LIABILITY OF INNKEEPERS
IN ROMAN LAW

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Private enterprise in antiquity can be discussed in many ways, but whichever way we choose, the importance and grandeur of Rome cannot be neglected. The greatest and the most powerful state in ancient world, which spread on three continents, with one hundred million people living in it, developed outstanding legal system, monetary economy and market which had never existed anywhere before.

Rome was the center of commerce and trades, but we are particularly interested in the private enterprise of sea merchants, innkeepers, and livery stable owners in the Roman Empire. This kind of private enterprise is related to quasidebts and we will pay some attention to the profession of caupones.

This trade was not very respectable. Their work came under minute scrutiny. Unlike bakers who were appreciated because their work was considered honorable and useful, innkeepers were reproached for many things. This attitude is partly the result of the belief that they secretly provided the services of prostitutes, that they conspired with robbers and that their treatment of guests was dishonest and unpredictable. Since bad news travel fast, this attitude soon became such a commonplace one that their responsibility was under special regime.

The Romans were not the only ones with an unfavorable attitude towards these entrepreneurs. Let us take Babylon as an example, and look at the articles 108 and 109 of Code of Hammurabi which indicate later Roman attitude:

"If a tavern - keeper (female) does not accept corn according to gross weight in payment of drink, but takes money, and the price of the drink is less than that of the corn, she shall be convicted and thrown into the water." ⁴

The above-mentioned article brings us to the conclusion that the Babylonian lawmaker included this criminal act in the code because of innkeepers' frequent dishonest dealings. The death penalty (throwing someone into water) for this criminal act is an example of the unfavorable position of these private entrepreneurs in Babylon.

The article 109 of Code of Hammurabi provides even more serious example of the innkeepers' liability:

"If the conspirators meet in the house of a tavern - keeper, and these conspirators are not captured and delivered to the court, the tavern - keeper shall be put to death." ³

It seems that the lawmaker's intention was to put an end to the collaboration of innkeepers and robbers because they were very often accomplices. The above-mentioned article shows that this criminal act can be executed by performing no action, with premeditation or by negligence, which is irrelevant for the existence of guilt and for the execution of punishment.

Dorde Milović says, "that it remains unclear whether innkeeper's duty was to report conspirators who she met in her tavern, or her duty was to capture and deliver them to the court." ⁴

With regard to the fact that a female person is not able to overcome several men, it seems that her duty was only to report conspirators, not to deliver them to the court. This led to avoidance of performing any action.

Roman law treats innkeepers in the same way. Hamman, the French author, says that innkeepers became stereotypes: the innkeeper was a miser, his wife was a witch, and his maid was a prostitute. "Innkeepers were reproached for diluting wine with water and for stealing hay from

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1 Mamford, L., *Grad u istoriji* (City in History), Beograd, 2000., p. 223.
2 Code of Hammurabi, article 108.
3 Code of Hammurabi, article 109.
donkeys. There was no hygiene, no honesty or decency at his inn." 5

The following 'Ulpianus' fragment from Digest is an example of prejudice of Roman law against innkeepers:

"Ait praetor: Naute cauponae stabulaii quod cuiusque salviuim fore receperint nisi resi stiitum, in eos iudicium dabo. Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodi re eorum committere, ne quisquam putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum faribus adversus eos quos recipiant com- eundum, cum ne nunc idem ab- stineant huissumodi fraudi- bus."

(,The praetor says: I will give an action against seamen, innkeepers and stablekeepers in respect of what they have received and undertaken to keep safe, unless they restore it. This edict is of the greatest benefit, because it is necessary generally to trust these persons and deliver property into their custody. Let no one think that the obligation placed on them is too strict: for it is in their own discretion whether to receive anyone: and unless this provision were laid down, there would be given the means for conspiring with thieves against those whom they receive, since even now they do not refrain from mischief of this kind). 6

This fragment confirms the unfavorable attitude of Roman law towards tavern keepers. The clause "let no one think that the obligation

6 D. 4. 9. 1

paratus sit. si autem alienum adhibuit servum, quasi in libero tenebitur. Caupo praestat fac- tum eorum, qui in ea caupona eius cauponae exercendae causa ibi sunt: item eorum, qui habitandi causa ibi sunt: viato- rum autem factum non praestat. Namque viatoriem sibi eligere caupo vel stabularius non vide- tur nec repellere potest tier agentes: inhabitatores vero perpetuos ipse quodammodo elegit, qui non reciecit, quorum factum oporer eum praesistae, in navi quoque vectorum fac- tum non praesistatur."

"In eos, qui naves cauponae stabula exercebant, si quid a quoque eorum quosse ibi habebunt factum esse dicetur, indicium datum, sive factum ope consilio exercitores factum sit, sive eorum causas, qui in ea navi navigandi causa esset. Navigandi autem causa accipere debemus eos, qui ad- hibentur, ut navis naviget, hoc est nautas. Et est in duplum actio. Cum enim in caupona vel in navi res perit, ex edicto prae- toris obligatur exercitor navis vel caupo ita, ut in potestate eius, cui res subrepta sit, utrum meletum cum exercitore honorato- rio iure an cum fure iure civili eriperi. Quod si receperit sal- vum fore caupo vel nauta, furti actionem non dominus rei sub- reptae, sed ipse habet, qua re- cipiendo pericum cultum subi- bit. Servi vero sui nomine exercitor noxae edendo se li- berat. cur ergo non exercitor condemnetur, qui servum tam malum in naves admisit et cur liberi quem hominis nomine tenetur in solidum, servi vero non tenetur nisi forte iecirco, quod liberum quem hominem adhivens statuere debuit de eo, quales esset, in serva vero suo ignoscedendum sit ei quasi in do- mestico mato, si noxae edere
to weight up the manner of man
he is, but in the case of his own
slave, such evaluation by him
may be waived, as for an offens-
se ashore, if he be prepared to
surrender the slave noxally. If,
though, someone else's slave is
involved, he will be liable as
for a freeman. The innkeeper is
answerable for the deeds of
those whom he has in the inn
to run the establishment as also
of those who reside in the inn.
he is not answerable for the
acts of passing travelers. For
an innkeeper or liverman is
not regarded as choosing his
own traveler and cannot refuse
those making a journey; but in
a way, the innkeeper does selec
t his permanent residents, since
he does not reject him, and so
should be answerable for what
they do. In the case of a ship,
there is no liability for the acts
of passengers.

This fragment deals with the
liability for the theft of nautae, ca-
uponem et stabularios. If a theft
is committed on a ship, the ship-
er and his crew are liable for it.
The action is in duplum. When some-
thing is lost at an inn or on a ship,
the praetor's edict gives the power
to the victim to bring the action
against the shipper and innkeeper,
regardless of his culpability; there-
fore, we may conclude that the lia-
ability of the shipper and innkeeper
is even stricter. Ulpian confirms this
saying that the victim of the theft
can either go against the shipper or
the innkeeper at praetorian
law, or
to bring the civil action against the
actual thief. This is yet another ea-
rly example of objective responsi-
bility, or, at least, presumed mala fi-
des.

We find interesting the case in
which the shipper or the innkeeper
has guaranteed the safety of the go-
ods on a ship or at an inn. Now, it
is the shipper or innkeeper, not the
owner of the stolen thing, who will
bring the civil action against the
actual thief. We find here the ex-
ample of the shippers or innkeepers
being noxally liable because they can
absolve themselves by surrendering
the actual thief to the owner of the
stolen thing. However, according to
Ulpian, this is possible only if a
slave has committed the theft.
Why the shipper is not liable for the
slave, if he is liable for the theft
committed by a free member of the
crew? Ulpian says that the reason
must be the fact that it is the ship-
per's duty to evaluate the freeman's
character when engaging him (in
modern or pandectist law: culpa in
eligendo). In the case of a slave,
however, the character evaluation is
not necessary because the slave
should be delivered to the victim of
delictum.

The innkeeper is liable for the
actions of his employees, and of
those who reside in the inn. He is
not liable for the acts of temporary
residents. The idea of the culpa in
eligendo is also implied here.

Eva Jakab wrote about the
innkeeper's business and dealings in
two articles, brought at Symposion
— Society of Greek and Hellenistic
law. Her first article Wo gärt der
verkaufte Wein?, analyses the model
of typical wine delivery contract:
those which guarantee the quality of
wine and those which do not. One
contract offers five-month guarantee
for the quality of wine, from the
moment of the delivery. If wine lo-
ses its original quality, it will be
replaced with equal quantity of
matching quality. The innkeeper's
liability for the quality of served
wine is reduced to its appropriate
level. He is not responsible for vis
mairor, but for exactly defined de-
fects during fermentation only.

In her second article Gaius
kommentiert die Papyri?, Eva Jakab
proves how papry could help better
understanding of well-known Ro-
man law sources. The comparison of
Gaius fragment from Digest with
two Byzantine documents dealing
with wine sale shows us a striking
similarity:

"Si vina quae in dolis erunt venierint eaque antequam ab emiptore tollerentur, sua na-
tura corrupta fuerint si quidem de bonitate eorum adfirmavit venditor, tenebitur emporti: quod si nihil adfirmavit, emptor is erit periculum, quia sive non degradavit sive degradando ma-
ile probavit, de se quieris debet, plane si, cum intellegeret ven-
ditor non duraturam bonitatem eorum usque ad in eum diem
quo tolli deberent, non admo-
nuit emportem, tenebitur ei, quan-
ti eius interesse fuisse."

(,When wine in casks is
sold and it goes off before re-
moval by the purchaser, the
vendor will be liable to the
purchaser, assuming that he
vouched for its quality; if, tho-
ugh, the vendor said nothing,
the purchaser bears the risk be-
cause, if he has not tasted the
wine or, tasting, injudiciously
approves it, he has only him-
self to blame. Of course, if the
vendor knew that the quality
would not last until the date for re-
moval and did not warn the pur-
chaser, he will be liable to the
purchaser for the latter's in-
terest in being warned."

9 D. 37. 5. 5
10 Ibid.
11 Ibid.
12 Jakab, E., Wo gärt der verkaufte Wein?,
Symposion, 1997. Vorträge zur griechi-
schen und hellenistischen Rechtsges-
chichte, Köln – Weimar – Wien 2001,
p. 295–318.
13 Jakab, E., Gaius kommentiert die Papyri,
Symposion, 1999, p. 313–324.
14 D. 18. 6. 16
This article deals with the liability of the purchaser and the vendor when selling wine. According to this article, when the wine in casks is sold and goes off before removal by the purchaser, the vendor will be responsible to the purchaser if he guarantees its quality. If the vendor does not guarantee the quality of wine and purchaser does not taste the wine, or if he tastes but injudiciously approves it, "He has only himself to blame," says Gaius. In this case he byes the wine telle-elle. If the vendor knows that the quality will not last until the date for removal and does not warn the purchaser of it, he will be liable.

Eva Jakab also mentions an interesting document about a sale of the future wine. It is a contract by which the purchaser pays in advance the price of sixty-six casks of wine which will be delivered after the future harvest. Of course, in this case the vendor cannot guarantee the quality of wine. This contract, which has elements of an axial contract, seems to be "a real specialty" of the Roman innkeepers who were making big profit without providing quality services.

Galenus (II century, B.C.), the Roman court physician, explains the reasons why the Roman innkeeper deserved the bad reputation he got. Galenus writes:

"We found out a that numerous innkeepers and butchers had been caught sel-

ling human flesh instead of pork and costumers did not notice the difference. Trustworthy people told me a following account. They had a delicious soup with fine meat at the inn. After they had almost finished the soup, they found a pulp of an index finger in it. They feared that they might be eaten by the innkeeper and his servants since they had such habits. They left immediately, threw up their lunch and moved on. Then, later on the innkeeper and his servants were caught murdering someone."16

This somewhat shocking example proves that it was prudent to treat the innkeepers harshly and that severe punishments were justified.

Hamman also says that these innkeepers provided services of prostitutes. Written messages to costumers in front of the taverns advertised "good services, bath and comfort", actually offered young girls to the guests who stayed at the inn. A guest could buy bread and wine for one as, hay for a horse for two ases, and a girl for eight ases.17 This author also says that the most famous innkeeper girl was Helen, emperor Constantin's mother, who was born in the city of Naisus (today Niš in Serbia). "Helen converted to Christianity. She influences both her son and the very course of history."18

If we compare innkeepers with members of other trades, we can see that their harsh treatment by law was justified. Real life imposed on Hamurabi the necessity to include, in his casuistic written code, certain articles which allow the punishment of dishonest and disloyal innkeepers in his empire. These articles would not have been included in Code of Hamurabi if there had not been many innkeepers who were punished (sometimes by being thrown into the water) with a good reason.

Roman law adopted this unfavorable attitude towards Roman innkeepers. It can be seen that they were often liable for mal practice, for covering up, even for conspiring with robbers and for secretly providing services of prostitutes. That is why they are categorized as quasi-delicts. Why not as real delicts? It is of course related to the much-discussed problem of the nature of quasi-delicts (with a contribution of the late professor Stojčević). His idea was that there is nothing in the nature of those very heterogenous cases which connect them, except the fact that they could not fit into the Roman notion of delictum. Here that element was: there is no evidence of the guilt on the side of nautas, cauponae et stabularios. The principle of the presumption of culpability (except in cases of vis maior) without any degree of guilt probably is the ancestor of today's principle of the objective responsibility.

15 Ibid

17 Hamman, p. 28-29.
18 Ibid.