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## Uti frui arbitrio boni viri: *Standard of Behaviour or Reference to an Arbitrator?*

### 1. Introduction

This paper focuses on a particular aspect of the *cautio fructuaria*, the guarantee given by the usufructuary to the bare owner. This is part of my ongoing doctoral dissertation, thus my conclusions are far from being definitive. Nevertheless, I thought it would have been interesting to expose my first impressions during the conference “*Possessio ac iura in re. History of real law*”.

The objective of my paper is to understand the meaning of the expression *uti frui arbitrio boni viri*, which can be found in one of the clauses of the *cautio fructuaria*.

This *cautio*, or more correctly this *satisfactio*<sup>1</sup>, was reconstructed in the following way by Otto Lenel: *Cuius rei usus fructus testamento Lucii Titii tibi legatus est, ea re boni viri arbitrato usurum fruiturum te et, cum usus fructus ad te pertinere desinet, id quod inde extabit restitutum iri dolumque malum abesse afuturumque esse spondesne? Spondeo*<sup>2</sup>.

### 2. Structure of the *cautio fructuaria*

The *cautio fructuaria* was composed by three clauses. The first one, *de utendo* clause, compelled the usufructuary to use the thing burdened *arbitrio boni viri*, i.e. as a good man. The usufructuary was compelled by the second clause, *de restituendo*, to return the thing. Lastly, there was the *de dolo* clause, which imposed on the undertaker to not engage in fraudulent behaviour.

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<sup>1</sup> It is a *satisfactio* because the promise was assisted by *sponsores*, that is guarantors. See M. Talamanca, *Istituzioni di diritto romano*, Milano 1990, p. 349.

<sup>2</sup> O. Lenel, *Essai de reconstitution de l'Édit Perpétuel* II, Paris 1903, p. 284.

As the restitution and the fraudulent behaviour clauses are not relevant to our study, we will focus our attention on the clause *uti frui arbitrio boni viri*. It is important to note that this guarantee took the form of a *stipulatio praetoria*, which was a promise imposed to one of the party by the praetor<sup>3</sup>. In fact it should be underlined that the usufructuary did not have any positive enforceable obligation, ensuing from the *ius civile*, toward the bare owner. This means that on the basis of the *ius civile* it was only possible for the bare owner to protect the thing burdened against damages provoked by a positive action<sup>4</sup>.

An example of a positive action is the death of a slave flogged to death. In this case, the protection could be enforced by recurring to the *lex Aquilia*, which sanctioned the damages done to someone's else property<sup>5</sup>. It was also possible to sue the usufructuary for theft, employing the *condictio furtiva*, nevertheless this was still a matter of positive behaviour. In fact, the situation was vastly different if the usufructuary was just negligent and inactive.

We can take as an example an usufructuary who did not farm correctly the land object of the usufruct. In this instance and in similar cases<sup>6</sup>, the bare owner had no civil recourse. For example, he could not act on the basis of the *actio negatoria*, which permitted the bare owner to deny the existence of the usufruct<sup>7</sup>. In fact, the usufruct did exist. The owner contested the way the thing was used, not the right of the usufructuary. Moreover it was not possible to apply the *actio legis Aquiliae* because there was no damage caused *corpore corpori*, i.e., by direct contact of a body<sup>8</sup>. The bare owner thus could find himself in a difficult position because he was deprived of legal recourse. But, as it was usual during the Republic, the praetor stepped in and instituted a new remedy, the *cautio fructuaria*, which took the form of a *stipulatio praetoria*. The usufructuary was compelled by the praetor to use the thing *arbitrio boni viri*.

Thanks to the *cautio* the owner had an enforceable right, an *actio ex stipulatu*, because he could prosecute the usufructuary *ex stipulatu*, i.e. on the ground of the promise.

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<sup>3</sup> On the *stipulationes praetoriae*, see A. Palermo, *Il procedimento cauzionale nel diritto romano*, Milano 1942; A. Mozzillo, *Contributi allo studio delle "stipulationes praetoriae"*, (Pubblicazioni della facoltà giuridica dell'Università di Napoli, 34), Napoli 1960; *idem*, s.v. "*Stipulatio praetoria*" [in:] *Novissimo Digesto Italiano*, vol. XVIII, diretto da A. Azara e E. Eula, Torino 1971, p. 450–456.

<sup>4</sup> See G. Grosso, *Usufrutto e figure affini nel diritto romano*, Torino 1968, p. 270 sq.

<sup>5</sup> About the *lex Aquilia*, see A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford 1965, p. 234.

<sup>6</sup> The examples of the usufructuary's negligence are recorded in Ulpianus 18 *ad Sabinum D.* 7, 1, 13, 2: *nam qui agrum non proscindit, qui vites non subserit, item aquarum ductus corrumpi patitur, lege Aquilia non tenetur*, i.e. someone who did not plow the land, who did not plant vines and who let waterworks get damaged.

<sup>7</sup> About the *actio negativa*, see G. Grosso, *Usufrutto e figure...*, p. 402 sq.

<sup>8</sup> F. Betancourt, *Sobre una preten dida "actio" arbitraria contra el usufructuario*, AHDE 1973, vol. 43, p. 359. As the author points out, it was not even possible to apply an *actio legis Aquiliae in factum*, because a *culpa in faciendo* would still have been necessary, whereas the cases recorded by *D.* 7, 1, 13, 2 are examples of *culpa in omittendo*.

### 3. Common interpretation of the clause *de utendo*

The expression *uti frui arbitrio boni viri*, i.e. to use and enjoy as a good man, raises an important question: does it refer to an arbitrator or to an abstract standard of behaviour? In the first case, the *bonus vir* was a real man appointed by the praetor to decide if the usufructuary respected his obligations. In the second case, the *bonus vir* was an abstract criterion employed to understand the respect of the obligations undertaken by the usufructuary with the *stipulatio*.

As far as I can see, the Romanist doctrine has privileged the idea of an abstract standard of behaviour. It is evident that most scholars considered that the reference to the *bonus vir* meant that the usufructuary should have behaved as an honest man. It is to be noted that the doctrine is generally quite vague about what exactly is entailed by this standard. Often, the scholars did not translate the term *vir bonus*, as if it were a self-evident concept, whereas it is a rather complex notion<sup>9</sup>.

### 4. C.A. Cannata's interpretation

However, there is a notable exception to this trend: Carlo Augusto Cannata<sup>10</sup>. According to this author, *uti frui arbitrio boni viri* refers to an arbitrator.

C.A. Cannata's opinion makes it necessary to analyse the expression *arbitrium boni viri* and his interpretation of the sources.

Ulpianus 79 *ad edictum D.* 7, 9, 1, 6 stated that *habet autem stipulatio ista duas causas, unam si aliter qui utatur quam vir bonus arbitrabitur, aliam de usufructo restituendo*.

C.A. Cannata translates this text in the following way: “codesta *stipulatio* contiene due distinti oggetti: l'uno riguarda il fatto che si usi altrimenti da come il *bonus vir* indicherà nel suo arbitrato, l'altra riguarda la restituzione dell'usufrutto”<sup>11</sup>. Thus, according to him, *usurum se arbitrium boni viri* means that the usufructuary would have had to use the thing burdened in the way the *vir bonus*, an *arbiter*, had indicated in his arbitration. The *vir bonus* would have been appointed by the praetor as an expert in order to evaluate the usufructuary's behaviour.

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<sup>9</sup> A clear example of this approach is offered by G. Pugliese, *Usufrutto, uso e abitazione*, Torino 1972, p. 471. He just limited to commenting that *boni viri arbitrato* meant that the good object of the usufruct should not be deteriorated.

<sup>10</sup> C.A. Cannata, *Corso di istituzioni di diritto romano I*, Torino 2001, p. 484–486. It should be noted that also Gianni Santucci expressed the idea that the *bonus vir* was an arbitrator. However, this theory was put forward during the conference *Vir bonus. Un modello ermeneutico della riflessione giuridica antica* (Trani 28–29 October 2011) and the acts have not been published yet. For this reason, we will not analyse his reconstruction.

<sup>11</sup> *Ibidem*, p. 484.

## 5. Defence of the common interpretation

However, this theory meets, in my opinion, several objections. First, I would like to mention that in our sources there is no mention of how this *boni viri arbitratus* took place or any indication given to the arbiter. On the contrary, there are such indications in the cases where we know for sure that the *bonus vir* was indeed a third party. I am alluding to the determination of the shares in a *societas* (partnership) made by a third party (*D.* 17, 76–80). This is quite a complex matter and it has been the object of serious controversies<sup>12</sup>. We are not going into details, but we will simply observe that the arbitration of the third party is problematic and that the juriconsults have to determine what exactly was entailed by the *viri boni arbitratus*. Moreover, the possibility of an appeal was debated. We find nothing of this sort about the *cautio fructuaria*.

This is not the only reason that makes me think that we cannot identify the *vir bonus* with an *arbiter* appointed by the praetor. It is true that the majority of the passages of the Digest about the *uti frui arbitrio boni viri* are quite ambiguous and could also refer to a real person. Indeed, nothing is clearly stated. Nevertheless, in my opinion a passage might show that *uti frui arbitrio boni viri* entails an abstract standard of behaviour. I am alluding to Ulpian 18 *ad edictum D.* 7, 1, 15, 4: *et si vestimentorum usus fructus legatus sit non sic, ut quantitatis usus fructus legetur; dicendum est ita uti eum debere, ne abutatur: nec tamen locaturum, quia vir bonus ita non uteretur*. This passage states quite clearly that a usufructuary should neither misuse neither rent the clothes, that are the object of the usufruct, because a *vir bonus* would not have done so. The sentence *vir bonus ita non uteretur* seems alluding to an abstract standard of behaviour. In my opinion, the use of the imperfect subjunctive shows us that we are not dealing with a real situation, but with an hypothetical one: what would have done an abstract *bonus vir* in the same situation? How would have he behaved? It seems unlikely to me that this passage could be alluding to a concrete arbitrator assessing the behaviour of an usufructuary.

There is also another important objection to C.A. Cannata's theory that should be taken into consideration: we should not forget that the *cautio fructuaria* is not the only *stipulatio praetoria* which mentions the expression *arbitrio boni viri*. On the contrary, several praetorian stipulations include a reference to the *bonus vir*. For example, in the *cautio de conferendis bonis et dotibus*<sup>13</sup> the promisor, the emancipated child or the married woman, committed himself to bring his own goods into hotchpot *boni viri arbitrato*. Also in this stipulation there are no evidence that the *boni viri arbitratus* referred to the arbitration of a third party<sup>14</sup>. Similar conclusions can be drawn for the other *stipulationes praetoriae* mentioning a reference to the *viri boni arbitratus*<sup>15</sup>: nothing gives us the impression that the *vir bonus* was an arbitrator.

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<sup>12</sup> For the bibliography see F. Gallo, *La dottrina di Proculo e quella di Paolo in materia di arbitraggio* [in:] *Studi Grosso* III, Torino 1969, p. 479–542 and G. P. Solinas, *A proposito dell' "arbitrium boni viri"* [in:] *Studi in onore di Gaetano Scherillo* II, Milano 1972, p. 539–571.

<sup>13</sup> About this subject see A. Guarino, *Collatio bonorum*, Roma 1937.

<sup>14</sup> About this see *ibidem*, p. 137 sq.

<sup>15</sup> The other *stipulationes praetoriae* are: *cautio pro praede litis et vindiciarum*; *cautio iudicatum solvi*; *cautio ex operis novi nunciacione*; *cautio de evicta hereditate legata reddi*.

For the reasons above stated, I do not think that C.A. Cannata's opinion is backed up by our sources. In my opinion, it is possible that the reference to the *arbitratus boni viri* in the *cautio fructuaria* was a way to enlarge the powers of the *iudex*. In fact, the *actio ex stipulatu*, which issued from any praetorian stipulation, was an *actio stricti iuris*, i.e. it left the judge little discretion. The reference to the *bonus vir*, a concept strongly linked to the *fides bona*<sup>16</sup>, gave more flexibility to the *actio ex stipulatu*.

## 6. *Bonus vir* and *bonus paterfamilias*

The analysis of the *cautio fructuaria* poses another important problem: in some passages of the Digest and of the *Pauli Sententiae* we find a reference to the *paterfamilias*<sup>17</sup>, the good head of a household.

A few authors have tried to solve the problem of the coexistence of the *vir bonus* and the *bonus paterfamilias*<sup>18</sup>.

First, we shall briefly mention Giovanni Bortolucci's idea that originally the standard of behaviour of the first clause of the *cautio fructuaria* was not the *arbitrium boni viri*, but the *bonus paterfamilias*. Instead the criterion of the *arbitrium boni viri* would have been present in the clause *de restituendo*, which, according to him, was separated from the *cautio de utendo*.

This theory has been criticized by all the following Romanists, for example by G. Grosso<sup>19</sup>. Indeed, it is quite improbable and it shows the excess of the interpolationist doctrine.

As for G. Grosso's assessment of the problem, the expression *bonus* or *optimus paterfamilias* do not refer to a criterion different from the *arbitrio boni viri*, but it is just a paraphrase of the praetorian edict<sup>20</sup>.

I am not completely persuaded by G. Grosso's dismissal of the problem. I do not think that it is possible to label the reference to the *bonus paterfamilias* as a simple way of paraphrasing the *arbitrium boni viri*.

We cannot completely identify the *vir bonus* with the *bonus paterfamilias*, as it clearly shown by Venuleius 1 *stipulationum D.* 45, 1, 137, 2: *Cum ita stipulatus sum "Ephesi dari?" inest tempus: quod autem accipi debeat, quaeritur. Et magis est, ut totam eam rem ad iudicem, id est ad virum bonum remittamus, qui aestimet, quanto tempore dili-*

<sup>16</sup> See G. Falcone, *L'attribuzione della qualifica "vir bonus" nella prassi giudiziaria di età repubblicana (a proposito di Cato, or. frg. 186 Sblend. = 206 Malc.)*, "Annali del Seminario giuridico Università degli Studi di Palermo" 54 (2010–2011) 90 sq.

<sup>17</sup> See Ulpianus 79 *ad edictum D.* 7, 1, 9, 2 (*quasi bonus paterfamilias*); Paulus 3 *ad Sabinum D.* 7, 8, 15, 1 (*bonus paterfamilias*); *Pauli Sententiae* 1, 11, 2 (*ipse paterfamiliae*); *Pauli Sententiae* 3, 6, 27 (*optimus paterfamilias*). There is also Ulpianus 79 *ad edictum D.* 7, 1, 9, 7 (*paterfamilias*), but, as we will see, this case is different from the others.

<sup>18</sup> For C.A. Cannata's theory see above, part 3.

<sup>19</sup> See G. Grosso, *Usufrutto e figure...*, p. 285.

<sup>20</sup> *Ibidem*.

*gens pater familias conficere possit, quod facturum se promiserit [...]*<sup>21</sup>. The *vir bonus* is something quite different and much larger than the *bonus* or *diligens pater familias*.

Indeed, the *diligentia* of the *pater familias* is a pattern of behaviour which permits to assess the *culpa*<sup>22</sup>, whereas the *vir bonus* is a standard of behaviour, which is not only confined to liability. In our juristic sources the *bonus paterfamilias* is strongly linked to liability, may it be contractual or extra-contractual. The difference between these concepts is displayed by the above mentioned passage of Venuleius. The *iudex*'s behaviour is to be that of a *vir bonus*, not of a *bonus paterfamilias*.

## 7. Meaning of the expression *bonus vir*

As for the meaning of the expression *vir bonus*, it has been clearly shown by Giuseppe Falcone, scholars are divided in two groups: for some of them, especially the older ones, *vir bonus* had chiefly a moral meaning, whereas for others this expression had mainly a social meaning<sup>23</sup>. The two latest works on the *vir bonus*, G. Falcone *L'attribuzione della qualifica 'vir bonus' nella prassi giudiziaria di età repubblicana* and Roberto Fiori *Bonus vir. Politica, filosofia, retorica e diritto nel de officiis di Cicerone*<sup>24</sup>, also follow this pattern. In fact, G. Falcone asserts that from our Republican sources<sup>25</sup> we can clearly understand that *vir bonus* had an ethical significance, whereas R. Fiori defends the social one. The same different interpretations can be found about the *bonus paterfamilias*.

For this paper, we can leave aside the problem of the original meaning of *vir bonus* and focus on its sense in the *cautio fructuaria*. Here it seems to me quite probable that this expression, and also *bonus paterfamilias*, had an ethical sense. In fact, we can not imagine that in the *cautio fructuaria* the *iudex* should have decided in accordance with the judgement of a wealthy man.

## 8. Difference between *bonus vir* and *bonus paterfamilias*

Nevertheless, the concepts of *vir bonus* and *bonus paterfamilias* are to be distinguished: in the juridical sources the recourse to the concept of the *bonus paterfamilias* is less wide. Indeed, it is limited to the assessment of the *culpa*, whereas we find a reference to the concept of the *vir bonus* in a great number of institutions: sale, lease, cor-

<sup>21</sup> A. Watson translated this passage the following way: "When I stipulate thus, 'to be paid at Ephesus' time is implicitly allowed. How much is questioned. It is preferable to have recourse to the judge, as a good man, who will assesses the time which the conscientious head of a household would need to do what is promised".

<sup>22</sup> About these problems see with bibliography, G. Santucci, *Diligentia quam in suis*, "Quaderni del dipartimento di Scienze giuridiche dell'Università degli Studi di Trento" 2008, no. 73, p. 1–131.

<sup>23</sup> Falcone, *L'attribuzione della...*, p. 59 sq. with bibliography.

<sup>24</sup> R. Fiori, *Bonus vir. Politica, filosofia, retorica e diritto nel de officiis di Cicerone* (Quaderni dei modelli teorici e metodologici nella storia del diritto privato, 5), Napoli 2011.

<sup>25</sup> For example, Cat., *or. frg.* 186 Sblend. = 206 Malc. or Cic., *de off.* 3, 77.

poration, dowry, will, fideicommissum. That can be demonstrated by a research in the *Vocabularium Iurisprudentiae Romanae*, where we find that *vir bonus* a larger scope.

The *vir bonus* and the *bonus paterfamilias* refer partially to the same semantic field, to the idea of respectability and integrity, but in our juristic sources the latter was indissolubly linked to the assessment of the responsibility. The evaluation of the behaviour of the usufructuary is an assessment of the contractual responsibility and thus the jurists resorted to this notion in order to better explain exactly what behaviour was requested of the usufructuary. Thus it was possible to explain and better define what a *vir bonus* would do by recurring to the concept of the *bonus paterfamilias*.

### *Uti frui arbitrio boni viri*: Standard of Behaviour or Reference to an Arbitrator?

#### Summary

The objective of this contribution is to analyse the meaning of the expression *uti frui arbitrio boni viri*. This expression is contained in one of the clauses of the *cautio fructuaria*, which is the warranty given by the usufructuary to the owner. We can find this expression in a dozen passages of the Digest. The entire title 9 of book seven is dedicated to the *cautio fructuaria*, which was given in the form of a *stipulatio praetoria*. *Uti frui arbitrio boni viri* raises a question, that this paper aims to answer: does it refer to an arbitrator or to an abstract standard of behaviour? The expression *arbitrium boni viri* is not the only one that we find in our sources. In fact there is a concurrent expression, *diligens paterfamilias*, which can be found in two passages of the Digest and in two passages of the *Pauli Sententiae*. I aim to understand why our sources left us two different expressions and if there is a difference between them.