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"Das 'depositum irregulare' als Kredit-geschäft", Klaus Geiger, München 1961 : [recenzja]

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L'ouvrage est nanti d'un index des sources citées.

[Cracovie]

Wiesław Litewski

Klaus Geiger, *Das depositum irregulare als Kredit-geschäft*, München 1961, pp. VIII+58.

The problem of the so called *depositum irregulare* has for long been an object of special interest for many Romanists¹. The lack of precision and clarity or, as some assume — the contradictions, which appear in the comparatively numerous sources have led the scholars to work out various theories and hypotheses. Obviously the irregular deposit belongs to the most controversial problems in the Romanistics and this fact has found its expression in a great number of research studies².

Recently this problem has been dealt with by Klaus Geiger in his doctoral dissertation. Owing to the nature of the theme the author has not only presented the respective Roman laws in the period in question, though they seem to be the main object of his interest, but also he has concentrated on the appearance and effect of the irregular deposit in the German common law and in the law of the papyri. This treatment of the subject has made Geiger divide his book into two parts (1. Teil: *Das depositum irregulare im gemeinen deutschen Recht und in den Papyri*; 2. Teil: *Das depositum irregulare*

¹ Th. Niemeyer, *Depositum irregulare*, Halle 1889; J. Naber, *Mnemosyne — Bibliotheca Philologica Batava* NS vol. 34 (1906) pp. 59–64; C. Longo, *BIDR* 18 (1906) pp. 121–156; *idem*, *Il deposito* (Corso) Milano 1933; G. Segré, *BIDR* 19 (1907) pp. 197–234; *Scritti vari*, pp. 199–248; B. Kübler, *ZSS* 29 (1908); P. Collinet, *Études historiques sur le droit de Justinien*, I, Paris 1912; F. Bonifacio, *BIDR* NS 8–9 (1948) pp. 80–152; F. Schulz, *Scritti Ferrini*, IV, pp. 254–263; P. Frezza, *Symbolae Taubenschlag*, I, pp. 139–172; E. Kiessling, *Akten des VIII Kongress für Papyrologie*, pp. 69–77 and the lit. cited here.

² M. Auger, *Du dépôt en droit romain*, Paris 1881; E. Cuvelier, *Du dépôt en droit romain*, Paris 1875; C. Ewald, *Du dépôt en droit romain*, Paris 1871; L. Lamarque, *Du dépôt en droit romain*, Paris 1875; C. Pages de Beaufort, *Du dépôt en droit romain*, Toulouse 1877; P. Motet, *Du dépôt* Paris 1889; H. Best, *Darlehn und depositum irregulare*, Bonn 1896; O. Constantin, *L. 9 § 9 und 1.10 D. XII, 1 im Streite über depositum irregulare und Darlehn*, Berlin 1908; E. Fränkel, *Das Darlehen und die irreguläre Hinterlegung*, Berlin 1899; A. Löwenstein, *Depositum irregulare und Darlehn*, Erlangen 1896; P. Münster, *Die Umwandlung eines depositum in ein mutuum oder in ein depositum irregulare*, Berlin 1907; K. Panofsky, *L. 24 D. 16, 3, ein Beitrag zur Lehre vom depositum irregulare*, Berlin 1913.

im klassischen römischen Recht), both preceded by a brief commentary and observations concerning the conception of *depositum irregulare* and by a survey of contemporary Romanistic theories on the same subject.

The author selects the most important works which deal with the irregular deposit. Thus he leaves out of his examination not only the Italian monograph of P. Coppa-Zuccari (*Il deposito irregolare*, Modena 1901) which, besides the considerations on this institution in the Italian law, discusses the Roman sources and the attitude of the *ius commune*³, but also the German doctoral dissertations cited in the present review. This attitude of the author is partly justified by the fact that the majority of these dissertations are out of date, but on the other hand several have some value as they treat the problem of the relation of *depositum irregulare* to the loan which is the central point of Geiger's considerations.

It seems that the theories of Niemeyer⁴ and Kiessling⁵ must have had a decisive influence upon the author's views. The first of them assumes that there is no difference between the irregular deposit and the loan because in fact the irregular deposit is a contract of a loan. Kiessling, who studies this problem in principle in the Greek law and in the law of the papyri, comes to a similar conclusion. Consequently Geiger holds an analogous position⁶. He compares the irregular deposit with the loan and endeavours to prove that the differences between them are inessential and fewer than they are generally assumed to be.

In the author's opinion it is not possible to consider as very important the circumstance that the lease is concluded for a longer and fixed period of time whilst the irregular deposit is revocable at any time. In Rome for instance there were issued leases with a term of repayment not fixed; it means it was possible to demand the return of a loan at any moment. This statement is without doubt correct but the conclusion evolved from it takes us a little too far. As emphasizes Solazzi⁷, who discusses the source quoted under n^o120 in the *Fontes III*, the lack of the term tells of the existence of the irregular deposit because in practice the term was always included in the contents of a loan contract.

Also another assertion proposed by the author seems to be controversial, namely that it is not possible to distinguish the lease from the irregular deposit by taking into consideration in whose interest the contract has been concluded.

³ To the Roman law devoted P. Coppa-Zuccari the pp. 1-32. The considerations concerning the irregular deposit in the *ius commune* are found on the pp. 32-60.

⁴ *Op. cit.*

⁵ *Op. cit.*

⁶ Geiger, p. 6 ff.

⁷ S. Solazzi, a review of the *Fontes iuris Romani — Pars tertia —* in the *SDHI* 13-14 (1947-1948) p. 333.

Apart from the testimony of D. 16, 3, 24, which defines the depositary as a person *qui beneficium in suscipienda pecunia dedit* (this testimony the author, in my opinion — wrongly, groups with the regular deposit), another objection may be raised. Against Geiger's assertion indirectly testify also D. 12, 1, 4 pr. In the mentioned source the receiver of the money shall be under no obligation of a lease before the spending of the money; and the statement of the jurist: *hoc periculo est eius qui susceperit* seems to testify that it also concerns the irregular deposit.

Being in favour of the assumption that the *depositum irregulare* appeared in the classical law, Geiger sees its justification in the influence of the Greek law, mainly due, no doubt, to the Greek predominance over the Roman banking (p. 22). To these considerations the author devotes relatively much attention and then immediately passes to an interpretation of the fragments of the works by classical jurists, preserved in the Digest.

The starting point for him is here D. 19, 2, 31 (*Alfenus libro quinto digestorum a Paulo epitomatum* — pp. 24–30). Upon a thorough analysis of this source the author comes to the conclusion, that the irregular deposit was not yet known to Alfenus and therefore he can not pass for the author of the passage which treats of this question: *idem iuris esse solveret*. Neither is it possible to attribute this passage to Paulus, who in the main was engaged in collecting the decisions of Alfenus; here and there only did he insert a few observations of his own. Neither can its authorship be attributed to the compilers because Justinian and his jurists dealt with the question of irregular deposit in the title D. 16, 3, so there was no reason for them to return to this problem for the second time. Besides they are not commentators but legislators. This is why Geiger assumes that the sentence, as quoted above, was inserted by some pre-Justinian jurist, of whom nothing is known.

This opinion supported by important arguments is probably correct. However, the same cannot be said of the observations concerning the second of the interpreted sources — D. 16, 3, 28 (Scaevola). The text refers to the claims concerning the interests. The jurist allows here a certain *iudicium bonae fidei* but he does not make clear the nature of this *iudicium*. Consequently, we may ask if this can be called a claim from a contract of a mandate or a claim from a contract of a deposit. Geiger (pp. 31–34) is in favour of the latter possibility. Thus he rejects the theory of Niemeyer, who indicates here to a far going analogy with D. 17, 1, 10, 3, and considers as correct the opinion of Bonifacio who in turn interprets the words: *apud me esse voluisti* to be related to a contract of a deposit. According to the opinion of Geiger the source does not indicate that Rogatianus concluded a contract of a mandate; the problem which results from D. 16, 3, 28 is here of different nature than in case of D. 17, 1, 10, 3. It is not so much the question, whether the mandatary had to pay the interests when against the contract he did not return the money and spent

it all, but the question whether *ex ea epistula etiam usurae peti possint*, or whether on the ground of this letter it would be possible to claim the interests. In my opinion the words quoted above have not the meaning which Geiger attributes to them. For the letter is only the evidence that the receiver of the money had borrowed it on interest. Then the quoted sentence should be interpreted in the sense: whether on the ground of the situation which is drawn in the letter it is possible to claim the interests? The argument based on *apud me esse voluisti* as every formal argument cannot be here of decisive importance. Presumably Caecilius Candidus was authorised by Rogatianus to receive the debt. Having fulfilled the mandate he lent the money on interest and therefore could be sued for interests. The case presented here is also an obvious instance of the one of many possibilities foreseen by Ulpianus in D. 17, 1, 10, 3. Then the opinion of Niemeyer should be recognized to be a correct one. Of no importance there will be Geiger's observation that the question of interests cannot be the matter of any discussion if this is the case of the *mandatum*. This question would not be a problem for Scaevola or Ulpianus but it could raise doubts in a person who interrogated the jurist. It is difficult to admit that this latter giving an answer in a real case only generally pointed to the possibility of a claim in the way of a *iudicium bonae fidei* without a clearer specification of this claim. That a possible designation of the claim could not be deleted by the compilers derives from the fact that in this scope the opinions of the classical jurists complied with the opinions of the compilers. Then if the compilers made a deletion they would make it against their own opinion. It seems rather that the compilers, in conformity with their opinion, decided to utilize this source in regard to the deposit, or it would be superfluous in the Digest because of the much more precise formulation of D. 17, 1, 10, 3, for the resemblance between the two contracts could not escape their attention. Therefore they removed whatever indicated the contract of the mandate, and because of that the fragment of Scaevola was subject to an alteration, especially in its second part.

Further considerations of the author concern D. 16, 3, 24 (pp. 34–39) a source which without doubt presents a situation corresponding to the irregular deposit. This was sufficiently proved by Segré⁸ and treated more amply by Bonifacio⁹. This source contains however a series of contradictions, and therefore could not have derived entirely from Papinianus, notwithstanding the indication of the *inscriptio* (*Papinianus libro nono quaestionum*). The case has originated a series of theories, and even became the subject of a German doctoral dissertation¹⁰. In general, independently from their views on the question whether

⁸ G. Segré, *Scritti vari*, p. 213.

⁹ F. Bonifacio, *Ricerche sul deposito irregolare*, *BIDR* NS 8–9 (1948) p. 138 ff.

¹⁰ K. Panofsky, *op. cit.*

there existed or not the irregular deposit in the classical period, the Romanists agreed that the middle passage of the source: *quod ita verum est* up to the words: *non facile dicendum est* and the final sentence cannot be ascribed to Papinianus. Geiger goes still further: he rejects Papinian's authorship not only of the quoted middle part of the fragment but also of the entire final part, beginning with the words: *sed contra bonam fidem et depositi naturam* ... up to the end. We may possibly disagree with this assertion¹¹ but we cannot deny its originality.

A subsequent interpretation of the two sources from Paulus: D. 16, 3, 26, 1 (p. 39–42) and D. 16, 3, 29, 1 (p. 43–46) raises many doubts. The first of the mentioned sources contains an obvious contradiction which Geiger explains to be an error made by the copist and not, as it has usually been accepted till now, to be an instance of inattention of the compilers. The further argumentation of the author is based on the fact that the jurist uses the expression: *depositae pecuniae modum excedere*. In Geiger's opinion the words *deposita pecunia* must point to an unsealed deposit because as regards the regular deposit the jurist employs the terms: *pecunia obsignata deposita*, as we may see in D. 17, 1, 56, 1; D. 22, 1, 1, 3; D. 22, 1, 7; D. 26, 7, 28, 1; D. 40, 7, 4 pr.; D. 46, 3, 39. This assertion does not seem to be a correct one. Even if we disregard the observation of H u v e l i n¹² who asserts that the classical texts do not speak of the *depositum* in relation to the irregular deposit but they apply in that case such designations as *commendare*, *apud aliquem esse*, *penes me habere* etc, the sources quoted prove clearly enough that in case of a regular deposit of money there is used the term *pecunia obsignata deposita* which refers almost entirely to the problem of a *depositio* of a thing. Namely in some cases, when the delivery of a thing to the creditor was impossible (e.g. because of his absence or minority), an order to protect himself against the consequences of a delay (the interest, the conventional penalty) the debtor could entrust this thing to the care of a third person. As to the money, however, for the validity of such a *depositio* it was required that the money should be sealed before it could be placed on deposit.¹³ To the respective expression the author attaches significant importance. To this opinion also Ulpianus speaks of the regular deposit in D. 12, 1, 9, 9; D. 12, 1, 10; D. 16, 3, 1, 34, though this jurist does not use the term *pecunia obsignata*.

The author's interpretation of D. 16, 3, 29, 1 deserves attention. It is a keen

¹¹ So I consider as authentic the words: *sed contra bonam fidem*... up to ...*in suscipiendo pecunia dedit*. The jurist used them to ground his decision concerning the interests, which, in my opinion, was authentic in the declaration of Papinian.

¹² P. H u v e l i n, *Études sur le furtum dans le très ancien droit romain*, I, p. 518 n. 2.

¹³ Cf. L. B o v e, *Gli effetti del deposito della cosa dovuta* (Labeo 1 (1955) 2 p. 175) and M. N i t s c h k e, *Die Hinterlegung der geschuldeten Leistung im römischen Recht* (SDHI 24 (1958) . 136).

criticism of the views of L o n g o based on the studies of B o n i f a c i o. This criticism is important because Longo's theory concerning the matter in question has been accepted by a relatively great number of scholars. Geiger considers this theory to be wrong, but on the other hand, the hypothesis presented by him in my opinion is also unacceptable. Although the source quoted in the Digest is defined as coming from Paulus it is so much altered that it is not possible to reconstruct its original tenor. In the actual reading it is a group of irrelevant sentences drawn from different sources¹⁴.

Also an attempt at the situation presented in the *pr.* to cover that in § 1 seems to be unjustified and incorrect. Since the jurist could open the *actio furti* against a dishonest depositary he would provide him with a means to claim the interests on the deposited loan. Besides, if in one paragraph Paulus secured for the depositor the *actio depositi* and *actio furti* in case of the infringement of a regular deposit, in the next paragraph in the same situation he spoke of the claiming of interests by means of the *actio depositi*. Presumably he would not overlook this occasion to emphasize that similar purpose and effect could be obtained by the means of the *actio furti*. This emphasis would be the more justified because the work of Paulus was not destined for experienced lawyers but for young students of the law.

Subsequently, Geiger interprets the fragments from Ulpian (p. 46-49). The majority of Romanists the texts of this jurist have considered to be a proof that the classical jurists did not recognize the irregular deposit. Recently B o n i f a c i o¹⁵ has taken a different stand, also taken by Geiger. In my opinion their views are fully justified. Indirectly, they are supported by D. 12, 1, 18, 1 where the deliverer of the money will deposit it while the receiver will take it as a loan. In practice, of course, this kind of misunderstanding could occur in principle only in case of the irregular deposit when the money was handed in an unsealed purse. Geiger's thesis is then a correct one. It must be said though that this part is less valuable than the rest of his book.

As to the three fundamental sources: D. 1, 9, 9; 12, 1, 10 and 16, 3, 1, 34 the author assumes that they treat of the regular deposit because they tell of the consent to using of the money. Geiger considers that there is no difference between these sources where they refer to changing the regular deposit into the loan and the fragments already discussed because Ulpianus speaks of the origin of a loan while Scaevola, Papinianus and Paulus decide the question which belongs to the next stage of lending, namely: whether the *actio depositi* could be applied

¹⁴ *Si ex permissu meo deposita pecunia* corresponds to the words *Si pecuniam deposuero eaque uti tibi permissero* from Coll. 10, 7, 9. This similarity, which here seems to be problematic, can not be yet questioned in the case of following phrase: *is, penes quem deposita est...* because of the tenor of the Coll. 10, 7, 5 as well as in the case of *ut in ceteris bonae fidei iudiciis* in comparison with C. 4, 34, 2.

¹⁵ F. B o n i f a c i o, *op. cit.*, p. 123 ff. and p. 148 ff.

to the *mutuum*? Even if we agreed that the second part of this assumption is correct, which is rather groundless to do, we should notice how the opinions of Ulpianus differ from those held by other jurists. For Ulpianus in D. 12, 1, 9, 9 expressly admits only one action, namely that of the *condictio*, in case of the occurrence of a loan and even in that case when the money has not yet been spent. He refers to Nerva and Proculus: *Nerva Proculus etiam antequam moveantur, condicere quasi mutua tibi haec posse (me) aiunt* and considers this decision to be absolutely right: *et est verum, ut Marcello videatur...* We pass over the next sentence which is generally considered to be a gloss, though this very sentence proves again that it was possible to apply the *condictio*, and that it could be used exclusively.

In his discussion the two next sources (D. 16, 3, 7, 2 and 42, 5, 24, 2) Geiger states that they raise certain difficulties because of the different ranking of the depositors in case of insolvency of the depositary but he does not explain this problem. According to his opinion Ulpian provides in that case for the depositor a place among other creditors even if not the *condictio* but the *actio depositi* should be opened. Nevertheless, the jurist speaks nothing of it but only emphasizes the importance of the fact whether the depositor has received or not the interests from the banker. It is not possible to give this meaning to the words of Ulpian. However it should be noted that the author bases his conclusions on a passage from D. 42, 5, 24, 2 the classical origin of which is questioned by Solazzi¹⁶.

The last source quoted by the author is D. 16, 3, 25, 1. It was not discussed by the author formerly, when he presented other texts of Papinianus, on the ground that it concerns the regular deposit. Yet certain Romanists consider this very source as a proof that Papinian accepted the irregular deposit. Although Geiger has no doubts that such are the opinions held by Papinian and other classical jurists, as regards D. 16, 3, 25, 1 he holds a different view. To prove that his assertion is correct he is much more convincing than when he interprets the texts of Ulpian.

Geiger concludes his work with some general remarks on the remuneration of the deposit and in the last chapter he summarizes the results of his investigation emphasizing the final conclusion: the defects of the *condictio* had caused that the Roman jurists accorded in the case of a loan an *actio depositi* (p. 57).

This conclusion, as it has been many a time stressed in this review, seems to be wrong or at any rate, in the light of the sources and of the author's arguments based on the sources, it is insufficiently proven. It is doubtful whether the Roman jurists effaced so far the boundaries between the deposit and the loan. Especially when we take into consideration the difference arisen in consequences of the application of *condictio* and *actio depositi directae*. Moreover

¹⁶ S. Solazzi, *Il concorso dei creditori* III, p. 114.

the sources which derive from Ulpian seem to testify against the opinions expressed by the author.

On the other hand there deserve admiration the logical construction of the work and a thorough examination of this rather difficult problem not only in the Roman law but also in the Greek and common law. However, the Roman sources are here so far obscure that they allow for different interpretation, none of them can pass for the most correct one. It is also possible that the theory of Geiger concerning the Roman law, worked out under the influence of the suggestion of Kiessling, may win general approval. But in the present state it contains several weak points and requires supplementary investigations. The question of the *depositum irregulare* remains still open.

[Cracow]

Janusz S o n d e l

Mogens Weitemeyer. *Some Aspects of the Hiring of Workers in the Sippar Region at the Time of Hammurabi. With a chapter on seal impressions by Edith Porada and Paul Lampl. Munksgaard, Copenhagen 1962, 145 pp. Price D. kr. 28.*

Mr Weitemeyer's book begins with a short survey of publications of the Old Babylonian attendance lists of hired workers and clay bullae (dockets) as receipts for work done (cf. B. Meissner, *Beiträge zum altbabylonischen Privatrecht.* (1893); A. Ungnad, *Vorderasiatische Schriftdenkmäler der königlichen Museen zu Berlin, IX* (1909); F. Thureau-Dangin, *Lettres et contrats de l'époque de la première dynastie babylonienne* (1910); T. Jacobsen, *Cuneiform Texts in the National Museum, Copenhagen 1939*). In addition to 25 dockets and 25 lists edited for the second time Mr Weitemeyer publishes copies and transcriptions of many other dockets and 13 lists from the collection of the British Museum. These documents originate from ed-Dér (situated a few miles to the north of Sippar) or more likely from Abu-Habba (Sippar). The lists from the British Museum are dated in 35-th year of Hammurabi; the date formulae of the docket are for the most part from the reigns of Hammurabi and Samsuiluna. The dockets are mostly three sided clay pyramids.

Mr Weitemeyer divides all the dockets edited in his book into three groups. The first group (nos 1-61) contains the dockets provided (three bead shaped dockets excepted) with a seal impression on the base as well as on the other surfaces and inscribed. On the first side the inscription mentions: „one hired worker” (lù hun-gà), on the second side is the name of the worker and on the third side — month and day. Probably a reed string has been inserted into the apex of the docket. To the second group (nos 100-122) belong the dockets on which the personal name is the name of a head man of a gang of workers. This name is always preceded by a specification of the workers. The third group