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OBJECT OF *LOCATIO CONDUCTIO*

1. At investigating into the object of *l.c.*, it seems right to analyse the sources separately, in accordance with the three types of this legal transaction. In respect of the three types of this contract, there is such a large difference that it is not possible to achieve a right result without making any distinction. It presents itself here, indeed, that *l.c.*, bearing one name, is divided, as a matter of fact, into three types (1).

2. In respect of *l.c. rei*, we have to start from the thing left the locator by in the hands of the conductor for being used by him (2). We think to proceed rightly, making groups of the possible objects because a full enumeration according to sources seems to be impossible and useless. It would also not be a good solution, in our opinion, to say simply that the object of *l.c. rei* were generally the thing hired-out (3). In itself, this statement would be right but, generalizing in this way, we would not achieve the desired aim, namely to state, which were actually the objects of this contract, occurring the most frequently.

In book 10 of Gaius, written to the provincial edict, we read the following:

Is qui rem conduxerit ... (D. 19, 2, 6).

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(1) *Niedermeyer*'s theory was also founded on the object of the contract as he reviewed Bolla's work: *Untersuchungen zur Tiermiete und Viehpacht im Altertum*, Göttingische Gelehrte Anzeigen 203, 1951, 321 sqq. Cf. also: MAYER-MALY, *Tipicità e unità della locatio-conductio*. « Labeo », V, 1959, 390 sqq. and KASER, in « Iura » XI, 1960, 229 sqq.

(2) Cf. KASER, *Das römische Privatrecht*, I², München, 1971, 565, as well as KASER, « Iura », XI, 1960, 230 sqq.

(3) AMIRANTE, « BIDR », LXII, 1959, 12 & 116, as well as also AMIRANTE, *Locare usum fructum*, « Labeo », VIII, 1962, 206 sqq. found, as well, that the object of *l.c.* is generally the *res locata*.

It follows from this that, as a matter of fact, only a thing *res* can be hired out. Within the concept of *res*, the following major grouping is to be made.

All kinds of movable property that can be used may be hired out (4). Taking this into consideration, there are a great many things to be hired (5). There can be enumerated, for instance, the following: any kind of casks (D. 19, 2, 19, 1); Ulpian enumerates from the letter of Neratius to Aristo, what should be put to the disposal of the leaseholder for oil production, thus barrels, press, hand-winch, pulley, copper-kettle, oil-can etc. (D. 19, 2, 10, 2). It qualifies for a hire if somebody takes a vehicle to transport his luggage (D. 19, 2, 60, 7) or if he hires a whole ship to forward the cargo (D. 19, 2, 61, 1).

We have plenty of sources where the object of leasing is the fundus, *praedium* (6) (D. 19, 2, 3 - *ibid*, 15, 2 - *ibid*. 25, 3 - *ibid*. 32 - *ibid*. 33 - *ibid*. 55 - C. 65, 8 - *ibid*. 15, etc.). The many examples, originating from the classics allow us to draw the conclusion that in the time of principate the leasing of lands had a central place within the framework of *l.c. rei*.

As a result of the inhabitants of Rome, the renting of flats became one of the most frequent forms of *l.c. rei* (7). In this area, we find a great many formations. In the sources, we find the renting of a *villa* (cottage) (D. 19, 2, 25, 3), *insula* (D. 19, 2, 30 pr. - *ibid*. 58), *domus* (D. 19, 2, 45 - C. 4, 65, 5), *cenaculum*, an attic upstairs in a tenement house (D. 19, 2, 27 pr. - *ibid*. 30) etc.

In Roman law, the leasing of barns, stores was also known (*horres* - D. 19, 2, 55 pr.) (8).

It was also qualified as *l.c. rei*, to hire out slaves for performing a work (9). Here was the object of the contract the slave himself,

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(4) KARLOWA, *Römisches Rechtsgeschichte*, II, Leipzig, 1901, 641; AMIRANTE, « BIDR », LXII, 1959, 53 sqq.

(5) MAYER-MALY, *Locatio-conductio*, Wien-München, 1956, 113 sqq.

(6) KASER, *RPR*, I², 565.

(7) SCHULZ, *Classical Roman law*, Oxford, 1951, 544 sqq.

(8) ALSON, *Problèmes relatifs à la locationem des entrepôts en droit romain*, Paris, 1965, 9 sqq., as well as the review, written by CANNATA on ALZON's work, « Iura », XVIII, 1967, 267 sqq.; MACCORMACK, *Custodia and Culpa*, « ZSS », LXXXIX, 1972, 193 sqq.

(9) THOMAS, « BIDR », LXIV, 1961, 232.

the *servus locatum* (10) (D. 19, 2, 42 & 43). At hiring out the slave, Paul's drafting was: *per eam rem quam conduxisti* (D. 19, 2, 45, 1), the slave was namely treated as a hired thing.

A strange case is discussed by Gaius (3, 146), where he mentions the hiring out of gladiators. These gladiators were transferred to the hirer, qualified as slaves, though there were also freemen among tehm (11).

Animals could also be objects of *l.c. rei* (12): Alfenus mentions e.g. the hiring out of mules for carrying loads: *mulas ad certum pondus oneris locare* (D. 19, 2, 30, 2).

In the framework of *l.c. rei*, the sources speak about hiring out *habitatio* resp. usufruct (13) (D. 19, 2, 5), too. The State hired out also the right of collecting taxes and customs or tolls (14) (D. 39, 4, 1 pr. & 1). This, however, does no more belong in the area of civil-law relations.

After this comprehensive enumeration, it arises as a question: what cannot be hired out. The most important rule is that nobody can hire his own thing (15). This is expressed by the sources in the following way:

> Ulp., D. 50, 17, 45 pr.: *Neque pignus neque depositum neque precarium neque emptio neque locatio rei suae consistere potest.*

We obtain here, therefore, a general enumeration of what kind of legal relations cannot be created on our own thing, thus among

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(10) De Robertis, *I rapporti di lavoro nel diritto romano*, Milano, 1946, 27 sqq.; Thomas, « BIDR », LXIV, 1961, 234; Amirante, *Locare habitationem*, « St. Biondi », I, Milano, 1965, 457.

(11) Kaser, *RPR*, I², 656, footnote 24.

(12) Bolla, *Tiermiete*, cit., 80 sqq.

(13) Amirante, *Locare usum fructum*, « Labeo », VIII, 1969, 268 sqq.; Amirante, *Locare habitationem*, « St. Biondi », I, Milano, 1965, 457 sqq. In the opinion of the author, the classics meant by the word habitation not only living at the house but also its use resp. its enjoyment. The difference between leasing a house and hiring habitation is, in his opinion, mainly that habitation cannot be subleased (p. 564).

(14) *RPR*, I², 565, fn. 26.

(15) Albanese, *Conductio suae rei*, « BIDR », LXIV, 1961, 121; Palazzolo, *Osservazioni in tema del legato con effetto liberatorio in favore del conductore*, « Iura », XVI, 1965, 124; Kupisewski, *Locatio conductio suae rei*, « Labeo », III, 1957, 344.

others any lease or tenancy, either (16). Iulianus speaks also about that if somebody hires his own thing, his contract is invalid.

> D. 16, 3, 15: *Qui rem suam deponi apud se patitur vel utendam rogat, nec depositi nec commodati actiones tenetur: sicuti qui rem suam conducit aut precario rogat. nec precario tenetur nec ex locato.*

A decision of Iulianus, in connection with a legal case, is founded on the mentioned principle, as well:

> D. 19, 2, 9, 6: *Si alienam domum mihi locaveris eaque mihi legata vel donata sit, non teneri me tibi ex locato ob pensionem: sed de tempore praeterito videamus, si quid ante legati diem pensionis debetur, et puto solvendum.*

Somebody takes a house on lease and this will get by donation or devise into the ownership of the tenant. After, when the tenant had become the owner, he is no more obliged to pay the rent because there cannot be any tenure of the own thing of anybody. For the period, of course, as long as he was no proprietor, he is obliged to pay the rent (17). The principles of the classical age, made known before, were also accepted by two decisions of the emperor from 293 (C. 4, 65-20 and 5, 65, 23). It seems particularly interesting to discuss the second imperial constitution (C. 4, 65, 23).

> *Ad probationem rei propriae sive defensiones non sufficit locatio ei facto, qui post de dominio coeperit contendere, cum nescientia dominii proprii et errantis nullum habeat consensum: sed ex eventu, si victus fuerit, contractus locationis non constitisse magis declaratur. nemo enim sibi iure possessionem mutare potest.*

The decision of the emperor Diocletian expressly emphasizes that there can be no lease, even if the man wanting to lease something believed that the thing belonged to somebody else. Because of error, the contract is invalid.

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(16) Tondo, *Pignus e precarium*, « Labeo », V, 1959, 172, fn. 22.

(17) Palazzolo, *Osservazioni in tema del legato con effetto liberatorio in favore del conductore*, « Iura », XVI, 1965, 138; Albanese, *Conductio suae rei*, « BIDR », LXIV, 1961, 138 sqq.

It is likewise legally not possible to hire a servitude. Ulpianus expresses this in the following way:

D. 19, 2, 44: *Locare servitutem nemo potest.*

This prohibition originates from the purpose resp. destination of servitude (18).

3. At investigating into the object of *l.c. operis*, we essentially meet two fundamental standpoints in literature. According to one of these, the object of *l.c. operis* is to make some kind of work of the matter handed over, or to achieve the aim of a task, or to produce some result (19). On the other hand, according to the other standpoint — the most prominent representatives of which in the recent literature are Amirante and Thomas (20) — the object of *l.c. operis* is the *res futura*. Accepting the latter standpoint, we would encounter a great many markings in the sources concerning the object of *l.c. operis*. The essential difference between the two standpoints is that the former regards the task to be performed as the object of *l.c. operis* (what may be supported according to the sources), the latter, however, regards as the object the work produced itself. This latter agrees with the opinion that the object of *l.c.* is generally the *res locata* (21).

Our task is, to decide, on the basis of sources, what is generally to be considered as the object of *l.c. operis*.

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(18) MAYER-MALY, *loc. cit.*, 119 sees the text to be interpolated, following Lenel, but taking into consideration De Robertis' opinion, as well, he represents the standpoint that this rule was only formulated because almost everything seems to be *locabilis*. Otherwise, the principle of *fundus fundo servit* excluded leasing.

(19) KASER, *RPR*, I², p. 570; BROSZ-PÒLAY, *Római jog* (*Roman law*), Budapest, 1974, 436; MARTON, *A római magánjog elemeinek tankönyve* (*Handbook of the elements of the Roman private law. Institució̇k - Institutiones - Institutes*, Budapest, 1960, 210; KUNKEL, *Römisches Privatrecht*, Berlin-Göttingen-Heidelberg, 1949, 2nd ed., 1935, 239; KAUFMANN, *Die altrömische Miete*, Köln-Graz, 1964, 257; KRELLER, *Römisches Recht*, II, Wien, 1950, 356.

(20) According to AMIRANTE, « BIDR », LXII, 1959, 9 sqq., its object is the new thing made of the matter, handed over by the *locator*, after being transformed (*res futura*). The same standpoint is expressed by THOMAS, *Non solet locatio dominium mutare*, « Meylan Memorial Volume », Lausanne, 1963, 340 sqq.

(21) AMIRANTE, « BIDR », LXII, 1959, 117 expresses his opinion that the object of the uniform *l.c.* is the *res locata*.

It is interesting to observe, first of all, the last sentence of the text of Gaius: D. 19, 2, 2, 1. We do not investigate into the first part because Gaius is here exclusively dealing with drawing the boundary line between the sale and purchase and the hire. The mentioned text of Gaius is the following:

> *... quod si ego aurum dedere mercede pro opera constituta, dubium non est, quin locatio et conductio sit.*

I.e., if I hand over gold and money to the master in order to make a ring of it, *l.c. operis* takes place. Money is due to somebody *pro opera constituta*, i.e. for a work in the course of which the *res futura* was created. I have paid for an activity, in the course of which the ring was made of gold. The conductor was mandated by the locator to do this.

It was elaborated essentially a similar problem by Gaius in his Institutes, as well (3, 147), emphasizing there, too, that the hire is due for the master's activity.

From among the different activities, constituting the object of *l.c. operis*, we are investigating here into those where the conductor makes a contract about producing something, e.g., engraving into a precious stone (D. 19, 2, 13, 5), house-building (D. 19, 2, 59 - *ibid.* 50, 3), canalization (D. 19, 2, 62) etc. In these cases, the expressions *domum faciendum, certe mercede opus tibi locavi, opus locatum est* include the activities, in the course of which the master achieves the production of the work (22), for which the remuneration of the contract is due. On the other hand, in case of the *fullo* and *carcinator*, we can no more speak about *res futura*, because there the same thing is washed out and returned (D. 12, 7, 2). This is no *res futura*, the activity in question is, neverthelless, that of a contractor (23).

Even if there remain any doubts in case of sources, according to which a kind of work is produced, a house built, in respect of

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(22) KAUFAMANN, *op. cit.*, 213; CANNATA, *Per lo studio della responsabilità per colpa nel diritto romano classico*, Milano, 1967-1968, 135 sqq.

(23) According to MARTON, *Versuch eines einheitlichen Systems der Zivilrechtlichen Haftung*, « Archiv für die zivilistische Praxis », 162, Hefte 1-2, Tübingen, 1963, 7 sqq., the activity of the *fullo* and *sarcinator* was one of the favourite subjects of Gaius. It must have been, therefore, in Gaius's age, obviously the typical case of *l.c. operis*.

that the object of the contract is ultimately the *res futura*, the scruples in connection with the texts where the contractor nothing produces but another tasks performs, totally terminate: *vinum de Campania conduxisset* (D. 19, 11, 3), *navicularius onus Minturnes vehendum conduxerit* (19, 2, 13, 1), *mulierem vehendam navi conduxisset* (19, 2, 19, 7), *columnam transportandam conduxit* (D. 19, 2, 25, 7). These examples are picked out from the scope of the transport of persons and wares. From the wording, it follows unambiguously that there was *l.c. operis* between the parties (24). Here it is not possible to speak of a *res futura*.

In the same way, we cannot speak of a *res futura* in case of storing, either (D. 19, 2, 60 - *ibid.* 9), when the store-keeper is obliged to give back the wares received for preservation: Gaius expresses this in this way: *Qui mercedem recipit pro custodia alicuius rei* (D. 19, 2, 40). The task of the *conductor operis* is here the preservation and return of wares.

D. 47, 2, 14, 17 speaks of forwarding a letter as an enterprising activity; here is no *res futura*, either.

An example of Ulpian also speaks against the *res futura*. According to this: *si quis servum docendum conduxerit* (D. 19, 2, 13, 3). This speaks namely of the instruction, schooling of a slave, as an enterprising activity (25). We think that the conception of *res futura* is not confirmed by Cato's examples on hiring out the olive harvest, either (Cato 144) (26).

In my conviction, the standpoint, according to which the object of *l.c. operis* is the production of a work, the performance of an activity, the achievement of a result, the conduct of an affair etc., seems to be more probable on the basis of the here enumerated sources. The *l.c. operis* included a very wide scope of living conditions. The most important of these was the activity of craftsmen (there are to be emphasized here separately building operations, as well, as the activities of the fullo and the sarcinator) and the enterprizing work connected with transporting isn't negligible, either.

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(24) RÖHLE, *Das Problem der Gefahrtragung im Bereich des römischen Dienst- und Werkvertrags*, « SDHI », XXXIV, 1968, 217 sqq.

(25) CUGIA, *Profili del tirocinio industriale*, 1921, reviewed by STOLL, « ZSS », XLVII, 1927, 530 sqq.

(26) KAUFMANN, *op. cit.*, 205 sqq.; PÓLAY, *A dáciai viaszostáblák szerződései* (*Contracts of the wax tablets from Dacia*), Budapest, 1962, 188.

Apart form these, there fall also other very manifold scopes of activity, which could hardly be enumerated, within the framework of *l.c. operis*; all the activities where the parties of a contract agreed on producing some result.

4. The widest research work began in the area of literature (27), from among the three formations of *l.c.*, concerning the object of *l.c. operarum*. This follows primarily from the fact that the subject of the so-called *ars liberalis* served as a particular basis of comparison in the relation of legal relations, taking place in the scope of *l.c. operarum*. For a present-day man, particularly under socialist relations, it is almost unimaginable that in a society a distinction was drawn between works due to gentefolks and those, performed by the members of lower classes (28). But taking into consideration that the problem of *ars liberalis* as already been perfectly elaborated particularly in the works of Visky (29), we do not wish to

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(27) Even the oldest literature dealt with the subject of *ars liberalis* but it mostly investigated into a question of detail in each case. The widest elaboration of this subject was performed in the candidate's thesis of Károly VISKY. We call here the attention only to the most important papers, dealing with this subject: IHERING, *Der Zweck im Recht*, I, Leipzig, 1884, 105 sqq.; KLINGMÜLLER, *Honorarium*, « Paulys Realenzyklopädie der Klasse. Altertumswissenschaft », VIII, 1913, 2220 sqq.; ERDMANN, « ZSS », 1948, 569. He pointed out particularly sharply that Romans always applied mandate where, owing to the object of the agreement, no *l.c.* could be applied. Cf. LAMBERT, *Operae liberti*, Paris, 1934, 351 sqq.; BERNARD, *Handbuch der Münzkunde*, Festband, Halle, 1962, 1 sqq.; SIEBER, *Römisches Recht in Grundzügen für die Vorlesung*, II, Berlin, 1928, 162 sqq.; HELDRICH, *Der Arzt im römischen Privatrecht*, « Jh. Jh. », LII, 1939-1940, 40 sqq.; BELOW, *Der Arzt im römischen Recht*, München, 1953, 1 sqq.; MACQUERON, *Le travail des hommes libres dans l'antiquité romaine*, Aix-en-Provence, 1954-1955, 197; VISKY, *Szellemi munka és az ars liberalis a római jog rorrásaiban* (*Mental work and ars liberalis in the sources of the Roman law* - candidate's thesis), Budapest, 1971.

(28) BERNARD, *op. cit.*, 7; MARTON, *Inst.*, cit., 210; THOMAS, « BIDR », LXIV, 1961, 235; VISKY, the above-cited candidate's thesis, 226 sqq.

(29) VISKY, *Retribuzioni per il lavoro giuridico nelle fonti del diritto romano*, « Iura », XIII, 1964, 1 sqq.; *La qualifica della medicina e dell'architettura nelle fonti del diritto romano*, « Iura », X, 1959, 24 sqq.; *Geistiges Eigentum der Verfasser im antiken Rom.* (Publishing House of the Hungarian Academy of Sciences), Budapest, 1961 (« Acta Antiqua », 99 sqq.); *Festők, szobrászok és alkotásaik a római jog tükrében* (*Painters, sculptors, and their products in the mirror of the Roman law*), Budapest, 1968, separate reprint from « Antik Tanulmányok », 1968, XV, No. 2, 190 sqq.; *Die artes liberales in den römischen Rechtsquellen unter Berücksichtigung der Ulpianstelle*, D. 50, 13, 1, pr.; *Gesellschaft und Recht im Griechisch-Römischen Altertum*, Berlin,

perform a deeper analysis in this question. There will only be mentioned the most important principles, being indispensably necessary to elaborate our subject.

The subject of *l.c. operarum* is the performance of a work of a freeman within a definite time (30). This is fixed in the most important relevant documents in the following way: *Qui operas suas locavit totius temporis mercedem accipere debet* ... (Paul., D. 19, 2, 38), that is to say, somebody who hired out his own work, should be paid for the full time. Callistratus, a contemporary of Paul (31), expresses this in another way.

> D. 22, 5, 3, 5: *Lege Iulia de vi cavetur, ne hac lege in reum testimonium dicere liceret ... quive ad bestiae ut depugnaret se locaverit.*

The autor speaks here of a person, incapable of testifying, who hires out himself for participating in an animal fight. The question is, what is the difference between the expressions *operas suas locare* and *se locare*. It is generally accepted in literature that the expression *se locare* is of older date and was later superseded, as a consequence of development, by the expression *operas suas locare* (32). According to the standpoint of others, the expression *se locasse* also meant that the worker hired out not only his work but he subjected himself to the power of working hours, as well, and this was connected with a certain right of disciplining (33). With the com-

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1968, 268; *Esclavage et artes liberales à Rome*, « RIDA ³ », XIV, 1968, 473; *Sulla qualifica della pittura e della scultura nelle fonti del diritto romano*, « St. Grosso », IV, Torino, 1970, 333 sqq.

(30) PÓLAY, *A dáciai*, 183 sqq.; BRÓSZ-PÓLAY *op. cit.*, 435; MARTON, *Inst.*, cit., 209; KASER, *RPR*, I², 568. Fundamentally in contrast with this is the standpoint which considers the worker himself as the object of the contract. (Thus, the worker is both the subject and the object of the contract!) This opinion is widely popular particularly in the Italian Romanistic. Cf. DE ROBERTIS, *Rapporti*, cit., 128 sqq.; MARTINI, *Mercennarius*, Milano, 1958, 214 sqq.; AMIRANTE, « BIDR », LXII, 1959, 60 sqq. Newly: THOMAS, « BIDR », LXIV, 1961, 233 sqq.

(31) KASER, *Römische Geschichte*, Göttingen, 1967, 291.

(32) The antecedents of the difference between *se locare* and *operas suas locare* are explored by DE ROBERTIS, *Rapporti*, cit., 128 sqq., referring to that both expressions essentially mean the same: the engagement of the worker to perform a paid work. PÓLAY, *A dáciai*, cit., 164 sqq.

(33) KOSCHACKER, *A review of J. G. Lautner's work: Altbabylonische Personsmiete und Erntearbeiterverträge. Studia et documenta ad iura Orientis antiqui perti-*

parison of the sources at our disposal, these statements cannot be demonstrated with absolute certainty.

We find particularly in case of De Robertis (34) an effort to demonstrate the earlier date of the expression *se locare* than that of *operas suas locare*. He cites as an example to this the above mentioned text of Callistratus, remarking that this originated from the lex Iulia (35). We may bring forward to this, as a counter-argument, Varro's text (D. 1, 1, 7, 105), which has probably not originated after the *lex Iulia*:

> *Liber qui suas operas in servitutem pro pecunia quam debet dat, dum solveret, nexus vocatur, ut ab here obheratus.*

We can speak hear, undoubtedly, not of a labour contract but of the slavery of the debtor (36). It is, however, not questionable that the freeman gives his manpower *in servitutem*. This text of Varro somewhat enfeebles the standpoint that the expression *se locare* was transferred from the self-hiring of slaves on the hiring of the free manpower.

It is really true that in the period of principate, the expression *operas suas locare* more frequently occurs than the expression *se locare*. But we use both of these. Let us take as an example the text of Callistratus. The engagement to an animal fight can be found in more than one place. Independently of the date of texts, both forms of expressions are used (37).

Ulpian (D. 3, 1, 1, 6) uses the expression *operas suas locaverit* for hiring out for animal fight.

Callistratus (D. 22, 5, 3, 5) uses the expression *se locavit*.

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nentis, I, Leiden, 1936, in « ZSS », LVII, 1937, 308 sqq., expounds that if the worker did not want to begin the work, then the employer could compel him to perform the work, without any proceedings at law. PÓLAY, *A dáciai*, cit., 166 sqq., as well, propounds his opinion in a similar way, in connection with the expressions, found on the tablets of Verespatak. There are represented similar standpoints by DE ROBERTIS, *Lavoro*, cit., 187 sqq., as well as of MORZEK, *Die Arbeitsverhältnisse in den Goldbergwerken Daziens*, Gesell. Al.t. II, Berlin, 1969, 146, as well.

(34) DE ROBERTIS, *Rapporti*, cit., 141 sqq.

(35) The law: *Lex Iulia de vi* was probably made not earlier than the age of Caesar or Augustus (i.e. in the second half of the 1st Century b.c.e.). BRUNS, *Fontes*, I, III, 1.

(36) Similarly MAYER-MALY, *loc.*, cit., 123.

(37) PÓLAY, *A dáciai*, cit., 164.

On the other hand, *Collatio* uses both the expression *se locaret* (9, 2, 2) and the expression *operas suas locavit* (4, 3, 2).

This duality is supported by the text of the contracts, containing labour contracts, found in the wax tablets in Dacia, as well:

> *se locasse et locavit Socrationi Socratis operas suas* (CIL p. 948, contract II),
>
> *se locasse et locavit operas suas opere aurario* (CIL III, p. 948, contract I),
>
> *se locasse et locavit operas suas opere aur ...* (CIL III, p. 949, contract XI).

The expressions of the texts of the three contracts of work agree with one another almost *verbatim*. From this the conclusion may be drawn that the writer of contracts knew the legal formula concerning the conclusion of contracts, hiring works and, as he could not be familiar with the law (38), he wrote in both text *formulae*, the expression *se locasse* and the expression *locavit operas suas*, as well, for fear of causing some mistake in the contract.

In other cases, we often meet the expression *operas suas locavit* (D. 19, 2, 19, 9 - Paul's Sent. 2, 18, 1 - C. 4, 22, 293). The listed examples make debatable the standpoint of De Robertis (39).

But in respect of that, in the post-classical age, in case of the slaves, hiring themselves out, the expression *se locaverit* was used: De Robertis was absolutely right (D. 33, 2, 2). A similar expression is to be found at Labeo, as well, in the form of *si ipse se locasset* (D. 19, 2, 60, 7). Concerning this, however, Schulz (40) supposes rightly that it does not originate from Labeo but is a post-classical insertion.

Concerning the problem that the expression *se locare* draws the work under the disciplinary right of the power of employers, both agreeing and opposite sources can be found.

> Paul., D. 47, 2, 90: *Si libertus patrono vel cliens, vel mercennarius ei qui eum conduxit, furtum fecerit, furti actio non nascitur.*

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(38) Pólay, *A dáciai*, cit., 140 sqq. refers to, as well, that in the provincial legal life, certain legal institutions of the imperial law were received in an amended form.

(39) De Robertis, *Rapporti*, cit., 141.

(40) Schulz, in « Grünhuts Zt. », XXXVIII, 1911, 51.

> Marcianus, D. 48, 19, 11, 1: *Furta domestica si viliora sunt, publice vindicanda non sunt nec admittenda est huiusmodi accusatio, cum servus a domino vel libertus a patrono, in cuius domo moratur, vel mercennarius ab eo, cui operas suas locaverat, efferatur quaestioni: nam domestica furta vocantur, quae servi dominis vel liberti patronis vel mercennarii apud quos agunt subripiunt.*

It comes to light, beyond all question, from the above text of Paul that against those being in a certain state of subjection to the patron (*libertus, alien*, and *mercennarius*) no *actio furti* can be commenced. We may conclude from the expression *eum conduxit* that the labour contract with the mercennarius was made in the form of *se locasse* because the employer hired «him». Marcian draws the slave, libertine, and *mercennarius* under house jurisdiction, namely the *mercennarius* who *operas suas locaverat*. It turns out from Marcian's text that he who hires out his manpower can also get under the disciplinary jurisdiction of the employer in case of petty larceny.

We are convinced by the investigated sources that in case of *l.c. operarum* the object of the contract is the performance of the work, in the course of which the locator obliges himself resp. his manpower to the *conductor*. It is not possible, to decide from the sources unambiguously, what the difference between *se locare* and *operas suas locare* was. This has probably historical roots (41). But it is very difficult to value it correctly, what kind of difference in content the classics saw between these two expressions. It emerged well, that the difference, existing in the historical age, later on disappeared and only as a parlance survived, with identical meaning. This is shown by the application of both expressions in similar cases. It seems, at any rate, to be certain that in case of hiring out the slave, whether in the form of *l.c. rei* or in that of self-hiring out, as it happened in the later ages, the expression *se locare* was always used (42).

5. In addition to the physical work, as the object of *l.c.*, we have to speak of the mental work, as well. According to the

(41) De Róbertis, *Rapporti*, cit., 41.
(42) Cf. Pólay, *A dáciai*, cit., 166.

general literary opinion, from among the mental works those could only not be the objects of *l.c.* which fell withing the scope of the so-called *artes liberales* (43).

For our subject, two questions are to be cleared up: partly, what the Romans meant by *artes liberales*; partly, what the mental works were, which fell within this scope.

According to Visky (44), Romans meant by *ars liberalis* the mental activity on high level, performed by people born free, for which no remuneration or fee could be demanded. The circumscription of *ars liberalis* in this sense agrees with the *communis opinio*, developed in the literature (45). Later on, however, the practice developed that anybody, having recourse to such a help, should pay a fee to the other, performing this work. And in the later classical law, this honorarium was even actionable by *cognitio extra ordinem* (46). It depended on the social opinion, what kinds of mental activities were enumerated within the scope of *artes liberales*. This opinion was, of course, different in different ages (47) (CIC., *De off.*, I, 150; SENECA, *Ep. ad Lucilius*, 88) (48). Ulpian's opinion of this subject is, for instance, the following

> D. 50, 13, 1 pr.: *praeses provinciae de mercedibus ius dicere solet, sed praeceptoribus tantum studiorum liberalium. Liberalia autem studia accipimus, quae Graeci appellant: rhetores continebuntur, grammatici, geometrae.*

We do not learn much from the definition itself, not more than what the so-called *artes liberales* are. The enumeration is also uncertain, contradictory to a number of sources (49). It brings the

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(43) BERNARD, *op. cit.*, 9; HELDRICH, *op. cit.*, 139; SIEBER, *op. cit.*, 161; VISKY's, *Cand. thesis*, 226 sqq. A somewhat contrary opinion is expounded by KASER, *RPR*, I², 569.

(44) VISKY's, *Cand. thesis*, cit., 226 sqq.

(45) SIEBER, *op. cit.*, 173; HELDRICH, *op. cit.*, 135; ERDMANN, *op. cit.*, 576; BERNARD, *op. cit.*, 118 sqq.; DE ROBERTIS, *Rapporti*, cit., 183 sqq.

(46) SIEBER, *op. cit.*, 189 sqq.; KLINGMÜLLER, *Honorarium*, cit., 2273; KASER, *RPR*, I², 569; DE ROBERTIS, *Rapporti*, cit., 183; VISKY, « RIDA ³ », XIV, 1968, 467 sqq.

(47) VISKY, *The Juridical*, cit., 40 sqq., « RIDA ³ », XIV, 1968, 475; « Iura », XV, 1964, 2.

(48) Seneca, whose aristocracical mentality was a proverb, says the following of this: *Liberalis studia dicta sint, vides, quis homine libero digna sunt.*

(49) VISKY, *Gesellschaft*, cit., 1968, 268.

character of activity into connection with freedom. Here enumerates Ulpian only rhetoric, grammar and geometry among *studia liberalia*. According to the evidence of sources, jurisprudence and philosophy can only be removed from the scope of *l.c.* (50). In connection with philosophy, only the text of C. 10, 53, 8 - 11, 19, 1, 4 and D. 50, 13, 1, 4 shows us the way. The *ars liberalis* character of the activities dealing with jurisprudence is evidenced by the text of sources to be found under D. 1, 1, 1 - 50, 13, 1, 5, as well as C. 11, 19, 1, 4 (51). Ulpian speaks of jurisprudence, going almost into extasies:

> *Proinde ne iniuria quidem civilis professoribus ius dicent: est quidem res sanctissima civilis sapientis, sed quae pretio nummario non sit, aestimanda nec dehonestanda. dum in iudicio honor petitur, qui in ingressu sacramenti efferri debuit* (D. 50, 13, 1, 5).

In literature, there is generally no word about whether the sculptural arts, the art of painting (D. 19, 5, 5, 2) and architecture (52) (D. 19, 2, 30, 3) fell within the framework of *l.c.* Thus they could not be qualified as *artes liberales*. So much the greater is, however, the divergence of opinions concerning the activity of the physician and lawyer. The opinions, connected with this, may be arranged in the following groups.

In respect of qualifying the activity of physicians, two standpoints developed. According to one of these, represented mainly by Klingmüller (53), this activity may be considered as *ars liberalis*. The other standpoint denies this. The main representatives of the latter standpoint are De Robertis and Visky. This difference in opinions is founded upon the contradictions of sources. Ulpian's text (D. 50, 13, 1, 1) takes a stand (*medicorum quoque causa est,*

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(50) Erdmann, *op. cit.*, 568; Sieber, *op. cit.*, 192; Macqueron, *op. cit.*, 197; Visky, *The Juridical*, 42, *Synteleis*, cit., 1070.

(51) Visky, « Iura », 1964, 2 sqq.; Schulz, *Geschichte der römischen Rechtsgemeinschaft*, Weimar, 1961, 26 sqq.; Ihering, *Der Zweck im Recht*², I, 110.

(52) De Robertis, *La organizzazione e la tecnica produttive. Le forze di lavoro e i salari nel mondo romano*, Napoli, 1946, 82 sqq.; Erdmann, *op. cit.*, 570; Macqueron, *op. cit.*, 150; Visky, *Festők etc.*, cit., 190; Sieber, *op. cit.*, 169; De Robertis, *Rapporti*, cit., 186, *Lavoro*, cit., 64; Visky, « RIDA ³ », XIV, 1968, 482 sqq.

(53) In the works: Klingmüller, *Honorarium*, as well as Below: Der Arzt, the mentioned principle runs through as a leading idea.

quae professorum) for that the activity of physicians is *ars liberalis*. In the second half of the sentence, he delcares that the fee of a physician is actionable *extra ordinem*, as well as in case of the grammarian, rhetor, and geometer. On the other hand, the source declaring that the faultily proceeding physician can be sued for damages by means of *actio locati* (D. 9, 2, 7, 8) (54), also originates from Ulpian.

From this the conclusion can be drawn that the activity of a physician can also be included in the scope of *l.c.* The non-jurist Plinius expressly speaks of a hiring activity, as well (*Nat. hist.*, 26, 4): *elocasse in eo morbo corandum esse.*

Visky (55) brings forward, as the most important argument in order to support his standpoint, that the fee of a physician was not qualified by the sources as a honorarium but it was treated as a merces.

Notwithstanding that the use of words is not to be over-estimated, the standpoint of the auctor may still be accepted as a weighty reason at placing the activity of physicians within the framevork of *l.c.*

An indirect allusion to *l.c.* in connection with the activity of physicians is to be found in the texts under D. 19, 5, 27 (Pomponius) and D. 9, 3, 7 (Gaius), as well. The former establishes about that a new year's present, given to a physician, is no merces and can, therefore, not be sued for in law as a merces (56). The latter speaks of the therapeutical expenses paid to a physician (57). Even if this debate can, of course, not be decided unambiguously, Kaser's opinion, which does not consider as impossible placing the medical

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(54) Cf. HELDRICH, *op. cit.*, 152; SIEBER, *op. cit.*, 160; VISKY, « Iura », X, 1959, 52 and « RIDA ³ », XIV, 1968, 483. A contrary standpoint is to be found at BELOW, *op. cit.*, 89 sqq. A number of authors placed the medical activity within the framework of *l.c.*, in the older literature, as well. Thus, among others, PERNICE, « ZSS », IX, 1888, 247, nt. 6, as well as BOZZONI, *I medici ed il diritto romano*, Napoli, 1904, 195.

(55) VISKY, « Iura », X, 1959, 40 sqq. A contrary standpoint is expounded by KLINGMÜLLER, *op. cit.*, 2272 and BELOW, *op. cit.*, 89, as well.

(56) Form this source, VISKY concludes *l.c.*: « Iura », X, 1959, 41 sqq. Similarly also HELDRICH, *op. cit.*, 152 sqq.; BELOW, *op. cit.*, 89 has a contrary standpoint, as well, starting just from the *actio factum*.

(57) According to VISKY, from this emphatically the *l.c. operis* can be concluded, in connection with the medical activity, « Iura », X, 1959, 42.

activity within the framework of *l.c.*, seems perhaps to be right (58). It seems to be probable that in Rome no uniform standpoint could develop in this question. On the basis of the sources and literary standpoints produced, we think to be more correct, to refer medical activity into the framework of *l.c.*

It is relatively easier to qualify the scope of lawyers' activity. On the basis of sources (D. 50, 13, 1, 10 - 19, 2, 38, 1), Visky's standpoint seems to be unambiguously right (59). According to this, though the activity of the Roman lawyer (advocate) did not fall within the scope of *l.c.*, but it cannot be qualified as *ars liberalis*, either. The law namely recognized their claim to be recompensed. In our opinion, Romans did not consider as important, to regulate the activity of the advocatus in deeper details.

In the post-classical age, the scope of *artes liberales* continued to develop. A deeper investigation into this question falls, however, outside the scope of our task. We have endeavoured to draw the line, limiting the physical work from the mental one. But it is not possible to go out of the way of boundary questions.

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(58) KASER's review about the work of BELOW, *Der Arzt im römischen Recht*, « ZSS », LXXII, 1955, 395 sqq.

(59) VISKY, « RIDA ³ », XIV, 1968, 480 sqq., « Iura », XV, 1964, 10 sqq. Cf. also: KUBITSCHEK, *Advocatus*, « RE », I, 1894, 436 sqq.

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