife gave the ownership of said property to you by way of dowry, and then your mother-in-law transferred to you the usufruct of the same, there is no doubt that the land will remain in your hands in accordance with the terms of the agreement entered into between you if your wife should die during the marriage. If, however, your mother-in-law gave her daughter the usufruct in consideration of receiving a certain sum of money annually, and the latter should die, at least the usufruct could [not (cf. Blume)] be extinguished. 294 CE.

J.2.1.36<sup>48</sup>] in eo quod enim ibi fere. Sed contra supra [C.3.33.10<sup>49</sup>]. Solve ut ibi.<sup>50</sup>

It is therefore the truth that it succeeds as introduced here and [D.19.2.60.1, D.19.2.19.9, C.5.12.18, J.3.24.6, J.2.1.36] in *eo quod enim ibi fere*. But [see] contrary above on usufruct [C.3.33.10]. It is solved as [indicated] there.

At first sight, Accursius' treatment of the matter seems unremarkable, but a closer inspection of the texts cited in support of his interpretation reveals interesting information. Thus, for example, D.19.2.60.1 is concerned with the issue of possession and whether the heir of an agricultural tenant continues to possess the property on behalf of its owner like the deceased tenant. Similarly, C.5.12.18 and J.2.1.36 deal with the letting out of a usufruct. The large number of supporting texts, combined with the breadth of coverage obtained from a collective reading of these, indicates that Accursius explored the potential application of this principle in the broadest possible sense.

### c. *Phase three*

Jacques de Revigny (fl. until the second half of the thirteenth century), one of the prominent French jurists of the "school" of Orleans, examined the *casus* mentioned in C.4.65.24.<sup>51</sup>

[*Contractus*] Si ergo licet uxor habitaverit cum marito[,] tamen non convenietur domus immo maritus nisi conduxerit post mortem domum. Unde non dico quod si mulier habitaverit mortuo marito quod possit conveniri immo convenietur heredes mariti qui poterunt habitare ut supra [C.4.65.10<sup>52</sup>]. Nec dicerem quod mulier videretur tacite reconduxisse. Nam

---

<sup>47</sup> J.3.24.6: "If someone who has something on hire dies before the period of the hire expires, his heir steps into his shoes with the same rights."

<sup>48</sup> J.2.1.36: "A usufructuary becomes owner of the fruits of the land only by harvesting them himself. If he dies when the fruit is ready but unpicked, his heir is not entitled to it. It goes to the landowner. Much the same rules apply for tenants."

<sup>49</sup> As in note 27.

<sup>50</sup> Accursius, *Glossa in Codicem*, in M. Viora, ed., *Corpus Glossatorum Iuris Civilis*, 10 (Turin 1968), on C.4.65.24.

<sup>51</sup> On Jacques de Revigny, see Coing (note 7), 281–82.

<sup>52</sup> As above in the survey of Roman law texts.



illud ego intelligo in eadem persona.<sup>53</sup>

Thus, even though a wife inhabited [the rented property] with her husband, she will not have concluded a contract for the house, more correctly the husband [has], unless she rented the house after his death. Thus I cannot say that if the wife inhabited after the death of her husband, she is able to conclude a contract, more correctly the heirs of the husband, who are permitted to inhabit as [C.4.65.10], [are able to conclude a contract]. Nor would I say that the wife is deemed to have rented the property tacitly for I understand this [to apply] to the same person.

The significance of de Revigny's commentary on this text is twofold. First, this text is not frequently discussed in the context of this debate. Most jurists focused on C.4.65.10 and Jacques de Revigny's choice to comment on this text rather than the conventional *sedes materiae* is some indication of his method. As the text shows, Jacques de Revigny generally did not use legal authority to the same extent as, for example, Accursius. Instead, he argued the legal point in this text logically (using the idea of tacit intent) without relying on extensive authority using Roman law texts.

Since the *ius commune* consisted of a number of different strands of legal thought, it is important to establish whether canonist thought on this subject deviated from civilian thought during this period. An influential canonist of this period, Henricus Hostiensis (d. 1271) held a similar view to that of his civilian counterparts.<sup>54</sup>

§ 8 Et quales sint perpetuae heredibus dantur et in heredes [D.19.2.19.8<sup>55</sup>].<sup>56</sup>

And these [actions] are perpetual and are granted to heirs and against heirs [D.19.2.19.8].

Unlike the statement by Goffredus de Trano, however, Hostiensis' comment on the issue seems to reflect the early discussions which focused on the transmissibility of actions rather than the more

<sup>53</sup> Jacques de Revigny, *Lectura super Codice*, in D. Maffei, E. Cortese and G. Rossi, ed., *Opera Iuridica Rariora*, 1 (Bologna 1967) (anastatic reprint of a Paris 1519 edition), on C.4.65.24.

<sup>54</sup> On Henricus de Segusio (Cardinal Hostiensis), see Coing (note 7), 378.

<sup>55</sup> As in note 36.

<sup>56</sup> Henricus de Segusio [Cardinal Hostiensis], *Summa Aurea* (Padua 1548), bk. 3, *de locato et conducto*, § 8.

recent discussions which took other areas of law into consideration.

As for civilian scholarship, Cynus de Pistoia (fl. until 1327/36), teacher of Bartolus de Saxoferrato, gave an in-depth analysis of C.4.65.10.

[*Viam*] Not[andum] quod qui contrarium iuris sentit, *viam* veritatis ignorat. Secundo not[andum] quod conductor tempus conductionis transmittit ad heredem. Ad legem istam oppositio supra de [C.3.33.10<sup>57</sup>]. Sed solve ut ibi. Quaero circa legem istam. Scholares conducunt hospitium, & dividunt cameras: vel unus conduxit principaliter, et & alius locat cameras. Recedit unus, vel moritur, nunquid alium possit substituere, vel nunquid heres eius possit ibi stare? Videtur quod sic, ut hic. Adverte in persona scholaris, quod duo concurrunt, contractus locationis et conductionis, & contractus societatis: si nos respiciamus primum, de natura eius est, ut possit alius surrogari. Si nos respiciamus secundum, tunc oportet subdistinguere: aut eligitur industria personae, & tunc non posset alius surrogari: aut non eligitur personae industria, ut accidit in quibusdam, qui tanquam extranei morantur, sicut grammates, & laici: et tunc potest fieri surrogatio.<sup>58</sup>

It should be noted that he who declares the contrary legal position ignores the path of truth. Secondly it needs to be noted that the tenant transfers the period of the contract to the heir. An opposition to this *lex* exists above [C.3.33.10], but it is resolved as [indicated] there. I pose the following question concerning that law. Students rent a house and divide the rooms, or one rents as the principal and sublets the rooms. If one were to withdraw, or die, can he substitute another, or is it possible for his heir to stay there? It seems that it is so, as in this case. Notice that two [contracts] run together in the person of the student, that is the contract of letting and hiring and of partnership. If we were to take notice of the one, its nature is that he is permitted to substitute another. If we were to take note of another, then a distinction should be drawn: if the industry of the person was [specifically] selected, then it is not possible to substitute another. If the in-

---

<sup>57</sup> As in note 27.

<sup>58</sup> G. Polara, ed., *Cyni Pistoriensis Lectura super Codice*, 1 (Rome 1998) (anastatic reprint of a 1578 Frankfurt am Main edition), on C.4.65.10.

dustry of the person was not selected, which happens in some cases which concern foreigners as in the cases of scholars and laymen; then a substitution is possible.

The importance of this account lies in Cynus' inclusion of an interesting practical question. Where a number of students rent accommodation collectively and one of them dies, is a substitution of a co-tenant possible? The question depends on whether the property was let collectively to a partnership of students or individually. If the property was let under the former contract, then a *delectus personae* existed and a substitution was said to be impossible. If it was done under the latter, then a substitution was possible. A similar discussion may be found in his comment on C.4.65.24.

[*Contractus*] Haec lex ponit duos casus: et circa primum sic procedit, quia primo loquitur in genere. Secundo infert ad speciem. Secundus casus est planus qui incipit ibi sane, et cetera. Nota ex lege ista, quod ex contractu locationis factae a marito non convenitur uxor. Sed si uxor ipsa conducat, tunc pro illo tempore convenitur ad mercedem. Et hoc verum quando conduxit expresse, nam quod dicitur de tacita conductione, locum habet in eadem persona, quae prius conduxit. Sic intelligitur supra [C.4.65.16<sup>59</sup> & l.ista<sup>60</sup>].<sup>61</sup>

This *lex* poses two cases and the first one should be approached in this manner, since in the first it speaks in general. In the second it refers to a specific case. The second case is self-evident where it begins "ibi sane" etc. Note from that *lex* that a contract of letting and hiring made by a husband does not bind his wife. But if the wife rented in her own name, then she has contracted for the payment of rent for that period. And this is the true position when she has rented expressly, because what is stated about tacit letting finds application in the same person who let originally. It is

---

<sup>59</sup> C.4.65.16:

*The Emperors Valerian and Gallienus, and the Caesar Valerian to Aurelius Timotheus.* The provisions of a lease must be observed, and no more than was agreed upon can be demanded as rent. If, however, the term for which the land was leased expired, and the lessee remains in possession, it is considered that the lease and the obligation of pledge are both renewed by tacit consent.

<sup>60</sup> This citation could not be resolved. There is no *l.ista* in the *Codex* title on letting and hiring.

<sup>61</sup> As in note 58.

interpreted in this manner above [C.4.65.16 & (spurious reference)].

Cynus' view on the hereditability of letting and hiring reflects wider civilian opinion on the matter. Thus, according to Albericus de Rosate (fl. until 1354/60) on C.4.65.10, the heirs of the tenant succeed him.

[*Viam veritatis*] Qui contrarium iuri sentit, viam veritatis ignorat, & heres conductoris in conductione succedit. Hoc dicit. Idem in re ecclesiastica, usque ad tertiam generationem, ut in [N.7.3<sup>62</sup>].<sup>63</sup>

He who believes the alternative legal position, ignores the way of truth and the heir of the tenant succeeds in the tenancy. This is what it says. The same applies in ecclesiastical objects, until the third generation, as in [N.7.3].

It is interesting to note that the same rules apply to objects rented out under ecclesiastical law until the third generation. This is supported by way of a text from the Novels on emphyteusis.

Bartolus de Saxoferrato (fl. until 1357) made scant reference to the issue of the hereditability of letting and hiring without contributing anything significant to the discussion.<sup>64</sup> His pupil, Baldus de Ubaldis (fl. until 1400), on the other hand, raised an interesting question in his discussion of C.4.65.10.<sup>65</sup>

Heres obligatur ex locatione et conductione defuncti, tam perpetua quam temporali hoc dicit et adde [C.4.65.5<sup>66</sup> in quaestio 3 et insuper C.3.33.6<sup>67</sup>]. Ratio dubitandi erat, quia

<sup>62</sup> This reference is spurious.

<sup>63</sup> Albericus de Rosate, *Commentarii in Primam Codicis Partem*, in D. Maffei, E. Cortese and G. Rossi, ed., *Opera Iuridica Rariora*, 27 (Bologna 1979) (anastatic reprint of a Venice 1586 edition), on C.4.65.10.

<sup>64</sup> Bartolus de Saxoferrato, *Commentaria super Primam Digesti Veteris Partem* (Lyons 1549), on D.19.2.15.9.

<sup>65</sup> On Baldus, see the entry by P. Weimar, in: *Lexikon des Mittelalters*, 1 (Munich 1980), cols. 1375–76.

<sup>66</sup> C.4.65.5:

*The Emperor Alexander to Aurelius Petronius.* It is a certain rule of law that property which tenants, with the consent of the owners, have brought onto the leased land, will be liable by the right of pledge to the owners of said land. When, however, a house is leased, it is not necessary for the owner to know that articles have been brought into it, in order to subject them to the right of pledge. 223 CE.

<sup>67</sup> C.3.33.6:

colonus adstringendo se in perpetuum obligat se ad quamquam finitatem: ergo non tenetur heres. . . .

The heir is obliged by virtue of the letting and hiring of the deceased, whether perpetual or for a fixed period of time. This is what the text states and add [C.4.65.5 question 3 and furthermore C.3.33.6]. A matter of doubt existed whether a tenant of agricultural land who has bound himself perpetually is obliged to a certain limit/boundary: thus the heir is not obliged. . . .

If a tenant of agricultural land (*colonus*) bound himself to the land in perpetuity, would his heirs be bound to the same fate as well? According to Baldus' reasoning, an obligation of this nature had a specific limit, namely the life of the original tenant. Thus, his heirs would not be burdened with it. As for the case at the basis of C.4.65.24, he mentioned that the wife of a deceased *conductor* was not bound by the letting and hiring entered into by her husband.

[*Contractus*] Ex conductione mariti non tenetur uxor: sed si ipsa conduxit, tenetur, hoc dicit. Tacite tamen non videtur reconducere, licet remaneat in eadem habitatione in qua maritus habitaverit secundum Cynum. Officio tamen iudicis tenebitur solvere competentem mercedem pro tempore, quo ipsa habitaverit post mortem viri, nisi habitavisset cum heredibus viri iure familiaritatis. Facit quod notandum Cynum infra [C.4.65.32 pr.<sup>68</sup>] ubi dicit, quod pensiones debent taxari per iudicem.<sup>69</sup>

*The Emperor Alexander to Stratonica.* It makes a difference whether your husband received only the usufruct by way of dowry, or whether the ownership was given as dowry, and a contract was entered into that at his death possession would be restored to you. For a usufructuary cannot pledge property. He, however, who has received land as an appraised dowry, is not, for that reason, prevented from encumbering it, since, if the marriage should be dissolved, the appraised value must be repaid to you. 230 CE.

<sup>68</sup> This text is not directly relevant as the author comments on another jurist's analysis on this text, but for the sake of clarity it will be cited. C.4.65.32 pr.:

*The Emperor Zeno to Adamantius, Praetorian Prefect.* No one who has rented a house, a shop, or a farm shall, after his lease has expired, be permitted to bring suit against a person who has leased the property on the same terms, with the consent of its owner, on the ground that the lease is unlawful, or attempt to injure him thereby,

The wife is not bound by virtue of the letting and hiring made by the husband, but if she rented in her own name, she is bound. This is what the text states. She does not seem to have re-rented tacitly, however, even though she is permitted to remain in the same property in which her husband lived according to Cynus [de Pistoia]. But he shall be bound through the office of the judge to pay an appropriate amount of rent for that period during which she inhabited the dwelling following the death of her husband, unless she had inhabited the house with the heirs of the husband by virtue of the *ius familiaritatis*. Attention should also be paid to Cynus below [C.4.65.32 pr.] where he states that rents ought to be assessed by a judge.

The significance of Baldus' examination of this text is twofold. First, Baldus attributed this interpretation (rightly) to Cynus de Pistoia. This suggests the growth of doctrine, since the earlier jurists' interpretations of this legal point were now regarded as settled doctrine and were cited as authority instead of referring back to the original Roman law texts. Furthermore, in an additional comment on local practice, Baldus mentioned that it was the task of the judge to assess the amount of rent that the wife of the deceased tenant will have to pay in return for remaining on the property, unless she inhabited the property together with the male heirs of the tenant on the grounds of the *ius familiaritatis*<sup>70</sup> in which case she could presumably remain there rent free.

#### 4. Conclusions

This examination of the way in which the notion of the hereditability of letting and hiring took root in civilian systems has shed

---

but every facility shall be afforded the owners of property to lease their houses, their lands, or their shops to anyone they wish, and those who have leased them shall, by all means, be protected from any annoyance of this kind; unless contracts especially entered into in writing with the owners, or with those who afterwards leased the property, and which were drawn up according to law, should justify them in instituting proceedings. [Undated.]

<sup>69</sup> Baldus de Ubaldis, *In III et V librum Codicis Commentaria* (Venice 1606), on C.4.65.24.

<sup>70</sup> This little-known concept seems to have existed in Roman law. Compare D.41.2.41, where it is noted that someone who enters the land of a friend (*amicus*) on account of the *ius familiaritatis* is not deemed to possess, since he does not have the *animus* to possess even though he may be physically present on the land. D.50.16.223 defines a friend (*amicus*) as more than a mere acquaintance.

new light on the formation of the *ius commune*. Three phases may be identified. In the first phase, medieval academic discussions focused mainly on the transmissibility of actions without much critical examination. Although there is some evidence of synthesis, neither the scope nor the application of the principle was at the forefront of any academic discussions. The second phase witnesses the evolution of a general principle. This occurred in a number of ways. The notion of the hereditability of letting and hiring was initially contrasted to other potentially conflicting passages in the *Corpus Iuris Civilis*. A discussion of a seemingly contradictory text about the renting out of a usufruct became a stock feature in the works of many medieval jurists. This indicates a higher level of understanding as the jurists began to consider the features of different legal institutions (letting and hiring v. usufruct) in an attempt to iron out the contradiction. The contradiction was finally resolved by a comprehensive statement about the nature of usufruct as a personal servitude which terminated upon the death of the holder. A process of integration is also visible in juristic discussions forming part of phase two. Thus, variations in local custom or ecclesiastical law were examined to test the scope and function of the developing general principle. The final phase in the development of this general principle was dominated by the practical application of this principle. All of the potential conflicts had by now been resolved (indeed there is evidence that jurists now cite earlier jurists rather than the original Roman law texts) and the jurists were more concerned with application.

It is important to note that these phases are not linear, nor is the development of one predicated upon the existence of another. What they demonstrate, however, is that the medieval jurists used a number of sophisticated cognitive techniques to develop principles of law from Roman legal texts. These were tested against other areas of law to establish their scope and implication.

The issues not addressed in the formulation of the principle also speak volumes. First, medieval interpretations of the issue of the hereditability of letting and hiring do not focus on the concept of the legal obligation. None of the texts justify the hereditability of letting and hiring in terms of the transmissibility of obligations. This would suggest that intellectual discussions of the concept of obligations had not yet come to the forefront as in subsequent periods of the *ius commune*. Secondly the issue of the hereditability of the contract of letting and hiring also seems to have remained unconnected to the debate about the forms types of

letting and hiring. This suggests that the classification of the law of letting and hiring into a trichotomy did not occur until later.

---