

## An Example Of Consensual Contracts: Locatio Conductio Rei

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### **ABSTRACT**

*Locatio conductio was a consensual contract which depended on bonae fidei and the consensus of the parties. Locatio-conductio was a form of consensual contracts which included three types of contract that today we divide into: the hire of things (locatio-conductio rei), the hire of services (locatio conductio operarum) and the hire of work (locatio conductio operis). Locatio-conductio, letting and hiring, was an agreement for the use of one thing belonging to another or for the use of another's services in consideration of an agreed payment. The contract was formed by consent, without any special form of words or writing or other formality being required. As this contract was bilateral and depended on "bonae fidei", it gave rise to reciprocal actions for both parties. In accordance with the nature of this contract, which implied an exchange of performances, the actio locatio of the locator and the actio conducti of the conductor were the actions for the parties of the contract. Both parties were responsible for dolus and culpa (omnis culpa). Locatio conductio rei was an consensual contract which was possible for both movables and immovables. In a contract of locatio conductio rei, remuneration must consist of money with one exception in agricultural tenancies where the payment might be agreed as the fruits of the land.*

### **ÖZET**

*Roma Hukukunda rızai akitlerden sayılan locatio conductio, kira, istisna ve hizmet akitleri olmak üzere içinde üç ayrı akdi barındırmaktaydı. Locatio conductio rei, yani kira akdi ile taraflardan biri olan kiralayan (locator) bir şeyin kullanılmasını kiracıya (conductor) temin etmek, kiracı da bunun karşılığında belli bir kira bedelini ödemek borcu altına girerdi. Günümüz hukuk düzenlerinde olduğu gibi, tarafların irade*

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beyanlarının uyduğu anda sözleşme doğardı. Kira akdinin tam iki taraflı bir hüsnüniyet akdi olması nedeniyle, her iki taraf da her zaman birbirlerine karşı borç altına girerdi. Her iki tarafın da yapılan akitten menfaatlerinin olması nedeniyle, taraflar tüm kusurlarından (omnis culpa) sorumluydular. Bu nedenle birbirlerine karşı actio locati veya actio conducti açabilirlerdi. Bu akde konu olan, yani kiraya verilen mal menkul veya gayrimenkul olabilirdi. Malın kullanımı karşılığında alınan ücret ise, genellikle para olmakla birlikte, hasılat kirasında malın semerelerinin bir kısmı olarak da kararlaştırılabilirdi.

### KEY WORDS

*Locatio conductio rei, Locatio conductio, Hire, Rızai akitler, Consensual Contracts.*

### ANAHTAR KELİMELER

*Locatio conductio rei, Locatio conductio, Kira akdi, Lease, Sözleşmeler.*

## LOCATIO CONDUCTIO REI

In some cases Roman civil law acknowledged an exception to the rule that the contracts should be made in certain ways which were recognised as consensual contracts that depended only on the *consensus* of the parties. Consensual contracts<sup>1</sup> were not the earliest contracts to have emerged in Roman law. They were developed due to the needs of the expanding Roman economy in the middle Republic<sup>2</sup>. They were bilateral and depended on *bonae fidei*. The four consensual contracts - sale (*emptio venditio*), hire (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*) - had distinct commercial characters. In these contracts the obligation was contracted by consent. It was stipulated that the presence of both parties was not required; consequently the contract could be concluded by lessor or messenger. All these contracts gave rise to reciprocal actions<sup>3</sup>.

“*Locare*” means “to place, place out or place at the disposal or to entrust something to a person”, and “*conducere*” means “to carry along, to take with one”<sup>4</sup>. *Locatio-conductio*, “letting and hiring”, was an agreement for the use of one thing belonging to another or for the use of another’s services in

<sup>1</sup> Iust. Ins. 3, 22, 1-3; Rudolf SOHM, *The Institutes*, (Translated By: James CRAWFORD LEDLIE), 3. Ed., Florida, 1994, p. 404.

<sup>2</sup> William BURDICK, *Principles of Roman Law and Their Relation to Modern Law*, New York, 1938, p. 442; Andrew BORKOWSKI, *Text-book on Roman Law*, Blackstone Publications Co., 2. Ed., United Kingdom, 2001, p. 265.

<sup>3</sup> Fritz SCHULZ, *Classical Roman Law*, Oxford, 1969, p. 525.

<sup>4</sup> Paul KOSCHAKER, & Kudret AYITER, *Roma Hususi Hukukunun Ana Hatları* (The Main Lines of Roman Private Law), A.U. Faculty of Law Publications, Ankara, 1975, p. 236; SCHULZ, p. 543.

consideration of an agreed payment. This contract closely resembles a sale. It was, in many respects, under similar rules that regulated purchase and sale<sup>5</sup>.

D. 19. 2. 2., pr., *Gaius (Rerum cottidianarum)*

***“Locatio et conductio proxima est emptioni et venditioni isdemque iuris regulis constitit: nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio contrahi intellegitur, si de mercede convenerit.”***

“Lease and hire is close to sale and purchase, and it is formed by the same rules of law. Sale and purchase is contracted if the price is agreed upon; similarly, lease and hire is considered to be contracted once the rent is agreed upon.”

The price was called *merces* “hire-money”<sup>6</sup> which we could translate as “rent” in the case of land or houses, and “wages” etc. For personal services. The sum paid (*merces*) had to be fixed before the contract was complete, and compensation had to be in the form of money<sup>7</sup>. The contract was formed by consent without any special form of words or writing or other formality being required.

D. 19. 2. 1., *Paulus (Edictum, lib. 34)*

***“Locatio et conductio cum naturalis sit et omnium gentium, non verbis, sed consensu contrahitur, sicut emptio et venditio.”***

“Because the contract of lease and hire is found in nature and among all peoples, it is contracted not by formal words but by agreement, like the contract of sale and purchase.”

According to the Roman society, *locatio-conductio*<sup>8</sup> was a uniform contract and this uniformity was upheld irrespective of the variety and diversity of relationships covered by the contract<sup>9</sup>. *Locatio-conductio* was a form of consensual contract which included three types of contract that today we divide

<sup>5</sup> Iust. Ins. 3, 24, pr.; BORKOWSKI, 2001, p. 281; BURDICK, 1938, p. 448; Pasquale VOICI, *Istituzioni di Diritto Romano*, 5. Ed., Milano, 1996, p. 455; Antonio GUARINO, *Diritto Privato Romano*, 8. Ed., Napoli 1988, p. 803.

<sup>6</sup> John Henry ROBY, *Roman Private Law*, Vol.:2, New Jersey, 2000, p. 169; VOICI, p. 456; KOSCHAKER & AYITER, 1993, p. 236; Gaius 3. 143; Iust. Ins. 3. 24. 1.

<sup>7</sup> BURDICK, 1938, p. 447; Ozcan CELEBICAN-KARADENIZ, *Iustinianus Zamanına Kadar Roma'da İş İlişkileri* (Labor Relations in Rome Till Iustinian), A.U. Faculty of Law Publications, Ankara, 1976, p. 120.

<sup>8</sup> Mario TALAMANCA, *Istituzioni di Diritto Romano*, Milano, 1996, p. 453; VOICI, 1996, p. 455; SOHM, 1994, p. 404.

<sup>9</sup> Max KASER, *Roman Private Law* (Translated by: Rolf DANNENBRING), Durban, 1965, p. 183.

into: the hire of things (*locatio-conductio rei*), the hire of services (*locatio conductio operarum*) and the hire of work (*locatio conductio operis*)<sup>10</sup>. In each of these three cases, the monetary rent, fee or wages (*merces*, less often *pretium*) passed from one party to the other according to the economic sense of the contract. For its validity, the contract did not depend upon the presence of the parties because it was consensual. It may be concluded by a lessor or messenger. It was complete as soon as the parties were agreed upon its essential terms<sup>11</sup>.

The parties were termed *locator* and *conductor*. The *locator* was the party who made a thing available, like renting something out. The party of the contract who wanted to labour as result of the "piece of work contract" or the party placing his services at the disposal of another in the services contract was also the *locator*. On the other hand, the *conductor* is the one who takes the object away as lessee, the one who engages himself to do work (*l.c. operaris*) or the employer who takes the labourer with him (*l.c. operarum*). In accordance with the nature of this contract, which implied an exchange of performances, the *actio locatio* of the *locator* and the *actio conducti* of the *conductor* were the actions for the parties of the contract<sup>12</sup>. Both parties were responsible for *dolus* and *culpa*, but the party who received one thing from the other (whether he was termed *locator* or *conductor*) was liable additionally for *custodia*<sup>13</sup>.

## I - THE FORMATION OF *LOCATIO CONDUCTIO REI*

*Locatio conductio rei*, in the sense of the hire of a thing, occurred where the *conductor* (lessee) was allowed the use of a thing by the *locator* (lessor) in return for payment<sup>14</sup>. The contract was made when the parties agreed on the subject matter of the hire and on the amount of payment. Unless the remuneration for the letting had been agreed upon, the contract would be formed. In these contracts the obligation was contracted by consent. There was no formal procedure and the agreement of the parties was enough to fulfil the contract.

<sup>10</sup> CELEBICAN-KARADENİZ, 1976, p. 122; Ziya UMUR, **Roma Hukuku** (Roman Law), İstanbul, 1990, p. 366; Reinhard ZIMMERMANN, **The Law of Obligations**, Johannesburg, 1992, p. 351.

<sup>11</sup> R. W. LEE, **The Elements of Roman Law**, Sweet and Maxwell Publications Co., 4. Ed., London, 1956, p. 321; KOSCHAKER & AYITER, 1993, p. 236.

<sup>12</sup> SCHULZ, 1969, p. 546; KASER, 1965, p. 183.

<sup>13</sup> TALAMANCA, 1996, p. 456; SCHULZ, 1969, p. 547.

<sup>14</sup> Türkan RADO, **Roma Hukuku Dersleri Borçlar Hukuku** (Roman Law of Obligations), Filiz Publications Co., İstanbul, 1992, p. 134; Cahit OGUZOĞLU, **Roma Hukuku** (Roman Law), İstanbul, 1950, p. 239; CELEBICAN-KARADENİZ, 1976, p. 123.

In this case the question arose as to whether hire was formed when the remuneration was left to be decided by the other party. It was generally accepted that events determined the classification as if there were conditional sale or hire of each one. For this reason, there was no doubt that things could be sold and hired subject to conditions<sup>15</sup>.

D. 19. 2. 20.pr., *Paulus (Edictum, lib. 20)*

“*Sicut emptio ita locatio sub condicione fieri potest.*”

“Like purchase, lease can also be contracted under a condition.”

## II - THE SUBJECT MATTER OF THE CONTRACT AND REMUNERATION

In the early times of the Roman Empire, *locatio conductio rei* was a type of contract regulating the renting out rooms. These rooms were called *insulae* in the notorious tenements of Rome where the risk of fire and frequent collapses threw the rules on the landlord's responsibility into grim relief, if they were destroyed during the tenancy<sup>16</sup>. Another area of equal economic importance in which *locatio conductio rei* was applied was for the leasing of land for agricultural exploitation<sup>17</sup>. The lessee of the land was called *colonus* and could benefit from the fruits of the land. In the case of agricultural tenancies, it could be agreed that the *locator* would receive a specified proportion of fruits of the land, in place of a monetary reward. This arrangement was called *colonia partiaria*.

*Locatio conductio rei* was an consensual contract which was possible both for movables and immovables. Houses, rooms, slaves, animals and other movables were the objects of lease<sup>18</sup>. In some texts, it was found that the slaves were also the object of the hire<sup>19</sup>. With regard to the hiring of a thing, in principle there was no difference between a movable and an immovable. The leasing of land did not create a real right: it was merely contractual. The thing that was hired would normally be a corporeal thing and something not consumable through use.

<sup>15</sup> Gaius, 3, 142-146; Iust. Ins. 3, 24, 2.

<sup>16</sup> Ditlev TAMM, **Roman Law**, DJOV Publications Co., Copenhagen, 1997, p. 136.

<sup>17</sup> SOHM, 1994, p. 404; TAMM, 1997, p. 137.

<sup>18</sup> KASER, 1965, p. 184; BURDICK, 1938, p. 448.

<sup>19</sup> Gaius 3. 146.; ZIMMERMANN, 1992, p. 352.

The payment for *locatio conductio rei* was called *merces*<sup>20</sup>. In a contract of *locatio conductio rei*, remuneration must have consisted of money. It must have been certain (*certa*) or ascertainable. If the *merces* was not paid by money, this contract was called *contractus innominati*. The rule that the remuneration must have consisted of money allowed just one exception: in the case of agricultural tenancies, part of the produce of the land was frequently used as payment. This might consist of a portion of the fruits, if it was determined absolutely<sup>21</sup>.

### III - DUTIES OF THE PARTIES

The duties for both parties could be varied by agreement, the rules being similar to those of *sale*. The remedies available to the parties for the enforcement of respective duties were the *actio locati* for the *locator* and *actio conducti* for the *conductor*. The measure of damages was the plaintiff's "interest" in the performance of the contract. As both of the parties benefited from the contract, they had the responsibility of *omnis culpa*. In certain cases in the classical period, they were responsible for *custodia*<sup>22</sup>.

#### 1) DUTIES OF THE LESSOR (LOCATOR)

The *locator* was bound to let the thing to the other party for use and possibly for enjoyment during the agreed term and to keep the thing in such a state that it was always fit for that purpose. In another sense, the lessor had to allow the lessee its use and enjoyment for the purpose contemplated by the contract. If the lessor neglected his duty, knowingly committing a breach of faith, he was liable to compensate for the damages under his responsibility<sup>23</sup>. The lessee could enforce these duties by *actio conducti*<sup>24</sup>.

While the *locator* left the use and the enjoyment of the thing to the *conductor*, the accessories that were normally required for the use of the property also had to be handed over.

D. 19. 2. 19. 2., *Ulpianus (Edictum, lib. 32)*

***"Illud nobis videndum est, si quis fundum locaverit, quae soleat instrumenti nomine conductori praestare, quaeque si non praestet, ex locato"***

<sup>20</sup> TALAMANCA, 1996, p. 452; VOICI, 1996, p. 594; D. 19. 2. 2. pr., *Gaius (Rerum cottidianarum)*.

<sup>21</sup> BORKOWSKI, 2001, p. 282; RADO, 2001, p. 135.

<sup>22</sup> UMUR, 1990, p. 367.

<sup>23</sup> D. 19. 2. 30., *Alfenus (Digestorum a Pauloepitomatorum, lib. 3)*; KOSCHAKER & AYITER, 1993, p. 236; ZIMMERMANN, 1992, p. 360.

<sup>24</sup> BORKOWSKI, 2001, p. 284; OGUZOGLU, 1950, p. 240.

*tenetur. Et est epistula Neratii ad Aristonem dolia utique colono esse praestanda et praelum et trapetum instructa funibus, si minus, dominium instruere debere: sed et praelum vitiatum dominum reficere debere.”*

“Now we must examine what the lessor (*locator*) of a farm customarily provides to his tenant farmer under the heading equipment; for if he does not provide this, he is liable on the hire. There is a lessor from Neratius to Aristo to the effect that the tenant must, in any case, be provided with storage jars, a press and grinder both fitted with ropes; if not the owner must provide them, but the owner must also repair a broken press.”

The *locator* had to keep the hired thing in good repair throughout the period of hire (unless damage had been caused by the negligence of the *conductor*). Necessary expenses, incurred due to the thing, fell on the *locator*<sup>25</sup>. If the *conductor* incurred reasonable (necessary and useful) expenses in the maintenance of the property, he was normally entitled to recover them<sup>26</sup>. But if the use or the enjoyment was prevented by *vis maior*, the risk (*periculum*) was with the *locator*. The conductor had no claim for rent and had to refund what had already been paid, but he was not further liable for damages<sup>27</sup>.

D. 43. 10. 3., *Papinianus* (Care of Cities)<sup>28</sup>

“And are to care that private walls and enclosure walls of houses facing the street are not in bad repair, so that the owners should clean and refurbish them as necessary.”

The lessor had the liability to deliver the thing free from defects. The extent of this liability varied with the circumstances. The lessor’s duty to supply a thing fit for its purpose had substantially the same effect<sup>29</sup>.

D. 19. 2. 19. 1., *Ulpianus* (*Edictum*, lib. 32)

*“Si quis dolia vitiosa ignarus locaverit, deinde vinum affluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata.”*

<sup>25</sup> KASER, 1965, p. 184; UMUR, 1990, p. 368.

<sup>26</sup> BURDICK, 1938, p. 449; D. 19. 2. 25. 2., ; For example, A let a house to B, and C, an adjoining owner, erected a building which shut out the light from B, the lessor could rescind the contract, as also he could do if the doors and windows of the rented house became out of repair and were not restored by the locator.

<sup>27</sup> KASER, 1965, p. 184; VOGL, 1996, p. 595; KOSCHAKER & AYITER, 1993, p. 237.

<sup>28</sup> The original text is in Greek language.

<sup>29</sup> ZIMMERMANN, 1992, p. 367; LEE, 1956, p. 323.

“If someone unknowingly leases out defective storage jars and wine runs out of them, he will be liable for the lessee’s interest, nor will his lack of awareness have been excused.”

The *locator* was liable, however, to the *conductor* for the damages in the case of eviction<sup>30</sup>. In this case, *actio conducti* was brought against the *locator*. If the *locator* substantially prevented the *conductor* from enjoying the property, the lessor could terminate the contract and sue for damages<sup>31</sup>. The lessor was not responsible for disturbance or eviction attributed to a cause which came into existence after the conclusion of the contract unless it was attributable to his own act<sup>32</sup>. Thus he was not liable if the land he had given on lease was expropriated by public authority, but he must forgo his claim to rent<sup>33</sup>.

D. 19. 2. 33., *Africanus (Quaestionem, lib. 8)*

“*Si fundus quem mihi locaveris publicatus sit, teneri te actione ex conductio, ut mihi frui liceat, quamvis per te non stet, quo minus id praestes.*”

“If you lease out a farm to me and it is then made public property, you are liable to me in an action on hire for allowing me the enjoyment even though you are not responsible for your failing to prove it.”

## 2) THE DUTIES OF THE LESSEE (*CONDUCTOR*)

The person who had to pay the remuneration was the *conductor*; he had to accept delivery of the hired property and normally had to pay for the hire either by a lump sum or instalments. The lessor could enforce these duties by *actio locati*<sup>34</sup>. The lessee had to retain possession of a thing for the time agreed. He was similar to a *detentor*<sup>35</sup> and was therefore not protected by possessory

<sup>30</sup> D. 19. 2. 25. 1., *Gaius (Edictum provinciale, lib. 10)*; D. 19. 2. 30. pr., 1., *Alfenus (Digestorum a Paulo epitomatorum, lib. 5)*; Cod. 4. 65. 9; UMUR, 1990, p. 368; ZIMMERMANN, 1992, p. 378.

<sup>31</sup> 19. 2. 24. 4., *Paulus (Edictum, lib. 34)*; ZIMMERMANN, 1992, p. 369; KOSCHAKER & AYITER, 1993, p. 237.

<sup>32</sup> VOICI, 1996, p. 456; SCHULZ, 1969, p. 547; Sometimes a *locator* was liable for *custodia*. Suppose A hired a place in a storehouse from B, and delivered a thing to him. Then B was liable for *custodia* unless this liability was expressly excluded.

<sup>33</sup> LEE, 1956, p. 324.

<sup>34</sup> SOHM, 1994, p. 404; OGUZOGLU, 1950, p. 240; KOSCHAKER & AYITER, 1993, p. 237; ZIMMERMANN, 1992, p. 375.

<sup>35</sup> KASER, 1965, p. 184; SCHULZ, 1969, p. 546; VOICI, 1996, p. 456.

interdictions. In Roman law, the lessee could be ejected by a purchaser of the land<sup>36</sup>.

D. 19. 2. 55. 2., *Paulus* (*Sententiarum*, lib. 2)

***“Qui contra legem conductionis fundum ante tempus sine iusta ac probabili causa deseriverit, ad solvendas totius temporis pensiones ex conducto conveniri potest, quatenus locatori in id quod eius interest indemnitas servetur.”***

“A person who, contrary to a lease clause, abandons his farm without legal and probable cause before the term is over, can be sued on the lease for payment of the rent for the remaining term to the extent that the lessor preserves his compensation upto the amount of his interest.”

The lessee had to take proper care of the farm with *exacta diligentia* and thus keep the agricultural land in proper cultivation or not overload a hired beast of burden.

D. 19. 2. 25. 3., *Gaius* (*Edictum provinciale*, lib. 10)

***“Conductor omnia secundum legem conductionis facere debet. Et ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat, ne intemptiva cultura deteriore fundum faceret.”***

“The lessee should perform everything in accord once with the clauses of the lease. Above all, the tenant farmer should see to it that he does farm work during his term as well, so that he does not make the farm worth less by his unseasonable cultivation. Furthermore, he should take care of the farmhouses so as to preserve them in good condition.”

At the end of the contract, the lessee was bound to return the thing he hired just as he received it, in as good condition, less ordinary wear and tear<sup>37</sup>. Allowing a decrease allowed in the value of the property could amount to a breach of this duty:

D. 19. 2. 11. 2., *Ulpianus* (*Edictum*, lib. 32)

***“Item prospicere debet conductor, ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur.”***

<sup>36</sup> ZIMMERMANN, 1992, p. 379; SCHULZ, 1969, p. 546; LEE, 1956, p. 321; RADO, 2001, p. 136; KOSCHAKER & AYITER, 1993, p. 236; Cod. 4. 65. 9; From the middle ages onwards it was matter of controversy whether “sale breaks hire” (*emptio tollit locatum*) or “hire goes before sale”. It was decided that “hire goes before sale” did not necessarily mean that the lessee had a real right. It might give him security only against the lessor and persons claiming under him, not against third parties. In this case the lessee could require the damages that were caused by the formation of the contract.

<sup>37</sup> BURDICK, 1938, p. 450; BORKOWSKI, 2001, p. 284.

“Likewise, the lessee should take care in no way to lower in value the thing’s legal or physical condition, nor to allow it to become lower.”

The lessee had to pay the agreed *merces*<sup>38</sup> subject to just grounds to excuse. Both parties were required to exercise *exacta diligentia*, in other words were answerable for *dolus* and *culpa levis in abstracto*<sup>39</sup>. If the property was destroyed or damaged during the period of hire and it was not the conductor’s fault, the risk of accidental or unavoidable loss was normally on the *locator*.

D. 19. 2. 15. 2., *Ulpianus (Edictum, lib. 32)*

“... *sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.*”

“... if an earthquake so completely destroys the land that the property no longer exists, the owner bears the loss: for he must present the land to the lessee for his enjoyment.”

#### IV - TERMINATION OF THE CONTRACT

It was usual that the parties could decide the duration of the contract. If they specified the duration, the hire would normally terminate on the expiry of the relevant period. Also, the parties could terminate the agreement before the expiry of the term only on the grounds of breach of contract. If the contract was for an indefinite time, the agreement could presumably be terminated unilaterally at any time<sup>40</sup>.

If the *conductor* continued to use the thing after the expiry of the agreed term, the contract was held to be renewed<sup>41</sup>. The death of the *conductor* did not terminate the contract. If the lessee died while the period of the hire was still running, his heirs succeed to the contract on the same terms<sup>42</sup>.

In the case of agricultural land, an implied re-letting was possible on a year to year basis. In practice, this meant that the *conductor* would continue to be the tenant unless he was given notice to leave before the expiry of the original period. However, the implied extension was regarded as a new lease rather than a continuation of the old one<sup>43</sup>. The contract could also end through the destruction or the termination of the subject matter, or through the misconduct of either party.

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<sup>38</sup> Iust. Ins. 3, 24, 5.

<sup>39</sup> LEE, 1956, p. 324; VOGLI, 1996, p. 456.

<sup>40</sup> ZIMMERMANN, 1992, p. 357.

<sup>41</sup> KASER, 1965, p. 185.

<sup>42</sup> Iust. Ins. 3, 24, 6; BURDICK, 1938, p. 450; OGUZOGLU, 1950, p. 241; UMUR, 1990, p. 368.

<sup>43</sup> BORKOWSKI, 2001, p. 282.

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