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III.

The Taxonomy of the actio furti. Between Ownership and Commerce*)

Von

Francesco Giglio

In this paper, the actio furti is examined from the perspective of the claimant. After a brief overview of the literature, the main thesis is introduced according to which the actio furti concerned a legal dispute over the control of a thing. The central section of the investigation is dedicated to an analysis of the sources, and particularly to the references to ownership and possession as the gateways to the action. It is followed by a fully-fledged exposition of the theory of control in which it is argued that the aim of the action was the protection of the circulation of goods. Between ownership and commerce, the actio furti privileged the latter over the former.

Keywords: furtum, actio furti, taxonomy, claimant, Aktivlegitimation, control, possession

Die Taxonomie der actio furti zwischen Eigentum und Güterverkehr. Dieser Beitrag untersucht die actio furti aus der Perspektive des Klägers. Nach einer kurzen Umsicht in der einschlägigen Literatur wird die zentrale These formuliert, wonach die actio furti einen rechtlichen Konflikt über die Kontrolle über eine Sache lösen soll. Diese These stützt sich auf eine detaillierte Untersuchung der einschlägigen Quellen, insbesondere jener, die Eigentum oder Besitz als Grundlage für eine solche Klage ansehen. Auf diesem Befund baut eine Theorie über die Sachkontrolle auf, mit der sich argumentieren lässt, dass Zweck der Klage der Schutz des Güterumlaufs war. Im Konflikt zwischen Eigentum und Güterverkehr war die actio furti dazu gedacht, letzteren bevorzugt zu schützen.

1. Introduction

One of the original decemviral delicts, *furtum* became firmly embedded in public law only from imperial times, when the State decided that it had a strong interest in controlling theftuous behaviour. The shift towards criminal

*) The central idea discussed here was presented at the conference on 'Understanding Legal Reasoning: A Role for History and Philosophy in Modern Private Law', Groningen 11–12 September 2014, organised by the Groningen Circle; and at the Tony Thomas Seminar held at University College London on 6th February 2015. I am grateful to the participants for the helpful discussion. I should like to thank Thomas Finkenauer, Eric Pool and Martin Schermaier for their comments on earlier versions of this paper.

law, however, was slow and progressive, so that we can identify in the sources several historical layers offering at times quite differing views on this legal institution. As a consequence, the reconstruction of the structure and function of the *actio furti* has seriously challenged the Romanists.

As is typical for a subject whose sources have barely changed over the centuries, the issue of a general theory of the *actio furti* has attracted the interests of the scholars in waves[1]). Only a handful of contributions have examined the taxonomy of this delict in the last one hundred years. The first modern comprehensive analysis of *furtum* has to be credited to Paul Huvelin[2]). Four decades later, Bernardo Albanese published two major studies[3]), whose results were summarised in shorter papers[4]), which have been extremely influential in shaping our understanding of this institution. After Albanese, the interest of the scholars has shifted to the particular aspects of the action[5]). The focus has been mainly upon the identification of the central requisites that qualified the person of the wrongdoer. In this context, the question has been discussed whether the *actio furti* required a subtraction of the thing, so that there was no theft as long as the thing had not been carried

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[1]) See an accurate list of authors who have dealt with this delict in the doctoral thesis of M.A. Fenocchio, Il momento genetico e l'evoluzione del concetto di furtum in diritto romano, 'Detrahere alteri aliquid', Per una ricostruzione storica del delitto di furto: genesi, sviluppi, vicende, Padova 2008, available on line. See also the more focused research conducted by I. Fargnoli, Ricerche in tema di furtum, Milano 2006.

[2]) P. Huvelin, Études sur le furtum dans le très ancien droit romain, I.: Les sources, Lyon 1915.

[3]) B. Albanese, La nozione del furtum fino a Nerazio, in: AUPA 23 (1953) 5–207; and idem, La nozione del furtum da Nerazio a Marciano, in: AUPA 25 (1956) 85–300. I am grateful to Giuseppe Falcone for providing the two volumes of the Annali.

[4]) B. Albanese, La nozione del *furtum* nell'elaborazione dei giuristi romani, in: JUS (1958) 315–326; idem, Furto (Introduzione Storica), in: ED XVIII, Milano 1969, 313–318.

[5]) *Ex multis*, H. Niederländer, Die Entwicklung des furtum und seine etymologischen Ableitungen, in: ZRG RA 67 (1950) 185–260; A. Watson, The Law of Obligations in the Later Roman Republic, Oxford 1965, ch. 4; M. Kaser, Das römische Privatrecht I, 2nd ed. München 1971, 157–160 and 614–619; P. Birks, A Note on the Development of furtum, in: The Irish Jurist 8 (1973) 349–355; G. MacCormack, Definition: Furtum and Contrectatio, in: Acta Juridica (1973) 129–147; D. Ibbetson, The Danger of Definition: *Contrectatio* and Appropriation, in: A.D.E Lewis/D.J. Ibbetson (eds.), The Roman Law Tradition, Cambridge 1994, 54–72. Most recently, M. Pennitz, Acria et severa iudicia de furtis habita esse apud veteres … (Gellius 6.15.1) – Überlegungen zum furtum usus, in: this volume of ZRG, 147–187.

away – the wrongful act being linked to terms such as *subripere* and *amotio* – or whether any kind of meddling with the thing, often expressed with the terms of *adtrectatio* and *contrectatio*[6]), was sufficient.

The discussion about the requisites to bring the action of theft has gone relatively quiet in the last thirty years, possibly because the modern scholarship has come to accept that the Roman victim could claim if he had an interest linked to the thing stolen or whether he was bound to someone else by a duty of safe-keeping. Joachim Rosenthal[7]) and Max Kaser[8]) must be credited with the most comprehensive exposition of this approach, supported by a strong exegetic analysis, which provides the modern point of reference. Accepting that the *actio furti* was available to owners and non-owners, Rosenthal looked for a different filter for the selection of the claimants. He found it in the *interesse rem saluam esse*[9]), which is a common justification in the sources for the availability of the action. Max Kaser's words on the validity and usefulness of this theory sum up the present view on the *interesse*-criterion. He pointed out that it was chosen by the jurists because by and large it covered most of the cases. Yet, the great Romanist observed, its popularity did not exclude that the jurists departed from it whenever they deemed fit to do so[10]).

Kaser's remark offers the starting point for the present investigation. Whereas there is no doubt that the *interesse rem saluam esse* played an important role, the theory based upon it is unable to explain several scenarios of the *actio furti* discussed by the jurists. It is likely that the jurists adapted the concept of *furtum* on the basis of small, not necessarily coher-

[6]) W.W. Buckland, Contrectatio, in: LQR 57 (1941) 467–474, 468: "*contrectatio* is needed, not, so to speak, on its own account, but as proof that the theft has actually begun. … This might well be accompanied by a certain looseness of conception of the meaning of the word, a looseness which would make 'meddling with' a better translation than 'handling'."

[7]) J. Rosenthal, Custodia und Aktivlegitimation zur Actio furti, in: ZRG RA 68 (1951) 217–265, 244–258.

[8]) M. Kaser, Die actio furti des Verkäufers, in: ZRG RA 96 (1979) 89–128.

[9]) E.g. Gai. inst. 3,203: *Furti autem actio ei conpetit, cuius interest rem saluam esse, licet dominus non sit. itaque nec domino aliter conpetit, quam si eius intersit rem non perire.*

[10]) M. Kaser, Grenzfragen der Aktivlegitimation zur actio furti, in: M. Harder/G. Thielmann (eds.), De iustitia et iure, Festgabe U. v. Lübtow, 1980, 291–324, 291: "Den Ermessensbegriff des Interesses wählen die Juristen, weil er… die Vielfalt der anerkannten Fälle im groβen und ganzen deckt; was nicht ausschlieβt, daß die Juristen bisweilen die a.f. verneinen, obwohl sie das Interesse bejahen, oder umgekehrt."

ent, corrections. The question is whether these corrections can be brought to a common denominator as part of a taxonomic analysis of the *actio furti*.

2. The Paulian Trichotomy

The so-called Paulian trichotomy supplies valuable information for the identification of the legal sources concerning the legitimation to the *actio furti*:

> D. 47,2,1,3 (Paul. 39 ad edictum): Furtum est contrectatio rei fraudulosa lucri faciendi gratia uel ipsius rei uel etiam usus eius possessionisue. quod lege naturali prohibitum est admittere.
>
> "Theft is the fraudulent interference with a thing with a view to gain, whether by the thing itself or by the use or possession of it. This natural law proscribes"[11]).

This passage, which has puzzled generations of scholars[12]), has been accurately analysed by Watson, whose investigation extends both to its content and to its further development in the centuries leading to modern times[13]). For Watson, the idea that the trichotomy concerns three independent forms of theft is the consequence of an error which this author traces back to Haloander. The mistake was due to the omission of the word *rei* between *contrectatio* and *fraudulosa*, which would make it possible to distinguish *furtum rei, furtum usus,* and *furtum possessionis*.

Watson presents a convincing case for the existence of only one delict by the name of *furtum*. The term 'trichotomy' is from this perspective misleading. Albanese's analysis dispels the doubts, advanced by Huvelin and other scholars[14]), on the classical origin of the classification. Albanese notes that

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[11]) If nothing else is specified, all translations are from the Pennsylvania translation edited by A. Watson, The Digest of Justinian, revised English-language edition, Philadelphia 1998; the excellent translation of Book 47 is by Tony Thomas. The translators of other books will be expressly mentioned.

[12]) See a detailed analysis of the main criticisms and suspected interpolations in Albanese, Furtum da Nerazio a Marciano (n. 3) 192–206. Pennitz (n. 5), texts to notes 49–55 and after note 83, acknowledges that this passage contains several unanswered questions and proposes a new reading of it: "Diebstahl ist das Ergreifen einer Sache, das (jemanden/einen anderen) böswillig zum Zweck eigenen Gewinns beeinträchtigt, (und zwar) entweder in Bezug auf die Sache selbst oder auch in Bezug auf ihren Gebrauch oder Besitz, was nach Naturrecht zu tun verboten ist."

[13]) A. Watson, The Definition of furtum and the Trichotomy, Tijdschrift voor Rechtsgeschiedenis [TR] 28 (1960) 197–210.

[14]) Cf. Albanese, Furtum da Nerazio a Marciano (n. 3), 197–202.

the Paulian definition was much more refined[15]) when compared with the two Gaian *formulae* given in the Institutes:

> Gai. inst. 3,195: Furtum autem fit non solum, cum quis intercipiendi causa rem alienam amouet, sed generaliter, cum quis rem alienam inuito domino contrectat.
>
> "Theft is committed not only by removing another's property with intent to appropriate it, but also by any handling whatsoever of another's property against his will"[16]).

The most conspicuous element in Paul's statement is the absence of some of the elements that characterised the Gaian *formulae*. Whereas Gaius required some act affecting the thing of another or done against the owner's will, Paul only mentioned a *fraudulosa contrectatio*[17]). If '*furtum*' refers to a delictual action concerning a thing, the *furtum rei* had to include the *furtum usus* and the *furtum possessionis*. From this perspective, Watson is likely to be right. But possibly Paul was seeking to make a different point. Arguably, the jurist was focusing on the importance of the control of the thing as an element of the *actio furti*.

3. Control as a Normative Requisite

The *actio furti* concerned a legal dispute over the control of the thing. This feature of the action does not emerge clearly in the opinions of the Roman jurists, who list several requirements for its availability[18]). In particular, the references to ownership and possession[19]) surprise because of the intrinsically different nature of these two legal institutions – one being a right and the other a factual situation – which raises the question of their compatibility. Other requisites may be linked to the action, such as the need for the claimant to have a specific personal interest or duty – the expressions '*cuius interest rem saluam esse*' and '*custodiam praestare*' recur in this context[20]). Whilst

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[15]) Ibid., 192. Note however that Pennitz (n. 5), text to note 99, rejects the very idea that the Paulian passage contains a definition in the first place: "Vielmehr wird darin der unterschiedliche Unrechtsgehalt diebischen Agierens thematisiert."

[16]) All translations of the Institutes are by Francis de Zulueta, The Institutes of Gaius, Part I, repr. Oxford 1969.

[17]) Watson, TR (n. 13), 198, considers the term '*fraudulosa*' as being "certainly interpolated": it would be useless and Paul would avoid uncommon words.

[18]) Cf. Kaser, Grenzfragen (n. 10), for an analysis of the factors that are seen as triggering the action.

[19]) E.g. Ulp. 28 ad ed. D. 19,5,17,5 – see text before n. 42; Pap. 12 quaest. D. 47,2,81,7 – see text to n. 101.

[20]) E.g. Gai. inst. 3,203: *furti autem actio ei competit cuius interest rem saluam esse, licet dominus non sit.* Gai. inst. 3,206, see text to n. 22.

these formulations, and other ones with the same function, helpfully remind us that this delict is about the legal interests of each single claimant, it is submitted that they do not describe normative requirements of the action. They were only means to circumscribe its application ambit.

The qualification of a requirement as 'normative' is used in this paper with reference to those elements without which a given legal institution would not be identified as such. Thus, the normative requirements of *furtum* are those elements in whose absence it would be impossible to classify a particular scenario as triggering an *actio furti*. Not all requirements are normative; and the normative requirements, of themselves, may not be sufficient to unlock the *actio furti* in given cases.

Discussing the consequences of theft from the perspective of the person who was deprived of the thing, Boudewijn Sirks argues that the deprivation implied a loss of control. He defines this form of control as "the power to dispose of [the thing] in the way [the person losing control] is entitled to it, including the entitlement to possession"[21]). Yet, entitlement to the thing does not seem to be a requisite of the action. As shall be seen, the thief could, under certain circumstances, bring the *actio furti*; but he was not entitled to the thing itself. His claim was based upon the sheer fact of control acknowledged by law. 'Control' identifies in this paper the power physically to dispose of a thing directly or through others. Control does not coincide with possession, because the action was available also to parties who did not have possession. Control cannot even be described as *possessio naturalis*, for it could be exerted indirectly.

Focusing on control as the element which identifies the claimant in the *actio furti* implies that the action was not about the assertion of ownership or any other right. It was about the protection of the circulation of goods. The normal gateways to access the action were proprietary and contractual relationships to the thing. But the existence of a legal title to the thing was not a normative requisite of the claim. It is not denied that the existence of such a title was a recurring characteristic of the action. Indeed, the sources indicate that most *actiones furti* were brought by a claimant on the basis of his legal title to the thing. Yet, it is submitted that the normative requirement which gave access to the *actio furti* was not the title, but a legally relevant relationship of control. Given that 'control' was an extremely wide concept, it was necessary to develop tools that would restrict its accessibility. Hence, the

[21]) A.J.B. Sirks, *Furtum* and *manus / potestas*, TR 81 (2013) 465–506, 494. The words in the square brackets are my interpretation of the author's thought.

legal availability of such relationship changed as a consequence of intervening factors, such as the introduction of other, more specific legal instruments, and the need to take societal inputs into consideration.

The meaning and nature of control will be considered more in detail in the last part of this investigation. It will be easier to understand the idea behind this notion if the latter is introduced through the cases discussed by the Roman jurists.

4. The Sources

This section is dedicated to supplying a legal underpinning to the asserted connection between the action and its function of securing control.

A. Commodatarius:

In the Gaian Institutes, we read that a borrower for use was legitimated to bring the action of theft, whereas, in the case of a deposit, the depositee was not granted the claim. Both had to give the thing back when demanded, but the law treated them differently.

> Gai. inst. 3,206: Quae de fullone aut sarcinatore diximus, eadem transferemus et ad eum, cui rem commodauimus. nam ut illi mercedem capiendo custodiam praestant, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare[22]).

> Gai. inst. 3,207: Sed is, apud quem res deposita est, custodiam non praestat 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 nec ob id eius interest rem saluam esse, furti [itaque] agere non potest, sed ea actio domino conpetit.

There are, of course, several dissimilarities in the positions of the two figures: for one, the *commodatarius* was authorised to use the thing. This usage can be financially quantified, but such operation would require some stretching of the real intention of the parties: the borrower may be glad to read the book that the lender gave him, but he may not be prepared to buy it or to pay for reading it. The interest of the fuller and tailor, with whom Gaius compared the borrower, is clear: they accept a reward for their work and therefore they will be liable for the breach of the duty of safe-keeping, *illi mercedem capiendo custodiam praestant*[23]). The *commodatus* gave to the borrower a *commodum*, which was a different kind of benefit in comparison with the contract concluded with the fuller or the tailor, *merces*. The rule according to which the *depositarius*, unlike the *commodatarius*, could not bring the *actio furti*

[22]) See also Ulp. 29 ad Sab. D. 47,2,14,8.

[23]) Gai. inst. 3,206.

does not seem very persuasive. From our perspective, we can observe that the level of control that the *commodatus* granted to the borrower is higher than the level of control permitted to the *depositarius*: unlike the former, the latter had the key, but he should not open the door.

Differently from the *commodatarius*, the *depositarius* was not strictly liable for *custodia*[24]) and therefore, according to the traditional approach[25]), the *actio furti* was not automatically applicable to him. However, the role of strict liability, which might be justified by the borrower's right to use the thing, does not explain why two persons in a similar position – both having the possibility to exert physical control – were treated so dissimilarly. The reason why the depositee could not bring the *actio furti* and did not have *custodia* is arguably that, owing to the limited availability of the thing to the depositee according to the contract of safe-keeping, his level of control over the thing, in theory sufficient to activate the claim, was classed as non-operative control. The legal device through which this result was achieved was the non-normative requirement of *custodia*. The depositee had a legal – contractual – title to control, but no entitlement to control that could be used to bring an *actio furti*.

The difference between legal title and entitlement is important. The title is linked to a substantive right, whereas the entitlement concerns a procedural right to bring the action of theft and is independent of the substantive right. Hence, control is non-operative when it does not translate into an entitlement to bring the action.

B. Fullo and sarcinator:

The legal status of the *fullo* and the *sarcinator* is interesting also from the perspective of the owner:

> Gai. inst. 3,205: Item si fullo polienda curandaue aut sarcinator sarcienda uestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil interest ea non periisse, cum iudicio locati a fullone aut sarcinatore suum consequi possit, si modo is fullo aut sarcinator rei praestandae sufficiat; nam si soluendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio conpetit, quia hoc casu ipsius interest rem saluam esse.

The fuller and the tailor, and not the owner, could claim in theft. However, if they were insolvent the owner was legitimated to the *actio furti*. The entitlement of the contractual holders was given priority over the entitlement of the owner. In general terms, the owner would claim because he had control

[24]) Gai. inst. 3,207.

[25]) Kaser, Grenzfragen (n. 10) 292.

of the stolen thing, albeit indirectly, and the thief had challenged this form of control. Yet, in this particular case the legal system had to balance different entitlements and inserted a non-normative bar to the claim of the owner, who had no interest in the loss caused by the thief, because, and in so far as, he could bring an *actio locati* against his contractual party. However, had this action been useless owing to the contractual party's insolvency, another non-normative requirement intervened to overrule the previous policy, and the owner would be able to claim against the thief. It can be seen here how the normative requisite of control was still acknowledged, but was shaped and re-shaped by non-normative rules. The latter did not override normative principles. Their function was rather to adapt those principles to the legal developments. The reason for the precedence accorded to the fuller and the tailor was their higher level of control of the thing in comparison with the owner. In the battle of the entitlements, the strongest form of control tended to impose itself if no other considerations – in the shape of non-normative requisites – emerged.

Note that the fuller who had been entrusted with the thing that was subsequently stolen would be granted the *actio furti* in so far as he had a certain degree of control. Once the entitlement to control was lost, for example when the owner released him from the action on the contract[26]), the *actio furti* was no longer available. The same idea was endorsed by Paul from a different perspective: if ownership of a stolen thing changes, the new owner had the action[27]), because the old owner's entitlement to control was no longer justified.

C. Fur as claimant:

One of the clearest signals of the importance of control is provided by the dispute between Quintus Mucius and Servius Sulpicius on the thief as claimant:

> D. 47,2,77(76),1 (Pomp. 38 ad Quint. Muc.): Si quis alteri furtum fecerit et id quod subripuit alius ab eo subripuit, cum posteriore fure dominus eius rei furti agere potest, fur prior non potest, ideo quod domini interfuit, non prioris furis, ut id quod subreptum est saluum esset. haec Quintus Mucius refert et uera sunt: nam licet intersit furis rem saluam esse, quia condictione tenetur, tamen cum eo is cuius interest furti habet actionem, si honesta ex causa interest. nec utimur Seruii sententia, qui putabat, si rei subreptae dominus nemo exstaret nec exstaturus esset, furem habere furti actionem: non magis enim tunc eius esse intellegitur, qui lucrum facturus sit. dominus igitur habebit cum utroque furti actionem, ita ut, si

[26]) Iav. 9 ex posterioribus Labeonis D. 47,2,91 pr.

[27]) Paul. 9 ad Sabinum D. 47,2,47: *Si dominium rei subreptae quacumque ratione mutatum sit, domino furti actio competit, ueluti heredi et bonorum possessori et patri adoptiuo et legatario.*

cum altero furti actionem inchoat, aduersus alterum nihilo minus duret: sed et condictionem, quia ex diuersis factis tenentur.

Prior fur steals something from *dominus*. Yet *prior fur* does not have the time to enjoy the booty, because *posterior fur* purloins the thing from him. *Dominus* has an *actio furti* against both *prior* and *posterior fur*. The significance of this passage for our investigation lies in the legal relationship between *prior* and *posterior*. Whereas Quintus Mucius denied that *prior fur* could bring a claim against *posterior* for want of *honesta causa*, Servius Sulpicius allowed the claim of *prior* if the owner did not commence proceedings. Pomponius rejected the Servian solution.

Servius was not some obscure lawyer. He was one of the most influential Roman jurists of the late Republic. And this issue went so directly to the very nature of the *actio furti* that it is hardly imaginable that he had not considered this case very carefully. His position was that the action was available to a person who obtained the thing through a theftuous act. This was a claimant who had no substantive right to possess – either in his own name, or in the name of somebody else. Yet, the thief did have interdictal protection against other thieves, because in the present scenario the *uitiosa possessio* was irrelevant[28]). He had also an interest in the safety of the thing, because he would be liable to the owner, who could bring an action of debt, the *condictio*.

The controversy confirms the centrality of control as a regulatory mechanism of the *actio furti*. Both Quintus Mucius and Servius Sulpicius agreed that *prior fur* could claim. Mucius accepted that *prior* had an interest in the safety of the thing because of the *condictio furti* of the owner. Yet he used policy considerations to restrict *prior*'s entitlement to control, the want of *honesta causa*[29]), whereas Servius only argued for the priority of *dominus*' entitlement over *prior*'s – a clear instance of the *actio furti* as a battle of entitlements.

In the sources, we discover that Julian was firmly against the availability of the action to the thief: it is settled that thieves cannot have an action for theft in respect of what they have stolen[30]). On this basis, Julian

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[28]) See n. 100 and text thereof.

[29]) There are several examples of denial of the claim to persons who have an *interesse*. E.g. Paul. 2 manualium D. 47,2,86(85): *item is, cui ex stipulatu uel ex testamento seruus debetur, quamuis intersit eius, non habet furti actionem: sed nec is, qui fideiussit pro colono.* Although it is not a conclusive argument, these denials seem to support the account of the interest in the safety of the thing as a non-normative requirement. On this last passage, see notes 52 and 53 and text thereof.

[30]) Ulp. 29 ad Sabinum D. 47,2,14,4: *Iulianus quoque libro uicensimo secundo di-*

denied the *actio furti* to the depositee who meddled with the thing. The depositee – someone who did not have *custodia* liability and therefore would be made answerable in theft only on the basis of his own wrongful behaviour[31]) – should not be granted the action despite having an interest in the safety of the thing. In this passage, the similar functions of safe-keeping and of the interest in the safety of the thing as non-normative requirements are evidently recognisable. The bad faith of the depositee was considered paramount and triggered a policy-based restriction of the rule according to which the *actio furti* was available in the presence of control. This conclusion was influenced by Quintus Mucius' view illustrated in the Pomponian passage.

Ulpian seems to confirm the centrality of the control-liability as the normative element of the action, which could be modified by non-normative requisites, although he opted for an approach different from Julian's:

> D. 47,2,48,4 (Ulp. 42 ad Sabinum): Si ego tibi poliendum uestimentum locauero, tu uero inscio aut inuito me commodaueris Titio et Titio furtum factum sit: et tibi competit furti actio, quia custodia rei ad te pertinet, et mihi aduersus te, quia non debueras rem commodare et id faciendo furtum admiseris: ita erit casus, quo fur furti agere possit.

Ego hires *tu*'s services to clean his garment. *Tu* lends it without *ego*'s consent to Titius, from whom the garment is stolen. *Ego* will have an action against *tu*. Yet *tu* will be able to claim in theft as well. Ulpian concluded that, in certain cases, a thief could bring the *actio furti*. Was it no longer settled that the thief had no active legitimation? It seems hardly possible. Even Ulpian presented this situation as an exception. More probably, the settled rule allowed for some scope which both jurists used: Julian for an interpretation linked to the Mucian *honesta causa*; Ulpian for a more lenient interpretation on the basis of several considerations, such as the fact that, unlike the honest depositee, the honest cleaner would have a claim in *furtum* against the thief because of the cleaner's *custodia*-liability towards the owner.

Both Julian's depositee and Ulpian's cleaner obtained the thing on the basis of a valid contract. The cleaner contracted it to someone else, whereas Julian tells us only that the depositee 'meddled with the thing', *eam*

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gestorum scribit: quia in omnium furum persona constitutum est, ne eius rei nomine furti agere possint, cuius ipsi fures sunt, non habebit furti actionem is, apud quem res deposita est, quamuis periculo eius esse res coeperit qui eam contrectauit.

[31]) Gai. inst. 3,207: *si quid ipse dolo [malo] fecerit*. Julian, too, acknowledges this point.

contrectauit. Unlike Ulpian, Julian did not mention a contractual relationship as the foundation of the transfer of the stolen thing to a third party. Yet it is not very plausible that the jurists would not comment upon the existence of a contractual relationship if it changed significantly the scenario. Julian wrote only that he who tampered with the thing did not have the *actio furti*, whereas he could have explicitly stated that the action would depend on the way in which the thing was transferred to the third party. His words were reported by Ulpian in the same work in which the Severian jurist presented his own view. Ulpian, however, did not make the direct point that the borrower for use, unlike the depositee, concluded a contract with the third party thief. If, as suggested by Pomponius, the Mucian view had imposed itself, the key to understand the passage may be offered by the concept of *honesta causa*. The act of the wrongdoer was not considered by Ulpian so despicable to deprive him of an honest ground to claim. After all, the cleaner had only lent the garment to the third party – presumably with the intention to give it back to its owner. If this analysis is correct, there seem to have been bad thieves and worse thieves; and arguments would be advanced to distinguish the different degrees of dishonesty. An approach based upon nuances of dishonesty would confirm that Mucius' reasons for not giving to the first thief an action had little to do with the normative requisites of the *actio furti* – that is, those essential requisites which characterised the action throughout its historical evolution. It can therefore be posited that there was no normative hurdle to the claim of a thief, from which it may be concluded that control was necessary to grant the action *stricto iure*; yet policy considerations might have suggested otherwise in given cases.

D. Fur rei suae:

As regards the theft of one's own thing, Gaius acknowledged the possibility to bring an action against the owner, for instance in the case of the debtor who theftuously subtracts the thing that he gave to the pledgee:

> Gai. inst. 3,200: Aliquando etiam suae rei quisque furtum committit, ueluti si debitor rem, quam creditori pignori dedit, subtraxerit, uel si bonae fidei possessori rem meam possidenti subripuerim. unde placuit eum, qui seruum suum, quem alius bona fide possidebat, ad se reuersum celauerit, furtum committere.

The Gaian definitions of *furtum*[32]) would exclude that the pledgee could claim in theft: neither was the stolen thing a *res aliena* nor was the act committed *inuito domino*. Plainly, the Roman jurists encountered difficulties in

[32]) Gai. inst. 3,195; see n. 16 and text thereof.

the analysis of this particular set of facts. Yet Paul managed to supply a definition of *furtum* which included the *furtum rei suae* by omitting any qualification of the thing: *furtum est contrectatio rei fraudulosa lucri faciendi gratia*[33]. The pledgee was entitled to control and could successfully proceed against the owner.

Paul, referring Pomponius' view, stated that even in the case of the loan for use the lender was bound by the duration of the loan if a deadline had been fixed in the contract[34]). And if the lender took the thing before the deadline, the borrower for use would have an *actio furti* when the borrower had incurred expenses in respect of the thing[35]). Paul commented that the borrower for use was in a position similar to the pledgee: *quia eo casu quasi pignoris loco ea res fuit*. Hence, the owner was at risk of being liable for *furtum* even to the *commodatarius*. Such situation does not speak for an ownership-based delict of theft. The risk of an excessive expansion of the *actio furti* was counteracted through a restriction of its availability to those claimants who would be financially affected by the wrongful behaviour of the owner. It appears, therefore, that even economic considerations were part of a pool of techniques that were applied to rein in what was a potentially extremely wide action.

E. Res hereditariae:

As intimated, the *actio furti* did not seem to be contingent on the legal title of the claimant, but rather on the claimant's entitlement to control. This entitlement is a legal recognition of a procedural, as opposed to a substantive, right of the claimant to act in court. A good example of such situation is supplied by the *res hereditariae*. The person who usucapted the things included in an inheritance committed no theft, even when the usucapient knew that they belonged to another, as long as the owner had not taken possession:

> Gai. inst. 2,52: Rursus ex contrario accidit, ut qui sciat alienam rem se possidere, usucapiat, uelut si rem hereditariam, cuius possessionem heres nondum nactus est aliquis possederit; nam ei concessum est usucapere, si modo ea res est, quae recipit usucapionem. quae species possessionis et usucapionis pro herede uocatur[36]).

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[33]) D. 47,2,1,3 (n. 11).

[34]) Paul. 29 ad ed. D. 13,6,17,3.

[35]) Paul. 5 ad Sabinum D. 47,2,15,2.

[36]) On this source, see E. Pool, Die Erbschaftsersitzung in Gai 2,54 und Theo Mayer-Malys Thesen zum Ursprung der usucapio, in: ZRG RA 129 (2012) 113–160, 118–130.

Gaius specified in another passage that the rule did not apply in the case of the *heres necessarius*[37]), whose existence hindered the usucaption *pro herede*.

> Gai. inst. 3,201: Rursus ex diuerso, interdum alienas res occupare et usucapere concessum est nec creditur furtum fieri, ueluti res hereditarias quarum heres non est nactus possessionem, nisi necessarius heredes extet; nam necessario herede extante placuit nihil pro herede usucapi posse.

According to Gaius, therefore, the owner, with a legal title to possess, was unable to bring a claim in theft against someone who took control of things belonging to the inheritance. In this scenario, only the *possessor ad usucapionem* had an entitlement to control the thing. The title to ownership, evidently, did not help the heir if it was not coupled with control. Sirks writes that "[*f*]*urtum* of an object in an open inheritance (*res hereditaria*) is not possible and the reason is that there is no possessor and *dominus*"[38]). Yet usucaption was possible even in the presence of an owner not in possession. The example of the *res hereditariae* is particularly illuminating because the *fur* who stole a thing belonging to an inheritance would be liable in theft if someone exerted a power of control over the thing. Thus, Julian stated that, if the *res hereditaria* had been given as a pledge or loan, the claim would be available to the person in control[39]). The sources add usufruct to Julian's non-comprehensive list[40]).

On the other hand, the *possessor pro herede* was not deemed to deserve the support offered by the *actio furti* in the case of a theft perpetrated by a third party[41]). The possessor was in control of the inheritance, but the claim was barred through the addition of a non-normative requisite that hindered control from becoming operative: the *possessor pro herede* did not have an interest in the safety of the thing, *interest rem non subripi*. The more restrictive approach was justified on economic grounds: the person with a financial loss was given priority over the person who only suffered an expectation loss.

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[37]) Gai. inst. 2,152; 156; 160.

[38]) Sirks, TR (n. 21) 495.

[39]) Marcel. 8 digestorum D. 47,2,69(68): *Hereditariae rei furtum fieri Iulianus negabat, nisi forte pignori dederat defunctus aut commodauerat.*

[40]) Scaev. 4 quaestionum D. 47,2,70(69).

[41]) Iauol. 15 ex Cassio D. 47,2,72(71)1: *Eius rei, quae pro herede possidetur, furti actio ad possessorem non pertinet, quamuis usucapere quis possit, quia furti agere potest is, cuius interest rem non subripi, interesse autem eius uidetur qui damnum passurus est, non eius qui lucrum facturus esset.*

F. Anuli sponsionis causa accepti:

D. 19,5,17,5 (Ulp. 28 ad ed.): Si quis sponsionis causa anulos acceperit nec reddit uictori, praescriptis uerbis actio in eum competit: nec enim recipienda est Sabini opinio, qui condici et furti agi ex hac causa putat: quemadmodum enim rei nomine, cuius neque possessionem neque dominium uictor habuit, aget furti? plane si inhonesta causa sponsionis fuit, si anuli dumtaxat repetitio erit.

The role of the relationship of control might be able to explain the difficult case of the rings given to a third party in a position similar to the *sequester*, a particular kind of depositee, during a dispute concerning ownership linked to a *sponsio*. If the third party did not give up the rings to the winner of the dispute, the refusal triggered for Sabinus the *actio furti*. Ulpian rejected this solution: the action would not be available to the victor because the latter would have neither ownership nor possession. He would only have an *actio praescriptis uerbis*. There is general agreement that Sabinus' view can safely be attributed to Sabinus himself, whereas Ulpian's view has attracted doubts of interpolation[42]). Yet these doubts do not seem justified.

Kaser observes that the winner would have been unable to get the losing party's ring if he claimed as a creditor, for creditors did not have the *actio furti*. In his view, Sabinus thought that the winner had become the owner, whereas for Ulpian the winner had not acquired ownership, and therefore was a mere creditor[43]). Kaser's explanation does not answer two questions: the first one is why the source does not distinguish the action for the recovery of the winner's own ring given to the keeper from the action to obtain the ring deposited by the losing party. Kaser's account is only compatible with a reading of the passage as concerning the action directed to the losing party's ring. But the text remains silent on this issue. Second, his explanation does not clarify why Ulpian referred to the lack of ownership and possession, that is, two legal institutions which, as he himself argues in the very Commentaries to the Edict from which this excerpt was taken, 'have nothing in common'[44]).

The analogy with the *sequester* – accepted by Kaser – might throw some light on this complex case. The deposit with a *sequester* could be requested by one party with the aim to break the other party's possession[45]), or the judge himself might decide that a *sequester* had to be appointed[46]). Hence, it

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[42]) Albanese, *Furtum* fino a Nerazio (n. 3) 128–129.

[43]) Kaser, Grenzfragen (n. 10) 310–311.

[44]) Ulp. 70 ad ed. D. 41,2,12,1: *Nihil commune habet proprietas cum possessione* (my translation).

[45]) Iul. 2 ex Minicio D. 41,2,39.

[46]) Ulp. 14 ad ed. D. 2,8,7,2.

is conceivable that the winning party did not have control over the thing. The disagreement between Sabinus and Ulpian was arguably about the question of the entitlements to control the rings. For Ulpian, the winning party did not have operative control and consequently lacked the necessary requisite to the action of theft. The terms 'ownership and possession' are examples of shortcuts used by the jurists, for want of better terms, to refer to the kind of control that was relevant in the *actio furti*.

G. Ancilla furtiua:

Javolen discusses a difficult case of multiple claimants:

> D. 47,2,75(74) (Iav. 4 epist.): Furtiuam ancillam bona fide duorum aureorum emptam cum possiderem, subripuit mihi Attius, cum quo et ego et dominus furti agimus: quaero, quanta aestimatio pro utroque fieri debet. respondit: emptori duplo, quanti eius interest, aestimari debet, domino autem duplo, quanti ea mulier fuerit. nec nos mouere debet, quod duobus poena furti praestabitur, quippe, cum eiusdem rei nomine praestetur, emptori eius possessionis, domino ipsius proprietatis causa praestanda est.

Attius purloins a stolen slave-woman whom *ego* bought in good faith. Both *ego* and the owner sue in theft. For the Roman jurist, the two actions were perfectly compatible, even though the measure of damages would be different. Javolen opined:

> "We should feel no concern that a penalty for theft is to be awarded to two people; for where reparation is made for one and the same thing, the purchaser's justification for an award is his possession of the thing, the owner's, his very title to it."

This passage is a serious obstacle to the theory advanced by Fritz Schulz, who linked the *actio furti* to the duty of safe-keeping, because the *bona fide possessor* was not liable for *custodia*. The key argument is *emptori eius possessionis, domino ipsius proprietatis causa praestanda est*. We have seen Thomas's translation; Herbert Jolowicz translates: "the purchaser gets the value of possession, and the proprietor the value of the ownership"[47]). Yet, Javolen is not concerned with value, but, as Thomas emphasises, with the rationale of the award. There are two different justifications, *possessionis causa* and *proprietatis causa*. The incongruence of placing on the same level a right with a fact has already been pointed out. A plausible explanation for such incongruence is that the jurists used these expressions *lato sensu* to identify the triggering elements of the action: direct and indirect control. Anyone who had control could potentially claim in theft, but non-normative requisites intervened to reduce the number of claimants: they might have had

[47]) On Schulz's theory, see infra, n. 75; also H.F. Jolowicz, Digest XLVII. 2 de furtis, Cambridge 1940, Introduction xxxvii.

control, but they did not have an entitlement to control. In this scenario, such requisites were not called upon. Owing to the penal nature of the damages, it was possible that both the possessor and the owner were acknowledged to have operative control. A similar construction was discussed by Paul with reference to the tenant and the landowner whose crops were stolen[48]).

H. Serui optio:

The role of safe-keeping in the *actio furti* and its relationship to other non-normative requisites was discussed by Papinian in the case of the *serui optio*:

> D. 47,2,81(80),2 (Pap. 12 quaest.): Si ad exhibendum egissem optaturus seruum mihi legatum et unus ex familia seruus subreptus, heres furti habebit actionem: eius interest: nihil enim refert, cur praestari custodia debeat.

Ego is bequeathed the choice of one slave out of a body of slaves. He brings an *actio ad exhibendum*, but before he can exert his choice, one of the slaves is stolen. Papinian denied that *ego* can claim in theft. The reasoning is particularly important: "the heir would have the action for theft because he would have the interest; and it is irrelevant on what ground the obligation of safekeeping is due." The *custodia*-liability was irrelevant because only the heir had an interest in the safety of the thing. Until the choice was made, *ego* might be a legatee, but he had no entitlement to control the slave. It seems logical that only the heir could take action. The duty of safe-keeping was not a requirement, and rightly so. Yet, it could be argued – and indeed possibly it had been argued, which would explain Papinian's statement – that the legatee had a form of indirect control arising out of the testamentary clause in his favour. Papinian needed an explanation for the exclusion of the legatee from the category of the claimants, and he found it in the want of *interesse*, which here displayed its usual function of excluding requisite. The non-normative *custodia* requirement yielded to another non-normative requirement.

I. Venditio without traditio:

An interesting and possibly not so infrequent case, which caused some stir among the jurists, concerns the situation of the owner who has sold a thing that is stolen before delivery:

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[48]) Paul. 2 sententiarum D. 47,2,83(82),1: *Frugibus ex fundo subreptis tam colonus quam dominus furti agere possunt, quia utriusque interest rem persequi*. Pennitz (n. 5), text after note 93, explains Javolen's need to provide a justification for the availability of two actions, *nec nos mouere debet*, as the consequence of the lack of a legal relationship between owner and good faith possessor, which puts the latter in a disadvantageous position.

D. 47,2,81 pr. (Pap. 12 quaest.): Si uendidero neque tradidero seruum et is sine culpa mea subripiatur, magis est, ut mihi furti competat actio: et mea uidetur interesse, quia dominium apud me fuit uel quoniam ad praestandas actiones teneor.

Papinian argued that the better view, *magis est*, was that *ego*, that is the owner, and not the purchaser of the slave, should have the *actio furti* "because I am his owner or because I will be liable to yield up actions I have regarding him". The reference to the better view indicates a disagreement[49]). If one examines this passage a bit closer, two different issues emerge: one about the general availability of the action upon these facts; the other concerning the ground upon which to bring the claim – either the *interesse rem saluam esse* or the *cessio actionum*. Rosenthal suspects that the passage is corrupt, because the second debate would not fit in his theory of *interesse* as a central requirement of the action. He observes that ownership, of itself, is not sufficient to justify the interest in the safety of the thing[50]). Even Kaser has difficulties with the source. He attaches the right to claim directly to ownership – a construction that he explains as a 'peculiar, but original thought of Papinian'[51]). There is at least another passage which makes use of the same theoretical construction. Paul wrote that "a person who has an interest in the thing's not being stolen will have the action for theft, if he holds the thing with the owner's consent"[52]). David Pugsley observes on this source: "The text is clearly corrupt. The restriction in the first sentence is unparalleled elsewhere; and if genuine it would deny the right of action to *bona fide* possessors, for they do not hold the goods *domini voluntate*. Yet we know that they were entitled to sue"[53]).

On the face of it, the Paulian claimant could commence proceedings in theft if he was authorised by, or could derive his right from, the owner. Yet, possibly, this is not what Paul had in mind. If ownership was used as a shortcut for control, Paul was saying that the contractual partner of the

[49]) Kaser, ZRG (n. 8) 120–121, remarks on another passage about a sale without delivery, Ulp. 29 ad Sabinum D. 47,2,14 pr., that the actionability of the claim might have been a contentious issue, "diese Aktivlegitimation [war] nicht in allen Beziehungen unumstritten". Yet, in his view, it would be unthinkable that the right to claim was generally attributed to the purchaser.

[50]) Rosenthal (n. 7) 253.

[51]) Kaser, Grenzfragen (n. 10) 323–324: "singulärer, aber origineller Gedanke Papinians".

[52]) Paul. 2 manualium D. 47,2,86(85): *Is, cuius interest non subripi, furti actionem habet, si et rem tenuit domini uoluntate*; see also text to note 60.

[53]) D. Pugsley, The Plaintiff in the *actio furti*, in: Acta Juridica (1971) 143–146, 144.

owner would be unable to claim until he obtained control through delivery – or, with Papinian, until the *cessio actionum*, which would give to the buyer a form of indirect control. It does not seem that Paul was making a statement with general value, for this would be in blatant contrast with many sources. Paul was discussing only a particular entitlement to control.

Similarly, in the Papinianic excerpt it was not ownership that directly explained the availability of the action – Rosenthal was right in pointing out that a construction which links ownership, *actio furti* and *interesse* has no footing. The action was attached to the claimant's entitlement to control, which derived from his status as owner. Before delivery, or at least the transfer of the rights of action, the purchaser had no control and therefore no active legitimation.

J. Creditor pigneraticius:

A justification of the action on the basis of the interest in the safety of the thing encounters difficulties when the claimant is the creditor from whom the pledge is stolen:

> D. 47,2,15pr. (Paul. 5 ad Sab.): Creditoris, cuius pignus subreptum est, non credito tenus interest, sed omnimodo in solidum furti agere potest: sed et pigneraticia actione id quod debitum excedit debitori praestabit.

According to Paul, the creditor could bring the *actio furti* for the full value of the thing even if this value was higher than the credit – and therefore his interest. The surplus could be recovered by the debtor through an *actio pigneraticia*.

Jolowicz observes that "[t]he idea that the pledgee is entitled to full damages but must hand over the amount by which they exceed the debt is not consistent either with the security or the liability basis"[54]). In fact, the mention of the *actio pigneraticia* in favour of the debtor is irrelevant to the action of theft, for the liability of the claimant in the *actio furti* towards the debtor arises only when the profit is obtained, that is, after the action of theft has been successfully brought, and not before. If the *interesse* is seen as a non-normative requirement, and the passage is read in the light of the creditor's entitlement – which shifts the focus from the creditor's right to the legal recognition of an existing control – it no longer presents difficulties of interpretation. The pledgee was recognised as the party with the strongest form of control and could use his entitlement to secure the thing pledged. The force of attraction of his entitlement justified for Paul overriding the requisite of the

[54]) Jolowicz (n. 47) 22.

interest in the safety of the thing, which was possible given that this requisite was not normative.

The last point needs to be explored more accurately. William Buckland observes that "a pledge creditor had the action [of theft], but its basis is obscure"[55]). Tony Thomas accepts "the existence of the general active legitimation for *actio furti* of the pledge creditor", but, the English scholar continues, "[t]he great question, of course, is the nature of the *interesse* which entitles him to the *a. furti*"[56]). The following Ulpianic passage is an excellent example of the interpretative snags faced by the Romanists when analysing the interface of *pignus* and *furtum*:

> D. 47,2,14,6 (Ulp. 29 ad Sab.): Idem scribit, si, cum mihi decem deberentur, seruus pignori datus subtractus sit, si actione furti consecutus fuero decem, non competere mihi furti actionem, si iterum subripiatur, quia desiit mea interesse, cum semel sim consecutus. hoc ita, si sine culpa mea subripiatur: nam si culpa mea, quia interest eo quod teneor pigneraticia actione, agere potero. quod si culpa abest, sine dubio domino competere actio uidetur, quae creditori non competit. quam sententiam Pomponius quoque libro decimo ad Sabinum probat.
>
> "Papinian also writes that where ten are owed to me and the slave given to me in pledge for them is stolen, if I should recover for ten in the action for theft, I will not have a second action if the slave is taken off again, since my interest in him ceased when I was successful in the first action. That holds, though, if his abduction was not my fault; for if it were attributable to me, since I would myself be liable to the action for pledge, I would be able to sue for theft. But if I was not at fault, the second action, which does not lie to the creditor, would undoubtedly be available to the slave's owner. This view is approved also by Pomponius in the tenth book of *Sabinus*."

Ego, the pledgee, could claim in theft, but only once. If the slave pledged was stolen again, only the owner was legitimated to the *actio furti*. Thomas justifies the claim of the pledgee on the basis of a comparison between *pignus* and *fiducia*[57]). Yet the explanation is closer at hand. Both *ego* and *dominus* had control. In the battle of the entitlements the law gave precedence to the stronger position of the *creditor pigneraticius* and denied operative control to the owner. When the slave was stolen for a second time, the priorities changed. *Ego* had already obtained the value of the slave and therefore his credit was secured. If he was not at fault, why should the law grant him an action? *Dominus*' control became operative. In the opposite scenario, an

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[55]) W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian, 3rd ed. revised by P. Stein, Cambridge 1963, 580.

[56]) J.A.C. Thomas, Furtum pignoris, in: TR 135 (1970) 135–162, 137.

[57]) Thomas (previous note) 143–144.

avenue had to be found to link *ego*'s *culpa* to the *actio furti* and, at the same time, to block *dominus*' action. The solution was the application of the well-known non-normative criterion of *ego*'s *interesse rem saluam esse*, which was activated by the creditor's fault. Correctly, Kaser posits that the *creditor pigneraticius*'s action in this scenario did not depend on *custodia*[58]).

K. Creditor:

Unlike the *creditor pigneraticius*, the simple creditor did not have access to the *actio furti*. The claim could not be granted to a person who had only an obligatory right to the thing unsupported by control. However, the existence of a discussion on this topic indicates that the point was at least debated. Whereas most of our sources deny the availability of the claim to the creditor, Kaser discusses two passages which could be used in support of a theory in favour of the simple creditor as a claimant[59]):

> D. 47,2,13 (Paul. 5 ad Sab.): Is, cui ex stipulatu res debetur, furti actionem non habet, si ea subrepta sit, cum per debitorem stetisset, quo minus eam daret.
>
> D. 47,2,86(85) (Paul. 2 manual.): Is, cuius interest non subripi, furti actionem habet, si et rem tenuit domini uoluntate, id est ueluti is cui res locata est. is autem, qui sua uoluntate uel etiam pro tutore negotia gerit, item tutor uel curator ob rem sua culpa subreptam non habet furti actionem. item is, cui ex stipulatu uel ex testamento seruus debetur, quamuis intersit eius, non habet furti actionem: sed nec is, qui fideiussit pro colono[60]).

In the first passage, Paul tells us that the creditor *ex stipulatu* could not claim in theft when the thing was stolen from the debtor who culpably delayed the performance. On a superficial analysis, the excerpt might be understood as implying that the creditor would be legitimated to the *actio furti* until the *mora debendi* kicked in. Kaser opposes to such interpretation that it is more logical to read the passage as stating that the debtor kept the action independently of the culpable delay[61]). Thus, Paul would point out that the debtor could claim with the *actio furti* not only when the thing was stolen before his culpable delay, but even after having been put on delay. Kaser's analysis is persuasive. The creditor never acquired any kind of

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[58]) Kaser, Grenzfragen (n. 10) 319: "die *custodia*-Haftung des Pfandgläubigers [kann] für seine Aktivlegitimation zur *a.f.* nicht maßgebend gewesen sein. Denn hinge diese hier von der *custodia* ab… dann müßte der Pfandgläubiger die *a.f. ohne* Rücksicht darauf erhalten, ob er den Diebstahl verschuldet hat oder nicht."

[59]) Kaser, Grenzfragen (n. 10) 304–308. Kaser correctly criticises Heymann's supposed interpolations.

[60]) See also the text to n. 52.

[61]) Kaser, Grenzfragen (n. 10) 306.

control and Paul opportunely rejected the theory that the creditor might be able to claim. On the other hand, Paul's urge to take position on this issue indicates that there might have been contrary opinions. We do not have sources that support a different view. Possibly, the minority view was not backed by a theory or by a jurist that the Justinianic commission deemed worth-mentioning.

The second passage is perfectly in line with the first one: the creditor *ex stipulatu* or *ex testamento* cannot claim in *furtum* because there is no control which the law needs to protect. A discussion has been triggered in the Romanist literature by the first sentence, according to which the person with an interest in the safety of the thing would be able to claim if he held it with the owner's agreement. But the scholars who reject this passage as corrupt simply read too much in it. As intimated, Paul only excluded that a creditor without control could bring the action. He did not argue, as several commentators seem to think, that the owner's agreement was always a necessary element of the claim. We can therefore conclude that the simple creditor would normally not have the *actio furti* when the legal title was not accompanied by control.

Before concluding this section, it is necessary to discuss a group of cases in which the role of control in the *actio furti* may be obfuscated by a more unusual application of the action. They differ from the previous ones for the problematic foundation of the claimant's right to claim, which is all the more evident because the other requirements of the action are pushed into the background. Yet, it will become apparent that, even in this context, the theory of control can contribute to clarify the legal basis of the claim. We shall consider two scenarios by way of example.

L. Pauo:

D. 47,2,37 (Pomp. 19 ad Sab.): Si pauonem meum mansuetum, cum de domo mea effugisset, persecutus sis, quoad is perit, agere tecum furti ita potero, si aliquis eum habere coeperit.

Ego's tame peacock has escaped; *tu* finds it and chases it away[62]). This set of events, of itself, does not activate the claim. But the legal consequences of *tu*'s conduct change as soon as *aliquis* takes the animal: this is the act that triggers the *actio furti*[63]). A particularly interesting element of this scenario, described by Pomponius, is that there is no reference to the mental state of

[62]) A similar set of events can be found in other passages, such as Ulp. 27 ad ed. D. 47,2,50,4; and Gai. 12 ad ed. prouinciale D. 47,2,51.

[63]) Jolowicz (n. 47) 48, speculates that the verb *perire*, to which is often attached the meaning of 'to get lost', meant in this case that the peacock had died, possibly on the third party's dinner table.

aliquis, nor is there any indication that *tu* wanted to capture the peacock. It is quite improbable that *aliquis* included *tu*, because Pomponius would have specified that the delict was activated by the act of 'the chaser or someone else'. But even if *tu* could be the one who took the peacock, the legal issue does not change, for *aliquis* could also be a third party. Until *aliquis* intervenes, *tu*, this was presumably Sabinus' view, is no thief. It does not emerge in the source that *aliquis* and *tu* must be acting in agreement. Thus, the events narrated by Pomponius translated into *furtum* only when *aliquis* was able to challenge *ego*'s control. *Tu* seems to be attracted into the sphere of the delict by the power of control exerted by *aliquis*. We can turn this analysis upside down and note that *ego* is unable to bring a claim against *tu* until something happens which threatens the solidity of *ego*'s control. Once again, this set of events revolves around the identification of the moment in which the claimant loses control.

This scenario pushed the boundaries of *furtum*. Control as a normative requirement is highlighted by the jurist's acknowledgement that the simple chasing away did not activate the delict – not even, one might assume, if the terrified animal injured itself and died. For Sabinus, a challenge to the claimant's control sufficed even when it was procured by a third party, as opposed to a party to the *actio furti*. The agent's intention does not appear to be particularly significant. Sirks, too, has recently interpreted this case using control language: the loss of the peacock implies a loss of control for the owner[64]).

The case of the peacock creates a further difficulty to the theory based upon the *interesse rem saluam esse*, since this element is unable to account for all the scenarios discussed by the Roman jurists[65]). The *interesse*-theory cannot explain why the action is released by the act of taking control of the animal, and not simply by the act of chasing it away.

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[64]) B. Sirks, Delicts, in: D. Johnston (ed.), The Cambridge Companion to Roman Law, Cambridge 2015, 246–271, 253, acknowledges the function of control, but proposes a different interpretation of this scenario: "The peacock was lost: this implied a loss for its owner. He was indeed deprived of it, but it was also no longer under control of its owner (as expressed in its now lost will to return). The chaser behaved as if he had the right to strip the peacock from [sic] its intention to return." Yet, the will to return did not play a role in this case, for the *actio furti* was finally activated by the intervention of the third party, not by a loss of the *animus reuertendi*. Further, no such intention of the chaser as described by Sirks can be inferred from the text. The action was linked to the third party intervention.

[65]) See Rosenthal (n. 7) 244–258.

M. Mulio:

The muleteer's case shows that the Sabinian lenient interpretation in the scenario of the tame peacock grounded on the older jurisprudence of the *ueteres*:

> D. 47,2,67(66),2 (Paul. 7 ad Plaut.): Eum, qui mulionem dolo malo in ius uocasset, si interea mulae perissent, furti teneri ueteres responderunt.

A muleteer had to leave his mules unattended to abide by the terms of a summon before the magistrate issued upon the request of a person in bad faith. With no one to take care of them, the mules went astray. The muleteer's loss was actionable in theft. Once again, there is no indication that an accomplice of the wrongful claimant stole the animals[66]). Notably, the text does not suggest that the muleteer was also the owner. He was certainly responsible for the mules and for this reason exerted a direct relationship of control over them. Yet, the laconic text does not provide any information on the legal title of the claimant, which indeed appears to be quite irrelevant. Further, the text does not suggest that there was any form of *interesse* or *custodia*-liability attached to the role of the *mulio*. This very basic description of facts puts the received theories on the actionability the *actio furti* out of their comfort zone. The verb *perire* describes a situation which has the consequence of stultifying the victim's entitlement to control. For the Republican jurists, therefore, the claimant's loss of control and the bad faith of the defendant, here possibly an indication of the *animus furandi*, were enough to trigger the action. Sabinus appears to have drawn heavily on this jurisprudence. For David Ibbetson, this is an instance of the attenuation of the role played by the physical element of the *actio furti* and of the corresponding "primacy of the mental element"[67]).

The last two examples epitomise a jurisprudential tendency which can be located between the late Republic and the early Principate. They should be seen a self-contained group of cases based upon the same expansionary impulse rather than as a stream of cases that can be followed from the Republic to classical law. The reasons behind this tendency are well exemplified by Albanese, who observes that the *actio furti* was an extremely flexible legal tool which was stretched to cover areas where no other remedy

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[66]) Those, like Watson, Law of Obligations (n. 5) 222, for whom handling was a necessary requirement of the action, have to explain the passage as a case of theft with accomplices. Yet, they read into this text much more than what Paul tells us. G. MacCormack, Ope consilio furtum factum, in: TR 51 (1983) 271–293, 275, advances convincing objections to this theory; see also Jolowicz (n. 47) 102.

[67]) Ibbetson (n. 5) 58–59.

was available but it was felt that the wrongdoer could not go scot-free. This stream ran dry when more technically appropriate legal institutions were introduced. Still, it cannot be said that they were not in line with the general structure of the action of theft. They were all characterised by a loss of control, but the action was not always triggered by a direct challenge to the claimant's control. In the peacock case, the challenge to the control exerted by the owner was raised by the third party finder. The muleteer case is more extreme than the peacock case because it is not even clear whether a third party had taken control of the mules. The bad faith of the agent occupied the centre stage and one has the impression that the third-party's challenge to the claimant's control was relegated to the background: someone might take the mules, but this act becomes opaque in front of the gravity of the agent's bad faith.

Although the classical jurists departed from the approach of the Republican jurists, it can be observed that the claimant's control offers a requirement that clearly subtends to all known cases of application of the *actio furti*. Certainly, it was not the only normative element. But it was the normative element that constantly occupied the centre stage, as the examples just examined confirm.

5. The Meaning of Control

Albanese has demonstrated that *furtum* was an extremely flexible institution[68]). The application radius of the *actio furti* could be enlarged or restricted according to the legal developments and the social dynamics with strong variations ascertainable in the historical periods. Consider the difference between the Republican times, during which the theft of land was operative[69]), and classical law, when only movables could be the object of the action. Thoughts concerning the financial implications of the theft, too, were not alien to its availability[70]). Republican law suggests that *furtum* could potentially cover an extremely wide area of interests and situations, from which it follows that those elements of the action without which the claim would not be qualified as *actio furti*, that is, its normative elements, must have been few and quite unspecific: the *actio furti* was potentially available to anyone who exerted control over the thing.

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[68]) Albanese, JUS (n. 4) 316.

[69]) Gellius 11,18,13; Gai. 2 rerum cottidianarum siue aureorum D. 41,3,38.

[70]) Cf. the scenarios concerning the *fur rei suae* and the *res hereditariae* – texts to notes 32 and 36 respectively.

'Control' corresponds to a general holding of the thing, a having it in one's power and being able to exert this power. As described above, it is the power physically to dispose of a thing directly or through others. In the latter case, control was justified by a relationship based upon a contractual agreement or a different power, such as the power of the master over his slaves. Paul agreed with Sabinus, Cassius and Julian that "we acquire possession through a slave or a son in power … even without being aware of the fact … since those are deemed to possess with our consent"[71]). If a slave carries a thing belonging to his master, the slave, and not the master, has the immediate power: he can destroy it, damage it, run away with it, or whatever else. The slave has control. Indeed, the sources do refer to slaves as *fures*[72]). Yet, it is not the slave who can claim if the thing is purloined, but the master who controls the thing through the slave. Hence, the law couples control to an entitlement to control. The master is entitled, the slave is not.

The expression 'entitlement to control' refers to a form of control qualified by law. An entitlement is a legal interest which is not based upon a substantive right but is linked to the procedural right to claim in theft. 'Entitlement', therefore, is different to legal title to control: it is the legal recognition that a form of control is procedurally relevant. For instance, the thief had no title to control, but he had an entitlement to bring the *actio furti* based upon his control. The difference is subtle, but is essential to understand the mechanism. Having an entitlement meant that the claimant had a legal interest supported by a procedural right. There were different entitlements – from the title of the owner in possession to the interdictal possession of the thief. Hence, it was necessary to determine a priority of entitlements. This result was achieved with the help of non-normative requirements, through which a direct link was created between control and the right to bring the claim.

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[71]) Paul. 54 ad ed. D. 41,2,1,5: *Item adquirimus possessionem per seruum aut filium, qui in potestate est, et quidem earum rerum, quas peculiariter tenent, etiam ignorantes, sicut Sabino et Cassio et Iuliano placuit, quia nostra uoluntate intellegantur possidere, qui eis peculium habere permiserimus. igitur ex causa peculiari et infans et furiosus adquirunt possessionem et usucapiunt, et heres, si hereditarius seruus emat.* (translation by Thomas).

[72]) E.g. Ulp. 41 ad Sabinum D. 47,2,36,3: *Si duo serui inuicem sibi persuaserunt et ambo simul aufugerunt, alter alterius fur non est. quid ergo, si inuicem se celauerunt? fieri enim potest, ut inuicem fures sint. et potest dici alterum alterius furem esse, quemadmodum, si alii singulos subripuissent, tenerentur, quasi alter alterius nomine opem tulisset: quemadmodum rerum quoque nomine teneri eos furti Sabinus scripsit.*

Anyone, but only he, who was in a position of control was potentially able to claim in *furtum*. An entitlement, of itself, cannot give a right to claim but merely enable the access to the action when and if the other substantive criteria are given: first there must be a claim, and only then there can be an entitlement. Entitlements were a kind of procedural gateways to the *actio furti*. The latter could be accessed only through one of these gateways and the law would determine, on the basis of different and evolving, non-normative criteria, who should bring the action in practice when all requirements of the claim were given.

It could be posited that control means simply possession. But there are several obstacles to this identification. For one, the language of possession is strongly charged with the burden of the academic disputes and its use might divert the focus of this investigation. As William Buckland observed, the sources on possession are "confusing"[73]). Furthermore, neither possession nor detention seems to be able to identify the triggering factor of the *actio furti*. Referring to control instead of, for example, *possessio naturalis*[74]) is not a way to deny that possession could play a role. Yet, from what has been said it emerges that natural possession does not overlap completely with the definition of control.

Possession is used in the sources – together with ownership – to access the *actio furti*. If the Roman jurists had held possession as the only identifier of the claimant, they would not have referred also to ownership. This very simple, but irresistible consideration allows us to conclude that possession did not coincide with control. In fact, although there was a degree of closeness, control and possession were unlikely to match completely. Noticeably, in the sources the action of theft is never mentioned together with *possessio naturalis*, which, one might argue, was a more suitable term to describe the physical power that triggered the *actio furti*. Yet, natural possession was probably a fact unfiltered by the legal system, whereas the *actio furti* was granted to holders on the basis of their legal entitlements. In this fashion, the legal system was able to regulate the availability of the action of theft against the background of all the other accessible ac-

[73]) Buckland, Text-Book (n. 55) 197: "The terminology of the texts is confusing. We find *possessio, possessio naturalis*, and *possessio civilis*, and the exact meaning of the distinctions is disputed."

[74]) Cf. Paul. 54 ad ed. D. 41,2,1,1: *Dominiumque rerum ex naturali possessione coepisse Nerua filius ait eiusque rei uestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderint.*

tions. Further, *possessio naturalis* was unable to describe the phenomenon of indirect control.

The *actio furti* was granted to claimants who were neither owners nor possessors. Hence the element that characterised the claim was neither ownership nor possession. One possible explanation for the reference to ownership and possession is that the two terms were the closest expressions with which the Roman jurists came up to refer to situations of direct and indirect control which triggered the claim. In other words, the syntagma 'ownership and possession' was a way to circumvent potentially dangerous references to non-legal concepts. 'Control' refers to situations in which someone who holds the thing directly or indirectly is entitled to the *actio furti*. Whereas there are scenarios, such as the thing purloined from its owner, which are almost invariably openings to the action, in other cases whether a holder had an entitlement to control, and could therefore take legal action, depended on several factors. Sometimes, the entitlement was denied because more appropriate legal tools were available. Sometimes, the entitlement was not acknowledged for policy reasons, for example when a thief acted as a claimant. Sometimes, economic considerations suggested that the claimant should be denied operative control. Thus, the *possessor pro herede* did not commit theft if the *res hereditariae* were not financially exploited because the owner had not yet possessed them, whereas the same action would have been classed as theftuous when the things were part of the economic cycle – for instance, when they had been given as pledge. Hence, the same kind of policy justifications which would suggest a rejection of the action might have provided a reason to grant it in a different situation. In this context, the victim's right to get the benefits deriving from the stolen thing would have been a major driving factor. These and other considerations were dependent on, and steered by, the concept of control.

The thief did not want a right. He wanted the thing. In this sense, he did not challenge the right of the holder, but only the holder's control of the thing. The legal answer to a situation in which not a right, but a legally qualified form of control was challenged could not be a claim based upon a proprietary right. It had to be a delictual claim concerning the wrongful conduct of the defendant. Ownership had no direct role to play in the *actio furti*; but it had an indirect one, for the owner could sometimes justify his entitlement to control by linking it to his proprietary right.

The non-normative elements of the action would change through time. They were instruments to shape the concrete application of the claim. They would play an important role in the sense that they contributed to identify the sphere of application of the action. Yet they could be substituted by other

requisites without affecting the normative core of the *actio furti*. They overlapped, although they did not coincide, with what modern jurist would call 'policy considerations'. They were linked not only to societal and cultural developments, but also to changes in the legal order and economic evaluations.

6. The Function of the actio furti in the Light of the Control Theory

As intimated, the sources mention ownership and possession as the requirements of the action. When the power of control derives from a contractual relationship, how is it compatible with the position of the owner? If it can be shown that the foundation of the contract-based claim in theft lies in the power of the owner, which is what Fritz Schulz sought to do, it would be possible to develop an overarching theory of the action at issue as a legal tool that protects the stability of proprietary relationships. According to Schulz, the *custodia*-liability of non-owners in classical law was linked to the interest of the owner, so that in the view of the great scholar there were very few situations of positive interest which were independent of ownership[75]). Yet, Buckland demonstrated that the Schulzian account is unable to provide a coherent explanation for the *actio furti*[76]).

The case of the plot of land in which a treasure had been buried sparked a debate on usucaption which is helpful for the present investigation. The jurists discussed whether the person who usucapted the land became the owner of the treasure even if he was not aware of its existence. Brutus and Manilius answered this question in the positive. This view was rejected by Paul, who agreed with Sabinus that knowledge coupled with recovery of the treasure was necessary to start the usucaption process. Only when the treasure was dug out and taken into safe-keeping the land owner / finder obtained possession:

> D. 41,2,3,3 (Paul. 54 ad ed.): Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedat naturalis possessio. ideoque si thensaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet. ceterum quod Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thensaurum cepisse, quamuis nesciat in fundo esse, non est uerum: is enim qui nescit non possidet thensaurum, quamuis fundum possideat. sed et si sciat, non capiet longa possessione, quia scit alienum esse. quidam putant Sabini sententiam

[75]) F. Schulz, Die Aktivlegitimation zur actio furti im klassischen römischen Recht, in: ZRG RA 32 (1911) 23–99.

[76]) W.W. Buckland, L'intérêt dans l''actio furti', en droit classique, in: RHDE 41 (1917) 5–47.

ueriorem esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.

This relationship between possession and *custodia* is an important element of Okko Behrends's theory of *furtum*. In his view, the *furtum possessionis* was not dependent on a concept of safe-keeping according to which *custodia* derived from the right of the person who gave the thing for safe-keeping[77]). Rather, possession as *custodia* meant that the contractual possessor, as opposed to the possessor of his own thing, *Eigenbesitzer*, derived his own *custodia* and his own interest to use the thing directly from natural law. When the victim of the theft possessed for somebody else, the object of theft was not the thing itself, but the *custodia*[78]).

Behrends presents a lucid case for the contractual parties' independent right to claim in theft – a right which would be anchored in a safe-keeping duty that the *fundatores* attached directly to possession, and not to a proprietary right. From the perspective advanced in this paper, however, neither ownership nor *custodia* played an essential role in the *actio furti*, because, unlike what Behrends argues, they were non-normative elements of the claim. It follows that, from this viewpoint, there was no necessary link between natural law and the action at issue.

An entitlement to control independent of the ownership right signals that, rather than being a guardian of the sanctity of ownership, the *actio furti* concerned the protection of a factual relationship with the thing. Hence, the commercial traffic was not as heavily affected by the action of theft as a right-based theory would have it. Through the circulation of the goods and a better allocation of the resources, a dynamic society based upon commerce produces more wealth than a static society based upon the conservation of rights. If the control theory is correct, the *actio furti* supported the economic development to a larger extent than previously thought.

7. Justifying the Theory of Control

Owing to the paucity of data on the earlier phase of development of the *actio furti*, the procedural rules are the safest place from which to start the

77) This is the well-known theory advanced by Schulz, see text to n. 75.

78) O. Behrends, Gesetz und Sprache – Das römische Gesetz unter dem Einfluß der hellenistischen Philosophie, in: O. Behrends/W. Sellert (eds.), Nomos und Gesetz, Ursprünge und Wirkungen des griechischen Gesetzesdenkens, Göttingen 1995 135–249, re-published in: M. Avenarius/R. Meyer-Pritzl/C. Möller (eds.), Institut und Prinzip, 2004, 91–224, 199: "Gegenstand des 'Angriffs' [war] nicht die Sache selbst, sondern die Obhut."

analysis. The oldest known formulation of the action concerns non-manifest theft. It contains important pieces of information. The persuasive, albeit not universally accepted[79]), reconstruction of non-manifest theft proposed by Otto Lenel points to the *legis actio sacramento in personam* as the basis for the claim[80]). Although our main sources on the edictal text, Gaius and Cicero[81]), are often said to refer only to the accomplices[82]), Lenel argues that the original action included also the main thief. According to Lenel's reconstruction, therefore, the oldest statutory source to which we have access enabled the victim of a non-manifest theft to bring a personal claim against the wrongdoer. Even if one agrees with Albanese's alternative analysis, the conclusion does not change, because for Albanese, who followed Huvelin[83]), *furtum ope consilio factum* indicated, at least at the time of the Republican jurists, not a case of complicity in theft, but rather a theftuous act deliberately perpetrated[84]). Either way, the well-founded supposition concerning the personal nature of non-manifest theft allows a series of helpful inferences[85]). Those who reject Lenel's modifications still accept that this *formula* referred to non-manifest theft.

Though he might be the owner of the thing stolen, the claimant in a personal action does not directly assert his ownership right: he argues that the action of the wrongdoer has established a legal obligation between the parties to the claim. Rather than being a denial of the claimant's property right *per se*, the

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[79]) Cf. Albanese, *Furtum* fino a Nerazio (n. 3) 164–165; MacCormack, TR (n. 66) 292–293.

[80]) O. Lenel, Das Edictum Perpetuum, 3rd ed. 1927, 328: *S. p. Ao Ao a No No opeue consilio Ni Ni furtum factum esse paterae aureae, quam ob rem Nm Nm pro fure damnum decidere oportet*, *quanti ea res fuit, cum furtum factum est, tantae pecuniae duplum iudex Nm Nm Ao Ao c.s.n.p.a.*

[81]) Gai. inst. 4,37; Cic. nat. deor. 3,74.

[82]) But see the reconstruction of the Gaian passage by J. Platschek, Die Klage gegen den peregrinen Dieb in Gai 4,37 – Zugleich zum Aufbau der actio furti, in: ZRG RA 131 (2014) 395–402, 397–398: "Die Formel bei Gaius enthält… weder in ihrer *intentio* noch in ihrer *demonstratio* eine Bezugnahme an die Beteiligungsformen *ope consilioue* 'mit Hilfe oder Rat'. Die Ansicht, lediglich die Klage gegen den Teilnehmer eines *furtum*, nicht aber die gegen den Täter gründe sich im *ius civile*, entbehrt daher der Grundlage in den Quellen."

[83]) Huvelin (n. 2) 387–392.

[84]) Albanese, *Furtum* fino a Nerazio (n. 3) 164: "furto commesso deliberatamente".

[85]) Even though one should not forget Geoffrey MacCormack's words of caution, TR (n. 66) 293, that "[e]ven if Lenel is right … the *formula* is from too late a period to be of assistance in reconstructing the earlier law".

theft is an attempt to gain that form of factual control which would allow the thief to make the most of the thing stolen. The thing remained tainted as long as the control of the owner was not restored and therefore until then it could not be usucapted[86]). Once the wrongdoer was identified as a thief, this label stuck to him even if the thing was no longer in existence[87]). Whilst we cannot exclude that *dominium* was an original requisite to identify the claimant, as Sirks has argued[88]), by the time of the *legis actiones* the link between the *potestas* of the *pater familias* and the action, to stay with Sirks's theory, was no longer so central as to justify the need for the victim to play the ownership card. Potentially, therefore, the *actio furti* was, or had become, available to a larger group of persons. This group would include some owners but also those who had acquired the thing on the basis of a contractual relationship – yet neither class obtained automatically the right to claim[89]). Further, claimants who did not have any title to possess or to control the thing, such as the thieves, would under certain circumstances be able to bring the action[90]).

If neither a proprietary nor a contractual title automatically opened the doors to the action, there had to be other requirements for the identification, among all potential claimants, of those who had an actionable loss.

Sirks argues that the *lex Atinia* would have extended the *aeterna auctoritas* of Tab. VIII 17, until then confined to the peregrines, to the Roman citizens. Before this statute, the Roman citizens would be able to usucapt the stolen things of which they took possession after the theft. The *auctoritas* to which the *lex Atinia* referred would have been a weaker form of the *usus* lost by the owner, whose control had been weakened by the transfer of *usus* to the new possessor[91]). This innovative idea encounters several obstacles. It presupposes that good faith was one of the original requisites of usucaption, so that the thief would not be able to become the owner of the stolen thing. Further, whereas Gaius told his students that usucaption of things taken by violence was excluded by the *lex Iulia et Plautia*, he did not mention the *lex Atinia*

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[86]) Paul. 2 ad Neratium D. 47,2,85(84): *Quamuis res furtiua, nisi ad dominum redierit, usucapi non possit.*

[87]) Ulp. 42 ad Sabinum D. 47,22,46 pr.: *Inter omnes constat, etiamsi exstincta sit res furtiua, attamen furti remanere actionem aduersus furem.*

[88]) Sirks, TR (n. 21) 482; a position supported by several authors, cf. Kaser, RP (n. 5) 616.

[89]) E.g. Gai. inst. 2,52 (*res hereditariae*), see text to n. 36; Gai. inst. 3,207 (*depositarius*), see text to n. 24.

[90]) Pomp. 38 ad Quintum Mucium D. 47,2,77(76) 1; see text after n. 27.

[91]) Ibid. 501.

when referring to theft[92]). It is quite improbable that Gaius was not aware of the drastic change in Roman legislation suggested by Sirks. In fact, he appears to be quite sure of the legal background of his analysis: the Twelve Tables forbade usucaption and no one, even though in good faith, would acquire ownership of a stolen thing through usucaption[93]). Describing the position of the *possessor ad usucapionem*, Sirks writes: "[O]ne may say that the mere control of the possessor threatened the authority (the power, what was left thereof) of the owner, which is comparable to a thief who robs an owner of his possession"[94]).

His highlighting the importance of control is convincing. When both parties to the claim were thieves[95]), an actionable theft required the claimant to show some form of control over the thing now in the hands of the second thief. Those Roman jurists, probably in the majority, who opposed granting a claim to the first thief, explained their opposition not on the basis of the lack of the legal requisites to bring the action, but on policy considerations: the want of *honesta causa*[96]). The thief's control of the thing was a legally recognised power from the perspective of the *actio furti*, but the thief had no title to dispose of the thing. The thief had only some room for manoeuvre from a procedural perspective, in that he did not have to justify his control, which was protected as such against the actions of other thieves and persons without qualified control.

Behrends observes that the *actio furti* was granted also to those who had a using and having, "Nutzen und Haben", of the thing – an approach which for the German scholar is to be traced back to the *fundatores* of the civil law, that is to Republican times[97]). Indeed, in the sources the owner is not always the claimant and the kind of possession required to bring the *actio furti* cannot be easily identified. For example, Paul writes that the usufructuary is granted the action against the owner who has subtracted the thing object of

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92) Gai. inst. 2,45: *nam furtiuam lex XII tabularum usucapi prohibet, ui possessam lex Iulia et Plautia.*

93) Gai. inst. 2,49: *nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.* '*Ab eo*' refers to the thief.

94) Sirks, TR (n. 21) 492.

95) Pomp. 38 ad Quintum Mucium D. 47,2,77(76) 1; see text after n. 27.

96) This reading of Quintus Mucius' use of *honesta causa* is in line with his predilection for general principles; see O. Behrends, Institutionelles und prinzipielles Denken im römischen Privatrecht, in: ZRG RA 95 (1978) 187–231, repr. in: Institut und Prinzip (n. 78) 15–50.

97) Ibid. 201.

the usufruct[98]). Technically, the usufruct does not transfer possession from the owner to the usufructuary, who has only a right to use the thing and get the fruits. And yet the sources mention ownership or possession as requirements of the *actio furti*. Ownership can be easily excluded in the instant case. The relevant kind of possession cannot be the *possessio ad usucapionem*, given that the usufructuary acknowledged the higher title to possession of the owner. Interdictal possession was meant here, which concerned actual physical control. Whereas it was arguably possible for the usufructuary to ask to the praetor that his control over the thing be protected[99]), this avenue was barred to the *fur*, but only as regards claims in which the other party was the previous possessor, *possessio ab aduersario adquisita*, because such theftuous appropriation of the thing was qualified as *uitiosa possessio*, that is, one obtained *aut ui, aut clam, aut precario*[100]), and therefore the praetor would not concede the interdict. When the claim was brought by the thief against a third party who had deprived him of possession, that is a second thief, the *actio furti* was not barred because of *uitiosa possessio*, but, at least for the majority view which goes back to Quintus Mucius, because the thief had no honest interest upon which to base the claim.

There are several references in the sources to possession as a requirement of the *actio furti*. Thus, Papinian discussed the scenario in which someone, acting on behalf of Titius, pays to the false procurator of Titius's creditor and Titius ratifies the transaction. Titius would not have the *actio furti* because he never obtained ownership or possession of the coins:

> D. 47,2,81,7 (Pap. 12 quaest.): Qui rem Titii agebat, eius nomine falso procuratori creditoris soluit et Titius ratum habuit: non nascitur ei furti actio, quae statim, cum pecunia soluta est, ei qui dedit nata est, cum Titii nummorum dominium non fuerit neque possessio. sed condictionem indebiti quidem Titius habebit, furtiuam autem qui pecuniam dedit: quae, si negotiorum gestorum actione Titius conueniri coeperit, arbitrio iudicis ei praestabitur[101]).

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[98]) Paul. 5 ad Sabinum D. 47,2,15,1: *Dominus, qui rem subripuit, in qua usus fructus alienus est, furti usufructuario tenetur.*

[99]) As regards the interdict *uti possidetis*, see Ulp. 70 ad ed. D. 43,17,4: *In summa puto dicendum et inter fructuarios hoc interdictum reddendum: et si alter usum fructum, alter possessionem sibi defendat. idem erit probandum et si usus fructus quis sibi defendat possessionem, et ita Pomponius scribit. perinde et si alter usum, alter fructum sibi tueatur, et his interdictum erit dandum.*

[100]) Gai. inst, 4,151 (interdict *utrubi*). For the same requisites in the case of a possessory interdict concerning immovable things, cf. Gai. inst. 4,150 (interdict *uti possidetis*).

[101]) See also D. 47,2,75(74), text to n. 47.

An examination of the position of the *commodatarius*, however, appears to contradict Papinian's statement: Gaius acknowledged that the borrower for use could bring the *actio furti*[102]). Yet Pomponius, commenting on Sabinus, stated that 'we keep possession and ownership of what we lend for use'[103]). Further, as reported by Ulpian, Pegasus argued that the *commodatarius* did not have interdictal possession[104]). Buckland refers to *commodatus* as "a mere physical transfer"[105]). Clearly, the borrower for use was no possessor: whereas Ulpian wrote in the passage last quoted that 'some jurists', for instance Pegasus – *quidam tamen, ut Pegasus* – would support a restrictive application of the vindication claim discussed in that passage, there is no mention of a disagreement concerning the unavailability of interdictal possession to the categories listed by Ulpian: *quia hi omnes non possident*. '*Hi*' includes the borrower for use, the hirer and others. Hence, we must conclude that the *actio furti* could be granted to a non-owner who was not in possession, from which we can infer either that the action was available to someone who had neither ownership nor possession, or that possession was understood *lato sensu*. Of the two alternatives, it seems more probable that possession was a default term used by the jurists in the absence of a more precise word that could render the importance of control as a normative requirement. As a term, ownership was preferred to possession when the claimant had a proprietary right because it was deemed to include possession in the sense of control. It was an imprecise use of the term, but it could do well enough. If we adopt the Roman terminology, we ought to look to possession, rather than to ownership, to understand how the action worked. The role exerted by control in possessory matters was the central mechanism in operation in the *actio furti*: when the jurists referred to possession, they meant the control element of possession.

An opinion of Tryphoninus, the Severian jurist pupil of Scaevola, seems to support the independence of the *actio furti* from possession. Remember the scenario of a treasure buried in a field that has been usucapted. If the usucaptor is unaware of the valuable object hidden in the field, will his ignorance

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[102]) Gai. inst. 3,206; see text to note 22.

[103]) Pomp. 5 ad Sabinum D. 13,6,8: *Rei commodatae et possessionem et proprietatem retinemus* (my translation).

[104]) Ulp. 16 ad ed. D. 6,1,9. The relevant passage states: *quidam tamen, ut Pegasus, eam solam possessionem putauerunt hanc actionem [sc. rei uindicationem] complecti, quae locum habet in interdicto uti possidetis uel utrubi. denique ait ab eo, apud quem deposita est uel commodata… quia hi omnes non possident, uindicari non posse.*

[105]) Buckland, Text-Book (n. 55) 470.

affect the process of usucaption of the *thensaurus*[106])? Brutus and Manilius answered in the negative, whereas Sabinus and Paul supported the opposite view. In a different passage, Tryphoninus advances a strong argument in favour of the need to be aware of the assets which are in one's patrimony, in line with what was argued by Sabinus in the treasure case. He discusses the situation in which a thing previously stolen or subtracted by force is returned to the owner without the latter's knowledge:

> D. 47,2,87(86) (Tryph. 9 disp.): Si ad dominum ignorantem perueniret res furtiua uel ui possessa, non uideatur in potestatem domini reuersa, ideo nec si post talem domini possessionem bona fide ementi uenierit, usucapio sequitur.

For the Roman jurist, the lack of the owner's awareness implied that the thing was still a *res furtiua* because it had not gone back *in potestate domini*, an expression which in Watson's Pennsylvania translation by Thomas is rendered with "into the owner's possession", but which, in this context, could be understood as 'under the control of the owner'. In the subsequent sentence of the passage at issue, the same concept expressed in the syntagma '*in potestate domini*' is given as '*possessio domini*'. Possession is here used to identify the normative element of control, which the ignorant owner cannot exert and which therefore bars usucaption. Discussing Tryphoninus' opinion, Jolowicz refers to Paul's definition[107]) according to which *in potestate* in the context of the *lex Atinia* would "include cases in which the owner, though the thing had not actually returned to his possession, knew where it was and could vindicate it"[108]). The Paulian passage confirms that this is a situation of control: knowledge enables the owner to keep some of his authority over the thing and in this fashion to exert control. The bottom line seems to be that only the power of control erased the stain which tarnished the *res furtiua*.

The Mucian opposition to allowing a thief to claim in theft[109]), it is submitted, did not diverge on this point from the Servian approval. Both views were compatible with a reading of control as a normative element of the claim. The difference was that the majority added further limitations to the actionability of the *actio furti*. This result was achieved through the inclusion of a non-normative requirement on the basis of policy considerations – it would be unjust to protect a thief; no one should have an action based upon one's

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[106]) Paul. 54 ad ed. D. 41,2,3,3; cf. text after n. 76.

[107]) Paul. liber singularis ad legem Fufiam Caniniam D. 50,16,215: *in lege Atinia in potestatem domini rem furtiuam uenisse uideri, et si eius uindicandae potestatem habuerit, Sabinus et Cassius aiunt*.

[108]) See Jolowicz (n. 47) XC.

[109]) D. 47,2,77(76) 1; see text after n. 27.

own wrongdoing – whereas the minority view rejected this non-normative requirement and applied only strict law. This conclusion is confirmed by those cases in which the policy-based restrictions were lifted because it would have been more unjust not to allow the claim, such as in the case of the cleaner who lends the garment to a third party without the owner's knowledge, and technically is a thief, but this notwithstanding he was granted the claim in theft[110]).

Analysing *usucapio*, Sirks argues that just holding the thing was not sufficient to obtain control[111]). This statement paves the way to the question of the degree of control necessary to allow the claimant to bring the *actio furti*. Why should the simple holder not be able to claim just on the basis of his having the thing into his hands at the time of the theft? From a theoretical perspective, there was no reason to deny this possibility to any holder, as long as he was able to exercise control. Indeed, in the case of legal institutions with a wide radius of application, such as *furtum*, it would appear quite straightforward to adopt a blanket rule that would then be shaped according to the legal and societal inputs. To be a potential claimant, however, did not mean that this potentiality would have translated into the availability of an action. Roman law intervened in different fashions to determine the category of claimants. Criteria were developed, such as the interest in the safety of the thing. Gaius tells us that the action "is not open even to an owner except if he is interested in its not being lost"[112]). Further, the claim was barred to claimants in bad faith[113]), and for want of a *honesta causa*. The concept of *custodia* had the same, non-normative function of restricting the category of potential claimants[114]). Through these devices, non-normative requisites were introduced which represented different interests and could for that reason be in contrast with each other. Thus, other non-normative requisites might have barred the claim altogether, focusing for instance on the protection of the wrongdoer in good faith[115]).

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[110]) Ulp. 42 ad Sabinum D. 47,2,48,4; see supra, text between notes 31 and 32, for an analysis of this passage.

[111]) Sirks, TR (n. 21) 492.

[112]) Gai. inst. 3,203: *itaque nec domino aliter competit quam si eius intersit rem non perire*. Examining the case of the person to whom the thing is due under a stipulation, e.g. Paul. 2 manualium D. 47,2,86(85) and Paul. 5 ad Sabinum h.t.13, Rosenthal (n. 7) 246, observes: "er ist als Nichtbesitzer nicht bestohlen und hat daher trotz seines Interesses *rem salvam esse* keine *a. furti*." The focus is on the lack of possession, in the sense of control, and not on the lack of an interest.

[113]) Ulp. 12 ad Sabinum D. 47,2,48,5.

[114]) Gai. inst. 3,207; see text to n. 24.

[115]) D. 47,2,48,5: *Ancilla si subripiatur praegnas uel apud furem concepit, partus*

Albanese's theory, according to which the application ambit of the *actio furti* reached its maximum extension shortly before the introduction of the *lex Aquilia* and the praetorian *actio doli*[116]), confirms the conceivable width of the delict at issue. With such potentially large spectrum of claimants, it does not surprise that the jurists decided that it was opportune to set appropriate fences to avoid an excessive expansion of the action. The dimension and position of these fences changed through time without touching the essence of the action.

8. An Outline of the Theory of Control:

i. The references to ownership and possession:

The sources require ownership or possession for the *actio furti*. However, the action was sometimes granted to those who were neither owners nor possessors. A plausible explanation for this phenomenon is that the references to possession and ownership in the context of theft were a shortcut for control – technical artifices to vest the power of control with a legal cloak.

ii. The range of application of the actio furti:

Control as a normative element of the *actio furti*, that is, an element without which the relevant facts would not trigger the action, implies that the *actio furti* had a very wide application radius. Other requirements, both normative and non-normative, helped reduce the number of the actual claimants. Among the most common requirements there were the interest in the safety of the thing and the role of safe-keeping.

iii. Control and entitlement:

Control was the power physically to dispose of a thing directly or through others. The physical holding of the thing was legally qualified by an entitlement and the *actio furti* was a battle between different entitlements, so that the action was triggered only by the combination of holding and legal recognition – as long as, of course, the other requirements were present. Control was one and the same; the entitlements to control might vary. 'Entitlement' has been used in this analysis as the identifier of the legal recognition that the person who had control could bring a claim in theft. Entitlements did not identify legal rights to a thing; they were legal interests linked to procedural rights.

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furtiuus est, siue apud furem edatur siue apud bonae fidei possessorem: sed in hoc posteriore casu furti actio cessat.

[116]) Albanese, JUS (n. 4) 317–319.

iv. Control as an independent source of entitlements:

Control followed the thing and was not derived from anyone. Yet, as it was the law that decided the legal entitlements to control, the priority of entitlements was established in the legal sources according to different considerations – policy-based, economic, legal. Legal considerations concerned the examination of a potential claimant from the perspective of the whole private law system. The qualification of *furtum* as a delict confirms that the position of the owner was not automatically stronger than that of a third party.

v. The shaping of operative control:

Operative control depended on the award or withdrawal of entitlements on the basis of the considerations mentioned in the previous paragraph. Thus, control was shaped on the basis of societal, economic and legal patterns through the application of non-normative elements. When new legal tools were developed which responded better to given scenarios, the facts of that scenario might no longer amount to operative control. This happened for example in the case of the *furtum fundi*.

9. Conclusion

It is possible that the origin of the delict at issue lay in the *potestas* of the *pater familias*, as argued by Sirks. *Potestas* and ownership are not the same. It is not to be expected, however, that during the early phase of an ancient civilisation the legal concepts were already fully developed. At any rate, the personal nature of the *actio furti* at the time of the Twelve Tables indicates that the action had already been extended beyond the boundaries of what was later to become *dominium*, so that ownership was no necessary requirement of the action.

The sources seem to suggest that the aim of the *actio furti* was to ensure that nobody interfered with the relationship of control between a person and a thing. The focus of the delict was on the different dimensions of control and the ensuing entitlements. Legally qualified control was essential to bring the *actio furti*. Qualified control paved the way to co-existing levels of control and included the indirect exertion of power. Control offers therefore the foundation to determine the entitlements to control, which were requisites for the actionability of the claim. There are persuasive indicators that this was the situation from the late Republic. The more we look further back in the past, the more speculative any analysis becomes.

This thesis has certain implications for our understanding of Roman law. If we consider the *actio furti* in the light of an 'Interessenjurisprudenz',

we notice a contrast between the need to ensure the protection of proprietary rights, which are endangered by a meddling with the thing, and the importance to enable a fluid development of the commercial transactions. Having to take sides between the stability of property rights and giving impulses to the circulation of goods, the *actio furti* decided in favour of the latter option. It was not the existence of a right – be it a right of ownership or a different right – which determined the availability of the claim; it was control.

If we take ownership out of the equation, Roman law appears to have been more dynamic than what an interpretation of the *actio furti* as a right-based claim would indicate. Vindication provided the main tool to organise legal relationships, but the *actio furti* shook the proprietary establishment helping the party in control independently of the legal basis of such control. Vindication protected the legal dimension of the relationship between a person and a thing, whereas theft concerned the factual dimension of a similar relationship. Limitations to the claim in theft, through the means of non-normative requirements added to the claim, kept a balance between static ownership and dynamic commerce.

The *furtum rei suae* highlights how the *actio furti* was more interested in the protection of the circulation of goods than in securing ownership rights. That the owner was prevented from taking his own thing offers a clue of the importance given to the transfer of the thing within society as a means for the contribution to the production of wealth. Another scenario is even more telling. If the purchaser took the thing away from the vendor after the price had been paid, the seller was still the owner, but Julian did not give him the *actio furti*. This action was available to him only if the price had not been paid[117]). The deprived owner was not allowed to protect a thing which was legally still his. There can be no clearer indication of the function of the *actio furti* as an instrument that supports commerce, as opposed to ownership.

At this point, the question remains open whether the Paulian trichotomy is about different forms of control. It has been objected to that classification that it is taxonomically incoherent, because the *furtum rei* would incorporate

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[117]) Ulp. 29 ad Sabinum D. 47,2,14,1: *Adeo autem emptor ante traditionem furti non habet actionem, ut sit quaesitum, an ipse subripiendo rem emptor furti teneatur. et Iulianus libro uicensimo tertio digestorum scribit: si emptor rem, cuius custodiam uenditorem praestare oportebat, soluto pretio subripuerit, furti actione non tenetur. plane si antequam pecuniam solueret, rem subtraxerit, furti actione teneri, perinde ac si pignus subtraxisset.*

also the *furtum possessionis* and the *furtum usus*[118]). Watson has no doubts that the passage is corrupt and the trichotomy is due to an interpolation. One cannot have a *contrectatio* of use and possession, given that they are incorporeal[119]). Without entering in a very complex discussion, it could be observed that, from the perspective of the control of, as opposed to the right over, the thing, the classification could be seen as logical: it refers to different entitlements to control.

It has not been argued in this paper that the Romans were aware of the structure of the delict which has been examined. The approximate terminology would indicate that they never realised the full implications of their own methodology in the case of the *actio furti*. This investigation does not aim to put in the jurists' mouth concepts that they never used. It is rather an exercise in understanding the mechanisms at work in Roman law, which ultimately means understanding Roman law better.

[118]) For an exhaustive list of the authors and their views on this topic, see Fenocchio (n. 1) 89–91.

[119]) Watson, TR (n. 13) 200: "To begin with, and this in itself should be conclusive, *contrectatio usus possessionisve* does not make sense. One just cannot touch or hold the use or possession of anything." The author refers to Fritz Schulz to support his view.