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# A NEW ARGUMENT FOR *DEDUCTIO EX MERCEDE*

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## 1 Introduction

In his book *Landlords and tenants in Imperial Rome* and in a number of articles, B.W. Frier has advocated the existence of a legal remedy which functioned in the context of urban lease in classical Roman law.<sup>1</sup> This remedy, called *deductio ex mercede*, was seemingly only available to tenants of urban property.<sup>2</sup> It was essentially a form of legalised self-help that arose during the Republic and which enabled urban tenants unilaterally to deduct an amount of rent when undisclosed circumstances, which could not be attributed to their fault, had a detrimental effect on their use of the leased property.<sup>3</sup> Depending upon the degree of interference, an urban tenant had the choice either to abandon the leased property, thereby terminating the contract of lease, or, in less serious cases, to remain and unilaterally to reduce the amount of rent due (presumably) in proportion to the diminished use.<sup>4</sup> The impact of *deductio ex mercede* upon the contractual relationship between landlord and tenant was therefore less severe than related remedies such as justifiable abandonment, since it enabled the contract to continue, while balancing the interests of the respective parties.<sup>5</sup> The remedy ties in with the central premise of his book, namely that the Roman law of urban lease was a separate body of legal rules comprised of specialised remedies designed to protect the interests of wealthy

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1 B.W. Frier, *Landlords and tenants in Imperial Rome* (Princeton 1980) 150-155; B.W. Frier, *Tenant remedies for unsuitable conditions arising after entry: A Roman law perspective on modern American common law* in R.S. Bagnall and W.V. Harris (eds.), *Studies in Roman law in memory of A. Arthur Schiller* (Leiden 1986) 65-79; B.W. Frier, *Law, economics and disasters down on the farm: "Remissio mercedis" revisited*, 1989-1990 (31-32) *BIDR* 237-270.

2 Frier, 1989-1990 (31-32) *BIDR* 237ff at 239. The terminology of this remedy remains controversial. Frier assigns a technical meaning to the phrase *deductio ex mercede* to distinguish it from *remissio mercedis* in agricultural tenancy. The technical meaning of the term has been questioned by P.W. De Neeve, *Remissio mercedis*, 1983 (100) *ZSS (RA)* 296-339 at 302 (following T. Mayer-Maly, *Locatio conductio: Eine Untersuchung zum klassischen römischen Recht* (Vienna 1956) 140-141) who has demonstrated in an exhaustive survey of Roman legal and non-legal sources that the phrase was used in a non-technical manner. See more recently the criticism of R. Fiori, *La definizione della "locatio conductio" - giurisprudenza romana e tradizione romanistica* (Naples 1999) 80-111. In medieval learned law, however, the texts on *deductio ex mercede* were used to construct a separate legal remedy that was linked to the agricultural doctrine of *remissio mercedis*, see P.J. du Plessis, *A history of "remissio mercedis" and related legal institutions* (Rotterdam 2003) Ch. 2, s. 1.

3 Frier, *Landlords* 150; Frier, 1989-1990 (31-32) *BIDR* 237ff at 240.

4 Frier, *Landlords* 152.

5 This article will focus only on contractual *deductio ex mercede* and not on those instances where the Roman state granted blanket deductions of rent to all urban tenants on account of various catastrophes. See Frier, *Landlords* 163 note 239 for a full survey of sources; Frier, 1989-1990 (31-32) *BIDR* 237ff at 244-245 for a discussion of the matter.

landlords.<sup>6</sup> The target audience of this body of law was predominantly upper-class tenants with sufficient financial reserves to access the Roman legal system to defend their interests in a court of law.

Reconstructing the details of *deductio ex mercede* is difficult owing to the paucity of evidence. There are only two legal texts in which it is mentioned and these have been suspected of interpolation. It is therefore merely the outlines of *deductio ex mercede* that are visible in the texts. The reasons for this apparent lack of evidence have not been fully explained. It has been suggested that this remedy was not favoured by the compilers of Justinian's *Digest* and that references to it were purposely expunged from the texts.<sup>7</sup> This article will examine Frier's reconstruction of *deductio ex mercede* with a view to providing an alternative context for this remedy. The argument will be developed in three stages. First, the two legal texts in which *deductio ex mercede* are mentioned will be explored. Particular emphasis will be placed in this section on the terminology used in urban lease in classical Roman law in an attempt to construct an alternative context for this remedy. Secondly, the assertion that the remedy was essentially a form of legalised self-help will be analysed. *Deductio ex mercede* will be compared to other examples of self-help in *locatio conductio rei*. Finally, the view that the remedy was not favoured by the compilers of Justinian's *Digest* and therefore purposely expunged from certain texts will be investigated.

## 2 The primary sources of *deductio ex mercede*

*Digest* 19.2.27pr. *Alfenus libro secundo digestorum. Habitatores non, si paulo minus commode aliqua parte caenaculi uterentur, statim deductionem ex mercede facere oportet: [Servius ait] ea enim condicione habitorem esse, ut, si quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi sustineret: non ita tamen, ut eam partem caenaculi dominus aperuisset, in quam magnam partem usus habitator haberet.*<sup>8</sup>

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6 Frier, *Landlords* Chs. 5, 6. See, however, the criticism of J.A. Crook, *Review of Frier, B.W. Landlords and tenants in Imperial Rome* (Princeton 1980), 1983 (73) *JRS* 213-214 against the concept of "the Roman law of urban lease".

7 Frier, *Landlords* 155.

8 Little information may be obtained from the original context of this text, see O. Lenel, *Palingenesia iuris civilis* I (Graz 1960) 41 (text 13) or later paraphrases, see *Bas.* 20.1.27 in G. Heimbach, *Basilicorum libri LX* (Leipzig 1833-1897).

The text is attributed to Alfenus Varus, a jurist of the mid-first century BC. It is suspected of extensive interpolations and scholars have also suggested that Alfenus was recounting an opinion of Servius Sulpicius Rufus.<sup>9</sup> While the existence of interpolations in this text cannot be discounted, its core substance appears to have remained intact.<sup>10</sup> As it stands, the text states that tenants of urban property should not immediately (*statim*) make a deduction from their rent if their use of the apartment is slightly diminished. The *ratio* for this rule is found in the nature of urban lease. It is a condition of urban tenancy that a tenant has to endure slight inconveniences such as a slight decrease of his use of the apartment. This rule does not apply, however, if a tenant's use of the property is severely diminished. Both situations are illuminated by an example. Using an *argumentum e contrario* based on the last sentence, Frier has argued that a remedy, called *deductio ex mercede*, existed which was available to a tenant of urban property whose use had been substantially infringed. The remedy would have been used in those cases where the infringement of use was considerable, but not serious enough to warrant justifiable abandonment of the leased property and the resulting termination of the agreement. Furthermore, the use of the adverb *statim* in the first sentence suggests, again arguing from an *argumentum e contrario*, that this remedy was essentially a form of self-help that tenants could enforce without having to follow due process. The text does not explain how the extent of the deduction would have been calculated, but Frier has surmised that it would probably have been in relation to the loss of use, provided that the "threshold level" justifying abandonment was not reached.

The language of the text raises certain issues. The use of the terms *habitatores* and *cenaculum* suggests an urban context, but their significance in context has not been fully explored. In a broad survey of the terminology of urban lease, Amirante has demonstrated that the noun *habitor* and its equivalent verb *habitare* acquired a technical legal meaning in juristic writing of the first century BC, possibly even in the works of the same Alfenus Varus.<sup>11</sup> Throughout classical Roman law, the noun *habitor* was exclusively used in urban lease to refer to a tenant of urban property.<sup>12</sup> Furthermore, the verb *habi-*

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9 See Frier, *Landlords* 151 for an overview of suspected interpolations.

10 Regarding this text, A. Watson, *The law of obligations in the later Roman Republic* (Oxford 1965) 115 observes that "the interpolations are probably not so deep as is usually believed".

11 L. Amirante, *Locare habitationem* in *Studi in onore di Biondo Biondi I* (Milan 1965) 457-465.

12 See Alfenus – *D.19.2.27pr.*, *D.19.2.30pr.*, *D.39.2.43.1*; Labeo – *D.19.1.53.2*, *D.19.2.60pr.*; Iulianus – *D.6.1.59*; Ulpianus – *D.9.3.1.8*, *D.9.3.1.9*, *D.39.2.37*; Paulus – *D.9.3.6.2*. *Habitor* seems to be used as a synonym for *inquilinus*, see *D.19.1.13.30*; *D.19.2.24.2*; *D.19.2.25.1*.

*tare* was used in juristic writing to refer to a specific type of lease concluded for personal use.<sup>13</sup> The main purpose of this type of lease was to provide the urban tenant with accommodation for an agreed period of time in return for the payment of an amount of rent. It was not the aim of the *habitor* to exploit the economic capacity of the object of lease and the Roman jurists therefore did not describe the contract using the terminology of economic exploitation (*fruo-frui-fructus/fruitus sum*).<sup>14</sup> *Habitare* therefore referred to the scope of use afforded by the contract of the lease to the urban tenant.

Having established that these terms had technical legal significance, the primary context in which these occurred in juristic writing needs to be ascertained. There are five legal texts spanning the classical period in which the verb *habitare* is used in the context of *locatio conductio rei*:

*Digest 19.2.30pr.* (Alfenus). ... *Respondit, si vitiatum aedificium necessario demolitus esset, pro portione, quanti dominus praediorum locasset, quod eius temporis habitatores habitare non potuissent, rationem duci et tanti litem aestimari: ... .*

*Digest 19.2.60pr.* (Labeo epitomised by Iavolenus). ... *Cum in plures annos domus locata est, praestare locator debet, ut non solum habitare conductor ex calendis illis cuiusque anni, sed etiam locare habitatori si velit suo tempore possit. ... .*

*Digest 19.2.25.1* (Gaius). *Qui fundum fruendum vel habitationem alicui locavit, ... , curare debet, ut apud emptorem quoque eadem pactione et colono frui et inquilino habitare liceat: ... .*

*Digest 19.2.8* (Tryphoninus). ... *Et tamen primus locator reputationem habebit quinquaginta, quae ab illo perciperet, si dominus insulae habitare novissimum conductorem non vetuisset: ... .*

*Digest 19.2.7* (Paulus). ... *Si tibi alienam insulam locavero quinquaginta tuque eandem sexaginta Titio locaveris et Titius a domino prohibitus fuerit habitare, ... .*

With the exception of the Gaius text (*D.19.2.25.1*), all the others refer to a scenario of subletting where the owner had rented out the entire tenement/

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13 *D.19.2.7, D.19.2.8, D.19.2.25.1, D.19.2.30pr., D.19.2.60pr.*

14 The deponent verb *fruo-frui-fructus/fruitus sum* occurs exclusively in *locatio conductio rei*. It is predominantly used in the context of agricultural tenancy to refer to the tenant's right to draw fruits from it, but it also occurs in texts referring to the economic exploitation of a tenement building through subletting, see *D.19.2.25.1, D.19.2.30pr., D.19.2.35pr.*

house *en bloc* to a primary tenant who had sublet the spaces for profit. In every case, the verb *habitare* was used by the Roman jurists to describe those contracts of lease concluded for the purposes of accommodation between a primary tenant and his secondary tenants. This does not imply that the terminology *habitor/habitare* was peculiar to this practice, but it does suggest that subletting using a primary tenant was the main context in which it was used. The primary tenant is an interesting feature of urban lease in classical Roman law.<sup>15</sup> These individuals, mostly financial speculators from the lower classes, rented an entire tenement building *en bloc* and sublet the spaces for profit.<sup>16</sup> They generally paid a lump-sum to the owner of the tenement at the start of the lease-year and then recovered this expenditure with profit from secondary tenants, who paid rent daily, weekly or monthly.<sup>17</sup> The absentee owner generally would have had little interest in the way in which a primary tenant chose to exploit the economic capacity of the tenement building as long as his actions were not unlawful or in violation of the contract. Primary tenants alone were responsible for making a profit from subletting and had to bear the financial costs of incomplete occupancy or non-payment by secondary tenants. This meant that subletting for economic profit was a risky financial undertaking. There were no legal grounds, apart from lack of maintenance or repair of the tenement (lack of *frui*), whereby a primary tenant could recover such financial losses from the owner. When this context is applied to *Digest* 19.2.27*pr.*, it opens up other possibilities. It seems plausible that this text may have referred to a case of subletting using a primary tenant. The *habitatores* in question had rented an apartment from a primary tenant. If the owner of the tenement (a third party with whom the secondary tenants had no direct legal relationship) caused a slight diminution of their use of the apartment through his maintenance of the *insula*, they had to endure it since it was a condition of urban tenancy that small inconveniences had to be tolerated. On the other hand, a substantial decrease in the use of that part of the apartment of which tenants made the most use would entitle them to a reduction in rent.

15 The issue of subletting in urban lease using primary tenants was first treated by Mayer-Maly, *Locatio conductio* 27-33 thereafter by Frier, *Landlords* 30-31, 34-37, 78-82, 180, 183, 189-190; and since by G. Cardascia, *Sur une fonction de la sous-location en droit romain* in F. Pastori et al. (eds.), *Studi Biscardi II* (Milan 1982) 365-388.

16 See B.W. Frier, *The rental market in early Imperial Rome*, 1977 (67) *JRS* 27-37; B.W. Frier, *Cicero's management of his urban properties*, 1978 *Classical Journal* 1-6; Frier, *Landlords* 30-31; J.A. Crook, *Law and life of Rome* (London 1967) 154; D. Johnston, *Roman law in context* (Cambridge 1999) 63; P.J. Du Plessis, *Janus in the Roman law of urban lease*, 2005 *Historia* (forthcoming).

17 See, eg., *D.19.2.7*; *D.19.2.30pr.*; Cicero, *Att.* XIV, 10, 3; XV, 17, 1; XVI, 1, 5 as well as the sources noted in Frier, 1977 (67) *JRS* 27ff at 28 note 10. Only wealthy tenants paid annual rent instalments. Low-class tenants paid rent daily, weekly or monthly, see Frier, 1977 (67) *JRS* 27ff at 35.

This raises another interesting point which is not mentioned in the sources and therefore has to remain speculative. Assuming that this text referred to subletting, the party who would have been affected by the reduction in rent would have been the primary tenant and not the owner of the tenement. It is unclear whether the owner's maintenance activities would have constituted diminished *frui* and whether the primary tenant would have been unable to recover financial loss brought about by reductions in rent with the *actio conducti*.

A further point to be examined is the crux of the remedy which seems to have been the use of the space, presumably as agreed in the *lex locationis*. *Deductio ex mercede* was not concerned with the impact of the event upon the physical nature of the apartment, but rather with its impact on the tenant's use. This is demonstrated by *Digest* 19.2.28pr.–1:

*Labeo libro quarto posteriorum epitomatorum a Iavoleno. Quod si domi habitatione conductor aequae usus fuisset, [1] praestaturum etiam eius domus mercedem, quae vitium fecisset, deberi putat.*<sup>18</sup>

If a tenant has complete use (*aequae usus*) of the house, he is liable for the full rent even for that part of the house containing the defect. This is suggestive of a type of equality in performance between the amount of rent and the tenant's agreed use of the leased property. The tenant's use of the property was not necessarily affected by a defect in the property itself. If the use continued unaffected, the full rent was due. This is supported by the nature of the examples provided. *Digest* 19.2.27pr. contrasts a slight impairment of use (where *deductio ex mercede* is not available) to a significant one (where the remedy is seemingly available). “[S]i quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret” is given as an example of a slight impairment of use. Some event occurred which necessitated a partial demolition of something by the owner. The precise nature of the event “si quid transversarium incidisset” is unclear. It has been translated as “if something unforeseen occurred”.<sup>19</sup> The gist of this translation cannot be faulted, since the text is not concerned with actions which could be attributed to the fault of the parties, but a more literal translation provides added insight into the nature of

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18 External aids add little to the context of this text, see Lenel, *Palingenesia* I, 309 (text 203) on its original context and *Bas.* 20.2.28 on its subsequent interpretation.

19 *The Digest of Justinian*, trl. A. Watson (Philadelphia 1985) on *D.* 19.2.27pr. In the Accursian gloss, the word *adversarium* is used instead of *transversarium* [a reading consistent with the Greek paraphrase in the *Basilica* – see note 25]. Its meaning is explained in an anonymous gloss as: [Adversarium] *id est casum fortuitum ut aliud novum emergens* – *Accursii Glossa in Digestum Vetus* (repr. ed. Venice 1488) in M. Viora (ed.) *Corpus Glossatorum Iuris Civilis* vol. 7 (Turin 1969) on *D.* 19.2.27pr.

the legal rule. The adjective *transversarius-a-um* is a *hapax legomenon* in the *Digest*. It has the semantic connection of [something] lying across. There is also one example from non-legal sources where it has been used in the plural as a noun to describe cross-beams.<sup>20</sup> When this meaning is combined with the third-conjugation verb *incido*, there can be little doubt that the example referred to the breaking/collapse/removal of a cross-beam, which forced the owner to demolish something. Since the remedy was not concerned with the physical state of the apartment, but how the tenant's use (accommodation) of it as described in the *lex locationis* had been affected, it is conceivable that a collapse of a cross-beam and the resulting demolition may only have constituted a slight decrease in use. As an example of a significant impairment of use, *Digest* 19.2.27pr. gives: "*eam partem caenaculi dominus aperuisset, in quam magnam partem usus habitator haberet.*" The significance of the fourth-conjugation verb *aperio* has again been underestimated. If the owner "opened up/exposed" part of the apartment of which the tenant had most use, it constituted a significant impairment of use. Examples of this may have been the removal of the roof of the *insula* or the demolition of an external or party wall.

### 3 Self-help

Self-help as a means to enforce a claim was a characteristic element of early Roman law. It was not founded on the remnants of an original unrestricted right to self-help, but on the inability of the legal order to enforce certain claims in another manner.<sup>21</sup> With that said, the application of self-help was continuously restricted by the development of procedural alternatives (e.g. interdicts) until it was finally abolished in Justinianic law.<sup>22</sup>

The notion of self-help was not unfamiliar to urban lease in classical Roman law and Frier's classification of *deductio ex mercede* into this category seems broadly persuasive.<sup>23</sup> The lack of evidence about this remedy makes it impossible to ascertain if a tenant first had to approach a court of law before unilaterally withholding a portion of the rent on account of diminished use. Furthermore, there is insufficient information about the history of "rent

20 Vitruvius, *De architectura* 8, 6, 10-11 *in fine*.

21 The literature on this topic is extensive. Important works include G. Luzzato, *Von der Selbsthilfe zum römischen Prozeß*, 1956 (73) ZSS (RA) 29-67; G. Wesener, *Offensive Selbsthilfe im klassischen römischen Recht* in H. Baltl (ed.) *Festschrift Steinwenter* (Graz/Cologne 1958) 100-120 at 100 note 4 for a comprehensive survey of earlier literature; T. Mayer-Maly, *Vis [als Selbsthilfe]* in Pauly's *Realencyclopädie der classischen Altertums-wissenschaft* [G. Wissowa, *et al.* (eds.)] II, 17 (Stuttgart 1960) 315-320.

22 See *D.50.17.176pr.*

23 Frier, *Landlords* 92ff; Frier, 1989-1990 (31-32) *BIDR* 237ff at 240.

tribunals” such as those of the *Praefectus Vigilum* in the third century AD to speculate whether this matter would have been dealt with in this forum rather than by resort to the legal process.<sup>24</sup> A central point of Frier’s argument that *deductio ex mercede* was a form of legalised self-help is founded on the occurrence of the adverb *statim* in *Digest* 19.2.27*pr.* Arguing from an *argumentum e contrario*, an urban tenant would be entitled to reduce his rent immediately (i.e. without having to invoke a legal process) if the infringement of use was substantial. For all its apparent cogency, this argument is unconvincing. In later renditions of this text such as the tenth-century Greek paraphrase of the *Digest*, the *Basilica*, the adverb *statim* does not occur.<sup>25</sup> While it cannot be ruled out that later jurists’ limited understanding of *deductio ex mercede* may have caused this adverb to be omitted, it does suggest that it was not as pivotal to the understanding of the text as proposed by Frier. Had it been so central to the text, the adverb *statim* would surely have been included in the paraphrase and later scholiasts would have commented on it.

Another objection which may be raised against this argument is that the link between *deductio ex mercede* and other examples of self-help in urban lease in classical Roman law is tenuous. It has been suggested that the landlord’s entitlement to expel justifiably urban tenants on certain grounds was essentially a form of self-help.<sup>26</sup> So too was his right to attach the *invecta et illata* of the tenant in the event of rent not being paid.<sup>27</sup> On the other hand, finding examples of self-help available to tenants of urban property is more problematical. Apart from *deductio ex mercede*, the only other example appears to be the tenant’s obligation to defend the leased property against damage by outsiders.<sup>28</sup> Although the latter was self-help in the sense that it did not require notice to the landlord or a legal process, it is not in the same category as it extends to third parties outside the contractual relationship between landlord and tenant. Not to mention the fact that doubts have been raised about the existence of this obligation.<sup>29</sup> If *deductio ex mercede* and the tenant’s obligation to defend the leased property against damage by outsiders

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24 See D.19.2.56, D.20.2.9 on the rent tribunal of the *Praefectus Vigilum*.

25 See Bas. 2.20.1. The Latin rendition of the text states: “[Si is, qui domum locavit] Inquilini moleste ferre non debent, si parvula quaedam incommoda vel damna in aliqua parte coenaculi eis locati sustineant: et ob id nullam mercedis deminutionem faciant: eius enim conditionis inquilinus esse debet, ut, si quid adversum acciderit, propter quod dominus aliquid demoliri ex coenaculo velit, aliquam partem parvulam incommodi ferat. Non tamen eatenus incommodum sustinere debet, ut domus demolitione ea pars coenaculi aperiatur, in qua magnam partem usus inquilinus habebat.”

26 See C. 4.65.3.

27 See D.2.14.4*pr.*, D.13.7.11.5, D.20.2.2.

28 See Labeo’s curious statement in D.19.2.13.7.

29 See T. Mayer-Maly, *Haftung aus Miete nach Staatsunrecht*, 1957 (14) ZSS (RA) 363-373 at 370-371.

were the only examples of self-help available to tenants of urban property, this would suggest that the Roman law of urban lease was predominantly written from the perspective of the landlord. This would undermine the central thesis of Frier's book in which he argued that the target audience of the Roman law of urban lease was well-to-do tenants with sufficient financial reserves to defend their interests in a court of law. If this were the case then surely references to remedies specifically designed to strengthen the position of the tenant would have been discussed more comprehensively. It cannot be ruled out, however, that these remedies were later omitted by the compilers of Justinian's *Digest*, but their motive for doing so has yet to be fully explained.

A final point to be made concerns the issue of definition. With the exception of the obligation to defend the property against damage by outsiders, all the instances of self-help in the Roman law of urban lease are examples of "Offensive Selbsthilfe" – a legalised, unilateral assertion of a private right recognised by the legal order that does not require the intervention of a court of law to validate the existence of the right or its enforcement. If *deductio ex mercede* is tested against this definition it soon becomes clear that it could not have been an instance of self-help. Both *Digest* 19.2.27*pr.* and *Digest* 19.2.28*pr.*–1 clearly envisage some sort of value judgement concerning the extent to which the events in question interfered with the tenant's contractually agreed use of the leased property. It hardly seems plausible that such a decision would have been left entirely to the tenant, since this would leave the remedy open to abuse.

#### **4 *Deductio ex mercede* and the compilers of Justinian's *Digest***

The last argument put forward by Frier is that *deductio ex mercede* was probably not favoured by the compilers of Justinian's *Digest* and was therefore purposely expunged from certain texts. Two texts are cited in support of this argument. The first is a text by Gaius:

*Digest* 19.2.25.2 *Gaius libro decimo ad edictum provinciale. Si vicino aedificante obscurentur lumina cenaculi, teneri locatorem inquilino: certe quin liceat colono vel inquilino relinquere conductionem, nulla dubitatio est. De mercedibus quoque si cum eo agatur, reputationis*

*ratio habenda est. Eadem intellegemus, si ostia fenestrasve nimium corruptas locator non restituat.*<sup>30</sup>

Frier surmises that the sentence "*certe ... est*" is a reworking of the original sentence which allowed for either a *deductio ex mercede* or a justifiable abandonment depending upon the severity of the case.<sup>31</sup> This view seems to be based entirely on the fact that the sentence in question has in the past been suspected of interpolation. This argument is difficult to sustain, since the essence of the text is concerned, not with a mild infringement of use where the parties wished to preserve the contract, but with circumstances which would invariably lead to the termination of the contract of lease and a claim *ex conducto*. As Frier pointed out in the introduction to his book, the main source of light for any *cenaculum* was a row of windows along the side of the apartment.<sup>32</sup> Obscuring the only source of natural light would have rendered the apartment useless for habitation, thus enabling the tenant to desert the property and to sue the landlord *ex conducto*. It hardly seems surprising that the text mentions the plural *lumina* instead of the singular *lumen*. The circumstance envisaged is not a mild darkening of the apartment, but a substantial obscuring of all the sources of natural light of the apartment.

The other text cited by Frier is *Digest* 39.2.37 concerning the demolition of a party-wall. The principle explained by Ulpian is that the extent of the claims should be dictated by soundness of the wall. If the wall was unsound and had to be torn down, the demolisher cannot be sued for any damage arising from the demolition of the wall unless there was some dishonesty involved in the demolition. If the wall was suitable, however, the demolisher could be sued with the action against anticipated injury and the wall had to be rebuilt at the expense of the demolisher. Profit lost as a result of the unnecessary demolition of the party wall could also be recovered from the demolisher. This included rent lost because tenants abandoned the leased property or because "they lived less comfortably".<sup>33</sup> Frier has argued that the final sentence of this text may be a post-classical summary of the original sentence which contained a reference to the financial loss caused by the granting of a *deductio ex mercede*.<sup>34</sup> This seems plausible, especially since the language used is similar to that in *Digest* 19.2.27*pr*. It is also the only text that explicitly mentions *deductio ex mercede* as an alternative to justifiable abandonment. With that

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30 Lenel, *Palingenesia* I, 215 (text 245), *Bas.* 20.1.25.

31 Frier, *Landlords* 155.

32 Frier, *Landlords* ch. 1.

33 *D.39.2.37 Ulpianus libro quadragensimo secundo ad Sabinum: ... Si forte habitatores migraverunt aut non tam commode habitare possunt, imputari id aedificatori potest.*

34 Frier, *Landlords* 155.

said, however, it is difficult to see how this text supports Frier's argument that references to *deductio ex mercede* were purposely eradicated by the compilers. Surely if this had been the objective, then leaving a reference with strikingly similar terminology, even if only in a paraphrased format, would have made little sense.

A final point to be made concerns Frier's assertion that this remedy was probably not favoured by the compilers and therefore purposely expunged from these texts. This argument cannot be supported. If the compilers were intent on ridding the *Digest* of all references to *deductio ex mercede*, surely a conspicuous reference such as the one in *Digest* 19.2.27*pr.* would not have remained. Furthermore, it has not fully been explained why the compilers would be so averse to the notion of a *deductio ex mercede*. There are many other equally plausible reasons for the lack of references to this remedy that do not rely on the malice of the compilers. It could, for example, merely be the case that this remedy, because of its very nature, had limited scope or functioned largely extra-judicially and therefore did not attract much juristic attention.

## **5 Conclusion**

Largely owing to the paucity of sources, the nature of *deductio ex mercede* as a legal remedy must remain elusive. There is evidence for its existence, but too much is uncertain for Frier's argument to be convincing. This contribution has argued that the remedy, if it existed, had a limited application. It seemingly only applied to leases for personal accommodation, the majority of which occurred in the context of subletting. It follows that the issue of a reduction in the amount of rent mainly would have been the concern of the primary tenant rather than of the owner of the tenement.

Furthermore, Frier's classification of *deductio ex mercede* as an example of self-help cannot be supported. His argument is partly based on silence and partly on the rather slender assertion that the use of the adverb *statim* suggests a form of self-help. *Deductio ex mercede* simply does not fit the definition of self-help. It was not based on the existence of an incontrovertible right and both texts suggest that an evaluation of the seriousness of the infringement of use had to occur before the remedy would be available. Finally, the lack of evidence concerning this remedy cannot be blamed on the compilers. There is no logical reason why they would have wanted to get rid of *deductio ex mercede*, yet leave obvious references to it in *Digest* 19.2.27*pr.* There are equally plausible reasons relating to the nature of the remedy to

explain why it may not have attracted widespread attention in the works of the jurists. While it cannot be denied that the texts on which the argument for *deductio ex mercede* is founded were interpreted in the history of the *ius commune* to become a remedy which was inextricably linked to *remissio mercedis*, Frier's attractive construction of the nature of this remedy in classical Roman law cannot yet be accepted.