Michigan Law Review

Volume 80 | Issue 4

1982

Toward a New Theory of Roman Law

David F. Pugsley
Universities of Rennes and Aix-en-Provence

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*David F. Pugsley**

LANDLORDS AND TENANTS IN IMPERIAL ROME. By *Bruce W. Frier*. Princeton, N.J.: Princeton University Press. 1980. Pp. xxxii, 251. $17.50.

The germ of *Landlords and Tenants in Imperial Rome* came from Boalt Hall at Berkeley, and its debt to David Daube[1] is apparent, even apart from the direct citations (pp. 44 n.71, 51 n.14). It breaks out of the mold of the standard books on Roman law and Roman history, and makes a valiant effort to overcome disciplinary barriers. It is a different and welcome addition to the modern literature on Roman law.

The book divides into three main parts. The first deals with the physical and social aspects of Roman urban leases (chapters I-III), the second with substantive Roman landlord-tenant law (chapter IV), and the third presents a modern-style interest analysis of Roman lease law (chapters V-VI). "The core of the thesis of this book" (p. 52), set forth in the first part, is that the Roman law of landlord and tenant was designed for the upper-class rental market. That is unorthodox, as Professor Frier himself recognizes (p. 40), and surprising. The reader is entitled to be skeptical and to ask for the evidence. At the beginning of the book, the author frequently repeats this conclusion without argument (*e.g.*, p. xxi). He includes a liberal sprinkling of qualifying adverbs and adverbial phrases — no doubt (p. 24), necessarily (p. 28), presumably (p. 29), doubtless (p. 31) — which defeat their own purpose. They only remind us of the paucity of the evidence: "We know little about the sorts of contracts obtained by upper-class tenants" (p. 37); "About the furnishings of upper-class *cenacula* we learn little" (p. 38). None of this inspires confidence in a radical new approach. Frier also states that "[i]t was surely not the poor who rented houses or apartments for multiples of years" (p. 39). That conclusion, however, is not self-evident. If there is no direct evidence in what is known of Roman history, it would be interesting to know if it is accurate for other societies and other

* Associate Professor, Universities of Rennes and Aix-en-Provence. M.A., B.C.L., Oxford University. — Ed.

1. *See* D. DAUBE, ROMAN LAW (1969).

times. The author does not say. Much would depend on the provisions of the lease, and the legal and practical consequences of early termination. It is thus difficult to see why the length of time should be conclusive by itself.

The author first attempts to establish his thesis by examining the social background of Roman landlord-tenant law, principally as the law concerned tenants' dependents (p. 45) and subtenants (p. 45). Most tenants, whether upper or lower class, had families and guests. Some also had freedmen and clients (one text), or slaves (five texts), but these six examples alone hardly prove that landlord-tenant law was designed primarily for the upper classes. One thing strikes me as missing in this context: horses. One of the distinguishing features of upper-class households was the possession of horses. Did upper-class tenants keep their horses in Rome, and if so, where did they stable them? We are not told. There is one text about a lease with a clause prohibiting the tenant from storing hay (pp. 75 n.52, 142). The hay was presumably for his horses. If the law was designed for upper-class tenants, why is that the only text on the subject?

Professor Frier's thesis concerning subtenants is equally fragile. He claims that "[s]ome tenants gave over unwanted space to subtenants. In this respect, too, the legal sources are apparently concerned primarily with upper-class tenants" (p. 45). That is simple assertion. The argument remains undeveloped. Presumably the author means that the lower classes will rent just enough accommodation for their own needs, so that the question of subletting will not arise. But imagine a lower-class tenant with a long lease who has rented just enough accommodation for himself and his family. When his children leave home, he will have room to spare. Rather than move to a smaller house or flat, with all the resulting expense, inconvenience, and emotional upheaval, he may prefer to sublet the spare room. It happens in England today; it might have happened in imperial Rome. But the author has already excluded the possibility of the lower-classes' having long leases (p. 39).[2]

One may conclude that Frier's social-background arguments are not convincing. Indeed, one may wonder whether the author convinces himself. He gives his views very apologetically ("I may seem to overstate this point" (p. 40)), but he is not necessarily wrong, and one turns with interest and an open mind to his more legal arguments.

2. Unfortunately, the author abandoned his original plan to deal with lower-class housing as well. P. xx. I hope that he will reverse that decision in due course. It should shed further light on the whole subject.

The legal argument, in a nutshell, seems to be that lower-class tenants were too poor and too uninfluential to sue, and not worth suing; and that the sum of money involved was normally too small to be worth bothering about anyway. This argument is not new: In his now classic study of *Roman Law*,[3] David Daube noted, "[i]n the urban areas at least, the vast majority of residents were have-nots, with not much to litigate about and certainly lacking the means to litigate with." But Daube applied the argument to only two areas of law: succession and the status of the *filius familias*. One may accept that the law of succession only really applied to those who had fairly substantial estates to leave, the upper classes. It does not follow, however, that the recipients — the heirs and legatees — must also have all been upper-class, and it is apparent that they were not. It is equally natural to suppose that landlords tended to be upper-class, but it does not follow that tenants were. The argument about the *filius familias* is more specialized: The system looks crazy; it can be properly understood only if one remembers that in practice it only applied to the upper classes and then only because of that class's pride in an elitist tradition. One looks for similarly unlikely features in the law of landlord and tenant. Tenants, for example, could be evicted almost at will, but it is unlikely that that inconvenience applied only to the upper classes, who might have been proud of it, and not to the poor as well.

Conversely, if landlord-tenant law actually was designed for the upper classes, then so was most of Roman private law: partnership, naturally; agency, perhaps; but sale? Was the law of sale designed primarily for the upper classes? Was the separation of ownership and risk a strange upper-class aberration? Certainly the fact situations in sales law are upper-class: The have-nots do not buy slaves or land or houses or solid silver tables. But the legal principles are not specifically upper-class because they apply equally to all sales transactions. The same is true of leases, which in many ways resemble sales contracts.

And if all Roman private law was predominantly upper-class law, are we really much wiser? "How else could Rome have tolerated so small a judicial apparatus?" (p. 51, n.14), the author asks. The rhetorical question is tossed off in a footnote and its implications remain unexplored. France, for instance, has ten times as many judges as England for roughly similar populations, but that does not mean the English law is significantly, if at all, more upper-class ori-

3. *See* D. DAUBE, *supra* note 1, at 81.

ented than French law. There are, moreover, many other ways to restrict judicial workloads. One example must suffice. It is widely accepted that classical Roman law had no personal injuries action (that is, no action for a negligent injury to a *paterfamilias*). How many American judges and lawyers would be redundant if personal injury suits were barred?

Although the whole of this first part is thought-provoking, much of it is simply provoking. It asks good questions. It discusses interesting issues. One may go along with Professor Frier as far as to say that there were enough upper-class tenants "to have constituted a body of litigants for whom urban lease law *could* have been designed" (p. 40). Whether one can take the final step and say that urban lease law was primarily designed for the upper-class rental market is another matter entirely.

The second part of the book, the long chapter IV, provides an exposition of the substantive Roman law of landlord and tenant. On the whole it tends to accept the extant texts at face value and legal historians will not find much that is new. That was not the author's purpose. He admits (p. 174) that the juristic sources are overwhelmingly Justinianic, and therefore shortened and altered. It would be interesting to know — in the light of Byzantine archeology and literary sources — whether there was any change in the social and economic circumstances to which the law had to apply. Such a study would make a valuable contribution to the inconclusive debate about interpolations.[4] These kinds of considerations become crucial whenever an argument relies on statistics (p. 46). Since the Justinianic texts are comprised of only selections from classical sources, there is a real danger that the statistics will represent the Justinianic, rather than the classical, reality. The Justinianic compilers will naturally have chosen texts appropriate to the circumstances of their own time. Of all that, the author tells us nothing. Again, that was not his purpose. But it is an area where he would seem to be well-qualified to undertake the necesssary research.

4. Justinian was emperor of the Eastern Roman Empire, with its capital in Constantinople, from 527 to 565 A.D. In 533 he published his *Digest of Roman Law*, composed of extracts from the writings of thirty-nine jurists who had lived and worked at Rome during the classical period, roughly 0 to 250 A.D., altered and brought up to date so that the *Digest* could be given the force of law. Alterations were necessary not only because of the time lag. Other considerations include the transfer of the capital from Rome to Constantinople, the official recognition and generalization of Christianity, the decline (and in some cases, abolition) of formal cerimonial acts such as the transfer of property, fundamental changes in court procedure, and, finally, the many changes in the social and economic context in which the law had to apply. The various alterations are known as "interpolations," and their extent has been hotly disputed. The debate has been inconclusive so far because of the extreme paucity of legal evidence from the classical period. Fresh evidence from other sources would be invaluable.

One reads chapter IV primarily to see whether it confirms the thesis set forth in the first three chapters. There are undoubtedly some texts that concern only the upper classes. I have already mentioned the storage of hay (p. 142). Windows that are worth stealing suggest the same upper-class circumstances (p. 96), but we also hear of a clause prohibiting fires (p. 141). We may romantically view Italy as a peninsula in the sunny Mediterranean, but Italian winters are often bitterly cold. If the tenants were, as the author suggests, the social equals of the landlords, they would never have accepted such a clause.

The crucial section in this chapter is about the landlord's lien on his tenant's furniture as security for rent (pp. 105-35) but, like many of the arguments advanced in the book, the conclusions that Professor Frier draws seem premature, the evidence, inconclusive. He deduces from the mere fact that such liens existed that the apartments must have been expensively furnished and therefore occupied by upper-class tenants (pp. 38, 134). Once again, the implications of that proposition remain unexplored. It is possible that the author is right, but as he himself recognizes (p. 38), there is no independent evidence that most apartments were, in fact, expensively furnished. A lien on furniture provides very unsatisfactory security because a tenant who is in arrears with his rent can too easily disappear, furniture and all. If the landlord is really worried about payment of the rent, he should demand payment in advance or some form of caution money. It seems to me as likely that the lien was *not* a central feature of the contract on which landlords regularly relied, but an ancillary arrangement to deal with a practical problem: If the landlord ejected a tenant who was in arrears, or if the tenant simply disappeared, what was to happen to the furniture left behind? That problem would remain the same whatever the value of the furniture. In any case, the practical significance of the lien appears principally when the tenant is insolvent, has no other assets, or when he disappears. This will happen only with lower-class tenants. Upper-class tenants are likely to have other assets and are unlikely to disappear without a trace. If we are indeed dealing with the upper-class rental market, one is astonished to read that the jurists "also knew how easy it was for [tenants] to disappear afterwards in the maze of a city like Rome" (p. 173). Upper class tenants, with valuable furniture, disappear?

The third part of the book, building upon the substantive doctrines examined in the second part, undertakes an interest analysis of Roman lease law. Again, one reads this section primarily to see

whether it confirms Professor Frier's thesis that Roman landlord-tenant law was designed only to apply to the upper-class rental market. One quickly discovers that this section shares the faults of the other two: There is nothing typically upper-class in the supporting evidence. The author often offers no supporting evidence at all, as when he asserts that "[t]he jurists tried hard to make leasehold attractive to upper-class tenants" (p. 188). We may well agree that "ownership of leasable urban property remained a not unattractive form of investment throughout the classical period" (p. 193) and that "rental among the upper classes appears to have become more rather than less popular" (p. 193). It is not clear, however, that the credit for this popularity should be attributed to the law of urban leasehold. It is at least as plausible that the law did nothing more than provide an economically and socially neutral framework for what would have occurred in any event.

Despite the evidentiary uncertainties, the last chapter carries the author's argument to its logical conclusion. "The priorities of Roman lease law," he insists, "would seem clear: first and foremost, to encourage Roman property owners to exploit their property through rental to the upper classes; [and] second, to encourage the upper classes to avail themselves of the opportunity to rent." "These priorities," he adds, "seem to remain remarkably stable over time" (pp. 192, 209). Professor Frier has foreseen that there would be objections (p. 195). I cannot see that Roman lease law had such priorities, and after rereading chapter IV, I can find nothing in it that supports that view. Nor can I see why the Roman jurists, even if they did represent the public interest (which is not clear), should have had such views. More fundamentally, it seems to me that the author has examined the wrong interests to support his thesis. To establish that thesis we must examine not the various interests represented in the lease itself, but those involved in choosing between a lease and any other arrangement. People need accommodation. If they do not rent, they must do something else, and the obvious alternative is to purchase.

The interest analysis might then proceed in four parts, each cast as a question. First, what are the owner's interests in leasing rather than selling to upper-class tenants or buyers? If he leases, he preserves his capital, but the risks, particularly of fire, are so high (chapter II) that leasing is not always the best alternative. If he sells, he avoids that risk, but he must put his capital somewhere. He may lend it to the buyer on mortgage. If the house then burns down, an upper-class buyer should have other assets out of which to repay the

loan. Or the owner may build or buy other houses (pp. 32-33). Second, what are the upper-class tenant's interests in renting rather than buying? It is the upper classes who typically have a realistic choice because they can afford to buy outright or can obtain the necessary loans. For a short stay, it may be better to rent, though our sources talk of long leases. Third, what are the state's interests in lease rather than sale, in tenants rather than owner-occupiers? Owner-occupiers may look after their property better and so improve housing standards. Tenants may be more mobile, if mobility of labor is important. The general public interest in leasing in a system like that of imperial Rome is that it gives the landlord full powers of estate management. He can control an area. He can decide who shall live there. He may be encouraged to provide common services and deal with disputes between neighbors. In modern systems of home ownership, planning and administrative regulation perform these functions. The Romans did not have a well-developed administrative apparatus. And finally, what was the Roman jurists' interest in all this? "[R]ules of substantive law by their nature cannot be interest-neutral" (p. 176) between parties to a dispute, but they may be interest-neutral between two ways of providing accommodation. The jurists had no interest in favoring one system rather than another, and do not appear to have done so. Although, in short, *Landlords and Tenants* raises none of these questions directly, they seem important. But for the answers we shall have to wait.

With so much left unanswered, uncertainties inevitably remain. Even if one concedes that the number of upper-class tenants in imperial Rome was substantial and increased over time, I suspect that this was so not because of the law, but because of social and economic pressures. What those pressures were I do not know. Speculators might have acquired the whole of certain particularly desirable residential areas, which might have left the upper classes with a choice between renting or not going there at all. Be that as it may, and even if one cannot accept Professor Frier's conclusions, one must recognize that he has opened up new vistas in the field. He is well equipped to push the inquiry further. Like Oliver Twist, we shall come back for more.