The Law of Obligations

Roman Foundations of the Civilian Tradition

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CHAPTER 7

Commodatum, Depositum, Pignus

I. COMMODATUM

1. Commodatum and mutuum

Mutuum was available only where a party wanted to borrow money or fungibles; an equivalent in kind had to be returned. Where the lender, on the other hand, expected the very same thing that he had handed over to the borrower to be returned, the contract was not mutuum but commodatum. Commodatum was the gratuitous loan of a thing for use.[1] Like mutuum, it was a real contract, that is, it could not be created by a formless pact; nor could the lender bind himself by way of letter or any other means (except, of course, by way of stipulation) to grant a loan.[2] The contract of commodatum, and with it the obligation to restore, came into existence only once the object had been handed over.[3] This object was normally a non-fungible thing. However, a commodatum could come into existence in respect of fungibles too. The famous textbook examples are the food to be used as a show-dish or the cash to be spread out on a moneylender's table: "Non potest commodari id quod usu consumitur, nisi forte ad pompam vel ostentationem"[4]—consumable goods were normally lent by way of mutuum; if, however, they were not intended to be consumed, but merely to be displayed for the purpose of "pomp or ostentation" and then to be handed back again, a commodatum came into existence.

Thus we find two different forms of loan in Roman (and in modern) law: the one where the individual thing is lent (and has to be restored), the other where it is not the money or fungible object itself, but rather its value that is lent. Whereas, however, the terminological distinction drawn by the Roman lawyers "very happily expresses the fundamental difference" between these two forms of loan, "our poverty (sc: the English language) is reduced to confound (them) under the vague and common appellation of a loan".[5] Or, to quote Pollock and Maitland:

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[1] "Commodare" has been defined by Donellus in the following terms: ". . . rem quae usu non consumitur, scu mobilem seu immobilem utendam gratis dare certo praescripto utendi fine aut modo": *Commentant de Jure Civili,* Lib. XIV, Cap. II, II).

[2] Cf., for example, the case in Scaev. D. 39, 5, 32.

[3] Cf., for example, Inst. Ill, 14, 2.

[4] Ulp. D. 13, 6, 3, 6.

[s] Edward Gibbon, *Decline and Fail of the Roman Empire,* 1962 sqq., vol. IV, chap. 44, pp. 427 sqq.

"To this day Englishmen are without words which neatly mark this distinction. We lend books and halfcrowns to borrowers; we hope to see the same books again, but not the same halfcrowns; still in either case there is a loan."[6]

On the model of the French *pret a usage*[7] the term "loan for use" has been introduced by Sir William Jones in his *Essay on the Law of Bailments*[1]*—the first English monograph, incidentally, which can properly be called a legal treatise.[9] The German Code distinguishes between *Leihe*[10] (commodatum) and *Darlehen*[1]* (mutuum); the somewhat artificial term of *Darlehen,* alien to Germanic law,[12] has never managed to establish itself in common parlance.[13]

2. History and gratuitous nature of commodatum

Commodatum, being necessarily gratuitous, is not one of the cornerstones of commercial life. It usually occurs between friends, relatives or neighbours,[14] and litigation involving problems arising from loan is rare.[15] It is therefore not surprising that commodatum as a legally recognized and enforceable contract appeared comparatively late in Roman legal history, namely only towards the end of the Republic.[16] Before that time, a loan was regarded as a matter of amicitia, falling, as it were, outside the sphere of law. Thus, only the general delictual remedies might have been available where the "borrower" exceeded what had been granted to him as a favour.[17] A contractual action enabling the lender to sue the borrower for the return of his object was first recognized by the praetor.[18] This was the actio commodati, and it was based on a formula in factum concepta:

"Si paret A^m A^m № № rem qua dc agitur commodasse eamque A° A" redditam non esse, quanti ea res erit, tantam pecuniam iudex N^{ni} N^m A" A" condemnato, si non paret, absolvito."[1n]

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[6] *History,* vol. II, 170.
[7] Art. 1874 code civil; cf. also Pothier, *Traite du pret a usa$>e et du precaire.*
* N. 64.
[9] Cf. A. W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature". (1981) 48 *The University of Chicago LR* 658 sqq.
[10] § 598 BGB.
[11] § 607 BGB.
[12] W. Ogris, "Darlehen", in: *HRG,* vol. I (1971), col. 662 sqq.
[13] Cf. further Schulz, *CRL,* pp. 508 sq.
Picrluigi Zannini, *Spunti criticiper una storia del commodatum* (1983), pp. 115 sqq.; Michel. *Gratuite,* n. 140.
[15] As Story, *Bailments,* § 285, puts it: "[Gratuitous loans have] furnished very little occasion for the interposition of judicial tribunals, for reasons equally honorable to the parties, and to the liberal spirit of polished society."
[1r] Cf., for example, Carlo-Maria Tardivo, "Studi sul 'commodatum'", (1984) 204 *Archh'io Giuridico* 225 sqq.; but see Zannini, op. cit., note 14, pp. 67 sqq., 138 sqq. and passim (according to whom the legis actio per condictionem was available).
[17] Kaser, *RPr* I, p. 533; cf. also Zannini, op. cit., note 14, pp. 127 sqq.
[18] Cf. Ulp. D. 13, 6, 1 pr.
[19] Lenel, *EP,* p. 252; for a derailed discussion, see Maschi, *Contratti reali,* pp. 15U sqq.; Tardivo, (1984) 204 *Archivio Giuridico* 234 sqq.

By the time the praetorian edict was codified, the lender could, instead, choose to proceed under a formula in ius concepta.[20] Whether the latter was a iudicium bonae fidei or not[21] cannot be established with certainty and remains a matter of speculation.[22] With its intentio incerta (". . . quidquid ob earn rem N^m N^m A° A° dare facere oportet")[23] it gave the judge a greater discretion in the process of adjudication, anyway. Under the formula in factum concepta, the defendant could only be condemned into "quanti ea res erit", that is, the objective value of the object and what had been obtained from it.[24]

Commodatum as the gratuitous transfer of a thing for use was different from fiducia cum amico contracta in that it did not involve the transfer of ownership; nor was it confined to res mancipi. In this respect it was similar to precarium.[25] In contrast to precarium, however, commodatum gave the borrower only detention of the thing and not interdictal possession. On the other hand, precarium did not give rise to a legal relationship; it was a mere factum, revocable at any time.[26] In commodatum the lender was bound to leave the thing with the borrower for whatever time the parties had agreed upon, otherwise until the object had been or could have been used in the way envisaged in the contract.[27] If the lender claimed his thing back prematurely, the borrower could defend the action successfully.[28] The precario tenens at first did not enjoy any protection against the owner; in late classical law, however, we find a tendency to institutionalize precarium as a kind of loan transaction "ad tempus".[29]

Commodatum was distinguished from hire (locatio conductio rei) by the fact that it was gratuitous.[30]

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[20] Gai. IV, 47.

[21] This is essential for a variety of questions: whether pacta adiecta or a dolus in contrahendo could be taken into consideration, whether the exceptiones doli or pacti had to be raised or were inherent in the iudicium, etc.

[22] Cf. on the one hand Ernst Levy, "Zur Lehre von den sog. actiones arbitrariae", (1915) 36 *ZSS* 1 sqq. (formula did not contain ex bona fide clause), on the other hand, for example, Schulz, *CRL*, pp. 513 sq. The various arguments are discussed by Max Kaser, "Oportere und ius civile", (1966) 83 *ZSS* 30 sqq. But see, more recently, Maschi, *Qontratti reali*, pp. 218 sqq., 231, offering a reconstruction of the formula in ius concepta with the ex bona fide clause; cf. also Tardivo, (1984) 204 *Archivio Giuridico* 240 sqq.

[23] Lenel, *EP*, p. 252.

These strict and objective principles of estimation could sometimes be of advantage to the plaintiff; cf. Max Kaser, *Quanti ea res est* (1935), pp. 65 sqq. * Cf. Ulp. D. 43, 26, 1 pr. and 3.

[26] Cf. e.g. Max Kaser, "Zur Geschichte des precarium", (1972) 89 *ZSS* 94 sqq.

[27] Even if it suddenly turned out that the lender needed the object himself? On this problem, see Gluck, vol. 13, pp. 446 sq.

[28] Either by raising an exceptio doli (in the case of the formula in factum concepta and also under the formula in ius concepta, provided it did not contain the ex bona fide clause) or on account of the bona fide clause.

[29] For details and references cf. Kaser, (1972) 89 *ZSS* 100 sqq., 113 sqq.; contra: Pierpaolo Zamorani, *Precario habere* (1969).

[36] Cf. Ulp. D. 13, 6, 5, 12.

3. Gratis habitare

A difficult problem of delimitation cropped up where free habitation was granted.[31] Was this still commodatum or did it not rather have to be considered as a case of donation? According to Labeo and the Proculians, land could not be the object of commodatum.[32] This opinion, however, did not prevail: "sed ut apparet, proprie commodata res dicitur et quae soli est, idque et Cassius existimat."[33] On that basis Vivianus was able to answer the question "Si gratuitam tibi habitationem dedero, an commodati agere possim?", in the affirmative.[34] It is, however, not entirely clear whether gratis habitare was generally considered to fall under commodatum. Pomponius, for instance, applied the law of donation:

> "In aedibus alienis habitare gratis donatio videtur. id cnim ipsum capere videtur qui habitat, quod mercedem pro habitatione non solvit, potest enim et citra corporis donationcm valerc donatio, velut si donationis causa cum debitore mco paciscar, *ne* ante certum tempus ab eo petam."[35]

This fragment refers to the lex Cincia de donis et muneribus, which limited gifts to a certain maximum amount.[36] It can be read to imply a straightforward classification of gratis habitare as donation.[37] It has been argued,[38] however, that Pomponius, while not disputing the classification of this transaction as commodatum, nevertheless applied certain rules relating to the law of donation by analogy—the analogy being based on a fictitious splitting-up of the transaction into a contract of hire and a remissio mercedis, a remission of the rent. The latter, obviously, implies a gift of money. The problem, incidentally, is still exercising lawyers' minds today. The German Federal Supreme Court has in recent times managed to perform a surprising double-volte. Contrary to previous decisions, it has described in two pronouncements of 1970 the granting of free habitation as a donation of possession and use.[39] In 1981 the court again changed its opinion; the transaction is now once more considered to constitute a loan for use.[40]

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[31] For a detailed analysis, see Klaus Slapmcar, *Gratis habitare, Unentgeltliches Wohnen nach romischem und geltendem Recht* (1981), pp. 41 sqq.; cf. also Gluck, vol. 13, pp. 450 sqq.

[32] Ulp. D. 13, 6, 1, 1.

[33] Ulp. D. 13, 6, 1, 1.

[34] Ulp. *D.* 19, 5, 17 pr. (". . . et Vivianus ait posse"). Cf. also Ulp. D. 13, 6, 1, 1 in fine: "Vivianus amplius etiam habitationem commodari posse ait."

[35] Pomp. D. 39, 5, 9 pr.

[36] Cf. infra pp. 482 sqq.

[37] Cf. also Pomp. D. 24, 1, 18, dealing with the prohibition of donation between spouses ("valet donatio").

[38] Slapnicar, op. cit., note 31, pp. 82 sqq., 185 sqq.

[39] BGH, 1970 *Neue Juristische Wochenschrift* 941; BGH 1970 Wertpapier-Mitteilungen 1247.

[40] BGHZ 82, 354 sqq.; for an evaluation of this decision from a historical point of view, see Klaus Slapnicar, "Unentgeltliches Wohnen nach geltendem Recht ist Leihe, nicht Schenkung—Dogmengeschichtliches zu BGHZ 82, 354", 1983 *Juristenzeitung* 325 sqq.

4. The liability of the borrower

(a) The diligentissimus paterfamilias

"Rei commodatae et possessionem et proprietatem retinemus: nemo enim commodando rem facit eius cui commodat."[41] The position of the borrower was weak. Ownership of the borrowed object did not pass to the borrower; nor did he become possessor. He was a mere detentor. Apart from that, he was subject to a very strict type of liability. As to the range of this liability, the Digest has this to say:

> "In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tanturn eos casus non praestet, quibus resisti non possit, veluti mortes servorum quae sine dolo et culpa eius accidunt, latronum hostiumve incursus, piratarum insidias, naufragium, incendium, fugas servorum qui custodiri non soient."[42]

And then, again, following on from the discussion of mutuum:

> ". . . is vero qui utendum accepit, si maiore casu, cui humana infirmitas resistere non potest, veluti incendio ruina naufragio, rem quam accepit amiserit, securus est. alias tamen exactissimam diligentiam custodiendae rei praestare compellitur."[43]

Both texts, interestingly, enumerate a couple of catastrophes for which the borrower could *not* be held liable. However, they also try to define, positively, what is expected of the borrower. But the superlatives used in this context (diligentissimus paterfamilias, exactissima diligentia) are not easy to understand. For normal negligence, we would expect to find a reference to the diligens paterfamilias.[44] Can one be more diligent than diligent? The medieval lawyers evidently thought so and consequently came to distinguish various grades of negligence. As a counterpart to exactissima diligentia, the standard of culpa levissima was developed[45] and dominated the discussion about the liability in commodatum fand certain other contracts) down to the 19th century.[46] Or is the diligentissimus paterfamilias not a rather Utopian ideal, a paragon of circumspection endowed with the prophetic vision of the clairvoyant[47] and thus able to prevent incidents for which one cannot blame a normal human being? But why then introduce this awesome creature in an attempt to define in subjective terms what obviously seems to have been liability attributed according to objective criteria, that is, independent of a blameworthy state of mind of the borrower? The answer to this question lies in Justinian's tendency, originating in Greek philosophy and reinforced by the Christian religion, to make

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[41] Pomp. D. 13, 6, 8 and Ulp. D. 13, 6, 9.
[42] Gai. D. 13, 6, 18 pr.
[43] Gai. D. 44, 7, 1, 4. On exactissima diligentia, see De Robertis, *Responsabilite contrattttaie,* pp. 323 sqq.; Tardivo, (1984) 204 *Archivio Giuridica* 296 sqq.
[44] Cf. e.g. Paul. D. 10, 2, 25, 16; Paul. D. 19, 1, 54 pr.
[45] Cf. Accursius, gl. Diligentissimus ad D. 19, 2, 25, 7; Bartolus, D. 13, 6, 18 pr., § In rebus; cf. also e.g. Pothier, *Traite du pret a usage et du precaire,* nn. 48 sqq.
[46] For details of the development, cf. Hoffmann, *Fahrlassigkeit,* passim.
[47] Cf. *Hawkins v. Coulsdon and Purley Urban District Council* [19541 1 QB 319 at 341.

fault the central element of the law relating to liability.[48] As usual, he somehow tried to reconcile the old and the new, and thus he superimposed a subjectivizing terminology on the decisions of the classical lawyers.[49] They, in turn, had held the borrower liable not only where he had been at fault but also for certain typical accidents. This is known as custodia liability.[5]" It was demarcated in a concrete and casuistical way and cannot therefore adequately be cast into an abstract formula.

(h) The nature of custodia liability

The essence of custodia liability has been succinctly summed up by Fritz Schulz:[51]

> "(The borrower] was absolutely liable for certain typical accidents which were regarded as avoidable by properly watching and guarding the borrowed thing, and on the other hand he was not liable tor other typical accidents which were invariably regarded as not avoidable by the exercise of care."

1fa borrowed horse was stolen by a third person or it it was killed or injured by one of the borrower's friends, the borrower was responsible to the lender irrespective of whether he had in actual fact looked after the horse as well as possible, i.e. whether he could have prevented the incident in this individual case or not. If, on the other hand, the horse was taken away, injured or slaughtered by invading enemies or a gang of robbers, the borrower was not liable. Accidents of the latter type (of which Gaius gives a list of examples in both D. 13, 6, 18 pr. and D. 44, 7, 1, 4)[52] are normally referred to as vis maior[53] (or, to use the English terminology, as acts of God).[54] Thus one can say that "liability for custodia implied a liability for lesser accidents (casus minor), i.e. . . . a liability for any loss not to be attributed to vis maior".[55] This has come to be the prevailing view amongst Romanists in the 20th century,[5'1] but

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[4H] On the (justinianic) concept of diligentia and the yardstick of the diligens paterfamilias, see Wolfgang Kunkel. "Diligentia", (1925) 45 *ZSS* 266 sqq., 301 sqq.; Arangio-Ruiz. *ResponsabiHta contrattualc,* passim; De Robertis, *Responsibility contratniale,* passim, e.g. pp. 171 sqq.; Tafaro, *Regula,* pp. 218 sqq. Cf.. m our context, *Inst.* Ill, 14, 2 ("exacta diligentia custodiendae rei").

■"Both Gai. D. 13. 6. IS pr. and Gai. D. 44, 7, 1, 4 are, in so far, interpolated. Cf. e.g. Kunkel. (1925) 45 *ZSS* 271 sq.; Aranцio-Ruiz, *ResponsabiHta contratttuh*[1]*,* pp. 66 sqq.

*' Gai. III. 206; Ulp. D- 13, 6, 5, 5.

[51] *CRU* p. 515.

l[2] Cf. also *Inst.* III. 14, 2 and Ulp. D. 50. 17, 23.

"^ Theo Mayer-Maly, "Hohere Gewalt: Falltypen und Begriffsbildung", in: *Festschriftjur Artur Slt'ittweitter* (1958), pp. 58 sqq.; Giuseppe Ignazio Luzzatto, Om> *fitortuito e jorza million' come Utilite alla responsabilite contratiuale,* vol. I (1938); Inire Moltiar, "Die Ausgestaltung des Begriffes der vis maior im romischen Recht". (1981) 32 *Iura* 73 sqq.

"^[4] Or, to quote Hcineccius, *F.lemenia Iuris Civilis,* Lib. MI, Tit. XIV. § 784: "Casus est eventus a divina providentia profectus. cui resisti non potest."

" Schulz, *CRL, p.* 515.

[ы>] First put forward byj. Baron, "Die Haftung bis zur hoheren Gewalt", (1892) 78 *Archiv fur die civilistisch? Praxis* 203 sqq. and Emil Seckel, in: Heurmnn/Seckcl, pp. 116 sqq. Cf. today e.g. Antoiiino Metro, *L'obbligaziotie di custodire fiel diritto rotnano,* passim; Cannata. *Responsabilite (ontruttuiilr,* Kaser, *RPr* I. pp. 506 sqq.; Honsell/Mayer-Maly/Selb, pp. 233 sqq.

it has not remained unchallenged.[57] Custodia, in the sources, is not used as an unequivocal technical term of law. Thus, it has been argued that it expresses not a general category of liability but the content of an obligation. And, indeed,[58] "custodiam praestare" originally and primarily meant to furnish (and not to be liable for) custodia; it referred to the actual behaviour required of the person under the obligation, namely to keep the object safe. What he owed was in the first place the prevention of theft; in classical law, the content of his obligation was extended to cover certain cases of damage done to the object by third persons.[59] As a corollary, or spin-off, of this obligation, however, custodia came to be used also as a standard of liability: in case of breach of custodia (i.e. when a theft or some damaging event had occurred) the lender could bring the actio commodati, just as, for instance, the depositor could bring the actio depositi if the depository had acted fraudulently. Custodia therefore contained a guarantee to provide a certain result—namely to keep the object safe—which was tacitly implied in certain types of obligations (as, for instance, commodatum), but could also be expressly undertaken in others.[60] Yet, this guarantee (and consequently: liability for custodiam praestare) was not considered to be an absolute one; it was not taken beyond the limits of what could still be regarded, from an objective point of view, as humanly possible. Impossibilium nulla obligatio est:[61] nobody can promise what is impossible, namely to furnish a degree of custodia that will exclude damage by, say, an earthquake. These limitations of custodia, as has already been pointed out, came to be characterized as cases of vis rnaior,

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The literature is virtually boundless ("| I he subject is] snowed under with books and articles, with theories, comments, opinions and prejudices to such a degree, that hardly anybody ventures to undertake (a) reappraisal": Van den Bergh, infra, note 57, p. 59). There are three main problems that have triggered oft this prolific production of legal literature on custodia: a terminological one (the ambiguous nature of the term custodia in classical law), a historical one (the difference between classical and Justinianic law) and a policy-oriented one (custodia, esp, ы the 19th century, as one of me battle grounds for the basis of the law concerning liability; necessarily subjective, i.e. based on fault, or not?). For the traditional (prc-Baron and -Scckcl) approach (custodia as a mere species diligentiae), see e.g. Hasse, *Culpa,* pp. 281 sqq. It is on this basis, incidentally, that custodia liability has not been incorporated into the BGH (with the exception ot § 701 12; see infra, p. 521): "Motive", in: *Mugdan,* vol. II, p. 15.

[57] Cf. particularly Geoffrey MacCormack, "Custodia and Culpa", (1972) 89 *ZSS* 149 sqq. (e.g. p. 155: "A person required to show custodia is not normally liable for loss through theft or otherwise unless there has been fault on his part") and G.C.J.J. van *den* Bergh, "Custodiam praestare: custodia-Liability or Liability for failing custodia", (1975) 43 *TR* 59 sqq. (e.g. p. 71: "Custodia was . . . a liability for failure to guard properly over things one has in his keeping tor reasons ot profit"); idem, "Custodia and furtum pignoris", in: *Sttidi in ot tore di Cesare Sanfilippo,* vol. I (1982), pp. 601 sqq.; most recently, ct. Rene Robaye, *L'obligation de garde, tissai sur ta responsabilite contractuelle en droit romain* (1988).

[58] As to the following, *cf.* especially Cannata, *Responsabilite contrattuale,* passim.

[59] lui./Marcel]. D. 19. 2, 41 as opposed to lui. D. 13, 6, 19. On these texts, Cannata, *Responsabilite contrattuale,* pp. 61 sqq., 85 sqq.

[60] Cannata, *Responsabilite contrattuale,* pp. 102 sqq.; Kaser, *RPr* I, p. 5(17.

[61] Ccls. D. 5(1, 17, 185. On philosophical implications of this maxim ("ought implies can"), see Joachim Hruschka, "Zwei Axiome des Rechtsdenkens", in: *Aus dem Hamburger Rechtsleben, Festschrift fur Writer Reimers* (1979), pp. 459 sqq.

but were always conceived in a casuistic manner: they constituted a certain class of situations in which liability was excluded, because the fact that the guarantee had not been kept could typically not be attributed to the debtor. Custodia liability, therefore, did not presuppose fault.

This specific feature of classical Roman law should, I think, not be regarded as archaic or primitive.[62] Over the last hundred years we can observe a growing dissatisfaction with fault. Culpa as the essential cornerstone of our system of liabilities has come under attack, and the idea of allocating and demarcating spheres of risk according to objective criteria rather than necessarily basing liability on individual responsibility is a thoroughly modern one.[63] The "*Spharentheorie*" in modern German labour law, established by the Supreme Court of the German Reich and further refined, after the Second World War, by the Federal Labour Court, is but one example.[64]

(c) The range of liability; instances of liability for vis maior

Of course, whoever was responsible for custodia was a fortiori liable for dolus and culpa too.[65] The borrower was not liable for any deterioration of the object arising from wear and tear through normal use; he was liable, however, for careless handling:

> "Eum, qui rem commodatam accepit, si in earn rem usus est in quam accepit, nihil praestare, si earn in nulla parte culpa sua deteriorem fecit, verum est: nam si culpa eius fecit deteriorem, tenebitur."[66]

Where the borrower, through his negligence, enabled a third party to steal or damage the object, he was obviously liable. His fault normally did not even matter (and thus did not have to be proved), as he was liable for custodia anyway. It did, however, become relevant where the borrower had used the thing contrary to the terms of the contract. The

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[62] See, however, Schulz, CRL, p. 515.

[63] Cf. e.g. Walter Wilburg, *Die Elemente des Schadensrechtes* (1941), pp. 112 sqq., 124 sqq.

[64] RGZ 106, 272 sqq.; BAGE 3, 346 sqq. 1f an employee is unable to perform his services, the decision whether or not he can demand remuneration depends on whether this inability has its origin in the sphere of the employer (breakdown of electricity supply, unavailability of raw materials, fire, defects in the machinery, etc.) or of the employee (strike in his own or in other factories). Cf. for details Schaub, in: *Munchener Kommentar,* vol. HI 1 (2nd ed., 1988), § 615, nn. 93 sqq.; for a most interesting historical analysis, see Eduard Picker, "Richterrecht oder Rechtsdogmatik—Alternativen der Rechtsgewinnung?—Teil 2", 1988 *Juristenzeitung* 62 sqq.

[65] Cf. e.g. Kaser, *RPr* I, p. 511; Joachim Rosenthal, "Custodia und Aktivlegitimation zur Actio furti", (1951) 68 *ZSS* 258 sqq.

[66] Ulp. D. 13, 6, 10 pr.; cf. also § 602 I BGB. What if during a fire the borrower saved his own property in preference to what he had borrowed? ". . . si incendio vel ruina aliquid contigit vel aliquid amnum fatale, non tenebitur, nisi forte, cum possit res commodatas salvas faccre, suas praetulit" (Ulp. D. 13, 6, 5, 4). This case, "which is somewhat nice and curious" (Story, *Bailments,* § 245), has been interpreted in various ways, usually as indicating that to prefer one's own property in a dangerous situation amounts to negligence; cf. e.g. Voet, *Commentarius ad Pandectas,* Lib. XIII, Tit. VI, IV; Pothier, *Traite du pret a usage et du precaire,* n. 56; Gluck, vol. 13, pp. 438 sqq.; Story, *Bailments,* §§ 245 sqq.

contract of commodatum gave the borrower the right to use what was handed over to him for a specific purpose.[67] 1fhe used it for purposes other than the one agreed upon, or if he went beyond what the parties had in actual fact envisaged, he did not only commit (in modern terminology) a breach of contract; the borrower, in these instances, unlawfully appropriated to himself a specific use of the object lent to him, and in Roman law such "stealing" of the use {"furtum usus") satisfied the requirements for the delict of theft.[68] Thus, for instance, a horse borrowed for the purpose of joy-riding must neither be taken further than the distance agreed upon nor be used as a battle horse.[69] If somebody has been given silver cutlery to be used for a dinner party, he must not take it on a sea voyage overseas.[70] 1fa slave has been lent to work as a fresco painter on the ground, the borrower must not put him on a scaffold and ask him to decorate the third storey of his house.[71] In all these instances, the unauthorized conversion of use had the consequence of increasing the borrower's liability, beyond custodia, so as to cover incidents of vis maior too.[72] If the horse was killed by the enemies, if the cutlery was taken by Silician corsairs, if the fresco painter on his scaffold was struck by lightning: in all these cases the borrower was now liable under the actio commodati, even though the incidents normally fell outside his responsibility for custodia. The borrower, in other words, had to carry the full periculum rei: whatever happened to the thing, subsequent to the furtum usus, was attributed to him. It is not entirely clear from the sources whether there had to be a specific (causal) connection between the wrongful act of the borrower and the occurrence of the vis maior; so that, for instance, the borrower would not have been liable if the horse that he took (but was not supposed to take) on a ride to Rome was injured by an earthquake, which would also have struck it had it been quietly grazing on the borrower's pasture.[73] Depending on the answer to this question, the

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[67] Gluck, vol.]3, pp. 430 sqq. Cf. also e.g. supra, note 1.

[68] Gai. Ill, 196. If the borrower believed that the lender would have approved of this deviation from the contract, he was not liable: "Qui re sibi commodata . . . usus est aliter atque accepit, si existimavit se non invito domino id facere, furti non tenetur" (Pomp. D. 47, 2, 77 pr.). Further on furtum and furtum usus, cf. infra, pp. 922 sqq.

[69] Cf. Pomp. D. 13, 6, 23; Ulp. D. 13, 6, 5, 7.

[70] Cf. Gai. D. 13, 6, 18 pr.; Gai. D. 44, 7, 1, 4.

[71] Cf. Ulp. D. 13, 6, 5, 7.

[72] Cf. e.g. Gai. D. 44, 7, 1, 4: "sed et in maioribus casibus, si culpa eius interveniat, tenetur"; Ulp. D. 13, 6, 5, 4: ". . . nisi aliqua culpa interveniat. " Cf. also Lord Holt in *Coggs v. Bernard* (1703) 2 Ld Raym 909 at 915 (". . . as if a man should lend another a horse, to go westward . . .; if the bailee go northward . . ., if any accident happen to the horse in the northern journey, . . . the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he ■was lent, that accident would not have befallen him", quoting Bracton for this proposition); *Lilley v. Doubhday* [1881] 7 QB 510 at 511 (per Grove j); Jones, *Bailments,* pp. 67 sq.; Story, *Bailments,* §§ 232 sq., 241 sq.

[73] Cf. e.g. Windscheid/Kipp, § 375, n. 10 a, on the one hand, Van Leeuwen, *Censura Forensis,* Pars I, Lib. IV, Cap. V, 4 ("De casu forcuito commodatarius numquam tenetur.

borrower's liability was either based on culpa in these cases,[74] or on the idea that a wrong, once committed, taints all the consequences flowing therefrom: versanti in re illicita, omnia imputantur quae ex delicto sequuntur, to quote the famous adage of the medieval canon lawyers,[75] the origin of the notorious versari doctrine of modern criminal law.[76] Except for these cases, where culpa aliqua interveniat, the borrower could be liable for vis maior on account of a special agreement to this effect. The parties to a contract were free to vary the standard of liability (". . . sed haec ita, nisi si quid nominatim convenit (vel plus vel minus) in singulis contractibus")[77] and thus the custodia liability of the borrower was by no means mandatory.[78] Just as, therefore, the borrower could undertake to be liable only for dolus, or for dolus and culpa,[79] so he could assume the full periculum rei *("Versicherungshaftung")* .[m] When and how far he had in actual fact done so, was often a matter of interpretation; one of the most interesting cases in this context (which has left its traces in some modern codes),[81] is the valued loan. Where goods have been estimated at a certain price, the borrower, according to Ulpian, must be considered as bound to restore either the objects lent or their value, no matter what has happened: ". . . omne periculum praestandum ab eo, qui aestimationem se praestaturum recepit."[82]

Nisi expresse ita convenerit, ant si culpa casui occasionem aut causam dedcrit") on the other. One could also think of restricting the liability of the borrower to cases where his wrongful act has increased the risk of this specific vis maior, e.g. if the silver plates, which the borrower was supposed to have used at home, had been lost in a shipwreck; not so if they had been struck by lightning (which could just as well have happened at home). For further examples, see Story, *Bailments,* §§ 241 sqq,

[74] Cf. Van Leeuwen, loc. cit.: "Sed hoc casu, non tarnen propter casum, quam propter culpam lenetur."

[5] For details, see Horst Kollmann, "Die Lehre vom versari in re illicita im Rahmen des Corpus juris canonici", (1914) 35 *ZStW*46 sqq.; H.L. Swanepoel, Die *leer van "versari in re illicita" in die strajreg* (1944). For a legislative realization of this doctrine, see art. 146 CCC.

[76] As far as modern private law is concerned, liability for accidental loss continues to be imposed on the borrower who exceeds his right of use, by art. 1881 code civil, art. 1805 II codice civile and many other modern codifications. The German BGB is silent on the point; hence the dispute in modern literature (cf. e.g. Kollhosser, in: *Munchener Kommentar,* vol. Ill 1 (2nd ed., 1988), §§ 602, 603, n. 3). For a discussion of the problem in modern law and its historical ramifications, see Andreas Wacke, "Gefahrerhohung als Besitzverschulden", in: *Festschrift fur Heim Huhner* (1984), pp. 689 sqq.

[77] Ulp. D. 50, 17, 23.

[78] Cf. e.g. C. 4, 23, 1.

[79] Cf. Ulp. D. 13, 6, 5, 10.

[m] That is, he could insure the lender against accidental loss, even where it originated in an incident of vis maior. Cf. Paul Kruckmann, "Versicherungshaftung im romischen Recht", (1943) 63 *ZSS* 1 sqq. Cf. also Story, *Bailments,* § 252.

[8] Cf. art. 1883 code civil and art. 2901 Louisiana Civil Code, discussed by Alan D. Ezkovitch, (1983-84) 58 *Tuiane LR* 359 sqq.

[82] Ulp. D. 13, 6, 5, 3; cf. also Ulp. D. 19, 3, 1, 1 and Pothier, *Traite du pret a usage et du precaire,* nn. 62 sqq.; Jones, *Bailments,* pp. 71 sq.; Gluck, vol. 13, pp. 434 sqq.

(d) The principle of utility

If we attempt to determine why the borrower was (normally) liable to the strictest possible degree, we must look at who benefited from and therefore had a specific interest in the contract. The Roman lawyers, in determining the degree of diligence that the contractual partners could reasonably expect from each other, were guided by the principle of utility *("Utilitatsgedanke").*[83] He who asks a favour has no right to expect very favourable treatment when it comes to determining the question of liability for loss or destruction; he, on the other hand, who accepts a burden, may reasonably presume that he will not be required to exercise the same amount of diligence as if he had received a benefit.[84] Fraudulent behaviour, however, can under no circumstances be condoned. Dolus, therefore, must be the minimum for which contractual partners are liable to each other in any event. In the case of commodatum, things are lent "oftenest to the borrower's use alone".[85] Hence his custodia liability:

> "Quae de fullone aut sarcinatore diximus, eadem transferemus et ad eum cui rem commodavimus. nam ut illi mercedem capiendo custodiam praestant, ita hie quoque utendi commodum percipiendo similiter necesse habet custodiam praestare."[86]

It follows from this that where, for once, the loan was made in the interest of the lender (as, for instance, where "a passionate lover of music were to lend his own instrument to a player in concert, merely to augment his pleasure")[87] the borrower's liability cannot be for custodia, but "[he] is holden only for the grossest faults":[88] for dolus, according to Roman law.[89] Ulpianus provides some further examples of lenders keen to boast with the wealth of their (future) wives or with the splendour of games which they were about to organize:

> "Interdum plane dolum solum in re commodata qui rogavit praestabit, ut puta si quis ita convenit: vel si sua dumtaxat causa commodavit, sponsae forte suae vel uxori, quo honestius culta ad se deduceretur, vel si quis ludos edens praetor scaenicis commodavit, vel ipsi praetori quis ultro commodavit."[90]

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[83] Cf. esp. Bernhard Kubier, "Das Utilitatsprinzip als Grund der Abstufung bei der Vertragshaltung im klassischen romischen Recht", in: *Festgabe der Berliner juristischen Fakultat ?ir Otto v, Qiercke* (1910), vol. II, pp. 235 sqq.; Dietrich Norr, "Die Entwicklung des Utilitatsgedankens im romischen Haftungsrecht", (1956) 73 *ZSS* 68 sqq.; Michel, *Gratuite,* pp. 325 sqq.; Hoffmann, *Fahrlassigkeit,* pp. 16 sqq.; Tafaro, *Regula,* pp. 123 sqq., 207 sqq.; for Justinian's time, see Afr. D. 30, 108, 12; Ulp. D. 50, 17, 23 (both spurious) and De Robertis, *Responsibilita contrattuate,* pp. 13 sqq. Cf. also *Coggs v. Bernard* (1703) 2 Ld Raym 909 at 915.

[84] Story, *Bailments,* § 17.

[85] Stair, *The Institutions of the Law of Scotland* (Edinburgh, 1832), I, 11, 9.

[86] Gai. Ill, 206.

[H7] Jones, *Bailments,* p. 72.

[88] Stair, loc. cit.

[89] In later times usually for gross negligence also; cf. e.g. Voet, *Commentarius ad Pandectas,* Lib. XIII, Tit. VI, IV; "Motive", in: *Mugdan,* vol. II, p. 250 and D.J. Joubert, in: Joubert (ed.), *The Law of South Africa,* vol. 15 (1981), n. 281.

[90] Ulp. D. 13, 6, 5, 10.

The same considerations applied where an object was given to a person for examination:

> "Si rem inspectori dedi, an similis sit ei cui commodata res est, quaeritur. et si quidem mea causa dedi, dum volo pretium exquirere, dolum mihi tantum praestabit: si sui, et custodiam."[91]

What if the contract is in the interest of both the lender and the borrower? Here the extreme options of either imposing custodia or merely dolus liability on the borrower are both equally unsatisfactory. Hence, we find Gaius suggesting the via media of culpa liability:

> ". . . si utriusque [gratia commodata sit res], veluti si communem amicum ad cenam invitaverimus tuque eius rei curam suscepisses et ego tibi argentum commodaverim, scriptum quidem apud quosdam invenio, quasi dolum tantum praestare debeas: sed videndum est, ne et culpa praestanda sit. . . ,"[92]

Or, as Story put it:

> "When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect."[93]

As far as commodatum is concerned, this very differentiated way of looking at the borrower's position has not been preserved everywhere; according to the BGB, for instance, the normal principle of § 276 I 1 ("A debtor is responsible . . . for wilful conduct and negligence") applies.[94] Generally speaking, though, it is quite true that the determination of contractual liability on the basis of considerations of utility, that is, according to the parties' balance of interest in the particular type of contract, is so "rational, just, and convenient",[95] that it has not only left its mark on continental jurisprudence[96] but underlies even the common law to such an extent that Story saw the legal systems as being "in perfect conformity"[97] on this matter.

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[91] Ulp. D. 13, 6, 10, t.

[92] Gai. D. 13, 6, 18 pr.; on this text cf. Norr, (1956) 73 *ZSS* 82 sqq.

[93] *Bailments,* § 23; cf. also § 238 and Pothier, *Traite du pret a usage et du precaire,* nn. 50 sq. ; Jones, *Bailments,* p. 72.

[94] Reasons: on the one hand custodia liability was not incorporated into the BGB. On the other hand, those cases where the loan is in the interest of the lender alone are too rare to warrant special consideration; furthermore, it is doubtful, under those circumstances, whether the parties really intend to contract a commodatum.

[95] Story, *Bailments,* § 23.

[96] Cf., for example, Heineccius, *Elementa Iuris Chilis,* Lib. Ill, Tit. XIV, § 788: "In contractibus, in quibus penes unum commodum, penes alterum incommodum est, ille ordinarie culpam et levissimam; hic non nisi latam praestat. Ubi par utriusque contrahentis commodum atque incommodum est, culpa etiam levis ab utroque praestanda est. Qui sua sponte se contractui obtulit, vel obligationem suscepk, in qua personae industria summa requiritur, quamvis solum incommodum sustineat, tarnen ad culpam levissimam tenetur. Qui alteri rem ultro obtulit, ex qua ei soli commodum obveniat, non nisi latae eulpae praestationem exigere potest"; Vinnius, *Institutions,* Lib. Ill, Tit. XV, n. 12 (sub "commodatum"); Pothier, *Traite des obligations,* n. 142. Cf. further Michel, *Gratuite,* pp. 355 sqq.

[97] *Bailments, %* 18.

(e) The actio furti of the borrower

In Roman law, if the borrower was normally liable for custodia, this had a very interesting consequence in cases where the borrowed object was stolen. Here, the law provided (inter alia) the actio furti, a penal action for either twofold or fourfold the value of the stolen object.[98] This action was, of course, usually available to the owner." In the case of commodatum, however, the owner did not really have to bear the risk of theft, since the borrower was always liable to him. Whether the latter, in looking after the object, had been negligent or not, whether he had made the theft possible or could have prevented it, this was one of the typical incidents for which he was liable in any event. The lender therefore being well protected, it was actually the borrower who had an interest in the safety of the thing (". . . cuius interest rem salvam esse").[100] This is why the classical jurists were prepared, as long as he was solvent, to allow him (and anybody else who was liable for custodia) to sue the thief.[1III] Thus it was the borrower and not the lender/owner who could avail himself of the actio furti.

5. The actio commodate contraria

(a) Commodatum as imperfectly bilateral contract

We have thus far been dealing with the duties of the borrower. It has also already been mentioned that, if he did not duly restore the thing after the termination of the loan, the lender could bring the actio commodati. In turn, the borrower might, under certain circumstances, have an action against the lender: the actio commodati contraria. The existence of this contrarium iudicium was a characteristic difference between commodatum and both stipulatio and mutuum, which were unilaterally binding contracts. However, it would not be quite correct to place commodatum unqualifiedly into the opposite category of bilateral contracts. The decisive point is that it was not *necessarily* unilateral; a counterclaim *could* exist if (and only if) the borrower had incurred expenses or suffered damages. Whereas the actio commodati (directa) was an essential and indispensable element, intrinsically inherent in this type of legal relationship ("principalis actio", as Paulus puts it),[102] the counterclaim was only incidental; it was available to the borrower, depending on whether or not its specific prerequisites had been met in each individual case.[103] Thus we can call commodatum an

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[98] For details *c(.* infra, pp. 932 sqq.

[w] Paul. D. 47, 2, 47; Paul. D. 47, 2, 67, 1; Pap. D. 47, 2, 81, 1.

[100] Gai. Ill, 203.

[ui] Gai- III, 205 sq.; Mod. Coll. X, II, 6.

[102] D, 13, 6, 17, 1.

[103] In classical law, the contrarium judicium could be brought irrespective of whether the lender had sued the borrower with the actio directa. Originally, the borrower's claims could probably be taken into consideration only by way of compensatio or retentio, later also by

imperfectly bilateral contract;[104] the writers of the ius commune spoke of a contractus bilateralis inaequalis.[105]

(b) Reimbursement of expenses

What were these specific prerequisites for the actio commodati contraria?[106] On the one hand, the borrower could claim reimbursement of expenses that he had incurred in connection with the borrowed object: the costs involved in retrieving a borrowed slave who had run away, or in curing his rather less adventurous companion who had fallen ill.[107] However, it was only for such extraordinary incidents that an action could be brought. The ordinary expenses of the preservation of the thing lent had to be borne by the borrower, as a matter of course.[108] This applied, for instance in the case of the loan of an animal or of a slave, to the cost of fodder or food respectively.[109] After all, it was his contractual duty to preserve and look after the thing properly, and this of necessity involved some expenditure. Only if something had happened that lay beyond the boundaries of his obligation of custodiam praestare could he ask the lender/owner for reimbursement of his impensae necessariae.

On account of such impensae, incidentally, the borrower also had a ius retentionis which enabled him effectively to bar the lender's claim until he had been reimbursed.[no] If the lender tried to frustrate this right of retention[111] by simply taking back his object without further ado, the borrower could bring an actio furti against him—a remedy that was otherwise not available to the borrower against the lender:

> "[Ejrgo si ob aliquas impensas, quas in rem commodatam fccisti, retentionem eius habueris, etiam cum ipso domino, si earn subripiat, habebis furti actionem, quia eo casu quasi pignoris loco ea res fuit."[112]

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way of a counterclaim stricto sensu, i.e. only when the actio directs had already been instituted by the lender. For details, see Giuseppe Provera, *Contribua alla teoria dei iudicia contraria* (1951), pp. 20 sqq.; Fritz Schwarz, "Die Kontrarklagen", (1954) 71 *ZSS* 189 sqq.

[104] Kaser, *RPr* I, p. 528.

[105] Cf. e.g. Gluck, vol. 4, pp. 285 sqq.

[106] For details, see Provera, loc. cit., passim and Schwarz, (1954) 71 *ZSS* 111 sqq.; Pothier, *Traite du pret a usage et du precaire,* nn. 81 sqq.; Story, *Bailments,* §§ 273 sqq.

[107] Gai. D. 13, 6, 18, 2: "Possuni iustae causae intervening ex quibus cum eo qui commodasset agi deberet: veluti de impensis in valetudinem servi factis quaeve post fugam requirendi reducendique eius causa faetae essent . , ."; Mod. Coll. X, II. 5.

[nR] Gai. D. 13, 6, 18, 2: ". . . nam cibariorum impensae naturali scilicet ratione ad eum pertinent, qui utendum accepisset"; Mod. Coll. X, II, 5 in fine. Reason: qui habet commoda ferre debet onera; cf. infra, pp. 290 sq.

[109] Cf. also Pothier, *Traite du pret a usage et du precaire,* n. 81, Story, *Bailments,* § 256, and, today, § 601 BGB.

Schwarz, (1954) 71 *ZSS* 127; Alfons Burge, *Retentio in romischen Sachen- und Obligationenrecht* (1979), pp. 176 sqq.

On the ius retentionis in general, see Kaser, RPr 1, pp. 521 sq.; Burge, loc. cit., passim.

[112] Paul. D. 47, 2, 15, 2. On this text cf. Rosenthal, (1951) 68 *ZSS* 251 sq.; Schwarz, (1954) 71 *ZSS* 124 sq.

(c) Recovery of damages

On the other hand, the actio commodati contraria could be used to claim damages. Well known is the following example given by Gaius: "Item qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve est, condemnandus eo nomine est."[113] The vessels that had been lent proved to be defective, so that the wine or oil contained in them was spoilt or spilt. Another case in point is Paul. D. 13, 6, 17, 3; this text concerns the loan of decayed timber which was to be used for propping up a block of flats.[114] It is to be noted that the lender was liable only if he had known about the defects in the article lent ("sciens"). As it was the borrower and not the lender who was interested in and gained the advantage from the contract, it would have been unreasonable to subject the latter to strict and extensive liabilities. The standard of diligence required of the lender thus stood in a relationship of inverse reciprocity to that of the borrower: entirely in accordance with the principle of utility. The scientia requirement is stressed in other texts too, for example in Paul. D. 13, 6, 22. Here a slave had been handed over by way of loan and had subsequently stolen something from the borrower. Of course, the owner of the slave was under noxal liability—he could either pay what was due under the actio furti or surrender the slave.[115] But did the borrower in addition have a contractual action against the lender? Only if the latter had known that this particular slave had long fingers.

Later centuries tended to extend the lender's responsibility to gross negligence,[116] but apart from that his position remains unchanged in modern law. This has given rise to one particular problem. Where the lender has deliberately handed over a defective object and thus caused damage, the borrower will normally not only have a contractual but also a delictual action. The delictual action, however (based on the lex Aquilia) is not confined to cases of dolus but also lies against the negligent lender. Thus it is clear that to admit a delictual remedy in these cases would seriously undermine the lender's privileged position and make any restriction on his contractual liability more or less meaningless. Thus one could argue that the contractual degree of diligence expected in this situation should be applied to the delictual action too. But then: is it really acceptable to assume generally that what is not forbidden by contract is permitted under the law of delict?

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[113] Gai. D. 13, 6, 18, 3.

[114] For a discussion of these and further texts, see Schwarz, (1954) 71 *ZSS* 129 sqq.; *cf.* also Provera, op. cit., note 103, pp. 103 sqq.

[115] Cf infra, pp. 916 sq., 1118.

[116] Cf. e.g. Vinnius, *Institutions,* Lib. Ill, Tit. XV, 11 (sub "commodatum"); Pothier, *Traite du pret a usage et du precaire,* nn. 80, 84; cf. also § 599 BGB ("The lender is responsible only for wilful conduct and gross negligence"). But see § 600: "If the lender *fraudulently* conceals a defect in title or in quality in the thing lent, he is bound to compensate the borrower for any damage arising therefrom." Cf. further the "melancholy case" (Erie CJ) of *Bldkemore v. Bristol and Exeter Railway Co.* (1858) 8 El & Bl 1035 (obiter).

The law of delict sanctions general duties of behaviour which have to be observed, irrespective of whether a special (contractual) relationship exists in an individual case. Which of these two views the Roman lawyers took cannot be determined from the sources.[117] The authors of the ius commune were divided on this point.[118] Modern German lawyers tend to adopt the former approach and argue that the subjective requirements of § 823 I BGB must be modified by the standard set in §599.[119]

Finally, it must be pointed out that the borrower could not only claim under the actio commodati contraria where the damage had been caused by the defective object of the loan. A case in point is Afr. D.13, 6, 21 pr.:

> "Rem mihi commodasti: eandem subripuisti: deinde cum commodati ageres nee a te scirem esse subreptam, iudex me condemnavit et solvi: postea comperi a te esse subreptam: quaesitum est, quae mihi tecum actio sit."

As we have seen, the actio furti was not available to the borrower. However, the lender was liable under the actio commodati contraria. ". . . adiuvari quippe nos, non decipi beneficio oportet," as Paulus put it;[120] when we lend we ought to confer a benefit and not to do a mischief, and this reasoning underlies all other cases in which the borrower was allowed to claim damages too.[121]

6. Loan for use today

Throughout the centuries, the law relating to commodatum has seen little change. Certain marginal adjustments have been made: according to the German code, for instance, the lender is as a rule responsible not only for wilful conduct but also for gross negligence; the borrower is liable for dolus and culpa only (custodia having been transformed into and superseded by culpa liability already in post-classical Roman law); and the handing over of the object is now regarded as involving transfer of (direct) possession to the borrower.[122] By and large, though, Paulus or Gaius would find their way through the modern law of commodatum with ease. This applies not only to the European continental systems and South African law, but even to the English common law.

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[117] For a review of the relevant texts, see Norman S. Marsh, "The Liability of the Gratuitous Transferor: A Comparative Study", (1950) 66 *LQR* 51 sqq.

[na] Cf. e.g. Gluck, vol. 10, pp. 310 sqq.; Vangerow, *Pandekten,* § 681, Anm. 3, n. II; Windscheid/Kipp, § 455, n. 12.

[119] Cf. e.g. BGH, 1974 *Neue Juristische Wochenschrift* 234 (235); KoUhosser, op. cit., note 76, § 599, n. 4. For a full analysis of this and similar problems arising from the concurrence of delictual and contractual liability, see Peter Schlechtriem, *Vertragsordnung und ausservertraglkhe Ha?ung* (1972), pp. 27 sqq. Cf. also infra, pp. 904 sqq.

[?20] D. 13, 6, 17, 3.

[n] Especially in cases of an "importune repetere" of the object lent. Cf. e.g. Paul. D. 13, 6, 17, 3 {". . . si ad fuiciendam insulam tigna commodasti, deinde protraxisti . . ."). For a discussion of this and further cases, see Schwarz, (1954) 71 *ZSS* 157 sqq.

[122] This is different in South African law, where the borrower is still regarded as detentor.

In medieval English law—which had "but a meagre stock of words that can be used to describe dealings with movable goods"[123]—a host of legal relationships were lumped together under the title of bailment.[124] This term is derived from the French *bailler,* "to deliver"; originally it even covered cases where the transferor (bailor) was parting with ownership. In more modern times, however, it has been restricted to the "delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor",[125] that is, to the temporary transfer of possession of a chattel which must ultimately be returned. Even in this limited form, therefore, it ranges from hire to mandate, from deposit to pledge, and it also includes gratuitous loans. To this day, bailment is a somewhat labyrinthine concept. It appears at various disjointed places in textbooks on personal property, torts and contracts. Bailment is often, or even generally, a contract, but it may also be independent of a contract. If it is a contract, how can the gratuitous bailment be reconciled with the doctrine of consideration? Various attempts to do so are puzzling and rather unconvincing.[126] Does bailment therefore have to be regarded as a relationship sui generis?[127] We cannot pursue these questions. To a certain extent, however, the law of bailment has been set, since the great and celebrated case of *Coggs v, Bernard* (decided in 1703),[128] "upon a much more rational footing".[129] In an elaborate judgment, Sir John Holt isolated and distinguished six sorts of bailment and determined the liability of the bailee according to his benefit derived from the individual type of transaction.[130] This analysis is squarely based on Roman law;[131] it is through *Coggs v. Bernard* (and the subsequent

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[123] Pollock and Maitland, vol. II, p. 169.

[124] Cf. Pollock and Maitland, vol. II, pp. 169 sqq.

[125] Joncs, *Bailments,* p. 1; cf. also Blackstone, vol. II, p. 452 ("a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee").

[126] This is how Lord Holt *{Coggs v. Bernard* (1703) 2 Ld Raym 909 at 919) argued: "But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management." But the borrower has not given his promise because the lender was parting with his goods; the delivery cannot be regarded as the "price" for the promise. Cf. Aliyah, *Rise and Fall,* pp. 177, 186 sq., who tries to expose the fallacy of reading the decision ahistorically in the light of modern doctrine.

[127] Cf. M.P. Furmston, in: Cheshire, Fifoot and Furmston, *Law of Contract* (11th ed. 1986). p. 83.

[12f]*(1703)2LdRaym909.

[129] Blackstone, vol. II, p. 453.

[130] (1703) 2 Ld Raym 909 at 912 sqq. On the influence of civilian jurisprudence on Sir John Holt, see Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons* (London, 1988), pp 271 sqq.

And Bracton, who has in turn drawn from Roman law.

elegant and comprehensive treatises of Jones and Story,[132] building on this cornerstone) that (the Roman) commodatum, depositum and pignus entered into English law.

II. DEPOSITUM

1. The nature of depositum; depositum miserabile

Depositum was similar to commodatum in many ways. It was a contract re,[133] it was a gratuitous transaction and, like the commodatary, the depositary did not have the possessory interdicts, but was a mere detentor.[134] The most significant difference, however, was that the object was handed over not to be used but to be kept in safe custody.[135] If a depositary used what had been given to him, he committed furtum usus and was liable to the depositor under the penal actio furti.[136] It is clear, therefore, that the balance of benefit and interest in depositum was entirely different from that in commodatum: it was only the bailor and not the bailee who could normally have an interest in and derive an advantage from this type of transaction.[137] This was bound to find its reflection in the standard of diligence that could be expected from the bailee. It would not have been reasonable to impose custodia liability on an altruistic holder such as the depositary, who kept the object not for his own but for the depositor's benefit. In fact, his liability was restricted to dolus and that, of course, could easily be (and actually was) rationalized on the basis of utility considerations: ". . . nam quia nulla utilitas eius versatur apud quern deponitur, merito dolus praestatur solus."[138] A further consequence flowed from this: if the deposited object was stolen, the depositor had to bring the actio furti against the thief.[139] Unlike the commodatary, the depositary was not eligible to do so: seeing that he was not liable towards the owner for this incident, and in this sense did not have a specific interest in the

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Cf. further Winfield, *Province,* pp. 92 sqq. Story and especially Jones, however, do not find much favour with modern common-law writers such as Tyler and Palmer, *Crossley Vaines on Personal Property* (5th ed., 1973), pp. 70, 86.

[133] Gai. D. 44, 7, 1, 5. A mere pactum de deponendo (unlike today) was unenforceable.

[134] Flor. D. 16, 3, 17, 1.

[135] Ulp. D. 16, 3, 1 pr.: "Depositum est, quod custodiendum alicui datum est." Ulpian carries on to provide an etymological explanation: "dictum ex eo quod ponitur: praepositio enim 'de' auget positum . . ."; but cf. also Paul. Sent. II, XII, 2 ("depositum est quasi diu positum") and Giuseppe Gandolfi, // *deposito nella problematical della giurisprtidenza romana* (1971), pp. 107 sqq.

[116] Cf. Gai. Ill, 196; Inst. IV, 1, 6.

[137] Vinnius, *Institutions,* Lib. Ill, Tit. XV (sub de deposito), 2: ". . . totum hoc negotium ex utilitate deponentis aestimetur"; 3: "In deposito nullum commodum est depositarii."

[138] Ulp. D. 13, 6, 5, 2; cf. also Ulp. D. 50, 17, 23 and Tafaro, *Regula,* pp. 242 sqq., 259 sqq.

Gai. Ill, 207: "Sed is apud quern res deposita est custodiam non praestai, tantumque in eo obnoxius est, si quid ipse dolo malo fecerit. qua de causa si res ei subrepta fuerit, quia restituendae eius nomine depositi non tenetur nee ob id eius interest rem salvam esse, furti agere non potest, sed ea actio domino competit"; Mod. Coll. X, II, 6.