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TROUBLE AT THE BATHS

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Abstract:
This article is concerned with the seemingly common problem of the theft of personal belongings at the baths. It is argued, based on a close reading of epigraphic evidence and legal texts that, while theft was seemingly an ever-present concern, bathers could employ various legal strategies to ensure the safety of their personal belongings. An analysis of the legal rules and available legal remedies suggests that bathers were not completely without legal recourse. In addition, there is evidence that the Roman state sought to alleviate the situation through the introduction of various public-order offences.

1. Introduction

Sometime during the third century AD, an individual named Solinus fell victim to theft while at the baths associated with the temple complex of the goddess Sulis Minerva in the Roman province of Britannia. Solinus was so outraged by this act of theft that he decided to curse whoever had stolen his bath items (a bath tunic etc.) in the following terms:

> Deae Suli Minerv(a)e Soli/nus dono numini tuo ma/iestati pax{s}a(m) ba(ln)earem et [pal]/leum [nec p]ermitta[s so]mnum / nec san[ita]tem ei qui mihi fr(a)u/dem [f]ecit si vir si femi[na] si servus s[i] l[ib]er nis{s}i [s]e retegens istas / s[p]ecies ad [te]mplum tuum detulerit / [--- li]beri sui sua e[t(?)] qui [---]deg[---] / ei quoque [---]xe[---] / [--- so]mnum ne[c sanitate]/m [---]n[---]all[e]um / et reli(n)q[ua]s nis{s}i ad [te]mplum tu/um istas res retulerint[1]

As is a common convention with curses of this kind, Solinus gifted the items which had been stolen from him in ownership to the goddess and asked her to avenge the theft of her property by causing

[1] Text taken from https://edh-www.adw.uni-heidelberg.de/edh/inschrift/HD079550 (letzte Änderungen: 7. Mai 2019, Cowey). [accessed 9 March 2021]. The text has been discussed, among others, by Roger Tomlin in Barry W. Cunliffe, *The Temple of Sulis Minerva at Bath*, volume 2 (Oxford: University Press, 1988), 150 - 151. See also Amina Kropp, *Defixiones: ein aktuelles Corpus lateinischer Fluchtafeln*, (Speyer: Brodersen, 2008), Nr. 3.2/24.

physical distress to the perpetrator(s) whoever they may be. Given the absence of any additional information, we can never know whether Solinus's curse did the trick and whether the perpetrator(s) suffered terribly as he had hoped. In addition, the location of theft remains unclear, but given the reference to the stolen bath items and the place where the curse tablet was deposited, we will assume that Solinus's bath items were stolen at the baths. Although much information remains tantalisingly lacking, curses such as these provide interesting information for the legal historian, since they highlight alternative means of seeking justice than the usual route through the Roman courts. Viewed from this angle, it is not difficult to see why Solinus would have chosen to employ a curse in these circumstances. Not only was the value of the good stolen in all likelihood quite trivial, but more importantly, one of the fundamental rules of the Roman delict of theft was that the defendant had to be identified or identifiable in order to initiate a lawsuit and, in this case, Solinus clearly did not know who had stolen his bath items. This would have rendered the traditional actions on theft unavailable to him. And yet, Roman literary sources paint a picture of theft being a common problem in the baths. As Yegül has observed in his seminar book on Roman baths:

> "A perennial problem in public baths was the stealing of bathers' clothes. Many inscriptions allude to this much-despised nuisance and ways to prevent it."[2]

If theft of clothes was a common problem and the legal remedies under the law of delict were less than useful in these circumstances, the question remains which strategies Roman bathers employed to minimise their chances of having their personal belongings stolen. Employing elements of the rational choice theory in Economics, whereby the choices an individual makes in any given circumstance is geared towards minimising risk, this article will investigate the legal options, and therefore the choices, available to an individual in relation to the security of their personal belongings when attending Roman baths.[3] Phrased differently, this article aims to answer the following question: how safe were Roman baths when it came to the property of an individual? The main focus will be on Roman legal sources although other material will be used to contextualise these.

2. Locating baths in Roman legal sources

Before progressing to the substance of this article, certain terminological observations are required. The term *Balnea* is by far the

[2] Fikret K. Yegül, *Bathing in the Roman World* (Cambridge: University Press, 2010), 14.

[3] For an account of the history and application of this theory, see Mark Irving Lichbach, *Is Rational Choice Theory All of Social Science?* (Ann Arbor, Mich.: University of Michigan Press, 2003), generally.

most commonly used term in Roman legal sources to describe baths. While the equivalent Greek term, *Thermae*, does occur, it is found mainly in Imperial legislation.[4] As Fagan has demonstrated in his analysis of these two terms, they were used interchangeably in most sources.[5] The seeming simplicity of terminology found in the Roman legal sources can be misleading, however. It should be recalled that the terms could describe both large public bathing establishments such as Imperial baths as well as smaller baths attached to individual dwellings.[6] Thus, much relies on the interpretation of individual texts. Given the general nature of the legal problems raised in Roman legal sources, these could equally apply to "small, neighbourhood baths" as Yegül calls them, or to larger establishments.[7] The following text demonstrates this point:

> D. 32, 91, 4 Pap. 7 resp.
> Balneas legatae domus esse portionem constabat: quod si eas publice praebuit, ita domus esse portionem balneas, si per domum quoque intrinsecus adirentur et in usu patris familiae vel uxoris nonnumquam fuerunt et mercedes eius inter ceteras

[4] See, for example, C. 11, 43, 6, pr (440?), or C. 11, 43, 6, 3 (undated).

[5] Garrett G. Fagan, *Bathing in Public in the Roman World*, First paperback edition. (Ann Arbor, Mich.: University of Michigan Press, 2002), 14 - 19.

[6] On the culture of Roman bathing, see Marga Weber, *Antike Badekultur* (München: Verlag C.H. Beck, 1996); Michel Blonski, *Se nettoyer à Rome (IIe siècle av. J.-C.-IIe siècle ap. J.-C.): pratiques et enjeux*, (Paris: Les Belles Lettres, 2017), generally.

[7] Yegül, *Bathing in the Roman World*, 9.

meritoriorum domus rationibus accepto ferebantur et uno pretio comparatae vel instructae communi coniunctu fuissent.

It is impossible to discern from this text the size of the baths under discussion. Here, Papinian provided clarification as to when a bath, forming part of a *domus*, would be regarded as a public bath for the purposes of the law of legacies. As is clear from this text, the distinction between 'public' and 'private' could be quite fluid in this regard.

In terms of topics addressed in the legal sources, the two most prevalent contexts in which Roman legal sources treat baths are property law and the law of inheritance, specifically, as already noted above, where baths have been left as legacies in a will. Let us review these in turn.

D. 8, 2, 13, pr Proc. 2 epist.
Quidam Hiberus nomine, qui habet post horrea mea insulam, balnearia fecit secundum parietem communem: non licet autem tubulos habere admotos ad parietem communem, sicuti ne parietem quidem suum per parietem communem: de tubulis eo amplius hoc iuris est, quod per eos flamma torretur paries: qua de re volo cum hibero loquaris, ne rem illicitam faciat. Proculus respondit: nec Hiberum pro ea re dubitare puto, quod rem non permissam facit tubulos secundum communem parietem extruendo.

D. 9, 2, 50 Ulp. 6 opin.

Qui domum alienam invito domino demolit et eo loco balneas exstruxit, praeter naturale ius, quod superficies ad dominum soli pertinet, etiam damni dati nomine actioni subicitur.

D. 43, 21, 3, 6 Ulp. 70 ad ed.

Aristo et de cuniculo restituendo per quem vapor trahitur, in balneariis vaporibus putat utilem actionem competere: et erit dicendum utile interdictum ex hac causa competere.

As these three texts demonstrate, the imprint which baths leave in the legal sources is one of an industrial establishment, much like workshops, with all that this entails. The problems associated with running baths (heat, noise, vapour) were clearly not always to be welcomed in the urban sphere and could be a source of nuisance to adjacent properties.

In terms of the law of inheritance, Roman legal sources provide the following information regarding the furnishing of baths:

D. 33, 7, 13, 1 Paul. 4 ad Sab.

Instrumento balneario legato etiam balneatorem contineri Neratius respondit:

D. 33, 7, 17, 2 Marcian. 7 inst.

> Instrumento balneatorio legato dictum est balneatorem sic instrumento contineri balneario, quomodo instrumento fundi saltuarium et topiarios, et instrumento cauponio institorem, cum balneae sine balneatoribus usum suum praebere non possint.

The crux of the two texts, an amalgamation of the views of two different jurists (Paul and Marcian) of the classical period, is that when a suite of baths is given as a legacy, this also includes the (servile) bathkeeper, here referred to by the term *balneator*, and all the equipment (and presumably also servile staff) needed for the running of the baths.[8] Although many of these bathkeepers must have been slaves, judging from the discussion in the two texts quoted above, it must be recalled that the term could also apply to an entrepreneur who had rented the bath from its owner with a view to obtain financial profit from its running.

3. Baths as economic assets

There is ample evidence across Roman legal sources that baths, whether private or public, could be rented out to entrepreneurs for profit. Probably the best example of this comes from a rental notice in the form of a graffito in Pompeii (CIL 4.1136) where a landowner,

[8] Fagan, *Bathing in Public in the Roman World*, 202. See, on staff, Christer Bruun, 'Lotores: Roman Bath-Attendants', *Zeitschrift Für Papyrologie Und Epigraphik* 98 (1993): 222–28.

Iulia Felix, offered for rent a complex, which included baths, for a period of five years.[9] In this instance, an entrepreneur, perhaps a freedman, would rent the complex from its owner for a period of five years with a view to making a profit out of the business. As Yegül states: "Baths were built in such large numbers because running a public bath was a sensible and lucrative business proposition. … [E]ven though baths mainly operated for profit, entrance fees were so low that even the poorest were not deterred; … ."[10] Take the following two texts:

> D. 19, 2, 30, 1 Alf. 3 dig. a Paulo epit.
> Aedilis in municipio balneas conduxerat, ut eo anno municipes gratis lavarentur: post tres menses incendio facto respondit posse agi cum balneatore ex conducto, ut pro portione temporis, quo lavationem non praestitisset, pecuniae contributio fieret.

> D. 20, 4, 9, pr Afr. 8 quaest.
> Qui balneum ex calendis proximis conduxerat, pactus erat, ut homo Eros pignori locatori esset, donec mercedes solverentur: idem ante calendas Iulias eundem Erotem alii ob pecuniam

[9] Alessandro Grillone, 'La gestione privata dei balnea al tramonto dell'era repubblicana e nei primi due secoli dell'impero', *Bullettino dell'istituto di diritto romano 'vittorio scialoja'* 112 (2018): 175–99. The gist of Grillone's argument is that the wording of the rental notice indicates that the landlord was aiming to entice a better sort of tenant to rent the complex from her.

[10] Yegül, *Bathing in the Roman World*, 9 - 10.

> creditam pignori dedit. consultus, an adversus hunc creditorem petentem Erotem locatorem praetor tueri deberet, respondit debere: licet enim eo tempore homo pignori datus esset, quo nondum quicquam pro conductione deberetur, quoniam tamen iam tunc in ea causa Eros esse coepisset, ut invito locatore ius pignoris in eo solvi non posset, potiorem eius causam habendam.

It is impossible in either case to speculate about the ultimate ownership of these baths. In the first text, the aedile rented the baths from a *balneator* for a period of time, no doubt as a display of civic magnanimity. Thus, anyone wishing to use the baths during the period of the lease could do so for free (and basically at the expense of the aedile). In the second text, an unknown person, likely an entrepreneur, rented baths for a period of time from their owner and secured the payment of rent through a pledge without possession over a valuable slave.

The background of these two texts reveals that baths, whether owned by the state, a local town, or indeed by private individuals, could be exploited as an economic asset through the contract of letting and hiring. As with most economic assets, such as shops or warehouses, much would have depended on the terms of the

agreement under which the asset had been rented out.[11] And in this regard, although the texts quoted above do not reveal much detail, there is ample evidence in relation to other assets about the different management strategies that could be employed. Thus, for example, in the first text quoted above, it is not impossible to assume that the aedile had rented the baths with their accompanying *instrumentum*, the servile bath keeper and all the equipment and personnel associated with the running of the baths. Similarly, in the second text, this is most likely an example of an entrepreneur who rented the baths from their owner and who sought to turn a profit by charging individuals a fee to use the baths. How these baths were managed on a daily basis is not revealed.

4. Safety of personal belongings

In a frequently quoted legal text, the third-century jurist Ulpian states the following:

> D. 16, 3, 1, 8 Ulp. 30 ad ed.
> Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri et dolum dumtaxat praestare debere puto: quod si accepit, ex conducto.

[11] See, for a good discussion of this type of contractual practice, Paul du Plessis, 'Janus in the Roman Law of Urban Lease', *Historia: Zeitschrift Für Alte Geschichte* 55 (2006): 48–63 with reference to *insulae*.

In this text, Ulpian addresses the extent of the civil liability of the *balneator* for the clothes of his customers. The status of the *balneator* is unclear from this text and is not too important to the legal point made here. In Ulpian's view, the extent of his liability will be determined by the type of 'named contract' under which it could be classified according to the Roman scheme of contracts. Thus, if the *balneator* (or his staff) agreed to look after the clothes of customers for free, this amounted to a contract of deposit, which was gratuitous, and he would therefore only be liable if the loss of the clothes amounted to *dolus*, deliberate wrongdoing, on the part of the *balneator* or his staff.[12] This sets the bar quite high in terms of liability, and deliberately so, since the contract of deposit is based on a relationship of trust, articulated in the *bona fides* clause, between depositor and depositee. Contrast this to the case where the *balneator* undertook to look after the clothes of their customers in return for a fee. In such a case, the extent of the civil liability would be greater, since such an agreement amounted to a contract of letting and hiring. Thus, the *balneator* (or his staff) would be liable for both *dolus* and *culpa*, as is standard in the contract of letting and hiring.

[12] Compare D. 16, 3, 32, Cels. 11 dig. Quod Nerva diceret latiorem culpam dolum esse, Proculo displicebat, mihi verissimum videtur. nam et si quis non ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit.

The practicalities of this arrangement are lost to us. In the archaeological record, for example, baths such as those in Pompeii and Herculaneum only have open alcoves in the dressing areas. That the facilities could vary quite considerably from one establishment to the next is noted by Yegül:

> "These rooms must have contained wooden cabinets, chests, and benches for storing personal effects and clothes. … [I]n the smaller and poorer establishments, wooden pegs on the wall might have sufficed."[13]

Despite this confident statement, there are no indications from the baths in Pompeii and Herculaneum that these alcoves could be secured, similar to a modern locker in a gym with a lock, and one must assume that clothes were guarded in some way, either by slaves who accompanied their masters and mistresses to the baths or by slaves specifically appointed, as part of the staff of the bath, to look after the clothes of customers.[14] One legal text hints at this:

> D. 3, 2, 4, 2 Ulp. 6 ad ed.
> Ait praetor: "qui lenocinium fecerit". lenocinium facit qui quaestuaria mancipia habuerit: sed et qui in liberis hunc

[13] Yegül, *Bathing in the Roman World,* 13.

[14] For an exaggerated account of the perils which could befall a slave who had lost their master's clothes at the baths, see Petron. *Sat*. 30. Note that in this text the financial value of the clothes was quite low ('scarcely ten sesterces'.)

> quaestum exercet, in eadem causa est. sive autem principaliter hoc negotium gerat sive alterius negotiationis accessione utatur (ut puta si caupo fuit vel stabularius et mancipia talia habuit ministrantia et occasione ministerii quaestum facientia: sive balneator fuerit, velut in quibusdam provinciis fit, in balineis ad custodienda vestimenta conducta habens mancipia hoc genus observantia in officina), lenocinii poena tenebitur.

As Ulpian shows, here in a comment on the offence of *lenocinium*, certain *balneatores* in the provinces had slaves present in baths who could be rented *ad custodienda vestimenta*.[15]

That the practicalities of this *custodia* of clothes could take different forms can be seen from the following text:

> D. 1, 15, 3, 5 Paul. l. s. de off. praef. vig.
> Adversus capsarios quoque, qui mercede servanda in balineis vestimenta suscipiunt, iudex est constitutus, ut, si quid in servandis vestimentis fraudulenter admiserint, ipse cognoscat.

[15] On the vexed question of the meaning of *custodia* in a contractual context, see Geoffrey MacCormack, '*Dolus*, *Culpa*, *Custodia* and *Diligentia* : Criteria of Liability or Content of Obligation', *Index : quaderni camerti di studi romanistici* 22 (1994): 189–209; Martín Serrano-Vicente, *Custodiam praestare: la prestación de custodia en el derecho romano* (Madrid: Tebar, 2007), generally.

The context of this statement is difficult to pin down. The focus of the discussion by the Roman jurist, Paul, here is which public-order remedies were available against *capsarii* who had undertaken to look after clothes at the baths in return for money, and who had then dealt with these clothes in a fraudulent manner, no doubt by facilitating their theft. For the sake of argument, I will assume that these *capsarii* in this example were regularly 'employed' by the *balneator* in the bath (as suggested in D. 3, 2, 4, 2 Ulp. 6 ad ed.) and were not 'free agents' working for their own profit independently. One cannot rule out, of course, that they may have offered their guard services independently. According to Paul, the *Praefectus Vigilum* will try these individuals in his capacity as a judge.[16] Two aspects of this short text are noteworthy. The first is the term used to describe the slaves who looked after clothes for a fee in the baths, namely *capsarii*. The noun *capsa*, from which this word is derived, refers to a holder or a container, much like a box in which book manuscripts were kept.[17] Since there is evidence, at least in the case of book holders, that these boxes could be secured with locks, one may speculate that at least in some bathing establishment, bathers' clothes were secured, rather than merely guarded by a slave. Indeed, Fagan cites in a footnote a reference to two passages of the *Tosefta*, a collection of Jewish law

[16] See on this specifically Olivia F Robinson, 'Baths: an aspect of Roman local government law', *Sodalitas : scritti in onore di Antonio Guarino* III (Naples: Jovene, 1984): 1065–82.

[17] See, for example, Cic. *Div. Caec.* 16.51.

from the second century, which mention certain baths having niches for depositing one's clothes which could be secured.[18]

The second aspect of this text which is worthy of note is the relationship between this public-order provision and the other civil-law remedies available to individuals whose clothes had been stolen at the baths. For the sake of the argument, I will here assume that the *capsarii* mentioned above were the slaves of the *balneator*. As is well known from Roman law, free persons were liable for the delicts caused by their slaves. Take for example the following text:

> D. 9, 2, 27, 11 Ulp. 18 ad ed.
> Proculus ait, cum coloni servi villam exussissent, colonum vel ex locato vel lege Aquilia teneri, ita ut colonus possit servos noxae dedere, et si uno iudicio res esset iudicata, altero amplius non agendum. sed haec ita, si culpa colonus careret: ceterum si noxios servos habuit, damni eum iniuria teneri, cur tales habuit. idem servandum et circa inquilinorum insulae personas scribit: quae sententia habet rationem.

Here, the tenant (*colonus*) of a villa was deemed liable either under contract or delict for the actions of his slaves. The final sentence is particularly instructive as it demonstrates the extent the extent to which noxal surrender was possible for the owner as an alternative

[18] Fagan, *Bathing in Public in the Roman World*, 38 note 67.

means of compensation. *Mutatis mutandis*, therefore, the *balneator* would be liable either under the contract of lease or under the delict of wrongful damage to property if his *capsarii*, who had been made available to customers in the bath to rent for a fee in order to guard their clothes, damaged them. The same principle would apply where a *capsarius* stole clothes entrusted to them to look after in the baths. This may also go some way to explaining the context of D. 1, 15, 3, 5 (Paul. l. s. de off. praef. vig.) quoted above. Apart from the liability implications for the *balneator*, it seems likely that the Roman legal order wished to discourage this type of behaviour by creation an additional public-order offence.

But what of cases of theft by third parties unconnected to the servile staff of the baths? In order to understand the remedies available in this case, and since Roman legal sources do not discuss the matter to any great extent, an analogy will be drawn with a case which the Roman legal sources discuss at length, namely that of the fuller. It should be noted, of course, that while the two scenarios are comparable, they are not identical as these two texts show:

> D. 4, 9, 5, pr Gai. 5 ad ed. provinc.
> Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur. nam

> et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur.
>
> D. 4, 9, 5, 1 Gai. 5 ad ed. provinc.
> Quaecumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.

Nonetheless, there is sufficient similarity in the concept of *custodia* to permit a comparison. As Gaius tells us:

> Gai. 3, 205
> Item si fullo polienda curandave aut sarcinator sarcienda vestimenta 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 solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio conpetit, quia hoc casu ipsius interest rem salvam esse.

It would be the fuller, not the owner of the clothes, who had the *actio furti* where clothes were stolen while in his care. The reason for this is his *interesse* in the clothes not being stolen, since he will, in turn, face a lawsuit from the owner of the clothes on account of the breach of contract. *Mutatis mutandis*, the *balneator* would have the *actio furti* if clothes, which he or his staff had undertaken to guard, were stolen by

a third party. The customer, in turn, would have an action for breach of contract against the *balneator*.

As for thieves caught in baths, their fate is discussed in a short title in the Digest, devoted to this very issue:

> D. 47, 17, 1, Ulp. 8 de off. procons.
> Fures nocturni extra ordinem audiendi sunt et causa cognita puniendi, dummodo sciamus in poena eorum operis publici temporarii modum non egrediendum. idem et in balneariis furibus. sed si telo se fures defendunt vel effractores vel ceteri his similes nec quemquam percusserunt, metalli poena vel honestiores relegationis adficiendi erunt.

Two aspects of this text are noteworthy. For whatever reason, but most likely because of its prevalence, the legal order elected to deal with thieves who stole in the baths more severely than cases of ordinary theft. The reason for this, much like the motivation for dealing with thieves who use the cover of night to steal, is that it was deemed more grievous. Thieves who preyed upon bathers while they were vulnerable, and separated from their belongings, had to be dealt with harshly. Further evidence of this 'societal' concern can be found, for example in the manner in which the law dealt with soldiers caught stealing in baths attached to Roman military camps:

> D. 47, 17, 3, Paul. l. s. de poen. milit.

Miles, qui in furto balneario adprehensus est, ignominia mitti debet.

One final point to be considered relates to the extent to which it was possible for the *balneator* to create a completely secure environment for the bathers. Thus far, as this account of the various legal remedies have shown, while bathers were not without recourse where their clothes had been stolen, the impression created by the legal texts is that theft was accepted as fact of life in such establishments to be dealt with ad hoc when it occurred. But matters could have been different. There are examples where individuals in charge of specific premises were saddled with 'strict' liability for loss or damage.[19] As is well known, the Edict dealing with *nautae*, *caupones*, and *stabularii*, created such a scenario:

D. 4, 9, 1, pr Ulp. 14 ad ed.
Ait praetor: "nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo".

[19] For a lucid account of the complexities surrounding this form of strict liability, see James Mackintosh, '*Nautae Caupones Stabularii*: Special Liabilities of Shipmasters, Innkeepers, and Stablers', *Juridical Review* 47 (1935): 54–74. And on this, see most recently Maria F. Cursi '*Actio de recepto* e *actio furti* (*damni*) *in factum adversus nautas, caupones, stabularios* : logiche differenziali di un sistema composito' in *Studi per Giovanni Nicosia* III (Milan: Giuffré, 2017), 117-47.

By virtue of this Edict, those in charge of a ship, an inn, or a stable were held strictly liable for loss or damage of their customers irrespective of their involvement in the loss or damage. The reasons for the introduction of this legal measure are variously given as:

> D. 4, 9, 1, 1 Ulp. 14 ad ed.
> Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodiae 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 furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus.

> D. 4, 9, 3, 1 Ulp. 14 ad ed.
> Ait praetor: "nisi restituent, in eos iudicium dabo". ex hoc edicto in factum actio proficiscitur. sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: sed si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui receperit

> tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. idem erit dicendum et si in stabulo aut in caupona vis maior contigerit.

Much has been written about these supposed motivations for the creation of the Edict and, in all likelihood, the answer lies somewhere among these various justifications. Thus, it may have been the possibility of collusion, combined with the difficulty to establish blame in these cases, that led to Praetorian innovation whereby the operators of certain types of businesses could be held 'strictly' liable. The question that must therefore be asked is why such 'strict' liability was not extended to other business ventures, since there is no evidence that this Edict ever applied to businesses other than those listed. Legally speaking, the most likely reason has to do with the underlying bond between the businesses mentioned in the Edict. In each case, whether it be a stable, ship or an inn, the success and reputation of their operators depended on the ability to create a fairly secure environment in which the main activities associated with their type of business (lodging, stabling of animals, transport of goods) could be carried out. By contrast, in baths, with a great deal of footfall during the day, combined with the presence of food sellers and other third parties offering services such as oiling and massages, it would have been impossible to create a secure enough environment to

warrant imposing liability on the *balneator*.[20] If the legal order had done so, it would have made baths a supremely unattractive business venture that few would venture to take on.

5. Conclusions

Returning to the case of Solinus mentioned at the start of this piece, we can never know what confluence of circumstances led to him having his bath tunic and associated items stolen. Assuming that he was not an incautious person and that, in his choice to visit the baths at the Temple of Sulis Minerva, he had actively tried to minimise any potential dangers by behaving in a cautious manner, the fact that he fell victim to theft seems quite unfortunate. This survey of potentially applicable legal remedies has demonstrated that, while theft remained a problem in the baths, there were a number of measures that individuals could take in order to minimise the likelihood of being the victim of this delict. First and foremost, the safest option was not to visit the baths alone, but to have one or more slave attendants in attendance to look after one's clothes. In the absence of such attendants, an alternative option would be to rent the services of a custodian slave, either to look after one's belongings deposited in the niches of the *apodyterium*, or to keep these in a lockable box until one returned from the baths. At the very least, should clothes go missing under these circumstances, the bather would have legal

[20] Fagan, *Bathing in Public in the Roman World*, 33-4 for a discussion of food vendors within baths.

recourse against the bath-keeper under the contract of letting and hiring, although the insignificant value of the items stolen may have been a deterrent to initiating a lawsuit. In addition, the prospect of being tried by the *Praefectus Vigilum* would likely have moderated the behaviour of any slaves contemplating the idea of theft, thus making it a somewhat safer option. A similar regime applied when the bath-keeper and their staff accepted patrons' clothes on deposit, but in this latter case, the extent of their civil liability was much reduced. In this latter situation, 'reputation' was an important factor. It seems highly unlikely, given the narrow range of liability afforded under the contract of deposit, that such establishments would have been as popular as those affording greater protection to customers' clothes. In addition, as the various legal rules relating to theft by third parties in baths show, the security of bathers' belongings was of some concern to the Roman legal order, as is demonstrated by the severe penalties visited upon thefts caught in the bath. That being said and given the nature of the establishment and the footfall, it was impossible to create a completely secure environment legally speaking. Bath-keepers were not saddled with the same 'strict' liability as operators of ships, inns, or stables, since it would have rendered the running of a bath near impossible, not to mention financially unattractive. In all likelihood, it was under such circumstances that Solinus' sorry tale arose.

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