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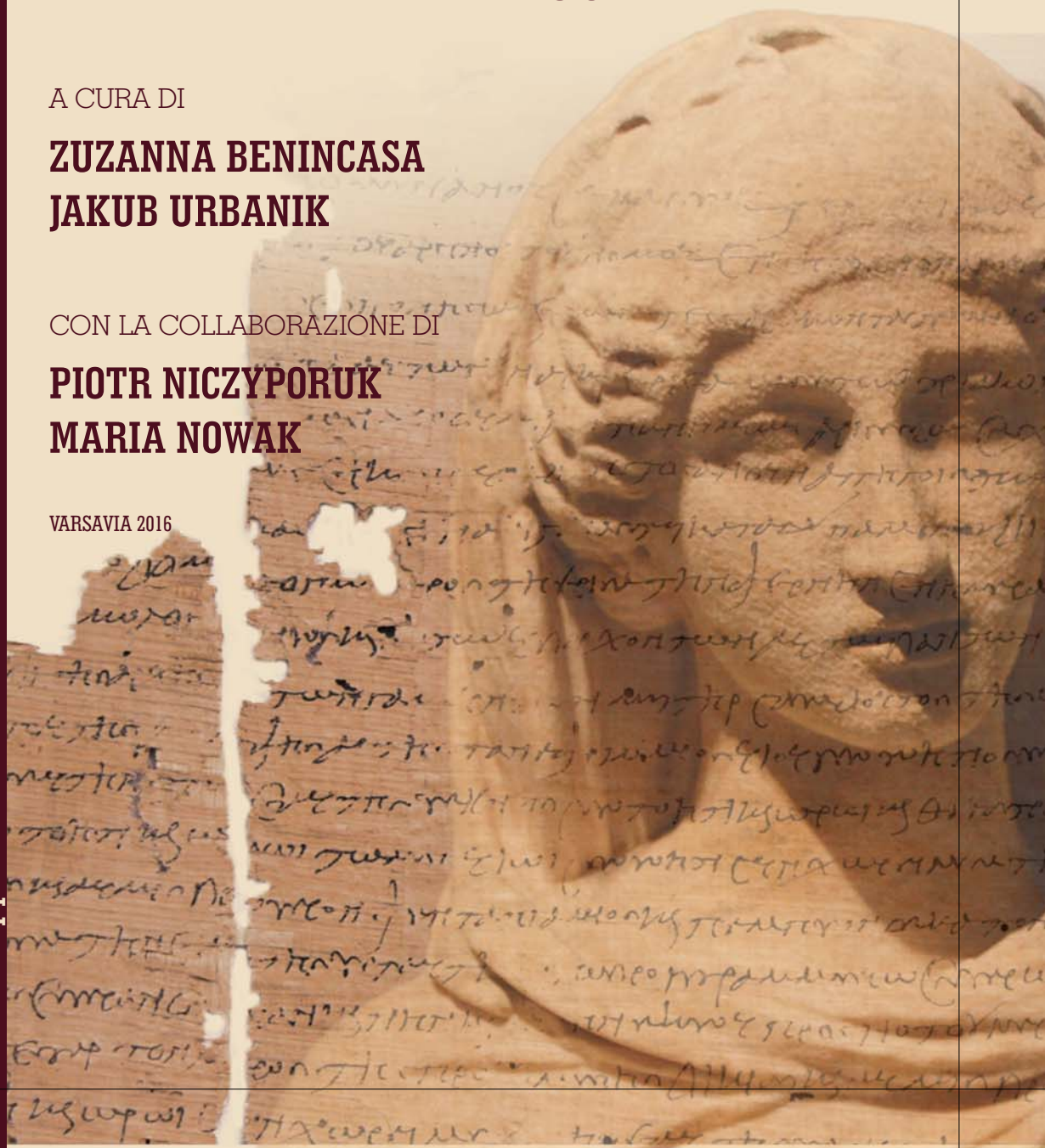
Supplement XXIX

MATER FAMILIAS
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA



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ZUZANNA BENINCASA
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CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
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Tomasz Palmirski

SOME REMARKS ON LEGAL PROTECTION OF COMMODANS PRIOR TO THE INTRODUCTION OF THE PRAETORIAN ACTIO COMMODATI

Commodatum is a contract of a gratuitous loan of chattels for use, with the obligation to restore the item within a definite period of time or after the time needed for a rational use.[1] Initially, c*ommodatum* occurred between friends, relatives and neighbours. For instance, Plautus, in his play *Aulularia*, depicts a greedy miser who guards a pot with gold. Fearing that one of his neighbours could notice his treasure, he instructs his servant to send away those who want to borrow a knife, axe, pestle or mortar by telling them that the items have been stolen. In another place, there is a cook who, leaving a house, informs that he is going to a neighbour to borrow a bread-pan:

> Plaut. *Aul*. 95–97:
> ... Cultrum, securim, pistillum, mortarium,
> Quae utenda vasa semper vicini rogant,
> Fures venisse atque abstulisse dicito ...

[1] Under vulgar law, a loan for use could also be given in return for a payment, and so, it was not distinguished from lease of a thing (*locatio conductio rei*). Justinian basically returned to a classic *commodatum* (*cf.* W. Litewski, *Rzymskie prawo prywatne* [Roman Private Law], Warszawa 2003 [5 ed.], p. 281).

Plaut. *Aul*. 400–401:
... Ego hinc artoptam ex proximo utendam peto
A Congrione ...

The sources quoted above indicate that the objects of *commodatum* were mainly everyday household items. Therefore, it should not be surprising that *commodatum* as a legally enforceable contract appeared relatively late in Roman law, only towards the end of the Republic, as litigation arising from a loan for use was rare.[2] Before that time, a loan for use, basing on *amicitia*, fell outside the sphere of law. For example, Plautus, quoted above, gives no information on the enforceability of *commodatum*. Similarly, Cato, in his work on farming,[3] only mentions that claims should be made on account of *commodatum*. He does not explain, however, how one should act in such a case. Legal sources also remain silent on the topic, and hence, in the doctrine of Roman legal science, there is a number of more or less probable hypotheses concerning the legal protection of *commodatum* at the time of the *legis actio* procedures.[4]

Avoiding hypothetical considerations which are not based on sources, one should rather ask whether before the implementation of the praetorian *actio commodati*,[5] any indirect protection of the commodans was pos-

[2] *Cf.* P. L. Zannini, *Spunti critici per una storia del commodatum*, Milano 1983, p. 115; J. Michel, *Gratuité en droit romain. Etudes d'histoire et d'ethnologie juridiques*, Bruxelles 1962, p. 140; C. M. Tardivo, *Studi sul commodatum*, *AG* 204 (1984), p. 225; On the date of the implementation of *actio commodati*, *cf.* above all, J. Słonina, '*Actio commodati* w prawie rzymskim' [*Actio commodati* in Roman law], *Prawo Kanoniczne* 27.3–4 (1984), pp. 203; 204 and the sources quoted therein.

[3] Cat. *de agr*. 5.3: '... iniussu domini credit nemini; quod dominus crediderit, exigat. satui semen, cibaria, far, vinum, oleum mutuum dederit nemini. duas aut tres familias habeat, unde utenda rogat et quibus det, praeterea nemini'.

[4] The issue is discussed in detail by Słonina ('*Actio commodati*' [cit. n. 2], pp. 198; 199).

[5] Contractual responsibility which enabled the commodans to defend his rights appeared, as already mentioned, only towards the end of the Republic. The action mentioned above was based on *formula in factum concepta*. *Cf. D.* 13.6.1 *pr. Cf.* also, O. Lenel, *Das Edictum Perpetuum*, Leipzig 1927 (3 ed., hereinafter *EP*[3]), p. 252; C. A. Maschi, *La categoria dei contratti reali* (*Corso di diritto Romano*), Milano 1973, p. 150; Tardivo, *Studi* (cit. n. 2), p. 234. The *commodans* could also apply *formula in ius concepta* with the *bona fide*

clause. *Cf.* above all, W. Litewski, 'Das Vorhandensein der *formula in ius concepta* mit der bona-fide-Klausel bei der Leihe', *RIDA* 45 (1998), pp. 287–319; J. Zabłocki, 'Klauzula *ex bona fide* w formułce komodatu' [*Ex bona fide* clause in the formula *commodatum*], *Zeszyty Prawicze* 3.2 (2003), 343–355. It is clearly mentioned by Gaius in his *Institutiones* (Gai. 4.47): 'Sed ex quibusdam causis praetor et in ius et in factum conceptas formulas proponit, veluti depositi et commodati. Illa enim formula, quae ita concepta est IUDEX ESTO. QUOD A. AGERIUS APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM N. NEGIDIUM A. AGERIO DARE FACERE OPORTET EX FIDE BONA, EIUS IUDEX N. NEGIDIUM A. AGERIO CONDEMNATO, NISI RESTITUAT. SI NON PARET, ABSOLVITO, in ius concepta est. At illa formula, quae ita concepta est IUDEX ESTO. SI PARET A. AGERIUM APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE EAMQUE DOLO MALO N. NEGIDII A. AGERIO REDDITAM NON ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM IUDEX N. NEGIDIUM A. AGERIO CONDEMNATO. SI NON PARET, ABSOLVITO, in factum concepta est. Similes etiam commodati formulae sunt'. It is hard to say whether formula *in ius concepta* was created prior to *formula in factum*. This issue is disputable in Roman legal science. *Cf.* E. Levy, 'Zur Lehre von den sog. *actiones arbitrariae*', *ZRG RA* 36 (1915), p. 1; F. Schulz, *Classical Roman Law*, Oxford 1951, p. 513; M. Kaser, '*Oportere* und *ius civile*', *ZRG RA* 83 (1966), p. 30; Maschi, *op. cit.*, pp. 218; 231; Tardivo, *op. cit.*, p. 240. The fact that the formula *in ius* was mentioned first seems to indicate that it was applied more frequently. *Cf.* F. Pastori, 'Sulla duplicità' formulare dell'*actio commodati*', *Labeo* 2 (1956), pp. 89 –94; A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford 1965, p. 167. It is also questionable whether the word *veluti* means 'that is' or 'such as'. Hence, it is unclear if the mention of a deposit and loan in the quoted passage of *Institutiones* should be regarded only as providing examples. Given that the text has the character of a textbook, the second possibility is more probable. It is known that at that time, other legal relationships such as a pledge, *negotiorum gestio* or *fiducia* also had a double formula. Due to the *Institutiones* having the character of a textbook, Gaius did not quote the entire formula of *commodatum*. Instead, he only stated that it was similar (*similes*) to the quoted formula of a deposit. The difference probably came down to the extent of responsibility. The formula *in factum* for a deposit contained *dolus* as the basis of responsibility, whereas the occurrence of *dolus* was not required in the case of *actio commodati* as the commodatarius was responsible for *custodia*. However, the formula *in ius* for *actio commodati*, as the formula of *actio depositi*, was *ex fide bona*. As in the case of all the *bonae fidei iudicia*, after the indication of the contractual relationship in *intentio*, in *condemnatio*, the judge was given the power to pass a verdict according to the principles of good faith, i. e. norms of contractual honesty. *Cf.* Lenel, *EP*[3], p. 253; G. Segrè, 'Sul'età dei giudizi di buona fede di commodato e di pegno', [in:] *Scritti vari*, Torino 1953, pp. 61–63; B. Kübler, 'Die Konträrklagen und das Utilitätsprinzip', *ZRG RA* 38 (1917), pp. 75–90; B. Biondi, '*Iudicia bonae fidei*', *Annali Palermo* 7 (1918), pp. 261–265; W. Kunkel, '*Fides* als schöpferrisches Element im römischen Schuldrecht', [in:] *Festschrift Koschaker* II, Weimar 1952, p. 3, n. 2; G. I. Luzatto, '*Commodati vel contra*', *Labeo* 2 (1956), pp. 358–362. On the contrary: Levy, *op. cit.*, pp. 1–9; idem, *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* II 1, Berlin 1922, pp. 52–57; idem, 'Neue Lesung von Gai 4.62', *ZRG RA* 49 (1929), pp. 472; 473; M. Kaser, *Quanti ea res est*, München 1935, p. 72; idem, *Oportere* (cit. n. 5), p. 30; idem, *Das römische Privatrecht* I, München 1971 (2 ed., hereinafter *RPR* I[2]), p. 534. Admittedly, in

sible on the basis of general delictual liability which was put in place when the commodatarius exceeded the boundaries of trust. In other words, the question is whether *actio legis Aquiliae*, *actio furti* and *condictio furtiva* could be applied in such cases.

The following discussion of this issue is based on texts written by classical jurists. Although the considerations contained in them refer to the time when *commodatum* as a legally enforceable contract already existed, in my opinion, the presented views of Roman jurisprudence can be helpful in an attempt to answer the question asked above.

The first of the actions mentioned above was applied in the case of the damage of a lent item caused by the *commodatarius*.

It was described by Paulus:

> *D.* 44.7.34.2 (Paul. 1 *conc. action.*): Hinc de colono responsum est, si aliquid ex fundo subtraxerit, teneri eum condictione et furti, quin etiam ex locato: et poena quidem furti non confunditur, illae autem inter se miscentur. et hoc in legis Aquiliae actione dicitur, si tibi commodavero vestimenta et tu ea ruperis: utraeque enim actiones rei persecutionem continent. et quidem post legis Aquiliae actionem utique commodati finietur: post commodati an Aquiliae remaneat in eo, quod in repetitione triginta dierum amplius est, dubitatur: sed verius est remanere, quia simplo accedit et simplo subducto locum non habet.

the praetorian edict, *commodatum* belonged to the category *de rebus creditis* and not to *de bonae fidei iudiciis* (*cf. D.* 12.1.1.1). Moreover, the sources provided in Gaius' *Institutiones* and Justinian's *Digest* (*D.* 17.2.38 *pr.*, *D.* 13.6.3.2) claiming that *actio commodati* had the clause *ex fide bona* were suspected of distortions and interpolations (this is discussed more broadly by Słonina, *Actio commodati* (cit. n. 2), pp. 209–221 and in the sources quoted therein). Nevertheless, some indirect evidence indicates that it was classified as a *bonae fidei iudicium*. Such evidence was, for instance, the possibility for a defendant sued for the recovery of the commodans' things to make a deduction on account of the expenses incurred by him.

The text comes from the sole book of the *Concurrent Actions*, in which the quoted jurist elaborates on the conflict between *actio commodati* and *actio legis Aquiliae*. Paulus concludes that *actio commodati* (a reipersecutory action) and *actio legis Aquiliae* (a penal action) cannot be cumulated. Applying *actio commodati* excludes the possibility to apply *actio legis Aquiliae – ope exceptionis* in the case of *actio commodati in factum*, and *ipso iure* when it is agreed that there was *actio commodati in ius* and *vice versa* (whereas the right to sue with *actio commodati* expired *ipso iure* as *actio legis Aquiliae* was an action *in ius*).

Obviously, penal actions are cumulated with the thematically corresponding reipersecutory actions. However, as in the postclassical period, including Justinian's law, *actio legis Aquiliae* was understood as a penal action with a reipersecutory function, it was not cumulated with other reipersecutory actions.[6] By means of this action, a plaintiff did not claim the exact value of an item, but its highest value in the last year (year of death of a slave or a gregarious animal) or in the nearest thirty days, which according to prevailing scientific opinions refers to the time counted backwards since the moment of committing an act.[7] Paulus indicates, as already mentioned above, that if *actio legis Aquiliae* was taken, *actio commodati* expired. The question is, however, whether taking *actio legis Aquiliae* for a surplus (*i.e.* what could not be recovered by means of a contractual action) was possible. The jurist quoted above rejects such a possibility as the difference with regard to the value of the item was of minor importance. Thus, after a chargeable value was once estimated, there was no need to claim the surplus. In fact, from a technical point of view, the text of Paulus does not cause major difficulties and follows a general criterion. As there is a conflict between the two actions, the commodans should choose one of them.

The same solution to the conflict between the actions appears again in the text written by Gaius:

[6] *Cf.* M. Kaser, *Römisches Privatrecht* II, München 1975 (2 ed., hereinafter *RPR* II[2]), p. 438.

[7] *Cf.* O. Lenel, *ZRG RA* 43 (1922), pp. 575–577, reviewing F. Jolowicz, 'The original scope of the *lex Aquilia* and the question of damages', *The Law Quarterly Review* 38; Kaser, *Quanti ea res est* (cit. n. 5), pp. 168–170; H. Ankum, '*Quanti ea res erit in diebus xxx proximis* dans le troisiome chapitre de la lex Aquilia: un fantasme florentin', [in:] *Mélanges Ellul*, Paris 1983, pp. 171–174.

> *D.* 13.6.18.1 (Gai. 9 *ed. prov.*): Sive autem pignus sive commodata res sive deposita deterior ab eo qui acceperit facta sit, non solum istae sunt actiones, de quibus loquimur, verum etiam legis Aquiliae: sed si qua earum actum fuerit, aliae tolluntur.

According to the jurist quoted above, *actio legis Aquiliae* conflicted with the actions arising from a deposit, *commodatum*, pledge contract – once a plaintiff chose one of them, the other expired (cf. also *D.* 13.6.7.1).

To sum up, in the case of restoring a damaged item, the commodans, depending on circumstances, could either accept the return (in such a case, a commodatarius could voluntarily pay for the damage; if he failed to do so, the commodans was entitled to take *actio legis Aquiliae* against him) or reject it and sue the commodatarius with *actio commodati* (as restoring the object in a worse condition than it was in when it was handed over was not treated as *reddere*)[8] or *actio legis Aquiliae*.

As mentioned at the beginning, under *commodatum*, the *commodatarius* was entitled to use someone else's item, however, he should do it according to its purpose and the terms of the contract. If, using the item, he exceeded the boundaries agreed upon by the parties, he committed *furtum usus*.

As this issue was frequently discussed by Roman jurists, there is a relatively great number of texts referring to this case. At first, literary sources will be discussed, though, as they also contain the relevant views of Roman jurisprudence.

[8] *D.* 13.6.3.1 (Ulp. 28 *ed.*): 'Si reddita quidem sit res commodata, sed deterior reddita, non videtur reddita, quae deterior facta redditur, nisi quid interest praestetur: proprie enim dicitur res non reddita, quae deterior redditur'. The proper meaning of *reddere* was analysed by jurisprudence, which stated that it did not mean any kind of return, but the return of an item in good condition. Thus, Ulpianus claimed that if the borrowed item was returned damaged, it should not be treated as returned. *Cf.* also, J. Słonina, 'Korzystanie z rzeczy użyczonej w prawie rzymskim' [Use of a lent item in Roman law], *Prawo Kanoniczne* 26.3–4 (1983), pp. 196–201.

> Val. Max. VIII 2.4: Multus sermo eo etiam iudicio manevit, in quo quidam furti damnatus est, qui quo, cuius usus illi Ariciam commodatus fuerat, ulteriores eius municipii divovectus esset. Quid aliud hoc loci quam verecundiam illius saeculi laudemus, in quo tam minuti a pudore excessus puniebantur?

> Gell. VI 15.1–2: (1.) Labeo in libro *de duodecim tabulis*' secundo acria et severa iudicia de furtis habita esse apud veteres scripsit, idque Brutum solitum dicere, et furti damnatum esse qui iumentum aliorsum duxerat, quam quo utendum acceperat, item qui longius produxerat, quam in quem locum petierat. (2.) Itaque Scaevola, in librorum quos *de iure civili* composuit XVI, verba haec posuit: 'Quod cui servandum datum est, si id usus est, sive quod utendum accepit, ad aliam rem atque accepit usus est, furti se obligavit'.

According to Valerius Maximus, a *commodatarius* who borrowed a horse in order to travel from Aricia to Rome, but went further to a hill situated far away from the city, was condemned for theft (*furtum*).

As far as the text written by Gellius is concerned, its analysis should begin with the second part, as the first person to formulate an abstract rule concerning the case described later as *furtum usus* was, according to Fritz Schulz[9] and Manuel García Garrido,[10] Quintus Mucius Scaevola, quoted therein. Scaevola claims that a person who makes use of an item deposited to him or is lent an item and makes use of it for other purposes than agreed upon is liable for *furtum*. In the first part, in turn, Brutus, quoted by Labeo, describes the case of a *commodatarius* who took a borrowed donkey further than it was agreed upon. The jurist mentioned above claims that the one who took the donkey to a different place than agreed upon was liable for theft. As always, case-based reasoning preceded the formulation of *regula iuris*. Still, it does not seem that the earlier jurisprudence distinguished any different issues or entered into further explanations. The first foundations of the concept were expressed in the rule mentioned above. Labeo himself considers this interpretation strict

[9] F. Schulz, *Prinzipien des römischen Rechts*, München 1934, p. 43.

[10] M. J. García Garrido, 'El *furtum usus* del depositario y del comodatario', *AARC* IV (1981), p. 847.

and cruel. However, there is no mention of his opinion or changes introduced by him to the views of *veteres* as both *Digesta* and a preserved passage of *Noctes Atticae* contain no information about his point of view.

Thanks to the comments of Paulus, the views of Sabinus are known. The jurist is thought to have introduced a new component, and even if he was not its author, it is here that the component is mentioned for the first time in the sources:

> *D.* 47.2.40 (Paul. 9 *Sab.*): Qui iumenta sibi commodata longius duxerit alienave re invito domino usus sit, furtum facit.

According to that, a person who uses beasts of burden beyond the place which was agreed upon or makes use of things contrary to the will of their owner commits a theft. The component which had not occurred before was the fact of handling contrary to the will of *dominus* (cf. also Gai. 3.197). The same solution appears again in the text written by Pomponius:

> *D.* 47.2.77(76) *pr.* (Pomp. 21 *Quint. Muc.*): Qui re sibi commodata vel apud se deposita usus est aliter atque accepit, si existimavit se non invito domino id facere, furti non tenetur. sed nec depositi ullo modo tenebitur: commodati an teneatur, in culpa aestimatio erit, id est an non debuerit existimare id dominum permissurum.

As far as the precedential issues in the text are concerned, they include the fact that a person who, using an item in a way not agreed upon, was not aware that he acted against the will of the owner (commodans) was not regarded as liable for theft. It is worth noticing that the last quoted jurist does not clearly indicate the possibility to take *actio furti*,[11] but only states in which cases such an action does not occur. He mentions, in turn, those cases where *actio commodati*[12] can be applied.

[11] On the cases in which actions for theft were applied, *cf. infra*, pp. 647–651.

[12] *Cf.* also, Słonina, '*Actio commodati*' (cit. n. 2), p. 200; idem, 'Korzystanie z rzeczy użyczonej' (cit. n. 8), p. 203.

In the case of theft, apart from an objective factor *contrectatio*, the jurisprudence also required the occurrence of a subjective factor *animus furandi*.[13] Theft was always committed with *dolus malus* (*animus furandi*) of the culprit. In the case of *furtum usus*, it can be assumed that each time the commodatarius made use of an item beyond the boundaries agreed upon, he was regarded as a thief and was liable to *actio furti*. Despite that, he could be absolved from responsibility if he proved that he had not acted with bad intentions, *i.e.* he had not acted deliberately against the will of *dominus*. The lack of *dolus* had to be proven *apud iudicem* by the commodatarius. In order to allow him to do this, the formula based on *actio furti* included *exceptio* as well.

The issue of *furtum usus* is also discussed by Gaius in *Institutiones*:

> Gai. 3.196: Itaque si quis re, quae apud eum deposita sit, utatur, furtum committi; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti abligatur, veluti si quis argentum utendum acceperit, quasi amicos cenam invitaturus, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius aliquo duxerit, quod veteres scripserunt de eo, qui aciem perduxisset.

The jurist mentions an example of a lent horse, making a literal reference to the solution provided by *veteres*. The commodatarius obtains a horse in order to reach a certain place, but he rides on it further. The most frequent case (an example usually used by *veteres*) was taking a horse to war by the commodatarius. In *Institutiones*, Justinian outlines the whole evolution of liability in such a case: from the lack of distinction, where each case of the use different than agreed upon constituted *furtum usus*, to a clear-cut distinction depending on *animus furandi* introduced later.

> *I. Just.* 4.1.7: Placuit tamen eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, si se intellegant id invito domino facere eumque si intellexisset non permissurum, ac si permissurum credant, extra crimen videri: optima sane distinctione, quia furtum sine affectu furandi non committitur.

[13] On the topic of *animus furandi*, *cf.* G. Longo,'L'elemento soggettivo nel delitto di furto', [in:] *Studi in onore di Pietro De Francisci* III, Napoli 1956, pp. 251–283; B. Albanese, *s.v.* 'furto', *ED* XVIII (1969), pp. 313–318; Kaser, *RPR* I[2], p. 615, n. 6.

The same issue, as mentioned before, was described *implicite* already by Pomponius (in *D.* 47.2.77[76] *pr.*), who complemented the rule of Quintus Mucius Scaevola.[14]

The second problem with regard to lending a horse and *furtum usus* committed in this context by the commodatarius is the issue of remedies which could be applied against him in such cases.

It was discussed, among others, by Ulpianus:

> *D.* 13.6.5.7 (Ulp. 28 *ed.*): Sed interdum et mortis damnum ad eum qui commodatum rogavit pertinet: nam si tibi equum commodavero, ut ad villam adduceres, tu ad bellum duxeris, commodati teneberis: idem erit et in homine. plane si sic commodavi, ut ad bellum duceres, meum erit periculum ...

In the passage quoted above,[15] the jurist argues that if the commodatarius committed *furtum usus* and a horse died, the commodatarius was liable to *actio commodati* as 'fur semper moram facere videtur'. Obviously, the very fact that a horse died constitutes the case of *vis maior*. The commodatarius would not be liable provided that the horse is lent for war and is killed on the battlefield. In such a case, the risk (*periculum*) is taken by the commodans. However, if a horse is not lent for war, and despite that fact, the commodatarius takes it to war, he is always liable, even in the case of force majeure.[16]

[14] *Cf.* García Garrido, 'El *furtum usus* del depositario' (cit. n. 19), p. 845.

[15] Some authors regard the text as not authentic; *cf.* F. Haymann, 'Textkritische Studien zum römischen Obligationrecht (Über Haftung für *custodia*)', *ZRG RA* 40 (1919), pp. 261–263; G. Beseler, 'Romanistische Studien', *TR* 8 (1928), p. 286; H. H. Pflüger, 'Zur lehre von der Haftung des Schuldners nach römischen Recht', *ZRG RA* 65 (1947), p. 128. In my opinion, it should be assumed that it is of a classical origin despite many grammatical and stylistic flaws resulting from summarising the considerations of Ulpianus by compilers; *cf.* W. W. Buckland, '*Diligens Paterfamilias*', [in:] *Studi Bonfante* II, Milano 1930, p. 93; G. MacCormack, '*Custodia* and *culpa*', *ZRG RA* 89 (1972), p. 210.

[16] *Periculum* can refer both to the risk taken by the owner of an item when it was damaged as a result of force majeure (this was the case of *periculum vis maiores*) and to the risk taken by a debtor remaining in a specific legal relationship, namely *periculum custodiae*. On these issues in the case of *commodatum*, *cf.* T. Palmirski, 'Stanowisko prawne stron kontraktu użyczenia w świetle poglądów rzymskiej jurysprudencji' [The legal standing of

The conflict between *actio commodati* and *condictio* (*ex causa*) *furtiva*, in turn, is mentioned by Pomponius and Paulus:

> *D.* 13.1.16 (Pomp. 38 *Quint. Muc.*): Qui furtum admittit vel re commodata vel deposita utendo, condictione quoque ex furtive causa obstringitur: quae differt ab actione commodati hoc, quod, etiamsi sine dolo malo et culpa eius interierit res, condictione tamen tenetur, cum in commodati actione non facile ultra culpam et in depositi non ultra dolum malum teneatur is, cum quo depositi agentur.

> *D.* 44.7.34.1 (Paul. 1 *de conc. action.*): Si is, cui rem commodavero, eam subripuerit, tenebitur quidem et commodati actione et condictione, sed altera actio alteram peremit aut ipso iure aut per exceptionem, quod est tutius.

Expanding on the concept of Quintus Mucius presented in the above-cited Gell. VI 15.2, Pomponius accepted *condictio* (*ex causa*) *furtiva* in the case of the unlawful use of a lent item.[17] Paulus, in turn, agreed to grant the commodans such a protection when the commodatarius secretly got rid of the object which was lent to him for use. According to the jurist, taking one action excludes the possibility to take the other – either *ipso iure* or, which seems to be more appropriate, *per exceptionem*.[18]

It was already outlined above that a person who committed *furtum usus* (including a commodatarius who made use of the object contrary to the contract) was also liable to *actio furti*. This problem was discussed again by Iulianus (his solution is evoked by Ulpianus), Iavolenus and Pomponius quoted above:[19]

the parties in loan for use in the light of the Roman jurisprudence], *Czasopismo Prawno-Historyczne* 58.2 (2006), pp. 110–115.

[17] Similarly, D. Liebs, *Die Klagenkonkurrenz im römischen Recht* (*Zur Geschichte der Scheidung von Schadenersatz und Privatstrafe*), Göttingen 1972, p. 110, n. 133. On the contrary: G. Scherillo *s.v.* 'commodato [diritto romano]', *ED* VII (1960), pp. 985; 986, who claims that the cited jurist quotes the solution of Q. M. Scaevola as regards *actio furti* and *condictio furtiva*, while he himself is the author of the comment on *actio commodati*.

[18] *Cf.* Levy, *Die Konkurrenz* (cit. n. 5), pp. 104–108.

[19] *D.* 47.2.77[76] *pr.*, *supra*, p. 648.

> *D.* 13.6.5.7 (Ulp. 28 *ed.*): Quin immo et qui alias re commodata utitur, non solum commodati, verum furti quoque tenetur, ut Iulianus libro undecimo digestorum scripsit. denique ait, si tibi codicem commodavero et in eo chirographum debitorem tuum cavere feceris egoque hoc interlevero, si quidem ad hoc tibi commodavero, ut caveretur tibi in eo, teneri me tibi contrario iudicio: si minus neque me certiorasti ibi chirographum esse scriptum, etiam teneris mihi, inquit, commodati: immo, ait, etiam furti, quoniam aliter re commodata usus es, quemadmodum qui equo, inquit, vel vestimento aliter quam commodatum est utitur, furti tenetur.
>
> *D.* 47.2.72(71) *pr.* (Iav. 15 *ex Cassio*): Si is, cui commodata res erat, furtum ipsius admisit, agi cum eo et furti et commodati potest: et, si furti actum est, commodati actio extinguitur, si commodati, actioni furti exceptio obicitur.

According to Iulianus and Ulpianus, the commodatarius who committed *furtum usus* was liable not only to *actio commodati*, but also – as in the case of a thief – to *actio furti*. The question appears whether this is the case of the cumulation of a reipersecutory action (*actio commodati*) and a penal action (*actio furti*) or the conflict between the two. At first glance, the text could suggest the former. Nevertheless, there are undoubtedly not enough reasons to think so. Moreover, the passage written by Iavolenus runs counter to it. The text clearly indicates that the said actions are not cumulated, and one can take either *actio commodati* or *actio furti* and never both of them. According to it, if *actio furti* (*nec manifesti*) is taken, *actio commodati* expires (*ipso iure*) and *vice versa*. If the commodans takes *actio commodati*, *actio furti* expires *ope exceptionis*, which means that there is a competitions of actions, not their cumulation.[20]

The fact that there is no cumulation of a penal action (*actio furti*) and a reipersecutory action (*actio commodati* or *condictio* [*ex causa*] *furtiva*) should not be surprising, whereas in the case of *furtum rei*, the cumulation of a penal action (*actio furti*) and a reipersecutory action (*rei vindicatio*, *condictio* [*ex causa*] *furtiva*)[21] is acceptable. Hence, it can be assumed that the

[20] On the competition of of these actions *cf.* Levy, *Die Konkurrenz* (cit. n. 5), pp. 95–102; Liebs, *Die Klagenkonkurrenz* (cit. n. 17), pp. 87–89.

[21] *Cf.* Liebs, *Die Klagenkonkurrenz* (cit. n. 17), pp. 92; 93; A. L. Olde Kalter, '*Condictio ex causa furtiva* und *dominium*', *TR* 38 (1970), pp. 107–134.

jurisprudence considered *furtum usus* less serious than *furtum rei*. It is probably only due to the attachment to tradition that during the time of classical law (including Justinian's law), the use of an item beyond the scope agreed upon was treated as a theft. From a structural point of view, *furtum usus* is objectively less unlawful than other types of theft.[22]

To sum up the considerations presented above, it may be stated that prior to the introduction of the praetorian *actio commodati*, the facts from which the plaintiff drew his claim, later described as *commodatum*, were probably protected on the basis of general principles concerning delictual liability arising from *damnum iniuria datum* and *furtum usus*.[23]

What is worth remembering, however, is the fact that liability arising from the first offense mentioned above was not entirely regulated until *lex Aquilia*, which, according to Ulpianus (*D.* 9.2.1 *pr.*), abrogated the earlier legislation on unjustifiable property damage.[24] It was one of the first *plebiscita* passed after *lex Hortensia*, probably in 286 BC.[25]

In turn, the earliest known reference to the case described later as *furtum usus*, as it was already mentioned above,[26] was in the text written by

[22] *Cf.* L. Paricio Serrano, 'La responsabilidad en el comodato romano a través de la casuistica jurisprudencial', [in:] *Estudios J. Iglesias* I, Madrid 1988, p. 468.

[23] *Cf.* also: Słonina, '*Actio commodati*' (cit. n. 2), pp. 202; 203 and 220. According to the quoted author, the assumption that *actio furti*, *condictio furtiva* or *actio legis Aquiliae* could be taken prior to the implementation of *actio commodati* is based on the passages discussing the concurrence of these actions. *Cf.* also, Kaser, *RPR* I[2], p. 533.

[24] Some cases of the damage done to another's property were punishable crimes already in the Twelve Tables. For instance, *os fractum* inflicted on another's slave was punishable by paying 150 asses to the slave's owner (Tab. VIII 3). *Cf.* also, Kaser, *RPR* I[2], pp. 156; 157.

[25] On the date of the passing of the law, *cf.* A. Biscardi, 'Sulla data della *lex Aquilia*', [in:] *Scritti in memoria di Antonino Giuffré* I, Milano 1967, p. 81; A. Guarino, 'Tagliacarte', *Labeo* 14 (1968), p. 120; F. Pringsheim, 'The origin of the *lex Aquilia*' [in:] *Mélanges Lévy-Bruhl*, Paris 1959, p. 233.

[26] *Cf. supra*, p. 645.

Brutus,[27] living in the 2nd century BC. However an abstract rule concerning *furtum usus* was first formulated by Quintus Mucius Scaevola,[28] living in the 1st century BC, the time when the preatorian *actio commodati* had probably already been implemented.

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[27] Marcus Iunius Brutus, praetor in 142 BC. He was one of the three jurists (together with Manius Manilius and Publius Mucius Scaevola) who according to the Romans themselves laid foundations for the civil law.

[28] Quintus Mucius Scaevola Pontifex (died in 82 BC), the son of Publius Mucius Scaevola (consul in 133 BC and also Pontifex Maximus) was a politician of the Roman Republic and an important early authority on Roman law. *Furtum usus* is also discussed in three more legal sources from the period of classical law. Gaius and Pomponius quoted above (*cf. supra*, pp. 647; 649) and Paulus in *D.* 47.2.1.3: 'Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionesve ...' [= *IJust.* 4.1.1]. The definition was probably formulated in the post-classical period. *Cf.* Kaser, *RPR* I[2], p. 615, n. 11 and 16.