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WHO DID WIN IN THE UTRUBI INTERDICTS?

Abstracts:

An accurate interpretation of Gai Institutiones, IV 150, 152, 160 and Iustiniani Institutiones, LIBER QUARTUS, XV, 4 a, reveals that in the utrubi interdict won that person who had possessed the mobile good for a longer time in the same year in which the interdict was granted. The general accepted opinion (that the winner was the person who had possessed the mobile good for a longer period in the year which had proceeded the granting of the interdict) implies the retroactivity of the imperium. But Romans rejected both the retroactivity and the ultra-activity of this power (Gai Institutiones IV, 105, 110 and Iustiniani Institutiones, LIBER QUARTUS, XII).

I. MODERN SCHOLARS' OPINION

It is well established both in Romanian and foreign Roman Law literature that the winner in the utrubi interdicts was always that person who possessed the mobile good for a longer period of time in the year before the granting of the interdict. Thus Professor M.V. Jakotă considers that: “ In this interdict [the utrubi one- author’s note] won that person that had possessed the good for a longer period of time in the year which had preceded the deliverance of the interdict”.¹ Emil Molcuț and Dan Oancea agree that the utrubi interdict was useful for that person who had possessed the mobile good “for a longer period of time in the year before the deliverance of the interdict”.² They introduce here the famous example taken from Gaius, *Institutiones*, IV, 152, about which we are going to discuss in this article. The same opinion is to be found in the Western Roman Law literature. For instance, René Foignet wrote: “Par l’interdit *utrubi*, il [the praetor] protège celui qui a possédé le meuble pendant la plus grande partie de l’année précédant la délivrance de l’interdit”.³ Spanish Professor Carlos M. Ontiveros Peláez, in his Roman Law course, published on the Web in 2002, agreed with this opinion.⁴

Let us now examine what was the ancient scholars’ point of view.

II. ANCIENT SCHOLARS' POINT OF VIEW

The best way to reveal this opinion is to examine the two ancient Roman Law handbooks that have survived until our age, that means Gai *Institutiones* and Justiniani *Institutiones*. Because of their “target-public”, these handbooks had to be more specific and clear on our issue, than any other ancient legal text.

¹ Jakotă Mihai Vasile, *Drept roman [Roman Law]*, , Iași, Editura “Cugetarea”, 2002, p. 256

² Molcuț Emil & Oancea Dan, *Drept roman [Roman Law]*, București, Casa de Editură și Presă “Șansa” S.R.L., 1997 p.112

³ Foignet René *Manuel élémentaire de Droit Romain [Elementary Handbook of Roman Law]*, Neuvième Édition, Paris, Rousseau et C^{ie} Editeurs, 1928, p.166

⁴ Peláez Ontiveros Carlos M., *Derecho privado romano, Instituciones, Tema30*, [Roman Private Law. Institutions. Subject 30] p.30-8, found at <http://w.w.w.juritexto.com/450HTML>

In Gai Institutiones IV, 150 it is written:

*Et si quidem de fundo uel aedibus interdicatur, eum potioem esse praetor iubet, qui eo tempore, quo interdictum redditur, nec ui nec clam nec precario ab aduersario possideat; si uero de re mobili, eum potioem esse iubet, qui maiore parte eius anni nec ui nec clam nec precario ab aduersario possederit; idque satis ipsis uerbis interdictorum significatur*⁵

It is obvious that, in order to determine who was preferred by judge in an utrobi interdict, we have to analyze the phrase “ si uero de re mobili... significatur”. An approximate translation of this phrase would be: “ he [the praetor – translator’s note] orders in case of mobile goods, to be preferred that person who would possess the good without secrecy, without a precarium title and without violence against his adversary, the longer period of *that year* (eius anni); this is well enough expressed (underlined) by the very terms of the interdicts.” Because of this last sentence, we are compelled to check out the formula used for the utrobi interdicts. This formula is to be found, also, in Gai Institutiones, IV, 160: “VTRVBI HIC HOMO, DE QVO AGITVR, [APVD QVEM] MAIORE PARTE HVIVS ANNI FVIT, QVO MINVS IS EVM DVCAT, VIM FIERI VETO.”⁶ In an approximate translation it says: “ I prohibit the use of violence in order to change the way in which is possessing who of you both has had this man for a longer period of this year.”

We notice, here, in IV, 160 the use of a demonstrative adjective that is very similar to that used above in IV, 150: “HVIVS ANNI” compared with “eius anni”. The difference between the two adjectives comes from the direct-indirect speech translation.

So, Gaius considered that in an utrobi interdict won the possessor that had possessed the good for a longer period of time in the same year when the interdict had been granted. This conclusion must be drawn up from the constantly use of the same kind of demonstrative adjectives

⁵ *Gai Institutiones* [*The Institutions of Gaius*]found at: <http://www.thelatinlibrary.com/gaius4.html>

⁶ *Ibidem*

that define the year when the parties are addressing to the praetor: *huius anni* (direct speech), *eius anni* (indirect speech).

In Iustiniani Institutiones, at LIBER QUARTUS, XV DE INTERDICTIS, 4 a, it is written:

*...UTRUBI vero interdicto is vincebat, qui maiore parte eius anni nec vi nec clam nec precario ab adversario possidebat....*⁷

That means, in an approximate translation that in the utrubi interdicts won that person who had possessed for a longer period of that year the mobile good, without secrecy, without a precarium title and without violence against his adversary. We notice here, again, the use of the demonstrative adjective “*eius*” which implies that the year taken into account was the very year in which the interdict was granted. So, for Tribonianus, Theophilus and Dorotheus (the authors of Iustiniani Institutiones), too, the winner in the utrubi interdict was the person who had possessed the mobile good for a longer period of the year in which the interdict was granted.

If the ancient sources are so clear, how do the modern scholars conclude that the winner in the utrubi interdict was the person who had possessed the good for a longer period in the year that had preceded the deliverance of the interdict?

III. THE MODERN SCHOLARS’ ERROR

In Gai Institutiones, at IV, 152, it is written:

*“Annus autem retrorsus numeratur. Itaque si tu uerbi gratia VIII mensibus possederis prioribus et ego VII posterioribus, ego potior ero, quod trium priorum mensium possessio nihil tibi in hoc interdicto prodest, quod alterius anni possessio est.”*⁸

An approximate translation would be: “But the year is counted down conversely. Thus, let’s say, you have first possessed it [the mobile good- translator’s note] for eight months and I have

⁷*Iustiniani Institutiones [The Institutions of Justinian]*, latin text and romanian translation with notes and introduction by professor Ph.D., Vladimir Hanga, București, Lumina Lex, 2002, p.314

⁸ *Ibidem*

possessed it after you for seven months, then I shall be preferred, because your possession for the first three month does not advantage you in this interdict, because it belongs to another year.”

This fragment (Gai Institutiones, IV, 152) is interpreted by modern Roman Law literature in a strange way. All scholars agree that the year had to be counted down conversely, because it was about finding out who from two persons had possessed the good for a longer period in a year. But modern scholars go wrong in determining the year that was taken into account by judge in solving an utrobi interdict. They deduce from the phrase: “Itaque...possessio est” that the year taken into account was the year before the deliverance of the interdict (as I have proved in the first part of this article). That means that the winner in the utrobi interdicts would have been the possessor who had possessed the mobile good for a longer time in the 12 months period counted down conversely from the moment when the utrobi interdict was delivered. So, if the interdict was granted in January 12, 99 AD, the winner would have been that party who had possessed the good for a longer time in the period January 12, 99 AD – January 12, 98 AD

But such a conclusion is merely a misinterpretation of Gai Institutiones, IV, 152. The reasons that compel me to think in such a way are:

1. In Gai Institutiones, IV 139, interdicts are defined as means by which the praetor (or the proconsul) used to finish certain litigation, using his “auctoritas”.⁹ According to modern scholars, this “auctoritas” must be understood as imperium (the power to order the measures that seem desirable in civil and military life), which is considered nowadays as the real source of interdicts.¹⁰ So, the utrobi interdict represented the mean by which the praetor (using his imperium) protected the longer possession over a mobile good;

⁹ Ibidem

¹⁰ Foignet René, op.cit., p.20, Jakotă Mihai Vasile, op.cit.,p.180, Cucos Ștefan, *Drept roman [Roman Law]*, București, Editura Fundației “România de Măine”, 2000, p. 38, Fredouille Jean-Claude, *Larousse. Dicționar de civilizație romană [Larousse. Dictionary of Roman civilization]*, București, Editura “Univers Enciclopedic”, 2000, p. 101,123, 159

2. The efficiency of imperium was strictly confined in time. Thus in Gai Institutiones IV, 105 it is written: “... ideo autem imperio contineri iudicia dicuntur, quia tamdiu ualent, quamdiu is, qui ea praecepit, imperium habebit” (approximate translation: “They are named instances invested by imperium, because they have power as long as who has invested them, will have imperium”)¹¹. In Gai Institutiones, IV, 110, where Gaius discussed about the two kinds of actions the Romans knew, he wrote about those actions based on praetor’s power to command: “... eas uero, quae ex propria ipsius iurisdictione pendent, plerumque intra annum dare”¹². In translation, it means that the praetor gives to those actions which are based on his jurisdiction a one year validity. In other words, the actions to be found on a certain praetor’s edict (which is another effect of that Praetoria’s imperium) must be asked and granted during one year. In Iustiniani Institutiones, too, at IV, XII, when the perpetual and temporal actions are discussed, it is mentioned: “... eas uero quae ex propria praetoris iurisdictione pendent, plerumque intra annum vivere (nam et ipsius praetoris intra annum erat imperium).”¹³ So, the ancient authors of this last genuine Roman Law handbook confirmed what Gaius had said about praetorian actions, reminding in the same time, that in the classical age, the praetor had had imperium only for one year. We know, also, that a person, elected as praetor at Rome, could exercise this magistracy only for one year.¹⁴ So it is reasonable to think that a praetor had imperium only during the year in which he exercised this magistracy.

¹¹*Gai Institutiones* [*The Institutions of Gaius*] found at http://w.w.w.fh.-augsburg.de/~harsch/Chronologia/Lspost02/Gaius/gai_ins4.html

¹²*Gai Institutiones* [*The Institutions of Gaius*] found at http://w.w.w.fh.-augsburg.de/~harsch/Chronologia/Lspost02/Gaius/gai_ins4.html

¹³*Iustiniani Institutiones* [*The Institutions of Justinian*], Latin text and Romanian translation with notes and introduction by professor Ph.D., Vladimir Hanga, București, Lumina Lex, 2002, p.314, p.304

¹⁴ Fredouille Jean-Claude, op.cit.

3. The Roman civil year had, in Gaius' time, 12 months. From the second century BC, it began on January 1. So, a praetor had imperium during the period January 1-December 31;¹⁵

From the data presented above (paragraphs 1,2,3) it can be easily deduced the following conclusion:

by mean of the utrubi interdict, the praetor protected that possession (over a mobile good) that had lasted for a longer time during the period contained between January 1-December 31 of the year for which he was elected , because only between these two days, he had the imperium which entitled him to do so

This conclusion contradicts the general accepted opinion that the year which the formula of the utrubi interdict referred to, is the 12 months period of time counted down conversely from the deliverance of the interdict, whenever this deliverance took place.

We shall try now to find out if the general accepted opinion about the winner in the utrubi interdict is so lawfully sound as it seem.

Let's assume, that a certain slave had been possessed by person A for 9 months (from April, 1, 98 AD until January, 1, 99 AD). After that, the same slave had been possessed by another person (B) for the following 3 months (from January 1 until April 1, 99 AD). On April, 1, 99 AD, the two possessors, A and B, asked praetor X, who occupied this magistracy that year, to grant them an utrubi interdict. Who would be the winner (A or B)? Following the general accepted opinion, we must consider A the probable winner. A had possessed the mobile good nine months during the 12 months period between April, 1, 99 AD and April 1, 98 AD.

Unfortunately, it would be a contradiction!

As it is already known, by utrubi interdict, the praetor, based on his one-year imperium, protected a certain possession over a mobile good. If person A would win in the utrubi interdict

¹⁵ Ibidem, p. 36-38, 62

described above, then praetor X would protect, by mean of his imperium, a possession exercised before the very first day in which praetor X had imperium.

As we have presented above, at the reason no.2, when a certain praetor ended his one-year of magistracy, the instances that praetor had invested lost their power and the praetorian actions of that praetor ceased to be granted. So, Romans declined any ultra-activity to imperium. That means that Romans did not allow to a certain praetor to produce any legal effects, by instances invested with his imperium or by granting praetorian actions, during the next year when another praetor exercised his own imperium. . Thinking conversely, it was not allowed to the next praetor's imperium to produce any legal effects (by instances imperio continens or by granting praetorian actions) referring to the previous year, when the previous praetor had exercised his imperium. Therefore, Romans denied to imperium any retroactivity. However there were some exceptions to this rule. In Gai Institutiones IV, 111 it is written:

Aliquando tamen et perpetuo eas dat, uelut quibus imitatur ius legitimum, quales sunt eae, quas bonorum possessoribus ceterisque, qui heredis loco sunt, accommodat. furti quoque manifesti actio, quamuis ex ipsius praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit¹⁶ ("Sometimes, however, he grants them [the praetorian actions- translator's note] anytime, for instance, those by which the statute law is imitated, or those granted to bonorum possessor or to those persons who act on behalf of the heirs. Even the action for furti manifesti, though it comes from the praetor's jurisdiction, is granted anytime. That is right because instead of the capital punishment, a money sanction was established". So, there were some praetorian actions that were granted anytime. Gaius included in this category: the actions created on the pattern of civil actions, the actions used by bonorum possessor, the penal action of furti manifesti, as well as those used by a person pro herede.

¹⁶ *Gai Institutiones* [*The Institutions of Gaius*] found at <http://www.thelatinlibrary.com/gaius4.html>

As a result of what I have just said above, if the utrobi interdicts were included by Romans in the general category of praetorian action and if the utrobi interdicts were considered temporal, praetor X would not be able, by his imperium to give legal relevance to A's longer possession over the slave.

First, let's see if Romans considered the utrobi interdicts as a kind of praetorian actions. Gaius wrote about interdicts in *The Fourth Commentary*, which is dedicated to actions. From *Gai Institutiones* IV, 141 ("Nec tamen cum quid iusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatores itur et ibi editis formulis quaeritur..."¹⁷) it can be easily deduced that interdicts had a regime very similar with other praetorian actions, because after an interdict had been granted, the parties went to a judge or to "recuperatores" in order to see who respected and who did not respect the interdict. This legal regime of interdicts could be an explanation for the evolution mentioned in *Iustiniani Institutiones*, LIBER QUARTUS (also dedicated to actions), XV, where it is explained that the ancient interdicts had been replaced by actions ("Sequitur ut dispiciamus de interdictis seu actionibus quae pro his exercentur..."¹⁸). So, for Romans, interdicts were included in the meaning of "praetorian actions" (in a large sense). By consequence the utrobi interdicts were also ranged in the large category of praetorian action.

Let's see now, if there are signs that the utrobi interdicts were considered perpetual actions. Because Gaius didn't mention the utrobi interdicts in his *Institutiones*, at IV, 111, where he talked about the praetorian actions that are regarded as perpetual, we have to consider that these interdicts were subjected to the rule presented at IV, 110, that means it were temporal actions, which could be granted only during the year in which the praetor who had included them on his edict was exercising his imperium.

¹⁷ *Gai Institutiones* [*The Institutions of Gaius*] found at http://www.fh-augsburg.de/~harsch/Chronologia/Lspost02/Gaius/gai_ins4.html

¹⁸ *Iustiniani Institutiones* [*The Institutions of Justinian*], Latin text and Romanian translation with notes and introduction by professor Ph.D., Vladimir Hanga, București, Lumina Lex, 2002, p.314, p.311

Proving the truth of the two conditions we are compelled to consider true the assertion that praetor X would not be able, by his imperium to give legal relevance to A's longer possession over the slave.

So, the general accepted idea about the winner in the utrubi interdicts is false ! It leads us to unacceptable legal consequences from the Public Roman Law point of view!

We have no other possibility than to agree with the ancient scholars' point of view on the winner in the utrubi interdict.

IV. CONCLUSIONS

In the utrubi interdict would win that person who had possessed the mobile good for a longer time in the very year in which the interdict was granted. In an utrubi interdict granted in January, the winner would be that person who had possessed the good for more January days. These allegations are supported by several fragments from Gai Institutiones (IV, 150, 152, 160) and Iustiniani Institutiones (IV, XV, 4a) as well as by the strict temporally confinement of the imperium (described in Gai Institutiones, IV, 105, 110 and Iustiniani Institutiones, IV, XII). The modern scholars' opinion on the winner in such an interdict leads to consequences that are unacceptable from the Public Roman Law point of view. So it must be left in favor of the ancient scholars' opinion.

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