5 Taming the platypus

Adaptations of the *colonia* tenancy contract to a changing context in nineteenth-century Madeira

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Introduction

The *colonia* was a customary tenancy contract in Madeira that combined sharecropping with land improvement by conferring on the tenants the ownership of the improvements they had made, such as vines and buildings. It was also a tenancy at will, which in practice became a long-term contract. Each of the aforementioned elements is found in several historical instances, most often associated with vineyards, generally in mountainous and often previously uncultivated land where creating them constituted a considerable long-term improvement. From a contract choice perspective, this association has been related to several factors. Firstly, to the landowners' preference for leasing out rather than cultivating vines with hired labour on such terrains. Secondly, to the unlikelihood of small peasants accepting a fixed-rent lease, given the crop's volatility and the consequent risk of forfeit, and lastly, to the relatively low share of capital in the inputs, because of the labour-intensiveness of traditional viticulture, which meant that a sharecropper's high share of the inputs in long-term improvements had to be compensated for with a stake in their value. The latter meant that a sharecropper's high share of the inputs in long-term improvements had to be compensated for with a stake in their value.[1] In this chapter, we will explore the way these elements came together in the particular context of Madeira, the sets of incentives they defined and how they were appropriated. We will not do so from a contract choice perspective, but rather from one of institutional and practical change.

As with all seigniorial, traditional, and customary institutions, the *colonia* posed a challenge to the nineteenth-century liberal project of perfecting and universalizing property rights, to be brought about by their abstract delineation and individualization out of the fetters of traditional and local particularisms, 'feudality' and 'backwardness' into the realm of 'progress'. Conversely, the materialization of this project posed the problem of striking a balance between the universality of the law and the specificity of custom, under the general principle of contractual freedom, and everyday challenges to the way new institu-tional forms were appropriated and re-appropriated in concrete social practice.[2]

The splitting of property and its relationship with contract in *colonia* were hard to fit within emerging liberal conceptions and with the 1867 Civil Code's *numerus*

clausus of property forms. The customary contract became a sort of juridical platypus, the inner workings of which would have to be regulated on the one hand according to the rules of sharecropping contracts, and on the other according to property law concerning the improvements. The way this played out in Madeira displays elements both of path dependence and adaptation. Changing economic, agricultural, and legal conditions in the course of the nineteenth century were met with practical adjustments in the contract which help account for its resilience. Moreover, practical and juridical solutions to this conundrum remained very much alive in everyday practice, as well as legal reinterpretation, long after the contract's relative weight declined and it was eventually outlawed. An earlier study argued that the Civil Code introduced or accentuated inefficiencies in the contract, which led to a gradual waning of its use from the 1870s onwards.[3] While holding to this view, in this chapter we will look at the process from another angle, by asking ourselves why, the waning *was* gradual and left persistent property issues in its wake.

One hundred years after the Civil Code, new *colonia* contracts were forbidden and the ones still in force were partially regulated by law. *Colonia* itself was prohibited by the Portuguese Constitution in 1976, and its extinction was decreed by ensuing national and regional acts, along with much debate concerning its phasing-out.[4] Nevertheless, to this day heated political struggle goes on over the effectiveness and fairness of the extinction process and the reallocation of the resulting bundles of property rights, along with a stream of court rulings concerning transactions of such rights.[5]

The setting

Madeira is an island situated off the northwest coast of Africa, almost 1000 km southwest of Lisbon. Maderia's geography lent it a strategic role within the expanding Atlantic trade routes, which contributed to a very open economy, ever since its early days in the fifteenth century, and ever more so as trade flows became increasingly globalized.[6]

When the Portuguese first landed there in 1419, Madeira was a deserted island, densely covered with forest. Settlement began shortly afterwards during the 1420s, and with it systematic land clearings.[7] The island's total area is 737 km^2, over a quarter of which is at altitudes above 1000 m and one half above 700 m; some 60 per cent of the total surface has slopes of over 25 per cent. As a result, the area suitable for agricultural use would was no more than 20,000 ha. The island's orography had obvious consequences for agricultural occupation, which was literally an uphill struggle from the earliest settlements on the littoral.

In the early stages of settlement, the new colony's 'captains' granted lands in *sesmaria* within their respective jurisdictions, until the king decreed in 1501 that no more land should be granted in that form. The *sesmaria* was a medieval form of granting uncultivated land for settlement and improvement, subject to confirmation after a specified period of time, which the Portuguese adapted to regulate the distribution of entitlements to land in their Atlantic colonies.[8]

The Portuguese also brought their institutional templates of agrarian contracts, among which the most relevant for the case at hand were those of *parceria* and emphyteusis. The former was the general legal designation for sharecropping contracts, which were varied in customary detail, were often short-term, and were not typically improvement contracts. The *parceria* was used in Madeira from the early days, and, as we will see, sharecropping formed a major component of the specific contract of *colonia* that concerns us here.

Emphyteutis was traditionally an improvement contract.[9] It split property into two separate *dominia* (henceforth 'domains'). The 'eminent' or 'direct' domain remained with the landlord, mainly consisting of the rights to receive an annual rent, succession and sale fines, and to have the last say concerning the alienation or subdivision of the useful domain. The latter consisted of the remaining property rights that were transferred to the taker. It could be sold, subject to the landlord's agreement, and it was handed down through inheritance.

Wheat was the main crop in the early days, but soon a very lucrative sugar manufacturing and export trade took off in the early 1450s. Sugar became the main driver of Madeira's economy and agriculture from the 1460s to the mid-seventeenth century.[10] Contrary to other sugar producing colonies, in late fifteenth-century Madeira, production was not organized in large plantations, but rather in small and medium landholdings belonging to 'a middling class of landowners with limited assets',[11] under a variety of contractual arrangements, including sharecropping and emphyteusis.

When the island's sugar trade succumbed to growing competition from the rest of the Atlantic complex, wine already had an incipient presence, and in the late sixteenth century exports were reported to India 'and many other parts of the world'.[12] Nevertheless, the actual Madeira wine industry only took off during the eighteenth century, supplying the worldwide British wine trade.[13] In this process, the *colonia* became the major institutional device for the creation of a new vineyard landscape.

The contract

The *colonia* was a customary tenancy that is likely to have evolved from recurrent contractual arrangements. In an open society, where winemakers and land-owners constantly interacted with merchants and seafarers from all over Europe, the influence of imported ideas cannot be ruled out, which, besides a commonality of practical problems it addressed, might help explain some striking similarities with known contractual forms elsewhere in Europe.[14] The earliest written contracts known, which were fully stipulated as *colonias,* date from the mid-eighteenth century.[15]

The *colonia* was, firstly, a plantation contract, which provided incentives for the tenants (henceforth *colonos*) to plant and tend the vineyards and to build and keep the necessary infrastructure, in the form of property rights in the stipulated improvements and fines in case of non-compliance. Secondly, it was an eviction contract that could be terminated at will and, while in force, it was hereditary.

Lastly, it was a share tenancy by which, as a rule, the main and accessory crops were shared in halves between the *colono* and the landlord, with no obligation of the latter to invest. In the predominant case of grapes, the rent would be half of the resulting must.

The planting of vineyards required considerable investments in vine stocks and labour, with deferred payback due to the growth and maturation period of the vines. When this was carried out on newly cleared land on the slopes, labour was required to build the stone walls supporting the terraced plots. The limited availability of capital in Madeira and the fragmentation of the plots, within a traditional agricultural system in which the main input, besides land, was the peasants' family labour, led landowners to offer the ownership of improvements as the major incentive for the *colonos* to clear new land and plant.[16] This contractual regime proved very effective in the economic context in which it developed, as the *colonos* responded by building and tending the vineyard landscape on which the commercial success of Madeira wines came to rest – a success it shared with several other plantation contracts for vines with the built-in incentive of entitling tenants to indemnification for improvements.[17] The rationale of the *colonia* arrangement was very similar to that of the *vigneronnage* in the Beaujolais, in which sharecropping was also 'linked to the production of better-quality wines, requiring the presence of a specialist wine-maker to supervise operations, and the need for a labour-intensive agriculture to provide the supply of suitable grapes'.[18]

The contract recombined in a new way some elements that were available in the institutional culture toolbox, namely the sharecropping principle of *parceria* and the principle of land improvement, which was a constituting element both for the early land grants in *sesmaria* and for emphyteusis. Improvements were partially compensated for in rent in the case of newly-planted vineyards, in which the landlords usually waived the share-–rent for the first four years and reduced it to one third of the crop up to the sixth year. The main feature of *colonia*, however, was the *colonos*' ownership of the improvements they had carried out, provided that this had been authorized by the landlord. Because of this divided property, regional historians have suggested that the *colonia* had evolved from some form of emphyteusis or sub-emphyteusis at its outset.[19] However, in *colonia* there was no splitting of property between two layered domains over the same physical object, but rather the ownership by different persons of two distinct, albeit interdependent sets of objects: the land on the one hand, and the buildings and plants on the other.

The ownership of improvements was not considered as just a right to indemnity for expenditure on leaving, but rather as a right *in rem*. This much was clearly stated by the Funchal Town Hall in representation to the king in 1776: '[the *colonos*] are the owners of the plants, houses and barns',[20] and later a court ruling in 1859 invoked custom, to state that improvements 'are not considered as a right of estimation, but as a real right, [which is] resolvable . . .',[21] the last term meaning that landlords could buy them upon eviction, independently of the *colonos*' will, for an agreed price or one stipulated by a court. A *colono* wishing to leave might offer to sell the improvements directly to the landlord or to a newly incoming

tenant, in which case the landlord might wish to enter into an amicable agreement to buy the improvements instead, usually to resell them to a new tenant.

The contract could be terminated at will by either party. Several factors colluded to its becoming, in practice, a long-term arrangement. Firstly, the landlords would have an interest in keeping good tenants whom they knew and trusted, as well as their families. The skills required for vine-growing and the tacit knowledge of the specific terrains in such a demanding environment certainly contributed to human asset specificity, which gave the landlords an interest in long-term cooperation with *colono* families who had proven their worth.[22] Moreover, due to asymmetrical information concerning the quantity and quality of the harvest, a *colonia* carried monitoring and supervision costs to prevent cheating, which the scattering of the plots increased. As in the Catalan *rabassa morta*, a sharecropping contract of indeterminate duration, and in which the sharecroppers owned the vines, gave them an economic interest in not overexploiting the tenants in the short run, which lowered the monitoring costs.[23] This was all the more reason for the landlords to invest on continued relationships, to build up 'a kind and confidential feeling . . . between the landlord and tenant', in the words of an English traveller who had made inquiries in Madeira in 1849.[24]

Secondly, the landlord could only evict by paying the *colono* the assessed price for the improvements. The higher the cost that improvements put on eviction, the more they curtailed the landlords' effective power to evict.[25] Supporting walls for terraces often made up a large part of the improvements' financial value, and, since they had to be maintained, added repairs made up for eventual depreciation. Fragmentation played a part in this as well, because improvements would often be divided among heirs. For instance, eviction court cases in the early twentieth century had to deal with one quarter of a house and half a kitchen, or from twelve to sixteen hundredths of assorted improvements.[26] Therefore, to the financial costs of buying the improvements and the transaction costs of assessing their value, further transaction costs accrued due to having to settle deals with multiple owners of shares in plants, walls, and buildings.

Thirdly, as land grew progressively scarce due to population growth, a *colono* would have few exit options. The rural economy provided little opportunity to make a living from wages – in 1847, there was a ratio of only one agricultural wage labourer to 4.6 farmers (many of whom would by then have been *colonos*).[27] Hence, the *colonos*' concern would be to keep as firm a hold as they could on the land, which gave them a powerful incentive to invest in long-standing relationships with their landlords, and to pile up improvements that might insure them against eviction.

In the economic context in which it was created, for both parties the *colonia* was an investment in future growth. The landlord expected to have his bundle of rights increased in land rent, by collecting half of its future produce, with, as a trade-off, a lesser control over the duration of the contract to the extent that the eviction costs would grow in proportion with the improvements made by the *colono*. The latter expected his bundle to grow through the ownership of the improvements, the increase in the economic worth of the improved land, of

which he would retain half the gross output, and the ability, either by consent or weak supervision, to allocate interstitial land to diversify crops.[28] Lastly, the *colono* would expect the contract to be made more secure by rising eviction costs, as well as by the landlord's own interest in keeping tenants who had proved themselves.[29]

The critical parameters defining the effective distribution of economic (as opposed to simply legal) property rights,[30] and over which tensions, conflict and bargaining were more likely to arise, were the quota of share–rent versus inputs and the compliance with the quota when sharing the crops, and the control over the amount of legitimate improvements, the assessment of their value, and their subdivision through sale or inheritance. More fundamentally, the latter brought up the issue of the relationship between the different ownerships of the two juridically separate but physically interlocked sets of assets. Such tensions, which ran through the history of the contract, were enhanced by changing conjunctures of economic, agricultural and political circumstances in the course of the nineteenth century.

A changing context

As long as the prices for wine were high and the vineyards were forthcoming, the contract seems to have been rewarding enough for both parties. One contract in 1828, in which the *colono* had previously served as a farm hand under his landlord, suggests it could provide a step up the social mobility ladder.[31] Even though this is as yet a poorly researched hypothesis, the *colonia* may have provided a basis for the rise or consolidation of a middling peasant stratum. Latter-day testimonies speak of 'relatively wealthy' *colonos* in the heyday of the Madeira wine trade,[32] some of whom used their future crop shares as collateral for credit, in order to expand or reorganize their holdings by buying improvements from others. In 1848, the Civil Governor of Madeira sent a circular letter to the municipal administrators cautioning them about daily requests by farmers to take over leases of plots and improvements belonging to the Treasury from their current tenants, signalling the existence of competitive demand for improvements.[33] Even after the wine boom subsided, we can find probate inventories like that of a widow in 1863, which reveals considerable wealth in cattle, crops, and improvements in several plots belonging to different landlords.[34] Nevertheless, by the end of the nineteenth century the social and economic status of a *colono* was low, as expressly alleged by the defendants in a law-suit who refused to be called *colonos* once the court found against their pretension of being emphyteuts.[35]

Starting in the second quarter of the nineteenth century, Madeira experienced significant changes in its crop mix, due both to market circumstances and to plant pests and diseases. Vine growing began declining in the 1820s, as a drop in export prices led some producers to look for alternatives. Grapes still remained the main crop up until oidium struck in the early 1850s, and this kept causing losses until the late 1860s. Increases in the production costs and a sluggish external demand for wine dictated a revival of sugar cane production, in parallel with a slow and

partial replanting of vines. The decline of the vineyards is patent in the makeup of the rents of an entail with a dispersed estate, which in the second quarter of the nineteenth century still received most of its share-rents in must, whereas during the second half of the century the shares in must were limited to a couple of localized areas, replaced in others with shares in sugar cane and even rents in money, where the crop was onions for export.[36]

From the late 1870s onwards, phylloxera broke out, once more driving up the cost of vine cultivation, concomitantly with a progressive decrease in the export price of Madeira wines. The ensuing changes in the crop mix and agricultural practice followed a trend towards both diversification and intensification, favoured by population growth and the resulting pressure on a virtually unchanged area of agricultural land. From 1864 to 1911, the number of twenty- to sixty-year-old men rose by over 23 per cent, and the area per male head dropped from 0.90 ha to 0.72 ha. Together this, with the fact that the steep slopes of much of the agricultural land prevented the use of animal traction, led to a labour-intensive trend.[37]

That was partly related to changing conditions in the contracts, concerning the enforcement of the landlords' control over accessory and often subsistence crops. In 1822, we can still find a large landowner ordering his steward to forbid the *colonos*' planting of vegetables in-between the vines.[38] The landlord's concern might be that such interstitial cultures would cause over-irrigation, thereby harming the main crop. However, allowing crop diversification in order to spread risk and provide for the tenant household's subsistence was often a requirement of viable sharecropping relationships.[39] This would have been even more the case after wine prices sank and diseases rendered the vines less productive. In a context of population growth, it became impossible to enforce the same degree of crop discipline and the landlords made more allowances for intensifying subsistence crops. Sometimes, this was associated with adjustments to the traditional contractual arrangements, such as in two contracts in 1873 in which different landlords authorized the *colonos* to plant potatoes, cabbage, or beans in-between the vines and waived their half-share in those crops for the first year, but in return did not waive the half-share of the must during the first four years.[40]

By 1911–1914, wine production had recovered to three and a half times the 1868–1869 pre-phylloxera volume, due to replanting with resistant American stocks and substantial inputs of pesticides, whereas the actual area covered by vineyards had actually decreased. There was a steep recovery of sugar cane, which quadrupled in production between 1862–1863 and 1910–1911, partly as a result of a protectionist policy for sugar from 1895 onwards, after it too had been decimated by pests and diseases during the 1880s. The shift to sugar cane encouraged cattle raising as well, because cane foliage provided forage and cattle supplied much-needed fertilizer for this crop. In roughly the same period, meat production increased by about one-third, while wheat gave way to potatoes as the main staple crop.[41]

Against this background of agricultural change, major political and juridical transformations also took place. After a troubled period beginning in 1820, a new constitutional monarchy was consolidated in Portugal in 1834. In tandem with

political Liberalism, the regime change led to the creation of a new institutional framework for property up to the final enactment of a new Civil Code in 1867. Broad steps were taken along that path with the dismantling of the seigniorial regime, the sales of the Crown's and other national assets, and full disentailment in the 1860s. In the mid-nineteenth century, while the reform of the entails was still under way, contemporaries estimated free allodia at no more than one-tenth of the total agricultural land in Madeira. However, property was not overly concentrated, and a lot of the estates were small.[42]

Throughout the nineteenth century, there were many land transactions, which may have brought about some degree of change in the social makeup of the *colonia* landlords, and in those attempting to exit the contracts. According to our survey of court cases, up until the 1880s landlords initiating eviction lawsuits remained for the most part the nobility and the *Misericórdia*, a land-wealthy charity; from then onwards, the number of institutional landlords decreased and small landlords, some of whom were themselves farmers or were based in the same locations as the farms, increased proportionally. There was a trend since the 1880s for landlords to buy the improvements and terminate *colonias*, leading to a continued decline of this contract's weight in the island's agriculture, for reasons addressed elsewhere.[43]

Within this broad context of juridical and agricultural change and with falling prices for wine, sugar and wheat during the 1880s, debates took place at the regional and national levels on institutional reforms, as was common to many regions in Europe.[44] Such debates favoured the reform or the downright doing away with of the *colonia* contract, which however did not actually happen until several decades later.[45] Nevertheless, even in the absence of legal reform, all the changes above interplayed with the structural tensions inherent to the *colonia* in ways that affected the reciprocal roles and the power balance between the parties.

Throughout the remaining sections, we will look for evidence of those tensions and readjustments in written sources, such as contracts and court rulings. In a social system in which informal contracting largely predominated it is impossible for us to assess the effectiveness of formal contracts and case law in depicting current practices. In fact, it can be argued that written contracts might be used to escape custom and would therefore stipulate rules contrary to it.[46] Nevertheless, it seems plausible enough that such piecemeal adaptations, as they do reveal, may be read as the tip of an iceberg of ongoing changes and resistances to change.

Rent and supervision

During the expansion of the vineyards, the heavy half-share rent became a matter of contention.[47] In 1774, a group of *colonos* petitioned the king for the landlord's share in the output to be cut down to one-fourth, which was eventually denied.[48] No legal change took place during the whole period and, arguably, the rent burden became relatively lighter during the second half of the nineteenth century, once the landlords started to contribute with more inputs, as explained below. True to liberal principles, the Civil Code placed no boundaries on the rent quota

when regulating share tenancies, leaving this entirely to 'what [the parties] agree amongst themselves'.[49]

In reply to the aforementioned petition, the previously-cited representation by the Funchal Town Hall in 1776 established a definite relationship between the high share–rent and the *colonos*' ownership of the improvements, arguing to the effect that the *colonos* had their investment and labour remunerated by earning property in real assets which 'they sell to whomever they wish when they leave the farm, or else the landlord pays for them if they are evicted'.[50]

While the wine industry was thriving, the value of the must and the improvements was high and certainly afforded liquidity. From the 1820s onwards, however, the depreciation of Madeira wines and the drop in exports was reflected in the price the shares of the must could fetch, significantly worsening the economic situation of both landlords and *colonos*. In times of hardship, supervision seems to have become more of an issue to both parties, and thereby a source for endemic conflict. In 1841, the overseer of a large estate complained to the landlord of suffering at the hands of 'malefactors', which is probably related to these issues.[51] It was reported in 1850 that overseers tending the landlords' interests, as well as resident landlords themselves, came under threat of violence against their persons and property, if they were too diligent in supervising the crops and their sharing.[52]

During the second half of the century, vine diseases severely devaluated the plants, not just in terms of production but as collateral for loans as well. This made the *colonos* more dependent on the landlords for short-term advancements, with likely repercussions on their contractual status. Even though by then the Civil Code had made the improvements mortgageable, a renowned reformer and publicist in Madeira reported in 1888 that the *colonos*' improvements were useless for accessing hypotecary bank credit.[53] Moreover, overcoming the oidium and especially the phylloxera outbreaks required capital outlays for replanting, whether with new vines or alternative crops, mostly sugar cane, and for the pesticides, fertilizers and irrigation water increasingly required, just when the *colonos*' ability to invest would have been at its lowest.[54]

Therefore, landlords with an interest in keeping their land productive and tenanted had to invest in capital inputs to a much larger extent than previously, well beyond their traditional obligations. Many landlords took loans at 10 to 12 per cent interest in order to invest.[55] This made them more concerned with supervising both the farming and the output. On the other hand, the *colonos*' capacity for resistance certainly subsided – possibly along with their customary legitimacy within the peasant communities – once they grew more dependent on the landlords' inputs and the effective sharing of costs became a permanent feature of the landlord-tenant relationship.

Controlling improvements

As we saw, it was in the *colonos*' interest to plant and build in order to accumulate capital in the form of improvements – which was indeed the point of the contract. Some deeds in the 1820s show that, as in other improvement contracts such as

the most intensely studied ones in eastern Spain, the value of the *colonos*' improvements might also be useful to the landlords as collateral against default and rent arrears.[56] However, since improvements were also a power asset to secure the land, the *colonos*' interest to plant and build extended beyond the economic efficiency, which was in the landlords' interest as well, to become a matter of practical control over the rights in land, and therefore one in which the two groups' interests could become opposed. As with all such contracts, the power balance between the parties to control the improvements was decisive to their effective economic property rights over the land itself. High costs for buying improvements not only hindered the landlords' right to evict the tenants and to dispose of the land, but they also made it more difficult for the former to change the crops.[57]

The first written contracts stipulated that the *colonos* would only be entitled to useful improvements. In 1779, the island's government ruled that the *colonos* had to obtain the landlords' permission, otherwise, the improvements would be deemed superfluous or made in bad faith and the landlords would not be forced to buy them.[58] One month later, in a report to the Portuguese government, the governor (*Capitão-General*) explained this was meant to avoid the *colonos* building 'useless improvements, adorning the lands with unnecessary walls so that the landlords could not evict them without paying for the said improvements'.[59] A court ruling in 1853, which denied the landlord the right to withhold his consent to necessary repairs, shows that the liberal courts would not enforce that obligation to the letter, provided that the improvements were found to have been necessary.[60] Moreover, in a period of demographic growth and expanding urban sprawl, the daily supervision of permissions to build and establishing each disputed improvement's usefulness or (dis)proving the landlord's permission to build certainly would have been a daunting task and a never-ending source of conflict.

At a later stage, some landlords tried to control the *colonos*' improvements through contractual specifications, while on the other hand using selective authorization for improvements as a reward for cooperation in agricultural change. For instance, shortly after the enactment of the Civil Code in 1867, the administrator of an entailed estate changed a number of procedures in contracts, mostly with incumbent *colonos*. Specifically where he opted for planting sugar cane, besides co-participating in capital outlays he authorized the *colonos* to build houses and cattle stalls, using this as an extra incentive for the *colonos*' collaboration in changing crops.[61] During the 1880s and 1890s, however, he systematically placed such authorizations under a set of clearly specified restrictions, including measurements and materials to be used and the buying price for the houses being set in advance, regardless of later inflation.[62] A court case in 1875–1876, in which the judge ruled that some house walls be deducted from the *colono*'s improvements because they belonged to the landlord, suggests that some landlords might also keep direct control over some of the improvements, either by taking on the costs themselves or by not reselling all those they had acquired from former *colonos*.[63]

Even before the Civil Code, the liberal courts began to reinterpret the customary contract by splitting the issues between the property of the improvements, on the

one hand, and the tenancy contract, on the other, according to the more formally defined contractual template of the *parceria*. This played against the landlords' holding of the improvements as collateral for rent: in a court case in 1853, the judge ruled against the landlord by interpreting *colonia* strictly as a sharecropping contract. In sharecropping, he argued, tenants were legally required to farm the land according to the customs of the region, not 'to provide a deposit that serves as a guarantee of compliance . . . and insures the indemnification to the landlord'; to uphold the landlords' pretension would therefore violate the constitutional right that no citizen could be forced to do anything not required by law.[64] This legal understanding, later reinforced by the Civil Code, impaired whatever purview the landlords held on the *colonos*' improvements through debts.

However, the landlords' larger share in the inputs could provide a basis for adaptations in the contract that recovered the use of the improvements as collateral. In one previously-mentioned contract in 1867, in which the landlord provided funds as an advance for a sugar cane plantation, he required the *colono*, if he was unable to fulfil his obligations, 'to choose either to pay a fine in cash or to deliver his own improvements without opposition'. Similar arrangements were made in another contract by a different landlord in 1871.[65] In these instances, the landlords used their capital outlays, which the customary contract did not require them to provide, as leverage to adapt the formula of the *colonia* contract to their new role as investors.

Valuing improvements

Valuing the improvements obviously was another crucial issue. When, upon a tenant's leaving or eviction, the parties could not reach an agreement over the valuation, they resorted to the courts. The judges decided according to their prudent discretion, based on assessments by experts chosen by the parties and the court. The improvements were customarily assessed according to the state in which they were found.[66] Buildings were valued in terms of the estimated building costs, often involving craftsmen as assessment experts.[67] Vines were also valued for their intrinsic value, by pricing the number of stems according to quality, age and size. In 1822, the Madeira Board of the Portuguese Treasury valued *colonia* improvements in vines in those terms, instead of their estimated added value to the revenue of the land, as they should according to the Treasury's instructions. The Board alleged that otherwise vine plantations would cease, the supporting walls would no longer be kept and the whole island would be reduced to wastelands and rubble.[68]

The 1867 Civil Code, if applied to the letter, would have made this more complex. The rules for land lease tenancies, which applied to sharecropping as well, distinguished between, on the one hand, improvements consented to by the landlord in writing, or which were necessary and made by the tenant after legally citing the landlord for omission, and, on the other hand, improvements which the tenant had made without meeting those conditions, but which were proven to be necessary or useful. Upon contract termination, the tenant had the right to

the intrinsic value of the improvements only in the former situations – which were rare, given the informality prevailing in *colonia* relationships, even though they became increasingly used during the second half of the nineteenth century. In the latter situations, the improvements were to be compensated according to the estimate of their added value to the annual income of the landholding.[69]

A draft law to regulate the *colonia* in the same year, pointed out that the second criterion would tip the existing balance in favour of the landlords.[70] However, where buildings and vines were concerned, the customary valuation criteria were never called into question in practical valuations. In one court case in the mid-1870s, the *colono* proposed a valuation of his improvements in view of an amicable resolution, which the landlord rejected. After the *colono* in turn rejected the second valuation carried out before the judge, the latter turned down his request for a third valuation. Accepting it, he argued, would go against 'the use and customs of the *colonia*', which were 'customary, adopted and followed in the courts'.[71]

The courts' use of custom in their rulings over the new problems posed by the changes in crops appears rather to have favoured the *colonos*. The same 1867 draft law, cited previously, defined a different valuation criterion for sugar cane plants, based on the cost of planting and not counting the intrinsic value of the ratoons. It was argued that, contrary to vines, a valuation based on counting the plants was 'absurdly prejudicial to the landlord', as the first cane production would by itself fully repay that expenditure.[72] In line with this argument, a landlord's lawyer in an eviction case in 1875, in which the planted ratoons accounted for a significant proportion of total valuation, alleged that because it needed periodical replanting, sugar cane 'served as a pretext . . . to attribute fantastic values to improvements'.[73] Nevertheless, court rulings on eviction lawsuits such as this one show that judges kept valuing improvements in sugar cane according to the custom.

Interlocked assets and fragmented properties

Once a *colono*'s improvements – especially the plants – were transmitted to a third party, either through sale, forfeit or inheritance, the new owner succeeded in the right to use the productive assets. Since the land and the productive improvements were interlocked assets, a new owner of the whole or a part of those improvements acquired the former tenant's rights in the corresponding land, that is to say, to use it as the new *colono*. The landowners' right to choose tenants therefore depended either on them buying the improvements pre-emptively, acting as middlemen between leaving *colonos* and new ones of their choice, or on using their power not to authorize sales as a way of imposing conditions regarding the buyers, or on evicting the new owners by buying the improvements when they could not help but accept the transfers, as was the case with inheritances.

Given the ease with which the *colonos* could enter into informal agreements to transact improvements and use them as loan collaterals, surveillance was required, but all forms of controlling the entry of new *colonos* carried financial or transaction

costs. Even so, before the Civil Code landlords could take action against undesired tenants, as a large landowner did in 1864, filing a lawsuit to expel a *colono* who had entered onto the land without making it known to him, as 'he was obliged to do'.[74] *Colonos* would circumvent the need for the landlords' consent by stipulating in sales contracts that the seller was liable for the buyer's losses, should the landlord refuse to acknowledge the sale.[75] Even though this certainly allowed for improvements to be sold outside the landlords' *ex ante* control, it came at a risk to the sellers, which still afforded the landlords some degree of *ex post* control.

An additional consequence of the interlocking of property rights in improvements and in land was the increasing morcellation of the landholdings. During the second half of the nineteenth century, in a context of population growth, increasing demand for land, and agricultural intensification, there was a trend for dividing up the property in improvements. When the new owner of a fraction of the planted improvements entered as a new *colono* in the corresponding land, effective landholding morcellation ensued. In the absence of legal rules stipulating otherwise for the inheritance of improvements, the landlords had no way of avoiding this unless they bought the improvements from the heirs. This is probably the reason for an eviction in 1875, in which the *colono* was a widow whose household included several children of marrying age.[76]

We have already explained how the fragmentation of the ownership of improvements checked the landlords' contractual power by raising the transaction costs of evictions, and as a consequence their economic rights regarding the land itself. Morcellation posed an additional threat to the economic viability of the *colonos*' households, and thereby to rent security, besides a further hindrance to crop changes. Not surprisingly, by the mid-nineteenth century checking the subdivision of improvements had become a major concern to those who favoured the landlords' interests and agricultural change. The most important attempt to achieve that was the draft law proposed in 1854 by a Portuguese MP and former Civil Governor of Madeira, which would have enacted the same impartibility rules that applied to the emphyteutic useful domain for the inheritance of *colonia* improvements.[77] However, even though the draft was voted favourably, the law was never actually passed.

The interlocking of properties in the *colonia* proved hard to conceptualize within the new liberal frame of mind. In 1855, an apparently perplexed Portuguese Home Secretary agreed with the proposal by the same MP to conduct an informal survey concerning the island's 'sort of agrarian legislation' in which 'the ideas of the property of the land and the property of the cultivator are singularly understood'.[78] In spite of all attempts to regulate it, however, the 1867 Civil Code ended up not acknowledging the *colonia* at all, as either a form of imperfect property or a specific type of contract.

Strictly speaking, according to the Code's abstract definitions the *colonia* would come under the general category of sharecropping contracts, to which applied most of the rules concerning land leases, including those regulating the indemnification for improvements.[79] The latter was defined as the tenants' right to be reimbursed upon contract termination of the expenditure they had made in

improvements and repairs that had been formally asked or agreed upon by the landlords, or those that were proven to be necessary, provided the landlords had not done them after being formally notified. Expenditure on necessary or useful repairs not coming under the previous situations would not be reimbursed, but rather paid according to the estimated increase in land income resulting from them.[80] The improvements were conceived of as a sort of a loan to the landlords, and therefore they only constituted a property right for the tenants in the future indemnification value, not in the things themselves.

This, however, would not be applied to the *colonia*. At the regional level even the landlords, let alone the *colonos*, acknowledged the legitimacy both of the constituted property rights in the improvements under customary norms and of the customary contract itself, which moreover the liberal courts had validated over the previous decades. The state had further reinforced this by having improvements registered as property for tax purposes, by admitting them to collateralize debts to the Treasury, and by the Treasury leasing out those that it had come to own. Therefore, the formerly organic whole of the *colonia* became a composite beast, partly coming under contract law concerning the sharecropping and partly under property law concerning the improvements, and moreover overlaying within the latter the two distinct properties in land and in improvements. This is why in 1971 a property law scholar considered that the *colonia* was the most complex real right in the Portuguese juridical order.[81] In practice, legislative power left it to jurisprudence and future legislation to extricate all those components, which were inextricably enmeshed in the customary contract and in everyday practice, into 'perfect properties' and 'pure contract'. As we have seen, some court rulings had already been implementing this to deal with specific cases. However, dissecting these different components under the property conception of the Civil Code caused important changes in their balance.

The Civil Code defined perfect and imperfect property and enumerated the latter's forms, none of which applied to *colonia* improvements. Therefore, these were owned as perfect property, which 'consist[ed] in the enjoyment of all the rights included in the right of property', namely, those of 'fruition, transformation, exclusion and defence, restitution and indemnification, and alienation'. The only limitation to property in the improvements came from it being resolvable, which was defined as 'the property that, according to its constituting title, is subject to being revoked independently of the proprietor's will' and therefore was not 'absolute', albeit being 'perfect'.[82]

Barring the landowners' use of their right to evict by buying the improvements from the *colonos*', the latter could legally do with their property as they wanted, provided that they kept using the land and the improvements according to the terms of their contract. Under the newly institutionalized concept of property and the liberal design to unfetter free trade,[83] the landlords' customary rights to authorize sales and leases of improvements – which, difficult as they were to exert before, could still be used as deterrents and brought to justice as a last resort – were no longer tenable in court.[84] Moreover, the improvements became mortgageable property. As we have seen, under the social and economic circumstances

in which the *colonia* operated, this largely removed what power the landlords previously had to choose tenants, and a freer market in improvements resulted in the morcellation of the landholdings. [85]

Since all this made the landlords' economic property rights increasingly slimmer, the *colonia* became less and less attractive to landowners, who furthermore were betting on alternative crops to vines. This certainly helps explain the contract gradually fading out of the agrarian contractual mix. However, because those changes increased the landlords' exit costs, they also can explain why, rather than because of some irrational atavism, the *colonia* seems to have outlived its effectiveness for so long. At the turn of the twentieth century, after evictions had been facilitated for emigrating *colonos*, we can still find the improvements being paid for by new entrants in the contracts, after the landlord had filed the eviction process.[86] This can be understood as one way for landlords to pass on the cost of terminating the existing contracts, thereby contributing to the survival of the *colonia*.

Finally, under the right of accession stipulated by the Civil Code, the assets accrued to a landowner's property by a tenant's work and belonging to the latter could be incorporated to the landed property by either the landowner buying them, if their value was inferior to that of the land, or the tenant buying the land if the value of the added assets was higher.[87] Even though at the moment we have no empirical corroboration for this, it seems a likely hypothesis that in cases of extreme morcellation of the landholdings the latter form of accession may have been both a landlord's way out of a puny contract and a tenant's way to become a small landowner. If such was the case, this could in turn partly explain the microfundia landholding structure that persists in Madeira to this day.[88]

Conclusions

The *colonia* has a long history of being looked at as an insular oddity, a contractual species which evolved out of feudal institutions and survived there because it served the exploitive landowners' interests. Contrary to this view, it seems clear to us that while, like all such customary arrangements, it did have its local singularities; in its essence the *colonia* was but one in a family of contracts that have developed in many different places across Europe, linked with the spread of vines and a market-oriented wine industry. If at some point the *colonia* came to be considered an unnatural mix of disparate contractual and property forms – our metaphorical platypus – that was because politicians, jurists and historians looked at it through the lenses of the liberal concepts of perfect property and contract, and because forcing it into the legal rules enacted according to those concepts eventually did turn it into a platypus.

In Madeira, as elsewhere, this contract, while certainly affording large and small, full and emphyteutic landowners a half-share rent in valued commercial produce at low cost, proved a very effective incentive for peasants to invest labour, capital and skills to create a productive landscape, and it also seems to have provided opportunities for property accumulation and social mobility within the peasantry.

However, the contract's effectiveness during the eighteenth and the early nineteenth centuries hinged on two things. Firstly, on the high demand for Madeira wines in the global market. When this subsided and vine diseases hit in the course of the nineteenth century, the *colonia* entered a long period of crisis. Secondly, on the alignment of goals and incentives and the balance of power between landlords and tenants. The *colonos*' ownership of the improvements was of key importance to that power balance. The changes introduced in the property rules following the establishment of the liberal regime, culminating with the enactment of the Civil Code in 1867, altered this and from the landlords' perspective, they made the *colonia* increasingly inefficient in the face of changing economic opportunities.

The breakdown of those factors may explain the platypus's gradual extinction from the late eighteenth century onwards. Precisely how this extinction process came about, with what intensity over time, and to whose benefit still begs systematic research. The puzzle that motivated us here was rather that of understanding why and how the contract lasted for so long after it had become inefficient for the landlords.

We believe that the major cause underlying the contract's resilience was the high exit costs that the *colonos*' property in improvements imposed on landlords wishing to terminate the contracts to allocate the land otherwise. The customary contract structure had created those costs to begin with, but they were greatly enhanced by the *colono*'s accumulation and subdivision strategies, by the action of the courts in upholding customary valuation procedures while at the same time enforcing new legal rules of contract and property, and by the liberal rules themselves which 'perfected' the *colono*'s property away from the landlords' control. The element of path dependence in this process, which made the customary contract more resilient to change, seems to have been caused not by the landowning elite appropriating the institutional changes, but largely by those changes having disempowered the customary property rights of the landlords.

This does not mean that the *colonia* remained static. While the *colonos*, often supported by the courts, held on to whatever customary and legal rules which empowered them, the landlords – at least those with more resources – to the extent that they were stuck with the *colonia*, imposed stricter limits on improvements and used selective authorizations, along with their higher participation in inputs, to reward the *colonos*' collaboration in changing crops. The platypus may well have been doomed from the moment of its inception by the liberal property laws. However, while the beast survived, it had to be tamed.

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Notes

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