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HIBERUS IN *DIG.* 8,2,13 PR: (M. ANTONIUS) HIBERUS (*PIR*² H 168)?

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An unknown owner of a warehouse wrote a letter to the jurist Proculus concerning his or her grievance with a certain Hiberus, the owner of the neighboring tenement block, who was building a bathhouse with pipes for smoke attached to the party wall (*Dig.* 8,2,13 pr).¹ The purpose of my paper is to suggest that it may be possible to identify this Hiberus with (Marcus Antonius?) Hiberus (*PIR*² H 168), probably a freedman of Antonia Minor and an ancestor of M. Antonius Hiberus (*PIR*² A 837), the consul of AD 133.² His birth-date is unknown, but Hiberus is remembered as the first (and perhaps the only) freedman prefect of Egypt,³ placed in charge of the province by Tiberius in AD 32 following the sudden death of the prefect in office (*Dio* 58,19,6).⁴ He may also be the same Hiberus who is attested

¹ I would like to thank professors Jean Andreau, Mika Kajava, Eva Margareta Steinby, and an anonymous reviewer for their helpful remarks on drafts of this paper.

² The probable connection between Hiberus and Antonia Drusi is pointed out already by H. Dessau in *PIR* H 118. See, e.g., O. Montevecchi, "L'amministrazione dell'Egitto sotto i Giulio-Claudi", in *ANRW* II 10.1, Berlin – New York 1988, 431; N. Kokkinos – F. Vartuca, *Antonia Augusta: Portrait of a Great Roman Lady*, London – New York 1992, 33.

³ J. G. Milne, *A History of Egypt Under Roman Rule*, London 1924, 280; A. Stein, *Die Präfekten von Ägypten in der römischen Kaiserzeit*, Bern 1950, 26, 150; O. V. Reinmuth, *The Prefect of Egypt From Augustus to Diocletian*, Aalen 1963, 5; B. Levick, *Tiberius the Politician*, London 1976, 117; P. A. Brunt, *Roman Imperial Themes*, Oxford 1990, 163; R. P. Saller, *Personal Patronage Under the Early Empire*, Cambridge 2002, 49. The second possible freedman prefect was Epagathus under Severus Alexander: J. Modrzejewski, "Les préfets d'Égypte au début du règne d'Alexandre Sévère", in *Antidoron Martino David Oblatum*, Leiden 1968, 66–7.

⁴ W. Eck, "Hiberus", *Der Neue Pauly* 5, Stuttgart 1998, 532; P. van der Horst, *Philo of Alexandria. Philo's Flaccus, The First Pogrom: Introduction, Translation and Commentary*, Leiden 2003, 92. Cassius Dio mistakenly thought that the deceased governor replaced by Hiberus was Vitrasius Pollio, who actually was successor of Flaccus who entered the office after Hiberus' death: J. Schwartz, "Préfets d'Égypte sous Tibère et Caligula", *ZPE* 48 (1982) 189–92.

in Egypt in AD 26/28 (?) as financial official inspecting accounts (*P. Oxy* 3807).⁵ Be that as it may, the prefecture of Hiberus was soon terminated by his death apparently in AD 32 (Philo, *In Flaccum* 1,2). Thus, in order for the freedman to be identified with the Hiberus in the Digest case, the consultation of Proculus would have had to take place before AD 32.

The time of birth and death of Proculus (*PIR*² P 999) is not known.⁶ But we do know that Proculus succeeded Nerva the Elder, who committed suicide in AD 33 (Tac. *ann.* 6,26,1; Dio 58,21,4), the year following Hiberus' death in Egypt, as the leader of the Proculian school to which he gave his name (*Dig.* 1,2,2,52). From this it is possible to infer that by then he must have been already one of the leading jurists of his time, and so his birth should have occurred near the beginning of the first century. We also know that Proculus was succeeded as a leader of the school by the jurist Pegasus, who became urban prefect under Vespasian (*Dig.* 1,2,2,53). It is clear that Proculus' career as a jurist (he is not attested to have held any offices but is presumed by many to have been a consular) continued long after Hiberus' death in Egypt in 32, but he also started giving legal advice well before that time.⁷ Therefore, chronology is not an obstacle to identifying the Hiberus mentioned in the letter to Proculus with M. Antonius Hiberus the freedman:

Proculus, *Letters*, book 2: A certain man, by the name of Hiberus, who has a tenement building at the rear of my warehouse, built a bathhouse next to our party wall. Now, one is not permitted to have pipes for smoke positioned against a party wall in the same way as one cannot even have a wall of one's own built alongside such a wall. This rule applies with more force in the case of pipes for smoke as, because of them, the wall may be scorched by the heat of the fire. I would like you to talk to Hiberus about this matter, to prevent him doing something which is unlawful. Proculus replied: "in this case, I do not think Hiberus is in any doubt that he is acting illegally by constructing pipes for smoke against your party wall".⁸

⁵ J. R. Rea, *The Oxyrhynchus Papyri* 55, London 1988, 177–87; On the position of Hiberus in AD 26–8: M. Sharp, "Shearing Sheep: Rome and the Collection of Taxes in Egypt, 30 BC – AD 200", in E. Müller-Luckner (ed.), *Lokale Autonomie und römische Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhundert*, München 1999, 222 n. 39, 230.

⁶ A. J. Enchedé, *De Proculo iureconsulto*, Leiden 1852; W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, Graz – Wien – Köln 1967, 123–9; A. M. Honoré, "Proculus", *LHR* 30 (1962) 472–509; R. Bauman, *Lawyers and Politics in the Early Empire*, München 1989, 119–27; F. Wieacker, *Römische Rechtsgeschichte* II, München 2006, 55–6 (n. 53 with further bibliography).

⁷ Nerva the Younger, his contemporary, gave *responsa* already at the age of seventeen, though this appears to have been exceptional: *Dig.* 3,1,1,3.

⁸ *Dig.* 8,2,13 pr: *Proculus libro secundo epistularum. Quidam Hiberus nomine, qui habet post*

It is well-known that one of the Roman jurists' primary functions was giving legal advice: *respondere*.⁹ Normally the client who consulted the jurist, either in person or in writing, stated the facts of the case and asked the jurist for his opinion. The jurist gave his reply (*responsum*), again in person or in writing, concerning the law applicable to the facts as proposed. In this regard, the consultation concerning Hiberus, excerpted to the Digest from a collection of Proculus' letters dealing with legal questions addressed to him,¹⁰ is quite exceptional.¹¹

The author of the letter to Proculus is undoubtedly the aggrieved party and so a potential plaintiff. It is clear, however, that he is not ignorant of the law but knows the building regulations concerning party walls well-enough. Indeed, he is not asking Proculus to *respondere*, to give a legal opinion the client might employ to support his claim in negotiations with the adverse party, or in hearings before the magistrate or the judge. Instead, the client asks Proculus to talk to Hiberus on his behalf, and to prevent him from proceeding with the illicit construction.¹² It seems that the author of the letter was not just any citizen who might consult the jurist, but someone in position also to ask Proculus to do the favor and speak with Hiberus.¹³ Thus, the role of *iurisconsultus* seems to be mixed, at least in this case,

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 Hiberio loquaris, ne rem illicitam faciat. Proculus respondit: nec Hiberum pro ea re dubitare puto, quod rem non permissam facit tubulos secundum communem parietem extruendo. Translation by D. Fergus in A. Watson (ed.), *The Digest of Justinian*, I, Philadelphia 1984, 254.

⁹ In addition to *respondere*, the traditional functions of the jurists included *agere* (to draw up forms for litigation), and *cavere/scribere* (to draft legal documents). As a jurist, then, Proculus might be supposed to point out to an average client, in addition to his legal position according to the facts stated, the correct legal remedy, and perhaps to draft the pleading to be addressed to the magistrate. For a brief discussion and bibliography: A. A. Schiller, *Roman Law: Mechanisms of Development*, Hague 1978, 272–7.

¹⁰ According to Krampe, this is a theoretical work destined for teaching rather than a collection of *responsa* dealing with real-life cases: Ch. Krampe, *Proculi Epistulae: Eine frühklassische Juristenschrift*, Karlsruhe 1970; however, cf. Th. Mayer-Maly, *Iura* 21 (1970) 298–300. But even according to Krampe the case of Hiberus is real, 47–8.

¹¹ Honoré (above n. 6) 483: "So far as I know, there is no parallel to a consultation in this form".

¹² Honoré (above n. 6) 483; Krampe (above n. 10) 47–8.

¹³ Contrast with the consultation addressed to P. Licinius Crassus, consul of 131 BC: Cic. *orat.* 1,56,239–240. According to A. Schiavone, the *responsum* of Crassus, which left the man who consulted him in great despair, exemplifies the true jurists' disregard to the client's best interest that was the advocate's concern: *Ius. L'invenzione del diritto in Occidente*, Torino 2005,

with that of a partisan intermediary proper of an able relative, friend or patron.¹⁴ Nothing suggests, at any rate, that Proculus was an office-holder empowered with the magistrate's imperium to issue formal orders to Hiberus.¹⁵

The fact that the warehouse owner approached Proculus instead of the magistrates in his conflict with Hiberus suggests that he wanted to avoid (at least for the time being) the recourse to courts. It may be that he, like probably most Romans, preferred to avoid the trouble, the cost, and the publicity of litigation.¹⁶ But it cannot be ruled out that the owner of the warehouse thought this Hiberus was the kind of opponent one would hesitate to confront in court.¹⁷ It is impossible to say if he had already confronted Hiberus in person, or the latter's procurators, or if he knew the tenement block's owner only by name, and possibly by reputation. In any case, the author of the letter first refers to the man as *quidam Hiberus nomine*, either presuming he is not someone the jurist might know, or preferring (because of courtesy, joke, or strategy) not to suggest at once that Proculus knows the man. Yet he later asks Proculus to speak with Hiberus, as if the jurist knew who the man is and how to reach him.¹⁸

148–50.

¹⁴ According to R. von Jhering, *L'ésprit du droit romain*, III, Paris 1887, 105–6, traditionally the jurist was a trusted family adviser (not only on legal matters), who played the role also of negotiator and intermediary. But this cannot, of course, hold true for every client that might approach the jurist for a *responsum*, especially in the metropolitan Rome of early imperial times. On the role of jurists see also J. Harries, *Cicero and the Jurists. From Citizens Law to the Lawful State*, London 2006, 33.

¹⁵ Writing *epistulae* was, however, one of the duties, defined under the Severan emperors, of the magistrate's assessor: *Dig.* 1,22,1. But Krampe, following Pernice, points out that the Hiberus case does not prove that Proculus was performing any intermediary function of the magistrate's assessor ("eine assessorische Vermittlertätigkeit"): Krampe (above n. 10) 13.

¹⁶ J. M. Kelly, *Studies in the Civil Judicature of the Roman Republic*, Oxford 1976, 93–111; M. Humbert, "Arbitrage et jugement à Rome", *Droits et Cultures* 28 (1994) 56.

¹⁷ On difficulties potential plaintiffs might encounter in bringing actions against more powerful and influential opponents throughout the Roman history: R. von Jhering, "Le riche et le pauvre, dans l'ancienne procédure civile des Romains", in R. von Jhering, *Études complémentaires de l'ésprit du droit romain*, IV, Paris 1902; J. M. Kelly, *Roman Litigation*, Oxford 1966, 1–101; P. Garnsey, *Social Status and Legal Privilege in the Roman World*, Oxford 1970, 181–218; B. Frier, *Landlords and Tenants in Ancient Rome*, Princeton 1980, 48–55; M. Peachin, *Iudex Vice Caesaris*, Stuttgart 1996, 10–91. However, J. Crook, *Law and Life of Rome*, London 1967, 92–7; G. MacCormack, "Roman and African Litigation", *Tijdschrift voor rechtsgeschiedenis* 39 (1971) 248–54; D. Johnston, *Roman Law in Context*, Cambridge 1999, 122–32; D. Kehoe, *Law and the Rural Economy in the Roman Empire*, Ann Arbor 2007, 13–25.

¹⁸ One possible explanation for this discrepancy, if it is necessary to look for one, could be that the original letter sent to Proculus contained more information about Hiberus than is preserved

Also Proculus' answer might give us a hint in regard to the identity of Hiberus, if only more was preserved of his letter of reply than *nec Hiberum pro ea re dubitare puto, quod rem non permissam facit tubulos secundum communem parietem extruendo*.¹⁹ According to one possible interpretation, Proculus is politely refusing the client's request, explaining that it is useless for him to speak with Hiberus because the latter (whoever he may be) is aware of the law anyway. But already J. Crook remarked that Proculus may have taken an unnecessarily strict legal opinion in this case,²⁰ perhaps because of Hiberus' personality. Another possible interpretation is, then, that whether he refuses or accepts the request, Proculus actually knows the man (either personally or by reputation) and explains to his client that this particular Hiberus is in no doubt that he is acting illegally. In this case the range of possible *Hiberi* to be identified with the arrogant (and perhaps absent) owner of the tenement block is reduced to those whose reputation could be known to Proculus.

In this perspective, the owner of the tenement block might find a very suitable match in M. Antonius Hiberus, the prime example, as B. Levick points out, of the "increase in influence of the freedmen".²¹ The owner of the warehouse might not want to risk making an adversary and enemy of the man so closely connected with the imperial family.²² Whatever interpretation of Proculus' reply is to be preferred, the Hiberus in question was not "in any doubt that he is acting illegally", and so was not shy of legal battles. The location of the warehouse or that of its owner is not known, but it is safest to assume that Proculus was supposed to reach

in the Digest fragment. Perhaps less likely is the option that the editor(s) either of Proculus' letters or the Digest later introduced the allusive expression when cutting out the legally irrelevant particulars of the case. It was a relatively common juristic practice to refer to people as *quidam Licinnianus* (*Dig.* 5,3,7,1); *Marius Paulus quidam* (*Dig.* 17,1,6,7); *Bellicus quidam* (*Dig.* 19,1,13,5); *Hosidius quidam* (*Dig.* 32,97); *quidam Caecilius* (*Dig.* 40,5,26,2); even *Brasidas quidam Lacedaemonius vir praetorius* (*Dig.* 36,1,23 pr).

¹⁹ The epistolary forms like the customary greetings have been expunged, and the other replies of Proculus preserved in the Digest tend to be longer: O. Lenel, *Palingenesia Iuris Civilis*, II, Leipzig 1889 [repr. Graz 1960], 159–66; F. Schultz, *History of Roman Legal Science*, Oxford 1946, 227.

²⁰ "Proculus agreed that [Hiberus' act] was illegal, but we are told in another passage that he was also quite firm that having a bath-house against a common wall was not in itself an offense, even if it led to dampness": Crook (above n. 17) 151 with *Dig.* 8,2,19 pr.

²¹ Levick (above n. 3) 117. On the power of freedmen connected with the imperial family, and especially under Tiberius: A. M. Duff, *Freedmen in the Early Roman Empire*, Cambridge 1958, 173–86.

²² According to Tacitus, the friendship of Empress Livia practically lifted Urgulania above the law: Tac. *ann.* 2,34; Garnsey (above n. 17) 188, 195–6.

Hiberus at Rome.²³ The *cognomen* Hiberus is rare,²⁴ so the freedman of Antonia Minor, who in all likelihood spent time in the imperial service at Rome before his placement as the vice-prefect of Egypt in 32,²⁵ must have been among the best known, or the most notorious, *Hiberi* around.

The identification of Hiberus with the freedman exceptionally promoted to the equestrian post of the prefect of Egypt by Tiberius might also explain why the owner of the warehouse approached Proculus with the problem. Legal scholars have accepted there was a personal connection in that Proculus, like Hiberus, came from Spain, and "so [he] was likely to have influence with the troublesome neighbour".²⁶ But the Spanish origin of Hiberus (and even of Proculus) is far from certain.²⁷ To look for another explanation, it is important to underline that Proculus was capable of exerting influence beyond his "not a slight legal authority" (*Dig.* 37,14,17). That Proculus *plurimum potuit* (*Dig.* 1,2,2,52) refers to a personal or political power, which may be due from his presumed senatorial status of consular rank.²⁸ He may also have been granted the right to give legal advice on the em-

²³ According to Honoré, "the consultant is, perhaps, Roman, but his neighbour, as the name shows, is Spanish": Honoré (above n. 6) 483. On the presumed Spanish origin of Hiberus and Proculus, see also Krampe (above n. 10) 48 and especially Bauman (above n. 6) 121–3 with further references. Even if Hiberus came from Spain, which is subject to serious doubt (cf. below n. 24), there is no reason to think that the dispute took place in Spain rather than Rome.

²⁴ I. Kajanto, *The Latin Cognomina*, Helsinki 1965, 199. It is also useful to remember that only two Hiberus' of high status are listed in *PIR*: M. Antonius Hiberus, the freedman prefect of Egypt of 32, and his descendant M. Antonius Hiberus, consul of 133.

²⁵ Vice-prefecture was perhaps preceded, as pointed out above, by some assignment in Egypt already in 26/28. J. Rea also links our Hiberus with the prefect Publius Flavius Hiberus, whose fragmentary name he reads in a dedication dated to AD 28 on behalf of Tiberius, Livia and their house to Herakles Kallinikos and Ammon found in the Small Oasis: G. Wagner, "Inscriptions grecques de Dakhleh et Baharieh", *BIAO* 73 (1973) 183–9; Rea (above n. 5) 182–3. According to D. W. Rathbone, Hiberus in *P. Oxy* 3807 was not yet a Prefect, and may be an altogether different Hiberus (in which case the document may indeed be dated to in or after 52 or 66). He also suspects that the Prefect in the inscription of AD 28 is another man: *CR* 41 (1991) 204.

²⁶ Honoré (above n. 6) 483 (who uses the Spanish origin of Hiberus as one of the evidence to argue for the Spanish origin of Proculus); Krampe (above n. 10) 3: "Der Name Hiberus deutet auf einen Spanier. Die eigentümliche Bitte könne damit erklärt werden, dass der Konsulent sich eine Einflussnahme des spanischen Juristen Proculus auf den spanischen Nachbarn erhofft habe."

²⁷ The anonymous reviewer stresses that the Spanish origin certainly "cannot be deduced from the cognomen Hiberus".

²⁸ According to Kunkel, this reference of Pomponius to Proculus' influence together with the fact that the latter succeeded Nerva *pater* as the head of the school instead of Nerva *filius* implies that he must have been a senator of consular rank: Kunkel (above n. 6) 123–9; Bauman

peror's authority (*ius respondendi*),²⁹ though there is no more evidence on this than there is on his consular career.³⁰ Be that as it may, the ultimate source of Proculus' influence was the personal favour of the Emperor that was able to match – the owner of the warehouse possibly hoped – that of another imperial favourite, Antonia Minor's freedman M. Antonius Hiberus.

In all, the above considerations do by no means prove that the *Hiberus* in Proculus' letter is the freedman M. Antonius Hiberus who died as a prefect of Egypt in 32. The fact that they have the same rare *cognomen* and are contemporaries makes the identification possible. Also some circumstances of the case speak for the identification. The conduct of the owner of the warehouse suggests that his opponent, who was not the least afraid of the laws, might indeed find a suitable match in Antonia Minor's freedman backed up by Tiberius. Especially if Proculus knew the Hiberus in question, this would be the most likely identification. If this identification is correct, then the case provides another example of the power and arrogance of the freedmen connected with the imperial family, which the traditional elite of the early Empire so detested. The case would also suggest that Proculus was believed to be able to exert personal influence, rather than legal expertise, against that kind of a man. But even if the identity of Hiberus remains in doubt, the case offers a good example of a potential plaintiff who, facing an insolent adversary, tries to have the conflict resolved outside the public tribunals. Instead of his well-known role as the disinterested "oracle" of law, it shows the jurist drawn (successfully or not) into the disputing process as a partisan intermediary.

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(above n. 6) 120. Honoré (above n. 6) 485, 490–1 underlines the connection between Proculus and Seneca, another man of Spanish origin, suggesting that the jurist achieved his influence through the philosopher. But as Bauman notes, Pomponius says Proculus *plurimum potuit* already in 32 when he succeeded Nerva the Elder, whereas Seneca exerted influence later under Nero: Bauman (above n. 6) 124–5.

²⁹ O. Tellegen-Couperus, *A Short History of Roman Law*, London – New York 1993, 96.

³⁰ J. W. Tellegen, "Gaius Cassius and the Schola Cassiana in Pliny's Letter VII, 24, 8", *ZRG* 105 (1988) 286: "there is nothing in sources to confirm that Proculus had the *ius respondendi*". Tellegen suggests, however, that *plurimum potuit* in Pomponius refers to Proculus' juristic talent.