

Some Remarks

on D. 16,3,15 and D. 50,17,45pr

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Loan for use (*commodatum*) is an agreement of gratuitous allowing somebody an object in order to use it and with an obligation to return it within the appointed time limit or else after the time indispensable for sensible use. Although loan for use never played as important role as sale (*emptio-venditio*) or rent (*locatio-conductio rei*) in the legal turnover of *Imperium Romanum*, it was practical in everyday life by enabling somebody to use other person's thing free of charge. Despite being not a very common contract in the legal turnover, nevertheless, as a legal transaction it raised numerous doubts as far as the interpretation and the development of general notions is concerned.

The most frequent object of loan for use were things individually indicated which couldn't get worn away when used appropriately¹. In

¹ The legal sources mention animals, silver utensils, slaves, clothes etc. (see G.3,196, D.13,6,5,7-8, D.13,6,5,10, D.13,6,5,14, D.13,6,17,3-4, D.13,6,18,3-4, D.13,6,21,1, D.13,6,23, D.44,7,1,4). However, the literary sources point out to things of lower value, but equally useful domestically. For example Plaut in his comedy *Aulularia* depicts a greedy miser who guards a vat full of gold that he had found. Worrying that any of the neighbours could spot his treasure, he tells his servant to send away those who would like to lend for use a knife, an axe, a pestle or a mortar saying that those things were stolen. In another passage he mentions a chief who leaves the house and says that he's going to the neighbour to lend for use an oven-pan (Plaut., *Aul.*, 95; Plaut., *Aul.*, 400). The above-quoted sources point out that the object of lending for use were mostly things of everyday and domestic use. See also C. FERRINI, *Storia e teoria del contratto di commodato nel diritto romano*, in *Opere di Contardo Ferrini*, III, Milano 1929, 141; F. PASTORI, *Il commodato del diritto romano (Contributi all*

some cases, however, things brought into use were also objects indicated as to their kind². It is evident from Ulpianus' commentary *ad edictum*³ that in the early period in his edict the praetor put under protection probably only personal estate things⁴. Such an interpretation of the edict formula was supported by Labeo quoted by Ulpianus. However, Cassius who was also mentioned therein, assumed that an object of lending for use could also be a real estate⁵,

studio della responsabilità contrattuale), Milano 1954, ff 126; M. KASER, *Das römische Privatrecht*² I, München 1971, 533, fn.2.

² D.13,6,3,6 (*Ulpianus libro vicensimo octavo ad edictum*): *Non potest commodari id quod usu consumitur, nisi forte ad pompam vel ostentationem quis accipiat*. The jurist claims that the thing which gets worn away by using it could not be an object of lending for use unless it was lent *ad pompam vel ostentationem*, i.e. in order to show off, to boast with the fact of possessing it. On the other hand, Gaius (D.13,6,4) described a case of lending for use money which was to serve in another legal act – *mancipatio nummo uno*. The lent coins were not to be used up (spent) by the borrower but were to be put on the weight and handed in as the symbolic payment. See also P. BONFANTE, *Corso di diritto romano*², II.1, Milano 1966, ff 91; C.A. MASCHI, *La categoria dei contratti reali (Corso di diritto romano)*, Milano 1973, 286.

³ D.13,6,1pr-1 (*Ulpianus libro vicensimo octavo ad edictum*): (*pr*) *Ait pretor: "Quod quis commodasse dicitur, de eo iudicium dabo"* (1) *Huius edicti interpretatio non est difficilis. Unum solummodo notandum, quod qui edictum concepit commodati fecit mentionem, cum Pacunius utendi fecit mentionem. Inter commodatum autem et utendum datum Labeo quidem ait tantum interesse, quantum inter genus et speciem: commodari enim rem mobilem non etiam soli, utendum dari etiam soli. Sed ut apparet, proprie commodata res dicitur et quae soli est, idque et Cassius existimat. Vivianus amplius etiam habitationem commodari posse ait.*

⁴ See F. PASTORI, *op. cit.* (fn.1), ff 21, ff 44.

⁵ Also Ulpianus points out to such possibility in D.13,6,5,15 (*Ulpianus libro vicensimo octavo ad edictum*): *... usum autem balinei quidem vel porticus vel campi uniuscuiusque in solidum esse...* The jurist states that everyone can make use of baths, a portico or a field. And although in the above-quoted excerpt there is no direct mention of loan for use of the listed objects but only of their use (*usus*), it is evident that the author meant the lending for use of those objects from placing this passage in the Justinian's Digests (in the title *De commodati vel contra*) as well as in the book 28 of the commentary on the edict (*De rebus creditis*) which is the book treating of the act of lending for use (comp. O. LENEL, *Palingenesia iuris civilis*, II, Lipsiae 1889, Ulpianus no. 807). It is possible that in the discussion on the object of an act of lending for use an ongoing disagreement between the school of the Proculians (Labeo) and the Sabinians (Cassius) took place. For the schools of law in ancient Rome see J. KODRĘBSKI, *Sabinianie i Prokulianie. Szkoły prawa w Rzymie wczesnego cesarstwa*, Łódź 1974; see also W. LITEWSKI, *Jurysprudencja Rzymska*, Kraków 2000, 54,55.

and Vivianus claimed the *habitatio* (the law of inhabiting) lending for use valid and protected by law. This issue was however discussed by the jurists who tried to establish whether the gratuitous *habitatio* could be considered as *precarium*, donation or loan for use⁶.

Taking into consideration the aforementioned claims on the notion of loan for use contract, there is one more question that needs a further and more detailed discussion with regard for the juxtaposing opinions of the jurists found in the sources. The issue concerns loan for use to the owner of a thing belonging to him, which was theoretically possible since the lending party could be also the possessor of the thing or its detentor. A general rule according to which *res sua* cannot be an object amongst other was formulated by Iulianus⁷. Ulpianus' tone of statement was similar⁸. Despite suspicions of interpolations of both passages⁹, there is a lack of formal grounds for denying them completely¹⁰. Let alone the fact that the legal acts listed in the above-quoted passages do not overlap, which inclines to assume that those enumerations are only exemplary ones, it should be supposed that the rule expressed in them sounds unequivocally. A contract, which an object of, is a thing owned by the depositary, the person who lend this object for use or had it in *precarium*, a tenant, a buyer or a lienor cannot come into effect. It is also confirmed by Iavolenus in a particular example¹¹. The jurist claims that a lease

⁶ See D.39,5,9pr; D.43,26,15,1; G.4,153; D.39,5,32. See J. SŁONINA, *Commodare habitationem*, PK 25 (1982), ff 199; C. FERRINI, *op. cit.* (fn.1), ff 129; J. SONDEL, *Precarium w prawie rzymskim*, Kraków 1971, 37.

⁷ D.16,3,15 (*Iulianus libro tertio decimo digestorum*): *Qui rem suam deponi apud se patitur vel utendam rogat, nec depositi nec commodati actione tenetur: sicuti qui rem suam conducit aut precario rogat, nec precario tenetur nec ex locato.*

⁸ D.50,17,45pr (*Ulpianus libro trigensimo ad edictum*): *Neque pignus neque depositum neque precarium neque emptio neque locatio rei suae consistere potest.*

⁹ See among others O. LENEL, *Quellenforschungen in den Edictcommentaren*, ZSS 3 (1882), 113; R. DE RUGIERO, *Depositum vel commodatum (Contributo alla teoria delle interpolazioni)*, BIDR 19 (1907), 22, fn.6; A. CARCATERRA, *I negozi giuridici sulla cosa propria*, Annali Bari 3 (1940), ff 23; B. ALBANESE, *Conductio suae rei*, BIDR 62 (1959), 124, 132, fn.33; P. ZAMORANI, *Precario habere*, Milano 1969, ff 256; M. KASER, *Zur Geschichte des Precarium*, ZSS 89 (1972), 140.

¹⁰ See J. SONDEL, *op. cit.* (fn.6), ff 47; J. A. C. THOMAS, *Conductio rei suae*, Index 2 (1971), 287.

¹¹ D.41,3,21 (*Iavolenus libro sexto epistularum*): *Ei, a quo fundum pro herede possidendo capturus eram, locavi eum: an ullius momenti eam locationem existimes,*

contract or a contract of ground sale had no legal validity in case of the estate being owned by the tenant or the buyer and the leaseholder or the seller was the owner (*pro herede*)¹².

The problem of establishing whether the general rule contained in D.16,3,15 and in D.50,17,45pr. applied without exceptions arises from the existing sources which allow possibility of concluding a lease contract or *precarium* providing that their object was a thing owned by the taker. The question of possible allowing *commodatum rei suae* is additionally complicated by the fact that both literary as well as legal sources do not mention it. However, because of the similarity of the purpose of *precarium*, lease or lending for use (it concerns making possible for the taker of a thing to use it, provided that in case of *locatio conductio rei* it is against payment and in cases of *commodatum* and *precarium* it is free of charge) in our considerations upon allowing the *commodatum rei suae* we should rely on analogous cases of letting an object out for lease or *precarium* to its owner rather than to reckon that it was unacceptable since there are no opinions in the sources withstanding the aforementioned general rules of Iulianus and Ulpianus.

Ulpianus¹³ and Paulus¹⁴ are in favour of *locatio conductio rei*'s validity. The first of the jurists after Pomponius gives an example of

quaero: quod si nullius momenti existimas, an durare nihilo minus usucapionem eius fundi putes. item quaero, si eidem vendidero eum fundum, quid de his causis, de quibus supra quaesii, existimes. Respondit: si is, qui pro herede fundum possidebat, domino eum locavit, nullius momenti locatio est, quia dominus suam rem conduxisset: sequitur ergo, ut ne possessionem quidem locator retinuerit, ideoque longi temporis praescriptio non duravit. in venditione idem iuris est, quod in locatione, ut emptio suae rei consistere non possit.

¹² See M. KASER, *Studien zum römischem Pfandrecht, III: Besitzpfand und „besitzloses“ Pfand*, SDHI 45 (1979), ff 45.

¹³ D.7,4,29pr (Ulpianus libro septimo decimo ad Sabinum): *Pomponius quaerit: si fundum a me proprietarius conduxerit eumque fundum vendiderit Seio non deducto usu fructu, an usum fructum per emptorem retineam? Et ait, licet proprietarius mihi pensionem solverit tamen usum fructum amitti, quia non meo nomine, sed suo fructus est emptor: teneri plane mihi ex locato proprietarium, quanti mea interfuit id factum non esse. quamquam si a me conductum usum fructum quis alii locaverit, retinetur usus fructus: sed si proprietarius eum locasset suo nomine, dicendum amitti: non enim meo nomine fruitur colonus.*

¹⁴ D.13,7,37 (Paulus libro quinto ad Plautium): *Si pignus mihi traditum locassem domino, per locationem retineo possessionem, quia antequam conduceret debitor, non fuerit eius possessio, cum et animus mihi retinendi sit et conducenti non sit*

letting an estate out for lease by a person who uses it (*ususfructus*) to its owner who next sells the estate to a third party. Pomponius claims that although the user forfeited a claim to the purchaser of the estate, he maintained his claim against the seller on the grounds of the binding lease contract. Whereas Paulus allows the use of a thing under lien by its owner (lienee) on the grounds of a lease contract between the lienee and the lienor as well as using by the owner-leaseholder the services of a slave who belonged to him and at the same time was the object of *usufructus* of the tenant¹⁵.

However, Florentinus¹⁶ and Ulpianus¹⁷ allow the possibility of using a thing by the lienee also as a *precario tenens*. What is more, Ulpianus claimed that this view was very useful since the creditors were asked to allow *precarium* by people who had given them things under lien¹⁸.

On the basis of the aforementioned excerpts it becomes evident that despite the general rule of invalidity of *precarium* or *locatio conductio rei suae* it was possible to conclude a valid contract which as its object had a thing owned by a *precario tenens* or a tenant (and

animus possessionem apiscendi. D.9,4,19,1 (Paulus libro vicensimo secundo ad edictum): *Si servi, in quo usus fructus alienus est, dominus proprietatis operas conduxerit ...*

¹⁵ See TH. MAYER-MALY, *Locatio conductio* (Eine Untersuchung zum klassischen römischen Recht), Wien-München 1956, 63; S. TONDO, „Pignus” e „precarium”, LABEO 5 (1959), ff 175; M. KASER, *op. cit.* (fn.12), 54, fn.193.

¹⁶ D.13,7,35,1 (Florentinus libro octavo institutionum): *Pignus manente proprietate debitoris solam possessionem transfert ad creditorem: potest tamen et precario et pro conducto debitor re sua uti.*

¹⁷ D.43,26,6,4 (Ulpianus libro septuagensimo primo ad edictum): *Quaesitum est, si quis rem suam pignori mihi dederit et precario rogaverit, an hoc interdictum locum habeat, quaestio in eo est, ut precarium consistere rei suae possit. Mihi videtur verius precarium consistere in pignore, cum possessionis rogetur, non proprietatis, et est haec sententia etiam utilissima: cottidie enim precario rogantur, creditores ab his, qui pignori dederunt, et debet consistere precarium.*

¹⁸ See S. PEROZZI, *Istituzioni di diritto romano*² II, Roma, 291, fn.4; A. CARCATERRA, *op. cit.* (fn.9), 20, 25; A. ALBANESE, *op. cit.* (fn.9), ff 126, ff 145; S. TONDO, *op.cit.* (fn.15), 171, 174; J. SONDEL, *op. cit.* (fn.6), 45, 135; M. KASER, *op. cit.* (fn.12), 48.

by way of analogy¹⁹, despite the lack of any mention in the sources, by the one lending for use)²⁰.

In my opinion, the above described cases, especially the one contained in D.43,26,6,4, as exception from the general rule concern such a situation when before concluding a lease or a loan for use (*rei suae*) contract the owner of a thing is legally limited in using it on the grounds of e.g. a previously concluded lien contract. Wanting to use the thing, the only way he can do it is to rent it from the lienor or lend for use or *precarium*²¹. Whereas actual impossibility of using a thing which is in possession of other person (who, as a matter of fact, has no title to it) by its owner does not account for concluding a binding agreement of using it (in the grounds of lease, *precarium* or loan for use). It seems that such a contract would be contradictory with the owner's authority. In order to use a thing owned he should have, instead of asking for concluding such a contract, make use of the protection of his ownership (for example by way of *rei vindicatio*). Since the expression *consistere potest* included in D.50,17,45pr. translates also as "cannot last" (have no legal implications in future)²², it has to be assumed that above mentioned rule concerns also cases in which an object of an agreement started to be owned by the parts of the contract within the duration of it. This issue was discussed among others by Ulpianus²³. The jurist claims that a tenant of a house who

¹⁹ Explanation of the reason I allow the analogy in this case see supra.

²⁰ As absolutely binding the *locatio conductio rei suae* in the classical and Justinian's law is adopted by, among others, A. CARCATERRA, *op. cit.* (fn.9), ff 14, Th. MAYER-MALY, *op. cit.* (fn.15), ff 114, H. KUPISZEWSKI, *Locatio conductio rei suae, Labeo* 3 (1957), ff 348; whereas M. KASER, *op. cit.* (fn.12), 45, fn. 159; S. TONDO, *op. cit.* (fn.16), ff 287 and J. A. C. THOMAS, *op. cit.* (fn.10), 287 claim that this rule had numerous exceptions which are described by the above-quoted sources; considering enforcing the rule of inadmissibility *precarium rei suae* and exceptions from it see A CARCATERRA, *op. cit.* (fn.9), ff 24; S. TONDO, *op. cit.* (fn.15), 161; J. SONDEL, *op. cit.* (fn.6), 44, 130; P. ZAMORANI, *op. cit.* (fn. 9), ff 243 and M. KASER, *op. cit.* (fn.9), ff 135.

²¹ See J. SŁONINA, *Commodatum rei suae, PK* 24 (1981), 263.

²² See J. SONDEL, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, s.v. *consisto*.

²³ D.19,2,9,6 (*Ulpianus libro trigesimo secundo ad edictum*): *Si alienam domum mihi locaveris eaque mihi legata vel donata sit, non teneri me tibi ex locato ob pensionem: sed de tempore praeterito videamus, si quid ante legati diem pensionis debetur: et puto solvendum.*

became its owner in consequence of a bequest or a donation made to him was not obliged to pay a rent to the leaseholder from that moment on. Whereas, as regards the period preceding acquisition of property by a tenant, he is obliged to pay the rent²⁴. And although Ulpianus did not state it straightforwardly, it is inferred from the general rule that he formulated in D.50,17,45pr.

²⁴ See M. KASER, *op. cit.* (fn.12), ff 46.