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### “ALL YOU CAN EAT” THE ANCIENT WAY

Research on any aspect at all of Antiquity is rather like trying to assemble a jigsaw puzzle with missing pieces. So even the smallest scrap of apparently insignificant information may turn out to be invaluable. Scholars of Roman law tend to rely on legal sources, which are helpful in shedding light only on certain of its aspects. We would know far less, and in some cases nothing at all, if we did not refer to other texts, from beyond the scope of law as such. Nonetheless, some of the legal institutions of ancient Rome seem to have been so thoroughly combed through by researchers and presented in documents pertaining to legal practice that we would not expect to find anything new on them in literary sources. One institution which appears to belong to this group is the contract of sale.

However, since doubts are the motor of progress, perhaps it might be worthwhile taking a look at a source which has claimed only a slight amount of attention from Romanists so far<sup>1</sup> – an anthology of jokes entitled *Philogelos*, dated to the 4<sup>th</sup>-5<sup>th</sup> century AD<sup>2</sup>. Its authorship is attributed to Hierocles and Philagrius, about whom not much is known<sup>3</sup>.

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<sup>1</sup> To date it has been referred to by A. BÜRGE, *Der Witz im antiken Seefrachtvertrag. Beobachtungen zur Vertragspraxis im antiken Mittelmeerraum*, «Index» 22/1994, p. 389-407; IDEM, *Humor ist Glückssache oder Wie die Alten den Juristenwitz gebildet*, [in:] *Festschrift für Peter Nobel zum 50. Geburtstag*, 1995, p. 11-25. Cf. also J. ROUGÉ, *Le Philogélôs et la navigation*, «Journal des savants» 1-2/1987, p. 3-12.

<sup>2</sup> Cf. C. WESSELY, *Ein Altersindizium im 'Philogelos'*, «Sitz. Akad. der. Wiss. in Wien. Phil.-hist. Klasse», 149.5/1905, p. 1-47; M. ANDREASSI, *Le faccie del 'Philogelos'. Barzellette antiche e umorismo moderno*, Lecce 2004, p. 33 ff.

<sup>3</sup> Cf. M. ANDREASSI, *Le faccie...*, p. 27 ff.

The sales contract makes up the background to a surprising number of the jokes – 36 out of a total of 265 in *Philogelos* – showing that it must have been an everyday matter for the inhabitants of the Roman Empire. The jests reflect the social reception of this legal institution. In many of them there is mention of defects of various kinds in the goods offered for sale, or of attempts to cover up the fact that they are stolen goods.

I am going to consider two jokes describing a rather unusual type of sales contract, featuring a glutton<sup>4</sup> or λιμόξηρος<sup>5</sup> – one of the frequent butts of the humour in *Philogelos*.

*Philogelos* 224:

Λιμόξηρος ἀπελθὼν εἰς κηπουρὸν ἔδωκε τέσσαρα δηνάρια ἵνα σῦκα ὅσα θέλει φάγη. τοῦ δὲ καταφρονήσαντος καὶ εἰπόντος Ἐπὶ τῶν παρακειμένων δένδρων φάγε ὅσα δύνασαι, ἀπελθὼν εἰς μεγάλας συκᾶς καὶ ἀποκορυφῆς ἀρξάμενος πάντα κατήσθιε. μετὰ δὲ πολλὴν ὥραν ἀναμνησθεὶς ὁ κηπουρὸς ἐπεζήτητε αὐτόν. ὡς δὲ εἶδεν εἰς ὕψος σαλεύοντα τοὺς κλάδους καὶ ἐσθίοντα, ἀγανακτήσας εἶπε· Κάτω ἐστὼς οὐκ ἠδύνω ἐκ τῶν ἐπικειμένων κλάδων φαγεῖν; ὁ δὲ ἀπεκρίνατο· Ἐκεῖνα ὡς καταβαίνω τρώγω.

A glutton goes off to a gardener and gives him four denarii to let him eat as many figs as he likes. The gardener, unconcerned, tells him to eat whatever he wants from the trees close by. So the glutton climbs up the tallest trees and, starting at the top, eats all the figs on each one in turn. A long time later, the gardener remembers the gut and goes looking for him. He finds him still swinging from branch to branch, eating as he goes. Outraged,

<sup>4</sup> On gluttony in Antiquity see S.E. HILL, *Eating to Excess: The Meaning of Gluttony and the Fat Body in the Ancient World*, Santa Barbara 2011, passim.

<sup>5</sup> Cf. M. ANDREASSI, *Il λιμόξηρος nella 'Vita Aesopi' e nel 'Philogelos'*, «Zeitschrift für Papyrologie und Epigraphik» 158/2006, p. 95-103.

the gardener cries, “Couldn’t you have stayed on the ground and eaten from these overhanging branches?” The answer: “Oh, I’ll get to those when I come down.”<sup>6</sup>.

In the first joke<sup>7</sup> the glutton enters an agreement with the gardener. For the price of four denarii he can eat as many figs as he likes.

*Philogelos 225:*

Λιμόξηρος ἄρτοπράτη προσπελθὼν ἦιτει δοῦναι δηνάρια δύο ἵνα ἄρτον χορτάσῃ. τοῦ δὲ λογισαμένου ἕνα ἄρτον τούτῳ ἀρκέσειν <καὶ> λαβόντος τὰ δηνάρια [ἤρξατο τρώγειν] ὁ δὲ τοῦ κοφίνου ἀρξάμενος ἐστῶς τὸ ἥμισυ ἔφαγε. τοῦ δὲ ἄρτοπράτου θαμβηθέντος καὶ εἰπόντος ὅτι Κάθισον καὶ οὕτως φάγε, ἀπεκρίνατο· Τοὺς ἐν τῷ κοφίνῳ ἄρτους βούλομαι ἐστῶς φαγεῖν, τοὺς δὲ ἐν τῇ προβολῇ καθήμενος.

A glutton goes up to a baker and offers him two denarii to let him fill up with bread. The baker, figuring that one loaf should be enough for this guy, takes the denarii. The glutton stands there and starts eating the contents of a whole bread-basket. He’s finished off half the basket when the astounded baker says, “Why don’t you go ahead and sit down to eat?” “I want to eat the ones in the basket standing up,” responds the glutton. “I’ll sit down when I get to the ones in the larder”<sup>8</sup>.

<sup>6</sup> English translation quoted after ‘*Philogelos*’. *The Laugh Addict. Jokes from the Turn-of-the-Fourth Century, Compiled by That Irresistible Pair, Hierocles and Philagrius, and Translated by Professor William Berg. Jokes performed and discussed by Jim Bowen*, p. 76. <http://publishing.yudu.com/Library/Au7bv/PhilogelosTheLaughAd/resources/index.htm><http://publishing.yudu.com/Library/Au7bv/PhilogelosTheLaughAd/resources/index.htm> (last accessed 1 November 2013).

<sup>7</sup> Cf. the commentary in A. THIERFELDER, ‘*Philogelos*’ *der Lachfreund. Von Hierocles und Philagrius*, München 1968, p. 270.

<sup>8</sup> English translation quoted after *Philogelos. The Laugh Addict...*, p. 76.

The second joke is set in a bakery<sup>9</sup>. The glutton pays two denarii to eat as much bread as he wants to. We may figure out from the text and its context that the price of a loaf of bread was about two denarii<sup>10</sup>. Artefacts excavated in Pompeii<sup>11</sup> show that a loaf was really big, and eating a whole one would have been a feat in itself...

Both of these situations call to mind the “all you can eat” type of restaurants popular nowadays. But we shall have to check whether this kind of agreement complies with the criteria applied for *emptio venditio* by the jurists. The *essentialia negotii* of consensual *emptio venditio* contracts involved an agreement on the price and the goods. Here we have the price established at four denarii and two denarii respectively<sup>12</sup>, while the respective goods are figs and bread, in other words commodities specified according to type.

D. 18,1,35,5 (Gai. 10 *ad ed. provinc.*): *In his quae pondere numero mensurave constant, veluti frumento vino oleo argento, modo ea servantur quae in ceteris, ut simul atque de pretio convenerit, videatur perfecta venditio, modo ut, etiamsi de pretio convenerit, non tamen aliter videatur perfecta venditio, quam si admensa adpensa adnumeratae sint. nam si omne vinum vel oleum vel frumentum vel argentum quantumcumque esset uno pretio venierit, idem iuris est quod in ceteris rebus.*

<sup>9</sup> Cf. the commentary in A. THIERFELDER, *op. cit.*, p. 270-271.

<sup>10</sup> Graffiti from Pompeii tell us that the daily cost of bread for one person was around 2 asses (with 16 asses to the denarius); cf. CIL IV,5380; IV,8561; A.E. COOLEY, M.G.L. COOLEY, *Pompeii. A Sourcebook*, London 2004, p. 164. Cf. Petr., *Sat.* 44,11, which gives a price of one as for a loaf for two people. Diocletian's edict on maximum prices does not give a price for bread, but it does give the price for a *modius* of wheat at 60-100 denarii, which was enough for 25-30 loaves (Plin. Mai. 18,66-67), to which we should add the cost of the other ingredients and the labour.

<sup>11</sup> Carbonised loaves, and a fresco in the Baker's House showing the bakery, now on display in the Museo Archeologico Nazionale in Naples.

<sup>12</sup> In both cases the price agreed on is in denarii, the typical Roman silver currency minted since the Punic Wars, and applied in Diocletian's edict to fix maximum prices for goods. The term *δηνάριον* is one of the Latinisms in *Philogelos*. See M. ANDREASSI, *Le facecie...*, p. 34-35.

In his commentary to the provincial edict Gaius wrote that the same principles held for the sale of goods which were weighable, countable, or measureable as for other goods, to make the sale appear to have been contracted (and the contract completed) as soon as the price had been agreed on; yet sometimes for the sale to appear not to have been contracted and completed until the goods had been counted, weighed, or measured, even though a price had already been agreed on. There were thus two options available depending on whether the determination of the price was considered sufficient, or whether it was necessary for the goods to be counted, weighed, or measured. Gaius also wrote that a contract for the sale of all the goods (e.g. all the wine, oil, grain, or silver) in a given resource was completed when the price was settled<sup>13</sup>. The latter seems to be the case applicable to the situations in the two jokes. The parties have agreed on a price, which has been paid with no ado. Then and only then – under the contracted agreement and once the buyer had met his contractual obligation – could he take the goods he had purchased. But the question arises whether the description of the goods as “as much as he wanted to eat” was a valid definition.

Roman lawyers engaged in rather complex deliberations on the ways the price could be established to make it a *pretium certum*, which did not necessarily mean that a specific sum had to be settled on at once<sup>14</sup>. So perhaps here, too, we may be able to follow a similar line of reasoning.

D. 18,1,7,1 (Ulp. 28 *ad Sab.*): *Huiusmodi emptio “quanti tu eum emisti”, “quantum pretii in arca habeo”, valet: nec enim incertum est pretium tam evidenti venditione: magis enim ignoratur, quanti emptus sit, quam in rei veritate incertum est.*

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<sup>13</sup> Further on Gaius writes that weighing, counting, or measuring the goods is necessary if the price has been settled for a unit, e.g. per amphora, jar, *modius*, or *libra*.

<sup>14</sup> Cf. the general account in R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 253 ff.

Ulpian determined that a sales agreement “for the price of the purchase that you have paid,” or “for as much as I have in my money-chest” was valid, since a price had been agreed on, even though the exact sum had not as yet been ascertained<sup>15</sup>. For a while the exact amount payable for the purchase was not known, but there was no doubt that there was a price.

D. 18,1,35,1 (Gai. 10 *ad ed. provinc.*): *Illud constat imperfectum esse negotium, cum emere volenti sic venditor dicit: “quanti velis, quanti aequum putaveris, quanti aestimaveris, habebis emptum”*.

There is a further interesting point in Gaius’ commentary to the provincial edict. He says that a contract has not been completed if the seller tells the buyer that he can buy the goods for whatever he wants to pay for them, for whatever price he considers right, or for whatever price he deems them worth. At first glance the situation looks similar to the ones described in *Philogelos*, since they all have the expression “as much as you want.” However there is a fundamental difference. If it is the buyer who is to establish the price in accordance with his own subjective view, the seller’s interest is put at risk<sup>16</sup>. Gaius calls such a contract incomplete, but not invalid; in other words he has shifted the moment of completion to the time when the buyer gives a price and the seller agrees to it. However, in the contracts in the two jokes the seller knows the price offered, but not how many goods (how much of the goods) *quae pondere numero mensurave constant* he will be bound to deliver.

The parties to the contracts in the jokes did not have an exact knowledge of the amount of figs or bread subject to contract, but it was a lim-

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<sup>15</sup> This passage has generated heated debate, primarily on the problem concerning the situation if the chest turned out to be empty. However, if the reasoning of D. 18,1,37 is applied, such a sale should be regarded as invalid due to there being no price. Cf. D. DAUBE, *Certainty of Price*, [in:] *Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta*, ed. D. DAUBE, Oxford 1959, p. 9-45; J.A.C. THOMAS, *Marginalia on ‘certum pretium’*, «TR» 35/1967, p. 77-89.

<sup>16</sup> Cf. R. ZIMMERMANN, *op. cit.*, p. 254.

ited amount and to a certain extent could be determined<sup>17</sup>. In the case of the figs, only those in the orchard could have been subject to the contract, which therefore determines the upper limit of the goods. But there was an additional restriction in the form of the capability of the buyer, who effectively could eat not as many of them as he wanted but as many as he was able to eat, and moreover at one sitting. The contract did not give him the possibility of leaving the orchard and returning later to continue eating the figs. In the second joke the amount of bread subject to contract can be specified even more precisely. First of all, only the bread in the bakery was subject to the contract; and secondly, only as much of it as the purchaser could eat on the spot and “all in one go,” that is within a fixed term, viz. at the very latest until the time when the shop closed.

Thus it seems that since the *essentialia negotii* have been kept, the sale of an amount of food that someone is able to eat in one go in a fixed place is a valid contract of *emptio venditio*.

There is just the question of the extent to which such situations were reflected in practice and in other source texts.

The fact that there are two different jokes on the same theme in the *Philogelos* suggests that the situation they describe must have been quite natural. A parallel may be supplied by a passage from Polybius’ *History*:

Polyb. 2,15,4-6:

περὶ δὲ τῆς κατὰ μέρος εὐωνίας καὶ δαφιλείας τῶν πρὸς  
τὴν τροφὴν ἀνηκόντων οὕτως ἂν τις ἀκριβέστατα  
κατανοήσειεν· ποιοῦνται γὰρ τὰς καταλύσεις οἱ  
διοδεύοντες τὴν χώραν ἐν τοῖς πανδοκείοις, οὐ  
συμφωνοῦντες περὶ τῶν κατὰ μέρος ἐπιτηδείων, ἀλλ’  
ἔρωτῶντες πόσου τὸν ἄνδρα δέχεται. ὡς μὲν οὖν  
ἐπὶ τὸ πολὺ παρίενται τοὺς καταλύτας οἱ πανδοκεῖς,  
ὡς ἱκανὰ πάντα ἔχειν τὰ πρὸς τὴν χρεῖαν,

<sup>17</sup> Neither is this a case of *Gattunskauf*, viz. the purchase of goods of a given type but with no further specifications, as here we have figs from a specific orchard and bread from a specific bakery. See R. ZIMMERMANN, *op. cit.*, p. 236-237, with the literature he cites in footnote 38.

ἡμιασσαρίου· τοῦτο δ' ἔστι τέταρτον μέρος ὀβολοῦ·  
σπανίως δὲ τοῦθ' ὑπερβαίνουσι.

Polybius was astonished at the general prosperity he had seen in Italy. His evidence was the observation that roadside inns did not charge travellers for each item or service separately, but a flat rate per day, usually amounting to half an as. This was an all-inclusive price, for which the innkeeper provided all they needed<sup>18</sup>. The contract Polybius described was certainly not a contract of sale and purchase, but a contract of hire, but we may assume that customers who paid the flat rate could use any of the services, available at a particular standard. They would have had a room and a place in the stable for their horse, and could probably take a *table d'hôte* or set meal (or possibly with a limited choice). The fact that some guests ate more and some less would not have been a problem for the innkeeper, who still made a profit on balance. Thus the legal construction was similar to the one in the jokes.

*Philogelos'* jokes are about a glutton entering a contract for the purchase of food. We may assume that sometimes travellers stopping at a farm, especially in rural areas, paid their host for the right to eat their fill in his orchard. The same sort of situation might have occurred in baker's shops. If a traveller could not, or did not want to take extra food with him, but could not estimate how much he would need to eat his fill, he paid a flat rate and ate as much as he needed. Presumably the gardener or baker must have been pretty confident that the rate charged would easily cover the cost of the goods supplied in this way.

It is certainly a situation in which the seller takes a risk, the converse of the situation in *emptio spei*. In an aleatory contract the buyer paid a predetermined price but had no guarantee that he would come away with anything; what he was buying was a chance to get the goods<sup>19</sup>.

<sup>18</sup> Cf. O.R. CONSTABLE, *Housing the Stranger in the Mediterranean World: Lodging, Trade, and Travel in Late Antiquity and in the Middle Ages*, Cambridge 2003, p. 17 ff.

<sup>19</sup> Cf. R. ZIMMERMANN, *op. cit.*, s. 246 i n.; B. SZARECKA, *Z problematyki umów aleatoryjnych w prawie rzymskim: 'emptio rei speratae' i 'emptio spei'*, «Studia Iuridica Lubliniensia» 2/2003, p. 165–174; K. CHYTLA, *Ekonomiczne i prawne podłoże*



The seller was bound to perform the task (for instance fishing), which was to bring the goods the buyer was expecting him to deliver (the fish). And he was to exercise the required amount of diligence in carrying out this duty. The buyer knew what the chances were of getting whatever he wanted to buy from the seller, for example he had a rough idea of how many fish the fisherman usually managed to catch in the given conditions. But he still took a risk: he might get as much as he had bargained for, or more if he was lucky, but he might walk away empty-handed. In the “all you can eat” type of contract the risk is on the seller, who reckons up his chances, too. He gets a flat-rate payment and in return allows the buyer to eat his produce. The buyer may eat so little that the flat rate charged will be more than enough; he may eat moderately; or – like the greedy-guts in the jokes – he may consume an inordinately large amount, making the seller face a loss. However, as I have explained, the risk is limited by the terms and conditions of the contract, which specify a one-off meal in a fixed place, and sometimes within a fixed time.

*Philogelos* has turned out to be an interesting source shedding light on certain aspects even of legal institutions as thoroughly examined as the *emptio venditio* contract. The jokes give us an insight into the social reception of legal norms, and even help us to understand the way such contracts were applied in practice, which Roman lawyers did not record, at least not in the extant source materials.

#### ANTYCZNE “ALL YOU CAN EAT”

##### Streszczenie

Przedmiotem niniejszego artykułu są dwa dowcipy ze zbioru *Philogelos*, których bohaterem jest głodomór (224,225). Opisano

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zawierania kontraktów kupna rzeczy przyszłej oraz kupna nadziei w starożytnym Rzymie, «Zeszyty Prawnicze» 6.2/2006, p. 73-84; K. WYRWIŃSKA, *Kazus złotego trójnoga a przedmiot sprzedaży w kontrakcie 'emptio spei'*, «Zeszyty Prawnicze» 11.1/2011, p. 403-419.

w nich umowę kupna sprzedaży, w której za ustaloną cenę nabywca mógł zjeść tyle chleba bądź fig, czyli rzeczy oznaczonych co do gatunku, ile zechciał. Analiza dostępnych źródeł wydaje się wskazywać na to, że tak zdefiniowany kontrakt wypełniał *essentialia negotii* sprzedaży. Wprawdzie strony nie wiedziały, ile dokładnie towaru jest przedmiotem umowy, ale była to ilość zamknięta, dająca się do pewnego stopnia określić: były to rzeczy znajdujące się na miejscu (sad, piekarnia), które kupujący miał za jednym razem zjeść. Kontrakt tego typu mógł być zawierany na przykład przez wędrowców zatrzymujących się u przygodnych gospodarzy. Ta jego pospolita natura może wyjaśniać brak zainteresowania nim wśród rzymskich jurystów. Sprzedawca brał na siebie ryzyko, przypuszczając jednak, że ustalona cena wystarczy na pokrycie skonsumowanego towaru. Można zatem tak zawartą umowę uznać, z przymrużeniem oka, za antyczny prototyp oferty typu „all you can eat”.