Book IV.
Title XXXIV.[1]

Deposits.
(Depositi.)

Headnote.[2]

Deposits were, in the nature of things, very frequent. Temples and banks were extensively used for that purpose. (See e.g. C. 32.19). The emperor Alexander Severus built a number of storehouses at Rome. Lamprid, Sev. Alex. C. 39. And it is clear from juristic texts that deposits were frequently made with friends.

A contract of deposit was a real contract; that is to say, it came into existence when movable property was delivered and accepted by a depository for safe-keeping without compensation. If the services of custody were not gratuitous—if, e.g. property was deposited in a private storehouse for compensation (C. 4.65.1), the contract was one of hire, with greater responsibility on the part of the depository than in the case of an ordinary deposit. Of special interest are the deposits made with bankers (law 4 h.t.), and those made with a stakeholder, which might embrace both real as well as personal property, and were frequently made when property was in dispute.

The Twelve Tables gave the depositor a delictal action for double the value of his property, in case the deposit was not returned. Paul. Sent. 2.12.11. The praetor originally gave an action on the case, for simple value. Paul. Sent. 2.12.11; G. 4.47. But an equitable action (C. 4.10.4 note) came to be given in early classical law (G. 4.47). This was decided according to the principles of good faith, and a judgment against a depositary made him infamous. Law 11 h.t. The depositary had, in the absence of an agreement to the contrary, a counter-action for his expenses. D. 16.3.12 pr; D. 16.3.23.

4.34.1. Emperor Alexander to Mestrius, a soldier.

If by the attack of robbers, or other fortuitous circumstances, ornaments deposited with the person killed should be lost, the loss does not fall on the heirs of the person who received the deposit, who, if no agreement to the contrary is specially made, is responsible only for fraud or gross negligence (lata culpa). But if the things are not restored under the mere pretext of a committed robbery or other fortuitous casualty, and are (in fact) under the control of the heirs, or which he ceased to possess through his fraud, an action on the deposit (depositi), as well as an action to produce (ad exhibendum), and also a real action are available.
Promulgated July 11 (234).

Note

Rules of due care and culpability in contracts.[3] One under contractual or quasi contractual duty to another was always liable for intentional damage (dolus-fraud) inflicted on another. Under later law, gross negligence came to be considered as equivalent to intentional wrong. Moreover, as the idea that a man's acts should be in

[1] [Blume] Rev. 5/16/32.
[2] Blume penciled in here: Not corr. As sent. Presumably this refers to the version he sent Pharr.
[3] Blume wrote here: Not sent.

accordance with good faith came to gradually permeate the whole law, the rules of liability were, in most instances, increased. And a man who had the property a man who had the property or affairs of another in his charge, or who had specific property which he was under contract to deliver to another was, in the absence of a contract, generally required in Justinian law to exercise that degree of care to protect and guard such property or interests, which was used by a careful business man—a head of the family, as the Romans expressed it—who would not easily make a mistake. D. 22.3.25 pr. This degree of care seemingly was somewhat greater than our reasonable, ordinary care. It was a vigilant care. It was required, for instance, of an ordinary agent. (C. 4.35.11), an unauthorized agent (C. 2.18.20; C. 4.32.24), a gratuitous borrower for use (C. 4.23.1 note), a pledgee (C. 4.24.5 note), an ordinary lessee (C. 4.65.28), a vendor, while awaiting delivery to a purchaser, (C. 4.48.2 note), a transferee, under obligation to return the property under certain conditions (D. 19.5.17.2), an heir required to pay a legacy (D. 30.47.4.5), and probably of a guardian, though that is somewhat doubtful (C. 5.51.7 note). Others, on account of the peculiar relationship of the parties, were liable only for the care which they exercised in their own affairs—a rather unsatisfactory standard. That was true of a partner (Inst. 3.25.9), of a husband in relation to his wife's property (C. 5.14.11.4), of co-heirs (D. 10.25.16), and possibly of guardians. In a few cases, as in that of the ordinary depositees (law 1 h.t.) and a few others, liability existed only for intentional wrong or gross negligence. One obligated to deliver specific property under a stipulation—a contract at strict law—was liable only for malfeasance and not non-feasance. D. 45.1.91 pr. That rule was a remnant of a rule of an early time, when there was no responsibility for non-feasance.

If in these cases, the property in question was lost or damaged without fault of the custodian, but by unavoidable casualty, such as robbery, storm, etc., making performance impossible, no liability ensued, in the absence of a contract, unless the debtor was in default—mora (C. 4.48.4 and 6), and a thief was considered as always being so. C. 4.7.7.

But greater responsibility might be assumed by contract, which seems to have been particularly usual in the case of shippers, inn-keepers, stable keepers and others. And under Justinian, a contract by shippers and inn-keepers to keep property safe from theft and damage was assumed, unless notice to the contrary was given. D. 4.9.6 and 7. But such notice did not relieve them from liability for theft committed by their employees. D. 47.5.1. And greater responsibility without contract rested on warehousemen (C. 4.65.4 note) and hirers of work on property, such as tailors and fullers, under classical as well as Justinian law. They were liable if the property entrusted to their care was stolen.

The history of development of the doctrine of due care is in many respects, due mainly to the interpolations in the Justinian compilation, rather obscure. Ordinary agents, partners, and guardians were originally liable only for intentional damage, just as the depositee still was under Justinian. Mitteis, R.P., 325 maintains that this was true on account of the fact that a judgment against them entailed infamy. The rule, probably, however, was originally applicable in other cases, though departed from earlier than in those mentioned. Culpable conduct (culpa) less than intentional, however, gave rise to liability in most instances not later than in early classical law, seemingly limited at first to malfeasance as opposed to nonfeasance. Classical law added in many instances the absolute responsibility for the custody of property which a man had in his charge against theft and (later) damage, which, however, in turn, except in the cases mentioned, was modified and controlled by the general rules of due care which finally prevailed, and

under which, save in exceptional instances, culpability included both intentional wrong as well as negligence. The terms gross and slight negligence appear to be post-classical. 38 S.Z. 263. See generally, 40 S.Z. 167; 45 S.Z. 266-351.

4.34.2. Emperor Gordian to Celsinus, a soldier.

Interest is usually recoverable for default in actions on deposit, just as in other equitable actions.
Given November 1 (238).

4.34.3. The same Emperor to Austronius, a soldier.

If you bring an action on deposit, you do not unjustly also ask for payment of interest, since he ought to thank you that you do not bring an action for theft against him, inasmuch as a person, who knowingly and advisedly, and without consent of the owner, converts a deposit to his own use also commits the crime of theft.
Given July 15 (239).

4.34.4. The same Emperor to Timocrates, a soldier.

There is no doubt that if a person who received money as a deposit has used it, he should also pay interest on it. But if judgment was rendered only for the principal in a suit on the deposit, you cannot again bring an action for the interest; for two actions do not lie, one for the principal and one for the interest, but only one, and when judgment has been rendered in the one, another action is defeated by the defense of res judicata.

Note.

If money, or other fungible, was deposited with a banker or other person, and it was agreed that the depositary might use it, making him liable to return, not the identical thing deposited, as in other cases, but only the same amount or kind (and hence called an irregular deposit), it is apparent that the transaction was similar to a loan. A bank deposit in our law creates the relation of debtor and creditor, and some of the Roman jurists took the same view. Coll. 10.7.9. Papinian, however, seems to have considered such transaction as a deposit, and this view was taken in the later law. D. 16.3.24; D. 16.3.25.1; D. 16.3.29.1 (itp). This was of advantage to the depositor. Thus a judgment against a depositary made him infamous. So, too, an informal agreement to pay interest on a deposit was valid, whereas a contract to pay interest on a loan required a stipulation. Again a deposit did not come under the Macedonian senate decree (C. 4. 28), prohibiting loans to unemancipated children. Nor could the defense of "money not paid" be interposed against instruments evidencing a deposit. C. 4.30.14.1. And under Justinian there could be no set off in such case. Law 11 h.t. Furthermore a depositor was a preferred creditor. This preference, however, was lost if interest was paid. D. 16.3.7.2. See 29 S.Z. 189 et seq. See C. 4.32.13 as to separate suits for interest.

4.34.5. Emperors Valerian and Gallienus and Caesar Valerian to Claudius.

If you performed your agreement, you can sue the stakeholder for the return of documents which you say you and your opponent deposited on condition that you would receive them when the remainder of the money for rent had been paid. But although they shall not have been turned over to you yet, if you have paid all you owe under the lease, you are safe against suit by your opponent by the very fact that you paid what was due.
Given July 15 (259).

Note.

The documents deposited were perhaps those evidencing a lease between the parties, as stated in note to Bas. 13.2.38 or perhaps those evidencing a compromise. See Muther, Seq. 201.

4.34.6. Emperors Diocletian and Maximian and the Caesars to Antonius Alexander and Ulpianus Antipater.

A person with whom you say both parties deposited agreements of compromise of other documents must observe the condition under which he received them.

4.34.7. The same Emperors and the Caesars to Antiochus Atticus Calpurnianus Democrates.

What you want does not accord with the rules of law. For if you undertook the custody of money, which you loaned out to others as shown in a document in which, as you acknowledge, the return thereof is promised you, it is dishonest for you to refuse to make repayment legally due.

Note.

It is certain that if a person who received money from you as a deposit loaned it out in his own or another's name, he himself, as well as his heirs, are liable to you for fulfillment of his undertaking. But you have no right of action against the borrower of the money, unless the identical money exists; for in that case, you may bring a real action (vindicatio) against the possessor thereof.[4]
Given at Sirmium February 27 (293).

4.34.9. The same Emperors and the Caesars to Menophilus and others.

Since an inheritance represents the person of the deceased, the things deposited on faith and credit by the slave of the inheritance before you inherited from your father may be reclaimed by you before the rector of the province from the heirs of the person who had received it.
Promulgated at Sirmium November 7 (293).

Note.

A slave of an inheritance was a slave whose master was dead, and when the inheritance of the master had not been entered upon. Such a slave had deposited some property. The slave, as part of the inheritance, represented the person of the deceased; though he had no living master, his transaction was not void, but the right acquired was for the deceased and his estate. Hence, a deposit made by such slave could be recovered by the heir after accepting the inheritance.

4.34.10. The same Emperors and the Caesars to Septimia Quadratilla.

A person who has not restored a deposit will, when sued in his own name and condemned, be compelled to restore it at the risk of infamy.
Subscribed at Nicomedia December 12 (294).

4.34.11. Emperor Justinia to Demosthenes, Praetorian Prefect.

If anyone has received monies or other things as a deposit, he must promptly return them whenever the depositor wants them, and he cannot set up any counterclaim, a

[4] [Blume] See C. 4.58.1 note.

claim for deduction, or a defense of fraud under pretense that he has a personal action or a real action or hypothecary action against the depositor, for he did not receive the deposit on condition that he might have an allowable right of retention, and hat the good faith on which the contract is based might be turned into perfidy.[5]

1. And if something shall have been deposited by both parties (one with the other), the transaction shall not in such case be entangled by any counterclaim, but the things or money deposited by either party shall be returned as quickly as possible without hindrance; and first to the party who wants them first, and all legitimate action will subsequently be preserved for him.

2. This shall apply also, as has already been said, if only one of the parties makes a deposit, and the other party shall claim a set-off against it, so that the things or money deposited shall be immediately restored, every legal right being preserved intact.

3. But if a protest in writing shall be sent to the person who received the deposit without deceit or fraud on his part—and he shall attest this on his oath—not to deliver it, the person who made the deposit may, upon furnishing sufficient security to protect the depositee, recover the deposit at once.[6]

Recited in the new consistory of the Justinian palace October 30 (529).

4.34.12. The same Emperor to Johannes, Praetorian Prefect.

Removing all unnecessary differences among the ancients, we ordain that if a person deposits a definite amount of gold, either wrought (confecti) or in bullion, and leaves it to several heirs, and one of them has received the portion left him from the depositee, but the other omits to do so, or shall be prevented from doing so by some fortuitous circumstances, and ill-fortune shall afterwards overtake the depositee, or he looses the deposit without fraud, the coheir shall not be permitted to lay claim to any portion of the other, because of his inability to get his own portion, as though the portion received by his coheir were joint property, for when definite sums of money had been deposited, and one of the heirs received his part, no one would doubt that he had received his portion and that he should not touch the other part. It does not seem well to us that a man who received his part should be liable to the other for either bullion, wrought gold, or money, so that industry may not pay the penalty of sloth. If the other heir had embraced his opportunity, the same as his coheir, each would have received his part, and no occasion for the subsequent disputes would have arisen.

(531-532.)

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[5] [Blume] A set off or counterclaim was not allowable against a demand to return property loaned for use or against a demand for the return of a deposit. C. 4.31.14 and note c. In earlier law the depositee could counterclaim for expenses on account of a deposit. Collatio 10.2.6.

[6] [Blume] If a third person claimed the ownership of the property deposited, and sent a protest to the depositee, the latter had the right of retention so as to protect himself, if the claim of such third person was not made by collusion, and the only way in which the depositor could then recover the property was by giving the depositee security for the latter's protection. Protests on the part of third persons and warnings not to deliver property deposited to the depositor were forbidden by Novel 88 of Justinian.