THE NATURE OF THE CLAIM FOR HOLDING OVER: AN HISTORICAL ANALYSIS*

1 Introduction

A lessee, who upon termination of the lease intentionally and unlawfully remains in possession of the leased property and fails to return it to the lessor, is said to hold over.1 Although it has recently been held that holding over applies also to mortgagors who continue to occupy their property after the mortgage bond has been called up and the property sold in execution,2 this paper investigates only holding over by a lessee.3 In

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1 Kerr Sale and Lease (2004) 417f, 421ff.; Cooper Landlord and Tenant (1994) 233-235; De Wet & Van Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1 (1992) 369; Nicholson v Myburgh (1897) 14 SC 384; Arenson v Bishop 1926 CPD 73; Du Toit v Vorster 1928 TPD 385 at 389; Sussman v Mare 1944 GWL 64; Van der Merwe v Erasmus 1945 TPD 97; Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd 1955 (3) SA 249 (C); Cf Visser & Potgieter Law of Damages (2003) 341 who include here a lessee occupying premises in terms of a void lease.


3 Some decisions relied on for holding over does not pertain to holding over in this sense, but rather deals with related instances, such as where the lessor committed a breach (Sapro v Schlinkman 1948 (2) SA 637 (AD)); or where the lease was cancelled by mutual agreement (Parry, Leon & Hayhoe Ltd

* I have written this essay for Philip, my friend, husband and love on the occasion of his appointment as Professor Emeritus.

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terms of South African common law, the lessor was entitled to an ejectment order. However, today eviction is regulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act which introduced requirements that have resulted in eviction becoming a lengthy process and which, consequently, emphasises the lessor’s remedies.

It is common cause that the lessor is entitled to a claim for holding over, but the nature of such a claim has been problematic and remains unresolved. The leading academic authorities on lease hold differing opinions.

Kerr is of the view that the lessor is entitled to recover, first, the value of the use and enjoyment of the premises for the period between the date on which the lease terminated and the date on which the lessee actually vacated the premises; secondly, what she has had to disburse; and thirdly, her loss of profit. In his opinion the correct basis of the lessor’s claim is one for breach of contract since she claims damages for the lessee’s breach of her obligation to restore the property on the termination of the contract of lease.

Cooper, again, proposes that a lessee who holds over is liable to the lessor for damages either ex contractu or ex delicto. This ambivalence is problematic as liability ex contractu entitles the lessor to be placed in the position she would have been in had the lease been properly performed, while delictual liability allows the lessor to be placed in the position she would have been in had the delict not been committed. Furthermore, Cooper states that in an instance where the termination was by mutual consent and

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4 South African courts have held that in a claim for eviction it is sufficient to allege that the plaintiff lessor is the owner of the property and that the defendant lessee is in possession of it. *Cf D 6 1 23p; Grotius Inleidinge tot de Hollandsche Rechtsgeleerheit* (1631; I made use of the 1952 edition by Doerring, Fischer & Meijers) 2 3 1 and 4; *Graham v Ridley* 1931 TPD 476; *Singh v Ramrathan* 1940 NPD 381; *Karim v Baccus* 1946 NPD 721; *Myaku v Haverman* 1948 (3) SA 457 (A); *Apollo Investments (Pty) Ltd v Patrick Hillock, Munn & Co (Pty) Ltd* 1949 (1) SA 496 (W); *Moosa v Samugh* 1952 (1) SA 29 (N); *Munsamy v Gengemma* 1954 (4) SA 468 (N); *Jeena v Minister of Lands* 1955 (2) SA 380 (A); *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T); *Harms Amler’s Precedents of Pleadings* (1989) 129f.

5 19 of 1998.


7 Kerr (n 1) at 418 bases his opinion on *Matz v Simmonds Assignees* 1915 CPD 34 and *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* (n 1).

8 Kerr (n 1) at 418.

9 (n 1) at 233; *Nicholson v Myburgh* (n 1) at 9; *Kama’s Estate v Kreusch* (n 3) at 55; *Sussman v Mare* (n 1); see also De Wet & Van Wyk (n 1) 369.

10 Cooper (n 1) derives this distinction from cases which dealt with mutual cancellation: *Tooth v Maingard & Mayer (Pty) Ltd* (n 3) at 131E-F where Henochsberg J stated that “it is a principle of
where the lessee continues to occupy the premises, the lessor has a claim for damages \textit{ex delicto} or one based on unjust enrichment.\textsuperscript{11} Judicial decisions further indicate that on occasion the courts have allowed the lessor a claim for rent on the basis of the contract.

Consequently, the lessor’s action has been classed as ranging from an action for rent based on contract,\textsuperscript{12} one for damages either based on breach of contract\textsuperscript{13} or delict,\textsuperscript{14} or one for unjust enrichment.\textsuperscript{15} It should be observed that all of these possibilities are countenanced in judicial decisions and that there is no clear guidance in this regard.

The need to determine the nature of the lessor’s claim lies in the amount she may claim, specifically in the method by which damages should be calculated. A claim for damages entails a comparison between an actual position and a hypothetical position.\textsuperscript{16} Such a claim based on breach of contract entitles the plaintiff to be placed in the position she would have occupied had the contract been properly performed, that is, a claim for her positive \textit{interesse}. A claim for damages based on delict, again, entitles the plaintiff to be placed in the position she would have occupied had the delict not been committed, that is, a claim for her negative \textit{interesse}.\textsuperscript{17} The aggrieved party is entitled to be placed in the respective hypothetical positions depending on the basis on which damages are claimed. Because there appears to be no consensus regarding the cause of action on which the lessor bases her claim for the lessee’s holding over, the amount awarded to the lessor has varied from the previous rental to damages, the latter then calculated in the different ways indicated.

2 The legal issues

At issue is whether in the event of holding over, the lessor’s claim is based upon contract, breach of contract, delict or unjust enrichment. As explained, the nature of the claim determines the method of calculation and the resulting amount that may be recovered. In addition, the question is important whether rental or damages are due, as in the case of the former the lessor has a hypothec over the lessee’s goods on the leased premises in respect of any rent, payable and not paid, which hypothec gives her a preference in the event of the lessee’s insolvency.\textsuperscript{18}

This article will first address the parameters of the concept of holding over: holding over in the strict sense occurs when, after termination of the lease and with no renewal

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\item our law that, if a lease is cancelled by mutual agreement of the parties, the lessee in the absence of expression to the contrary remains liable to pay rent at the agreed rate for the actual period of occupation”. This principle was laid down in \textit{Parry, Leon & Hayhoe Ltd v Yorkshire Insurance Co Ltd} (n 3).
\item Cooper (n 1) 167.
\item \textit{Sapro v Schlinkman} (n 3).
\item \textit{Matz v Simmonds’ Assessses} (n 7); \textit{Du Toit v Vorster} (n 1); Kerr (n 1) 375.
\item Cooper (n 1) 233; Visser & Potgieter (n 1) 342.
\item Cooper (n 1) 167; Visser & Potgieter (n 1) 342.
\item \textit{Van der Merwe, Van Huyssteen, Reinecke & Lubbe} Contract General Principles (2007) 140.
\item \textit{Ibid}.
\item Kerr (n 6) 182ff.
\end{itemize}
of the lease having taken effect, the lessee continues to occupy the leased premises. Termination of the lease agreement could have been the result of either an effluxion of time or a cancellation by one of the parties to the lease, most likely by the lessor. Termination by mutual agreement of the contracting parties is also a possibility. It is noteworthy that the leading case on the topic of holding over concerned a termination by agreement.\(^\text{19}\) This has lead to a certain amount of confusion not only because the subsequent litigation was founded on breach of the cancellation agreement and not on the original lease, but also because the lessor was held to be in breach.

It is trite that cancellation extinguishes the duties to perform in terms of a contract. The primary obligation to perform is transformed to a secondary obligation to return what had been received.\(^\text{20}\) Thus, the contract survives cancellation but brings about a transformation of its content.\(^\text{21}\) Apart from the obligation to return what had been received, the party in breach of the contract is obliged to compensate the innocent party for losses suffered as a result of the breach, the latter’s damages qualifying as contractual damages, in other words, the innocent party’s positive interesse.\(^\text{22}\)

However, the common scenario of holding over involves that the lessor unilaterally cancels the lease agreement while the lessee remains on the premises. The problem has become acute with the introduction of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act,\(^\text{23}\) a piece of legislation resulting from the constitutional emphasis on social justice. The question may actually be raised whether another dimension has not been added to the problem. The Act curtails the lessor’s right to eviction and has conferred a certain degree of protection on the lessee in that the latter may be evicted only if it is just and equitable to do so and after consideration of certain relevant personal circumstances.\(^\text{24}\)

In an attempt to find an answer to this conundrum, I will for present purposes analyse the Roman and Roman-Dutch law sources on the topic. An investigation of the South African positive law and the impact that legislative enactment and constitutional developments have had on holding over and the lessor’s claim for damages will have to stand over for another occasion.

19 Sapro v Schlinkman (n 3).
21 Lubbe & Murray (n 20) 593.
22 Idem 591; Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd 1951 (1) SA 312 (C); Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd 1974 (1) SA 414 (NC); Whitfield v Phillips 1957 (3) SA 318 (A); Lubbe “The assessment of loss upon cancellation for breach of contract” 1984 SALJ 616 at 637.
3 Roman law

In Roman times, most leases were for a definite period; agricultural land was usually let for a period of five years. Houses, however, were often let for an indeterminate period. When the lease period expired, a tacit renewal of the lease for a period of a further year was common.25

Zimmermann26 has drawn attention to the lessee’s eternal desire and need for security of tenure and how it is generally recognised that the lessee’s position in Roman law compared unfavourably with her situation today. In Roman law, the lessee did not have a real right to the leased premises but only a personal right;27 the maxim “sale breaks hire” applied.28 Neither was the lessee entitled to the possessory interdicts to protect her possession against the lessor or third parties.29 During the lease the lessor could terminate the lease and evict the lessee if the latter failed to pay the rent for a period of two years, or if she grossly abused the property.30 On termination of the lease, the lessor could institute the actio locati as well as apply for an interdict to effect an immediate eviction.31 Outstanding rent was easily obtained by executing the tacit hypothec over the invecta et illata.32

Zimmermann has further pointed out that Roman law was actional law and that where there was no litigation, no law could be developed.33 Since much of the litigation appears to have dealt with lessees vacating premises prematurely, it could be assumed that holding over either did not occur or did not pose a problem in Roman times. However, in D 19 2 48 1 Marcellus34 states that lessees of moveables have an obligation to return the movable leased object on the termination of the lease. Should the lessee fail to do so, she had to pay the value of the leased object to the lessor. This obligation to return was

D 19 2 13 11, Ulpianus libro trigesimo secundo ad edictum: “Qui impleto tempore conductionis remansit in conductione, non solum reconduxisse videbitur ... quod autem diximus taciturnitate utriusque partis colonum reconduxisse videri, ita accipienda est, ut in ipso anno, quo tacuerunt, videantur eandem locationem renovasse, non etiam in sequentibus annis, etsi lustrum forte ab initio fuerat conductioni praestitutum.” C 4 65 16, (Impp Valerianus et Gallienus) AA et C Aurelio Timotheo: “Legem quidem conductionis servari oportet nec pensionum nomine amplius quam convenit reposci. Sin autem tempus, in quo locatus fundus fuerat, sit exactum et in eadem locatione conductor permanserit, tacito consensi eandem locationem una cum vinculo pignoris renovare videtur.” [a 260]

27 “Emptio tollit locationem.” Today the lessee has a real right and the maxim “huur gaat voor koop” applies. See Kaser Das römische Privatrecht Vol 1 (1971) 567 n 44; Cooper (n 1) 277.
28 Kaser (n 28) 567; Van Zyl (n 27) 169.
29 D 19 2 54 1; D 19 2 56.
30 Van Zyl (n 27) 169.
31 Cf D 20 2 entitled “In quibus causis pignus vel hypotheca tacite contrahitur”; D 19 2 13 11 (n 25); C 4 65 16 (n 25); Van Oven Leerboek van Romeinsch Privaatrecht (1948) 174ff, 275f.
32 Zimmermann (n 26) 348f.
33 Libro octavo digestorum: “Qui servum conductum vel aliam rem non immobilem non restituit, quanti in litem iuratum fuerit damnabitur.” Cf Hallebeek (n 27) 233.
extended to immovable property during the post-classical period in *constitutiones* dating from AD 293, AD 294 and AD 484. In *C 4 65 25* and *29*, the emperors Diocletian and Maximian laid down that possession of an immovable leased object had to be returned to the lessor on the termination of the lease. *C 4 65 33* reiterated the same obligation and dealt with holding over, providing that where a lessee failed to vacate premises after the termination of the lease, she could be condemned not only to return the leased object, but also to payment of its value. Holding over was compared to the seizing of another’s property.

The introduction of these rules raises the issue of the nature of the lessor’s claim and whether, in the event of holding over, the value of the leased object was payable over and above the damages the lessor could claim with the *actio locati*. Van Oven is of the opinion that payment of the value of the leased object was a post-classical innovation introduced as a penalty, given that the lessee had forced the lessor to resort to litigation.

The fact that a lessee holding over could be compelled to return the leased object as well as be condemned to pay what constituted a penalty, leads to the hypothesis that in Roman law holding over founded two claims, namely a contractual claim for breach of the obligation to return the leased object as well as a delictual claim which constituted a penalty for holding over.

### 4 Roman-Dutch law

During the Middle Ages, the position of the tenant improved as many exceptions were introduced to the rule “koop breekt huur”. In Roman-Dutch law the rule became “huur gaat voor koop”, rendering Roman law obsolete in this respect. Moreover, holding over appears to have become a major problem. In 1515, Emperor Charles V issued a *placaet* addressing the increasing number of complaints concerning holding over in Holland, Zeeland and Friesland. The Emperor stated that on the termination of leases, lessees were resorting to violence in order to retain possession of leased premises without renewing their leases, and were threatening subsequent lessees. He expressed the wish to punish

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35 “Si quis conductionis titulo agrum vel aliam quamcumque rem accepit, possessionem debet prius restituere et tunc de proprietate ligare.”

36 “Cumi conductorem aedificia, quae suscepit integra, destruxisse proponas, haec heredes etiam eius praeses provinciae instaurare aedificiorum inter vos habita ratione indebit.”

37 (*Imp Zeno*) A Sebastiano pp: “Conductores rerum alienarum seu alienam cuiuslibet rei possessionem precario detinentes seu heredes eorum, si non eam dominis recuperare volentibus restituerint, sed litem usque ad definitivam sententiam expectaverint, non solum rem locatam, sed etiam aetitationem eius victrici parti ad similitudinem invasoris alienae possessionis praebere compellantur.”

38 Van Oven (n 32) 275.

39 *Cf C 4 65 33*: “ad similitudinem invasoris alienae possessionis”.

40 Van Oven (n 32) 275.

41 Hallebeek (n 27) 234.

42 *Groot Placaet Boek (GPB)* Deel 1 (1658) Tit 9 363: “Alsoo dagelijcks hoe langer hoe meer, veel ende diversche klachten gedaen worden by den Ridderschappen, Edelen ende Burgeren van ons Steden, ende anderen, woonnachtich binnen onsen voorsz Landen van Hollant, Zeeland ende Vrieslandt, dat die
this type of behaviour\textsuperscript{43} and prohibited holding over.\textsuperscript{44} He granted judges the discretion of imposing corporal punishment or a fine, depending on the status of the person and the exact circumstances of the situation.\textsuperscript{45} 

The Ordinance of 1515 was confirmed by the Politijcke Ordonnantie of Holland of 1580\textsuperscript{46} in article 30.\textsuperscript{47} In its article 31\textsuperscript{48} a new provision added that lessees who continued to occupy premises under the pretext that the lease had been renewed or that they were entitled to a lien, had to vacate the premises unless they could confirm their claim by way of a written lease drawn up by a public notary or by the owner herself. Article 32\textsuperscript{49} provided that if the former lessee prevented the owner or the new lessee from using the

Pachters ende Huyr-luyden, als sy yemandts Lande teen tijdt van Jaren in huyr ghehad hebben, ende se selve Huyr uyt is, willen met kracht ende gewelt gebruycken 't selve Landt, sonder eenige nieuwe Huyr te maeken tegens den Eygenaers van dien Landen, ghenoech tegens danck ende wilde van den genen die t'selvte Landt toe behoor ... indien de Eygenaers ende Proprietarisen vanden Landen yemant anders die selve heure Landen verhuysen, omme die te ghebruycken, soo dreygen de oude Pachters de nieuwe Pachters ...” \hfill 43

\textit{Ibid:} “[W]y willen dat van nu voortaen gepugneert ende gestraft worden ten exempl van een jegelijke.” \hfill 44

\textit{Ibid:} “... verklaren ende ordonneren mits desen, dat niemand wie hy zy vanden Pachtenaers ende Bruyckers van eenige Landen die sy in Pachte gehouden ende ghenoemen hebben, niet langer en sullen mogen gebruycken dan den tijde van vier Jaren, die hun gegunt, ende daer by hun’t selfde Lant by den Eygenaer van dien in Huyr gegeven is, ten zy by Pacht ende wille vanden selven Eyghenaer, ende dat sy daer af hebben Huyr-cedullen by geschritte alst behoor, sonder eenige andere ontwaerenger offe solemnitezeten van Rechten, die men hier van ghewoonlijcken is ten Landt-rechte te houden, te verwachten of te verbeyden, ende dat oock niemand vanden selven Pachtenaers eenige Huyr van Pachte nae expiratie van dien ander over sal mogen geven, buyten consente ende wilde vande Eygenaers vanden selven Lande ...” \hfill 45

\textit{Ibid:} “... dat den Rechter van de Plaetse, ende den nieuwen Pachter te kennen mogen geven, omme in heur recht te blijven, ende dit al ende elck poinct van dien bysunder, opte peyne van strengelijck daer as gecorrigeert te worden in heur Lijf ende goeden, na qualiteyt vanden Persoon ende misdaet.” \hfill 46

\textit{GPB Deel 1 Ordonnantie vande Pocien binnen Hollandt, in date den eersten Aprilis 1580 330ff.} \hfill 47

\textit{Idem at 337:} “Beroerende de Huyr-luyden ende Pachters vande Landen: Hebben de Staten voornoemt mede geordonneert ende gestatueert, ordonneren ende statueren by desen, dat de Ordonnantie jegens den Huyrluyden ende Pachters inden Jare 1515. in Februario ghemaeckt, al-omme inden voorsz Lande ende Graeffschappe van nieuws gepubliceert, uytgeroepen ende scherpelijcken onderhouden sal worden.” \hfill 48

\textit{Ibid:} “Ende amplierende de selve Ordonnantie, hebben van nieuws geordonneert ende ordonneren by desen, dat de Pachters ende Huyluyden, die eenige huyre ofte nae-huyre aen eenige goederen pretenderen willen, onder decksel vande selve pretensie inde occupation ofte t’gebruyck vande ghehyrde Landen ende Goederen niet en sullen mogen blijven, ofte hen de selfde directelijck ofte indirectelijck onderwinden, ten zy vande selfde pretensie by publijcke instrumenten ofte d’eygen handt vanden Eygenaer, ghepasseert voor date vande expiratie vande huyre, promptelijck blijcke, ende dat egeene hyrmen plaetsen hebben oft effect sorteren sullen, daer van suelks als vooren verhaelt is, niet en blijckt.” \hfill 49

\textit{Ibid:} “Dat oock soo wanneer den oude Huymann oft yemandt van sijnen wegen, den Eyghenaer ofte nieuwies Huymann, met raedt oft daet, directelijck oft indirectelijck, eenich hinder, letsels, empeschementen oftte dreygemenoten doet, ter oorsake van’t ghebruyck oft huyre vande voorsz Landen endegoederen, dat daer van exemplaire strafe ghedaen sal worden.” \hfill 49
premises, she would be liable for an exemplary penalty. Article 33\textsuperscript{50} determined that a lessee of immovable property holding over would, over and above the costs, damage and interest, have to pay half of the value of the leased premises if she held over until \textit{litis contestatio}; if she held over until final sentence, she would be liable for the full value of the leased premises. Article 34\textsuperscript{51} instructed judges to apply these penalties strictly and to sentence the impecunious to corporal punishment.

Groenewegen in his \textit{Tractatus de Legibus Abrogatis et Inusitatis in Hollandia}\textsuperscript{52} expressed the opinion that these penalties had become obsolete.

However, the matter received the renewed attention of the Legislature in 1658 when the States of Holland issued another Placaet Tegens de Pachters ende Bruycken van de Landen.\textsuperscript{53} The States explicitly addressed the situation where after termination of her lease, the lessee failed to renew the lease but continued to occupy and use the land under diverse pretexts.\textsuperscript{54} Such holding over threatened and prejudiced subsequent lessees, destroyed crops, injured and frightened cattle, and involved other malicious deeds.\textsuperscript{55} The States also expressed their desire to punish such perpetrators and reiterated the application of the \textit{Placaet} of Emperor Charles V as well as the Politijcke Ordonnantie. They specified the following: first, that upon termination of the lease, the lessee had to hand over the leased object to the lessor;\textsuperscript{56} secondly, if the lessee claimed to have...
a right of retention, she had to provide written proof drawn up by a public notary or a written document provided by the owner.\(^\text{57}\) If a lessee held over until \textit{litis contestatio}, she would, over and above all the costs, damage (\textit{schaden}) and interest, have to pay half of the value of the leased object;\(^\text{58}\) in the event of her holding over until sentence, the penalty increased to the full value of the leased object.\(^\text{59}\) Provision was also made that a lessee had to vacate the premises before she could institute any action for a claim for improvements.\(^\text{60}\)

The promulgation of this legislation serves to prove that Roman-Dutch law actually dealt with holding over severely. This is reflected in the old authorities who, contrary to Groenewegen, considered the legislation in question to have been current law. Grotius mentioned in his \textit{Introduction}\(^\text{61}\) that the lessees of immovable property who held over, had to pay, in addition to costs, damages and interest, half or the full value of the leased premises depending on whether they vacated the premises at \textit{litis contestatio} or at final sentence.

Wassenaar,\(^\text{62}\) in his \textit{Praxis Iudiciaria},\(^\text{63}\) provided the form for the pleadings as well as the procedure applicable to holding over. Sande\(^\text{64}\) mentioned that the lessee did not have

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gehad hebben, ende de Eygenaers haer vryen wille daer mede laten doen.”
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\(^\text{57}\) \textit{Ibid} \textit{III}: “Ende soo verre de selve tot de diffinitieve Sententie vanden eersten Rechter toe in de voorsz occupatie persevereren, sullen als dan boven alle kosten, schaden ende interessten vervallen ende gecondemneert werden inde geheele waerde vande selve goederen . . . .”

\(^\text{60}\) \textit{Idem} 2518 X.

\(^\text{61}\) \textit{De Prohibita Rerum Alienatione} (1633) Part 3 C 8 no 66. Sande (1568-1638) studied at Wittenberg and Leiden, practiced in Utrecht, became a professor of law at Franeker in 1598 and a judge of the court of Friesland in 1604: Roberts (n 62) 272.
a right of retention at the end of the lease for improvements but had to return the leased premises.

In the *Hollandsche Consultatien*, there is an opinion that a lessee of immovable property who, after termination of the lease, continued to occupy the premises against the wishes of the owner until *litis contestatio* or until sentence, had to pay the lessor either half of or the full value of the premises.

Voet referred to both legislation and authors in his *Commentarius ad Pandectas*. He observed that the property had to be returned at the end of the lease in the same condition as that in which it was given to the lessee. In the case of holding over, he compared the lessee to an illegal occupier of another’s possession and reckoned that she had to pay damages in the amount of half or full value of the leased property, depending on whether she returned the leased object at *litis contestatio* or at sentence. If the lessee did not have sufficient money to pay the fine, she was subject to corporal punishment. The duty to return the leased object was not subject to exceptions. Possessions had to be returned prior to resorting to litigation regarding the ownership of the leased object.

## 5 Conclusion

There appears to be no doubt that holding over had become such a problem in Roman-Dutch law that it necessitated legislative intervention. The relevant legislation on the topic introduced several penalties, of which the financial penalty for holding over is relevant for this discussion. The fact that both the idea and the amount of this penalty, either the full or half the value of the leased object, were obviously derived from Roman law, supports the conclusion that Van Oven was correct: payment of the value was the penalty for compelling the lessor to litigate. Accordingly, in both Roman and Roman-Dutch law holding over gave rise to a contractual claim for damages and a delictual claim for punishment.

Furthermore, in both Roman and Roman-Dutch law there was an obligation on the part of the lessee to return the leased object on the termination of the lease. Breach of this duty meant that the lessor could institute the *actio locati*. *Locatio conductio* was a contract based on good faith, which meant that the lessee had to make good the lessor’s damages. In Roman-Dutch legislation, these damages were explicitly described as the costs of having the premises vacated, the legal costs, any losses suffered by the lessor, as well as interest (*ontruyminge ende alle kosten, schaden ende interesten*).

65 *Consultatien Advysen en Advertissementen, by Rechts-Geleerden in Holland* Deel IV (1728) no 34.
66 *Commentarius ad Pandectas* Vol 1 (1731) 19 2 32.
67 *Ibid*.: “Tendit denique locate actio ad id, ut finita conductione res in eodum statu, quo data, restituatur.”
68 *Ibid*.: “(t)anquam invasor alienae possessionis”.
69 *Ibid*.: “Quod & nostris moribus firmatum est, in quantum post litem contestatam praeter fundum & litis impensas dimidia pretii, post sententiam vero totum pretium & id quod interest, reddere domino tenetur.”
70 *Ibid*.: “(s)i in aere non habeat, in pelle luiturus”.
72 *Ibid*.
In conclusion therefore, it appears that in post-classical Roman law, imperial legislation introduced a penalty for holding over, which penalty was revived in Roman-Dutch law by the statutes passed by Charles V and later by the States of Holland. It may accordingly be argued that a delictual action had been introduced and that the amount recoverable by the lessor for the lessee’s holding over represented punitive or exemplary damages.