

Dumtaxat de peculio: What's in a Peculium, or Establishing the Extent of the Principal's Liability

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1. INTRODUCTION

In contrast with modern slave systems, the Graeco-Roman world used slaves in all kinds of ways and functions. Besides what we consider liberal trades, such as medicine or banking, there is plenty of evidence for slaves being involved in business activities, producing and distributing goods and services, or in public administration at all levels of government. Roman law regards slaves as things (*res*), which implies that they could avail themselves of no legal rights, no juristic personality and no patrimonial capacity. Their condition was, however, no obstacle to their participating in management, as shown by the case of one Midas in charge of a perfumery in late fourth-century BCE Athens, recorded by the speechwriter Hyperides. We will return to this case shortly.¹

Craftsmen, traders and businessmen (and businesswomen) of servile status had many an opportunity to enter into contractual relationships with others, be they citizens, resident aliens and foreign travellers, freedmen, or slaves. In Athenian law, just like in archaic Roman law, contracts made by slaves apparently entailed no legal sanctions, social or religious pressure being presumably sufficient to enforce their provisions through fulfilment of obligations by both parties, whatever their respective social, economic and legal status.² In pre-classical Roman law, all acquisitions by a slave benefited the master's patrimony exclusively, while conveyances were considered legally void, according to the twofold principle that slaves were entitled to better, meaning increase, their master's patrimony, though not to worsen, meaning decrease, it. Such an imbalance was detrimental to those who wanted, needed, or were compelled to do business with slaves, while lowering the latter's practical efficiency and therefore economic value. Consequently, Roman praetors devised ways of correcting this situation during the mid or late Republican period (at some point between the late third and early first centuries BCE) by granting business people a set of legal remedies (*actiones*)

¹ Hyperid., c. *Athenog.* Cf. Aubert (2007), pp. 215–30.

² For religious sanctions against patrons convicted of deceiving their clients, cf. XII Tables 8.10 (Crawford 1996) = 8.21 (*FIRA* I², p. 62): 'Si patronus clienti fraudem fecerit, sacer esto'.

establishing, under specific conditions, various levels of contractual liability for the principal with regards to his dependant's transactions.³

In the ninth book of his commentary on the provincial edict, Gaius notes that

a proconsul does everything in order that anyone who enters into a contract with a person in power (*alieni iuris, in potestate*) gets his due in so far as circumstances allow it, based upon fairness, even though previously mentioned remedies, namely the *actiones exercitoria, institoria, and tributoria*, do not apply.⁴

Gaius goes on, mentioning three separate remedies, one calling for total liability (*in solidum*), equivalent to the amount of the debt incurred through the contract, on the part of the principal on the ground of an invitation (*iussum*) pre-emptively addressed to potential contracting parties to deal with the dependant.⁵ The other two remedies call for the principal's limited liability, up to the amount of the principal's enrichment (*versum*) from his dependant's transaction, or up to the amount of the dependant's *peculium*, even in the absence of invitation or enrichment on the part of the principal.

Those six remedies were created by one or more praetors by the late Republican period. Later commentators labelled them *actiones adiecticiae qualitatis*, to reflect a change of names within the formula. All of these remedies apply to obligations arising from contracts made by dependants in the context of economic activities carried out with various levels of autonomy that were instrumental in defining the extent of the principal's liability. Unlike contracts, delicts called for total liability.⁶

Not much will be said here about those three remedies calling for the principal's total liability. The *actio quod iussu* implies the awareness (*scientia*) and will (*voluntas*) of the principal to let third contracting parties deal with his dependant(s). Will and awareness are also implicit in the appointment (*praepositio*) by the principal of an agent as business manager or shipmaster, whose legal transactions carried out in connection with this specific activity (*negotiatio*) give rise, respectively, to an *actio institoria* or *exercitoria*. In all three cases, the principal unambiguously retains control over his

³ Inst.Gai.4.69–74a. For an overview, cf. Aubert (1994), ch. 2, pp. 40–116; Wacke (1994), pp. 280–362; and Miceli (2001).

⁴ D.14.5.1 (Gaius 9 ad Ed. Prov.): 'Omnia proconsul agit ut qui contraxit cum eo qui in aliena potestate sit, etiamsi deficient superiores actiones id est exercitoria institoria tributoriae, nihilo minus tamen in quantum ex bono et aequo res patitur suum consequatur. Sive enim iussu eius, cuius in potestate sit, negotium gestum fuerit, in solidum eo nomine iudicium pollicetur: sive non iussu, sed tamen in rem eius versum fuerit, eatenus introducit actionem quatenus in rem eius versum fuerit: sive neutrum eorum sit, de peculio actionem constituit'.

⁵ Cf. D.14.5.7 (Scaev. 1 Resp.), on a similar case involving a son in power (*filius familias*) and an alternative juristic response owing to particular circumstances (the father's death).

⁶ D.14.5.4.2 (Ulpian. 29 ad Ed.): 'Quamquam autem ex contractu in id quod facere potest actio in eum datur, tamen ex delictis in solidum convenietur'.

dependant's activity, the nature of which is clearly defined at the outset. In exchange, he stands surety for all debts arising from the dependant's transactions. Litigation bears on simple, binary questions: is the slave indebted or not? Does the transaction fit the principal's intention, expressed through *iussum* or implied in the *praepositio*, or not? If the answer to any of these questions is negative, the principal is not liable.

With regard to the other three remedies, namely the *actiones de peculio*, *tributoria* or *de in rem verso*, things are not so clear-cut, because the principal's liability must not only be established, but also quantitatively estimated, on the basis of a sophisticated analysis of the assets and liabilities of the principal's and/or agent's property. Such an estimate requires the examination of account books and inventories, provided that they exist and are reliably kept. The purpose of this chapter is to identify and list the main obstacles a creditor could and undoubtedly would meet in figuring out what is in a slave's *peculium*, and to ponder the consequences of this.

2. ACTIO DE PECULIO

Unfortunately, the chapters dealing with the *actio de peculio* in Gaius' Institutes (4.72–72a) are partly lost or badly damaged, both in the Verona palimpsest and in the Oxyrhynchite papyrus (P.Oxy. XVII 2103) that miraculously supplements it in this part of book 4. On the other hand, thanks to the compilers' diligence, a large collection of juristic opinions from the classical period of Roman law is preserved in title 15.1 of Justinian's Digest. Ulpian reports that the *actio de peculio* had been created after – meaning, possibly but not necessarily much later than – the above-mentioned remedies calling for the principal's total liability (*in solidum*).⁷ The *actio de peculio* is available if the *peculium* has seen an increase due to the transaction under litigation,⁸ thus benefitting the principal, whatever his legal relationship (ownership, possession, usufruct, and so on) with the slave.⁹ The question is how would such an increase be traced? What evidence would a creditor resort to in order to establish and quantify it? Pomponius regards the *peculium* as a sub-account, created by the slave's master and likely to grow or shrink, to be

⁷ D.15.1.1pr (Ulpian, 29 ad Ed.): 'Ordinarium praetor arbitratus est prius eos contractus exponere eorum qui alienae potestati subiecti sunt, qui in solidum tribuunt actionem, sic deinde ad hunc pervenire, ubi de peculio datur actio'. The standard work on the *peculium* is Micolier (1932). Cf. also Buti (1976); and Pesaresi (2008). More recently, in an historical perspective, Roth (2005), pp. 278–92; Grotkamp (2005), pp. 125–45; Aubert (2009), pp. 167–85; Rosafio (2009), pp. 287–302.

⁸ D.15.1.1.4 (Ulpian, 29 ad Ed.): 'Si cum impubere filio familias vel servo contractum sit, ita dabitur in dominum vel patrem de peculio, si locupletius eorum peculium factum est'.

⁹ D.15.1.2 (Pompon. 5 ad Sab.): 'Ex ea causa ex qua soleret servus fructuarius vel usuarius adquirere, in eum cuius usus fructus vel usus sit actio dumtaxat de peculio ceteraque honorariae dantur, ex reliquis in dominum proprietatis'.

eventually cancelled at the master's will. In legal terms, a *peculium* requires the master's initial permission.¹⁰ Thus Q. Aelius Tubero, a late Republican jurist 'quoted by Ulpian through P. Iuventius Celsus of Hadrianic time, defines the *peculium* as 'what a slave keeps separate from the master's accounts with the latter's permission, after deduction of what the slave owes his master'.¹¹ The master's permission rests less on his will (*volente domino*) than on his acceptance (*patientia*) with regard to his awareness (*scientia*) of the very existence of the *peculium*. To have a *peculium* does not imply the right to dispose of it, by transfer of some or all of its parts, because it would worsen the economic position of the principal. Consequently, more is required to do so, such as the *concessio liberae administrationis*,¹² a special permission whereby the slave is enabled to do on a regular basis what should have been allowed only on a case-by-case basis, according to Paul who implicitly refers to some kind of *iussum*.¹³ In so far as the *peculium* can be shown to exist, the principal becomes liable for his dependant's transactions in spite of specific restrictions or prohibitions to deal with the latter. The same Paul refers to a shop employee whose status has been clarified by a written sign (*proscriptio*) – he is not to be considered a business manager¹⁴ – but whose transactions nevertheless give rise to an *actio de peculio*: the standard of liability is admittedly restricted with regard to the *actio institoria*, but nonetheless potentially significant.¹⁵

3. ACCOUNTING AND BOOK-KEEPING

The *peculium* cannot exist without the master's knowledge and agreement. He, however, may be unclear about its content and components, both

¹⁰ D.15.1.4pr (Pompon. 7 ad Sab.): 'Peculii est non id cuius servus seorsum a domino rationem habuerit, sed quod dominus ipse separaverit suam a servi rationem discernens: nam cum servi peculium totum adimere vel augere vel minuere dominus possit, animadvertendum est non quid servus, sed quid dominus constituendi servilis peculii gratia fecerit'.

¹¹ D.15.1.5.4 (Ulpian. 29 ad Ed.): 'Peculium autem Tubero quidem sic definit, ut Celsus libro sexto digestorum refert, quod servus domini permissu separatum a rationibus dominicis habet, deducto inde si quid domino debetur'.

¹² Marcellus, according to Iulianus, quoted by Ulpian (D.15.1.7.1 (Ulpian. 29 ad Ed.): '[. . .] si (ut quidam, inquit, putant) peculium servus habere non potest nisi concedente domino. Ego autem puto non esse opus concedi peculium a domino servum habere, sed non adimi, ut habeat. Alia causa est peculii liberae administrationis: nam haec specialiter concedenda est'.

¹³ D.15.1.46 (Paul. 60 ad Ed.): 'Qui peculii administrationem concedit videtur permittere generaliter quod et specialiter permissurus est'.

¹⁴ D.14.3.11.2–4 (Ulpian. 28 ad Ed.) on the practical aspects of *proscriptio*.

¹⁵ D.15.1.47pr (Paul. 4 ad Plaut.): 'Quotiens in taberna ita scriptum fuisset "cum ianuario servo meo geri negotium veto", hoc solum consecutum esse dominum constat, ne institoria teneatur, non etiam de peculio'. This is already attested in Gaius D.15.1.29.1 (Gaius 9 ad Ed. Prov.): 'Etiam si prohibuerit contrahi cum servo dominus, erit in eum de peculio actio'.

in terms of nature (or quality) and quantity.¹⁶ Ulpian approvingly cites Pomponius who considers that the principal is not bound to know in detail what the *peculium* is made of: a rough idea (*pachymeresteron*) would suffice.¹⁷ In addition, the late second-century CE jurist Papius Fronto compares the *peculium* with a human being, a statement explained by Marcian, possibly in reference to Polybius' thought (*Hist.* 6.5) about the natural cycle of political regimes: a *peculium* is born, grows, declines, and dies. This evolution is not straightforward, since a *peculium* can be totally empty without losing its legal status and existence.¹⁸

Concerning the 'birth' or establishment of the *peculium*, it can be ascribed to various causes and origins. Florentinus lists the slave's personal savings out of his daily rations, and all incomes and rewards that his master allows him to keep for himself.¹⁹ To be added are whatever the slave is about to acquire: returns from pending litigation, inheritance, legacies, damages, refunds and other payments.

Just as the *peculium* arises from the master's will, it is cancelled in the same way.²⁰ The praetor's edict provides that the *peculium* ceases to exist at the time of the slave's death, manumission, or conveyance, through sale, gift, or legacy. However, creditors can bring an action on the *peculium* for a whole year after that, because, according to Pomponius, the *peculium* may still change over that period of time, through increase (gains) or decrease (losses).²¹ By contrast, the slave's escape or kidnapping brings the autono-

¹⁶ D.15.1.4.1–6 (Pompon. 7 ad Sab.): 'Sed hoc ita verum puto, si debito servum liberare voluit dominus, ut, etiamsi nuda voluntate remisit dominus quod debuerit, desinat servus debitor esse: si vero nomina ita fecerit dominus, ut quasi debitorem se servo faceret, cum vera debitor non esset, contra puto: re enim, non verbis peculium augendum est. 2. Ex his apparet non quid servus ignorante domino habuerit peculii esse, sed quid volente: alioquin et quod subripuit servus domino, fiet peculii, quod non est verum. 3. Sed saepe fit, ut ignorante domino incipiat minui servi peculium, veluti cum damnum domino dat servus aut furtum facit. 4. Si opem ferente servo meo furtum mihi feceris, id ex peculio deducendum est, quo minus ob rem subreptam consequi possim. 5. Si aere alieno dominico exhauriatur peculium servi, res tamen in causa pecuniaria manent: nam si aut servo donasset debitum dominus aut nomine servi alius domino intulisset, peculium suppletur nec est nova concessione domini opus. 6. Non solum id in peculio vicariorum ponendum est, cuius rei a domino, sed etiam id cuius ab eo cuius in peculio sint seorsum rationem habeant'.

¹⁷ D.15.1.7.2 (Ulpian. 29 ad Ed.): 'Scire autem non utique singulas res debet, sed *pachymeresteron* *fid est: magis in universum*], et in hanc sententiam Pomponius inclinat'.

¹⁸ D.15.1.40pr (Marcian. 5 Reg.): 'Peculium nascitur crescit decrescit moritur, et ideo eleganter Papius Fronto dicebat peculium simile esse homini'.

¹⁹ D.15.1.39 (Florent. 11 Inst.): 'Peculium et ex eo consistit, quod parsimonia sua quis paravit vel officio meruerit a quolibet sibi donari idque velut proprium patrimonium servum suum habere quis voluerit'.

²⁰ D.15.1.8 (Paul. 4 ad Sab.): 'Contra autem simul atque noluit, peculium servi desinit peculium esse'.

²¹ D.15.2.1pr -1 (Ulpian. 29 ad Ed.): 'Praetor ait: "Post mortem eius qui in alterius potestate fuerit, posteaquam is emancipatus manumissus alienatusve fuerit, dumtaxat de peculio et si quid dolo malo eius in cuius potestate est factum erit, quo minus peculii esset, in anno,

mous management of the *peculium* to an end. So does any doubt about the slave's survival.²²

I would like to suggest here that no one except the slave in charge of the *peculium* may actually know with precision and accuracy what it is made of. The slave's master – not to say third contracting parties – is, at best, able to acknowledge the existence of a *peculium*, the content of which is revealed in inventories and account books. Provided that such documents exist, that they are kept diligently up-to-date, and that they can be produced, consulted, deciphered and understood, it is possible to get an idea – however impressionistic – of the nature of the *peculium*, therefore of its value and volatility.

4. THE MAKE-UP OF THE PECULIUM

Classical Roman jurists surmise that the *peculium* was originally a small and simple entity. Ulpian provides an etymological definition of the word *peculium*: 'quasi pusilla pecunia sive patrimonium pusillum'.²³ Elsewhere, the same author and others specify that a *peculium* can contain all sorts of goods and commodities:

- movables, such as clothes, as long as they are kept for regular and personal use;²⁴
- real estate, be it agricultural land and buildings, or urban property;²⁵
- living beings, such as slaves' slaves (*vicarii*) or animals;

quo primum de ea re experiundi potestas erit, iudicium dabo". 1. Quamdiu servus vel filius in potestate est, de peculio actio perpetua est: post mortem autem eius vel postquam emancipatus manumissus alienatusve fuerit, temporaria esse incipit, id est annalis'. Pomponius D. 15.2.3 (Pompon. 4 ad Quint. Muc.): 'Definitione peculii interdum utendum est etiam, si servus in rerum natura esse desiit et actionem praetor de peculio intra annum dat: nam et tunc et accessionem et decessionem quasi peculii recipiendam (quamquam iam desiit morte servi vel manumissione esse peculium), ut possit ei accedere ut peculio fructibus vel pecorum fetu ancillarumque partibus et decedere, veluti si mortuum sit animal vel alio quolibet modo perierit'.

²² D.15.1.48pr (Paul. 17 ad Plaut.): 'Libera peculii administratio non permanet neque in fugitivo neque in subrepto neque in eo, de quo nesciat quis vivat an mortuus sit'.

²³ D.15.1.5.3 (Ulpian. 29 ad Ed.): 'Peculium dictum est quasi pusilla pecunia sive patrimonium pusillum'.

²⁴ D.15.1.25 (Pompon. 23 ad Sab.): 'Id vestimentum peculii esse incipit, quod ita dederit dominus, ut eo vestitu servum perpetuo uti vellet eoque nomine ei traderet, ne quis alius eo uteretur idque ab eo eius usus gratia custodiretur. Sed quod vestimentum servo dominus ita dedit utendum, ut non semper, sed ad certum usum certis temporibus eo uteretur, veluti cum sequeretur eum sive cenanti ministravit, id vestimentum non esse peculii'.

²⁵ D.15.1.22 (Pompon. 7 ad Sab.): 'Si damni infecti aedium peculiarium nomine promiserit dominus, ratio eius haberi debet et ideo ab eo qui de peculio agit domino cavendum est'. *Idem* D.15.1.23 (Pompon. 9 ad Sab.): 'Aedium autem peculiarium nomine in solidum damni infecti promitti debet, sicut vicarii nomine noxale iudicium in solidum pati, quia pro pignore ea, si non defendantur, actor abducit vel possidet'.

- assets (credit, damages to be collected as a result of litigation, inheritance and legacies to come, *peculia* entrusted to *vicarii*) and liabilities (mostly debts = *nomina*).²⁶

The *peculium* can be empty of any or all of the above²⁷ or consist exclusively of debts owed by the slave to his master.²⁸ In the books, it also contains whatever the latter has deceivingly withdrawn from it.²⁹ Last, it includes everything the slave has acquired and kept hidden from his master, insofar as it can be assumed that the latter would have let him have it, had he known about it.³⁰

5. LITIGATION WITH SEVERAL CREDITORS: FIRST COME, FIRST SERVED

A slave in business entrusted with a *peculium* may owe money to several creditors. When one of them wants to sue the master, he introduces an action on the *peculium* and can expect to be compensated up to the amount of the *peculium*. His position is obviously advantageous with regard to other creditors who would sue later, provided that a decision is made about his case first. Consequently, the timing of the judicial decision matters more than the chronological order of litigation, as Gaius clearly states in his commentary to the provincial edict.³¹ A pending decision, which may drastically change the content of the *peculium*, is irrelevant.

²⁶ D.15.1.7.4 (Ulpian. 29 ad Ed.): 'In peculio autem res esse possunt omnes et mobiles et soli vicarios quoque in peculium potest habere et vicariorum peculium: hoc amplius et nomina debitorum'. Cf. also D.15.1.17 (Ulpian. 29 ad Ed.).

²⁷ D.15.1.30pr (Ulpian. 29 ad Ed.): 'Quaesitum est, an teneat actio de peculio, etiamsi nihil sit in peculio cum ageretur, si modo sit rei iudicatae tempore. Proculus et Pegasus nihilo minus teneri aiunt: intenditur enim recte, etiamsi nihil sit in peculio. Idem et circa ad exhibendum et in rem actionem placuit, quae sententia et a nobis probanda est'.

²⁸ D.15.1.16 (Julian. 12 Dig.): 'Marcellus notat: est etiam ille casus, si alter ademerit: vel si omni quidem modo concesserit dominus sed in nominibus erit concessio'.

²⁹ D.15.1.21pr (Ulpian. 29 ad Ed.): 'Summa cum ratione etiam hoc peculio praetor imputavit, quod dolo malo domini factum est, quo minus in peculio esset. Sed dolum malum accipere debemus, si ei ademit peculium: sed et si eum intricare peculium in necem creditorum passus est, Mela scribit dolo malo eius factum. Sed et si quis, cum suspicaretur alium secum acturum, alio peculium avertat, dolo non caret. Sed si alii solvit, non dubito de hoc, quin non teneatur, quoniam creditor solvitur et licet creditori vigilare ad suum consequendum'.

³⁰ D.15.1.49pr (Pompon. 4 ad Quint. Muc.): 'Non solum id peculium est, quod dominus servo concessit, verum id quoque, quod ignorante quidem eo acquisitum sit, tamen, si rescisset, passurus erat esse in peculio'.

³¹ D.15.1.10 (Gaius 9 ad Ed. Prov.): 'Si vero adhuc in suspenso est prius iudicium de peculio et ex posteriore iudicio res iudicaretur, nullo modo debet prioris iudicii ratio haberi in posteriore condemnatione, quia in actione de peculio occupantis melior est condicio, occupare autem videtur non qui prior litem contestatus est, sed qui prior ad sententiam iudicis pervenit'.

6. TIME OF ESTIMATE

Like modern financial portfolios, *peculia* may fluctuate widely and quickly. In case of litigation on the *peculium*, it is vital for the plaintiff(s) to establish when the *peculium* must be taken into consideration, because the time is instrumental in defining the level of the master's liability. Whether the *peculium* incurs major losses after the estimate is irrelevant, because the master's other assets – outside the *peculium* – can be called upon for compensation. Theoretically, various moments can be envisaged:

- the initial establishment of the *peculium* (= *concessio peculii*), or any time the *peculium* has been re-evaluated or recapitalised, assuming that the master has then a precise and accurate knowledge of its content;
- the time of the transaction, assuming that the contracting party would check the state of the *peculium* standing as a kind of surety;
- the time when the plaintiff introduces his claim *in iure*, thus starting litigation;
- the time when the joinder of issue (*litis contestatio*) is pronounced, before sending the case to a judge (*apud iudicem*);
- the time when the judge makes his decision (*iudicium*);
- outside of the proceedings, whenever the *peculium* is cancelled because of the slave's death, manumission or conveyance, or at any given moment within one year of the event, while the *actio de peculio* is still available.

Classical jurists are rather discreet about this fundamental issue, and occasionally make ambiguous and somewhat contradictory statements. Following Proculus and Pegasus, Ulpian considers that a *peculium* may be empty at the start of litigation, but rebuilt later on by the time of the judicial decision, thus making the *actio de peculio* valid.³² Along the same lines, if the *peculium* is insufficient to repay a debt at the time of judgment, complementary proceedings can start anew for the balance if the state of the *peculium* subsequently improves.³³ Whoever makes a contract with a slave is bound to pay attention to changes in the value of the *peculium*, which does not preclude a certain amount of speculation.³⁴ Paul denies any guarantee (*cautio*) bearing

³² D.15.1.30pr (Ulpian. 29 ad Ed.): 'Quaesitum est an teneat actio de peculio, etiamsi nihil sit in peculio cum ageretur, si modo sit rei iudicatae tempore. Proculus et Pegasus nihilo minus teneri aiunt: intenditur enim recte, etiamsi nihil sit in peculio. Idem et circa ad exhibendum et in rem actionem placuit, quae sententia et a nobis probanda est'.

³³ D.15.1.30.4 (Ulpian. 29 ad Ed.): 'Is, qui semel de peculio egit, rursus aucto peculio de residuo debiti agere potest'.

³⁴ D.15.1.32pr – 1 (Ulpian. 2 Disp.): 'Sed licet hoc iure contingat, tamen aequitas dicitur iudicium in eos dari, qui occasione iuris liberantur, ut magis eos perceptio quam intentio liberet: nam qui cum servo contrahit, universum peculium eius quod ubicumque est veluti patrimonium intuetur. 1. In hoc autem iudicio licet restauretur praecedens, tamen et augmenti

on a possible, though hypothetical, increase of the *peculium*, no matter how insufficient it was at the time of judgment.³⁵ In some – admittedly far-fetched – cases, the estimate must take place at a given moment, for instance when the principal becomes the heir of a creditor of the *peculium*³⁶ or is kidnapped:³⁷ an estimate is made at the very moment when the principal's status is altered. The same opportunity occurs when the slave dies during litigation on his *peculium*, or when the late principal's estate includes a legacy of the *peculium*, either to the slave to be manumitted by will or to an outsider.³⁸

Because any *peculium* is potentially volatile, depending on its components and its management, it is difficult for would-be contracting parties to foresee future developments in the value of the *peculium*.

7. DEDUCTIONS FROM THE PECULIUM

Title 15.1 of Justinian's Digest displays several excerpts dealing with deductions from the *peculium* on behalf of the principal prior to its estimate. Aelius Tubero's definition discussed above specifies that the *peculium* does not include what the slave owes his master.³⁹ Ulpian, who cites Tubero through Celsus, specifies elsewhere that those deductions are based on the assumption that the master was the first creditor to sue on the *peculium* and that his claim is valid, thus forestalling all others. This principle goes back a long way, as Ulpian also cites Cicero's contemporary, Servius Sulpicius Rufus,

et decessionis rationem haberi oportet, et ideo sive hodie nihil sit in peculio sive accesserit aliquid, praesens status peculii spectandus est. Quare circa venditorem quoque et emptorem hoc nobis videtur verius, quod accessit peculio posse nos ab emptore consequi, nec retrorsus velut in uno iudicio ad id tempus conventionem reducere emptoris, quo venditor conventus sit'.

³⁵ D.15.1.47.2 (Paul. 4 ad Plaut.): 'Si semel actum sit de peculio, quamvis minus inveniatur rei iudicandae tempore in peculio quam debet, tamen cautionibus locum esse non placuit de futuro incremento peculii: hoc enim in pro socio actione locum habet, quia socius univ-ersum debet'.

³⁶ D.15.1.50.1 (Papinian. 9 Quaest.): 'Si creditor patrem, qui de peculio tenebatur, heredem instituerit, quia mortis tempus in Falcidiae ratione spectatur, illius temporis peculium considerabitur'.

³⁷ D.15.1.55 (Nerat. 1 Resp.): 'Is cum quo de peculio agebam a te vi exemptus est: quod tunc cum vi eximeres in peculio fuerit, spectari'.

³⁸ D.15.1.57 (Tryphonin. 8 Disp.): 'Si filius vel servus, cuius nomine dumtaxat de peculio actum est, ante finitum iudicium decesserit, id peculium respicietur, quod aliquis eorum cum moriebatur habuit. 1. Sed eum, qui servum testamento liberum esse iubet et ei peculium legat, eius temporis peculium legare intellegi Iulianus scribit, quo libertas competit: ideoque omnia incrementa peculii quoquo modo ante aditam hereditatem adquisita ad manumissum pertinere. 2. At si quis extraneo peculium servi legaverit, in coniectura voluntatis testatoris quaestionem esse, et verosimilius esse id legatum quod mortis tempore in peculio fuerit ita, ut quae ex rebus peculiaribus ante aditam hereditatem accesserint debeantur, veluti partus ancillarum et fetus pecudum, quae autem servo donata fuerint sive quid ex operis suis adquisierit, ad legatarium non pertinere'.

³⁹ D.15.1.5.4 (Ulpian. 29 ad Ed.): '[. . .] deducto inde si quid domino debetur'.

who includes all debts owed by the slaves not only to the master, but also to all dependants attached to his household (*familia*).⁴⁰ This is not the place to inventory and discuss at length the many types of deductions retained by classical jurists. Let us note, however, that no less than fourteen passages, out of all fifty-eight included in the title *De peculio*, deal with this issue.⁴¹ The ratio underlines the advantageous position enjoyed by the principal by comparison with all other creditors, who are left with the difficult task of figuring out to what extent the *peculium* is burdened with internal debts, either when the contract is concluded or when litigation starts or ends.

8. ACTIO TRIBUTORIA

A comparison of the respective modalities of application and effects of the three remedies *in solidum* (*actiones quod iussu, institoria* and *exercitoria*) with those of the *actio de peculio* suggests that the set of three remedies aims at protecting third contracting parties while the latter is more advantageous to the principal while limiting his liability for his dependant's transaction. Since the explicitly acknowledged purpose of all these remedies is to promote those economic activities carried out by dependants in order to maximise their principal's profit (*quaestus*), it is obvious that the *actio de peculio* is lacking in this respect because of its bias toward the latter. The Roman praetor obviously ended up noticing this shortcoming and came up with an analogous remedy, maintaining both the dependent's autonomy in his economic activities and the principal's limited liability for his dependant's transaction, but cancelling, in specific conditions, the preferential treatment of the latter, now to be set on an equal footing with all other creditors with regard to the *peculium*, provided that he was aware of his dependant's dealing with his *peculium*, or *merx pecularis*, as surety.⁴² This additional remedy is the so-called *actio tributoria*, with which D.14.4 (a total of twelve *excerpta*, from Labeo to Ulpian) is concerned.⁴³

Ulpian rightly underlines that this remedy is of significant usefulness ('*edicti non minima utilitas*'), because it stands halfway between the *actiones*

⁴⁰ D.15.1.9.2–3 (Ulpian. 29 ad Ed.): 'Peculium autem deducto quod domino debetur computandum esse, quia praevenisse dominus et cum servo suo egisse creditur. 3. Huic definitioni Servius adiecit et si quid his debeatur qui sunt in eius potestate, quoniam hoc quoque domino deberi nemo ambigit. 4. Praeterea id etiam deducetur, quod his personis debetur, quae sunt in tutela vel cura domini vel patris vel quorum negotia administrant, dummodo dolo careant [...].'

⁴¹ D.15.1.9, 11, 13, 14, 15, 17, 19, 27, 30, 37, 38, 47, 52 et 56, based on a search for 'deduc'.

⁴² D.14.4.1pr (Ulpian. 29 ad Ed.): 'Huius quoque edicti non minima utilitas est, ut dominus, qui alioquin in servi contractibus privilegium habet (quippe cum de peculio dumtaxat tenetur, cuius peculii aestimatio deducto quod domino debetur fit), tamen, si scierit servum peculiari merce negotiari, velut extraneus creditor ex hoc edicto in tributum vocatur'.

⁴³ The standard study is now Chiusi (1993). Cf. also Chiusi (2007), pp. 94–112.

in *solidum* and the *actio de peculio*, in that it increases all creditors' (other than the principal) protection, as they are no longer topped by the principal with regard to distribution of the *peculium* in case of bankruptcy. Both required conditions are fairly easy to meet: the principal's knowledge (*scientia*) is passive, and calls not for an explicit show of willingness (*voluntas*) typical of the *actiones quod iussu, institoria*, and *exercitoria* – through *iussum* or *praepositio* – but for acceptance (*patientia*) on his part of his dependant's creativity and dynamism, possibly, but not necessarily, within the context of a business (*negotiatio*) to which the *merx peculiaris* may be attached.

The very concept of *merx peculiaris* is controversial. Whether it represents some kind of capital investment attached to the dependant or a fictitious patrimony akin to the *peculium* after deductions, it bestows on the *actio tributoria* its commercial relevance.⁴⁴ Like the *peculium*, the *merx peculiaris* must be estimated. Consequently, all difficulties described in connection with the practical application of the *actio de peculio* remain well alive with the *actio tributoria*. Worse, the third contracting party acting as plaintiff on the *actio tributoria* must prove the principal's awareness (*scientia*) – less traceable than his willingness expressed through *iussum* or *praepositio* – and establish a connection between the *merx peculiaris* and the transaction at the origin of litigation. In addition, the asset to be distributed needs clarification. Ulpian unambiguously states that only what belongs to the *merx peculiaris* – as opposed to the *peculium* as a whole – is taken into account ('sed id dumtaxat quod ex ea merce est').⁴⁵ The same author acknowledges that the principal may be in doubt of what belongs to it.⁴⁶ Gaius suggests in his commentary of the provincial edict that the difference may be substantial enough for a plaintiff to choose the *actio de peculio* over the *actio tributoria*, since the *merx peculiaris* may consist at times of a small part only of the whole *peculium* or since the deductions to which the principal would have been entitled in connection with the *actio de peculio* happen to be insignificant.⁴⁷ The plaintiff's choice of one or the other remedy will in any case extinguish his claim.⁴⁸

⁴⁴ Földi (2001), pp. 65–90.

⁴⁵ D.14.4.5.11 (Ulpian. 29 ad Ed.): 'Non autem totum peculium venit in tributum, sed id dumtaxat, quod ex ea merce est, sive merces manent sive pretium earum receptum conversumve est in peculium'.

⁴⁶ D.14.4.7.2 (Ulpian. 2 ad Ed.): 'Si tamen ignorans in merce servum habere minus tribuit, non videtur dolo minus tribuisse, sed re comperta si non tribuat, dolo nunc non caret'.

⁴⁷ D.14.4.11 (Gaius 9 ad Ed. Prov.): 'aliquando etiam agentibus expedit potius de peculio agere quam tributoria: nam in hac actione de qua loquimur hoc solum in divisionem venit, quod in mercibus est quibus negotiatur quodque eo nomine receptum est: at in actione de peculio totius peculii quantitas spectatur, in quo et merces continentur. Et fieri potest, ut dimidia forte parte peculii aut tertia vel etiam minore negotietur: fieri praeterea potest, ut patri dominove nihil debeat'.

⁴⁸ D.14.4.9.1 (Ulpian. 29 ad Ed.): 'Eligere quis debet, qua actione experiatur, utrum de peculio an tributoria, cum scit sibi regressum ad aliam non futurum'.

9. ACTIO DE IN REM VERSO

For the sake of comprehensiveness, we should at this point have a look at the last remedy (*actio de in rem verso*)⁴⁹ and examine how the principal's enrichment (*versum*) as a result of his dependant's activity shows in his own accounts (*rationes dominicae*), namely in his *codex accepti et expensi*⁵⁰. However, this would bring us outside the context of the *peculium*.

There is undoubtedly a connection between the principal's main account and his slaves' sub-accounts (including *peculia* of *vicarii*). The jurists are mute about it, and there is no documentary evidence in spite of the wealth of surviving accounts in papyri and wooden tablets. We may assume that such documents did exist, and will be identified as such in a nearby future.⁵¹ The production, use and conservation of such documents require a rather high level of literacy and numeracy, and specific skills in financial administration and business management. Whether such competencies are likely to be found among those slaves, aliens and have-nots who were involved in crafts and trade is debatable.⁵²

10. CONCLUSION

What are the consequences of these observations? Those remedies calling for a limited liability on the part of the principal for his dependant's transactions are difficult, if not impossible, to apply without a sophisticated system of book-keeping and accounting to be used at both levels on a day-to-day basis. Provided that accounts were indeed kept on either side – nothing suggests that it was a legal obligation – there is no guarantee that traders knew how to consult them.

People who were dealing with slaves in business were vulnerable at best. The situation alluded to by Hyperides in his speech *Against Athenogenes*, written in Athens between 330 and 324 BCE, must have been standard in the classical world. Short of being able to consult the accounts of the perfume shop managed by Midas, Epikrates, blinded by his love, was sold a bunch of slaves and a business crippled with debts. It took only a few weeks for the new owner to measure, from the inside, the extent of his disastrous purchase.

⁴⁹ The standard work is Chiusi (2001).

⁵⁰ D. 15.3.3.5 (Ulpian. 29 ad Ed.): 'Idem Labeo ait, si servus mutuatus nummos a me alii eos crediderit, de in rem verso dominum teneri, quod nomen ei adquisitum est: quam sententiam Pomponius ita probat, si non peculiare nomen fecit, sed quasi dominicae rationis. Ex qua causa hactenus erit dominus obligatus, ut, si non putat sibi expedire nomen debitoris habere, cedat creditori actionibus procuratoremque eum faciat'.

⁵¹ Cf. Bresson and Aubert, in a forthcoming chapter on accounting in the *Oxford Handbook of Economies in the Classical World* (2012). The standard book on Roman accounting is Minaud (2005).

⁵² Cf. Aubert (2004), pp. 127-47.

In the Roman world, praetorian law, explained and enlarged by abundant juristic opinions, allowed economic actors, including slaves and other dependants, to minimise the risks attached to contractual transactions by granting them legal remedies easy to use because they are resting on a simple question, to be answered by yes or no. These remedies called for total liability on the part of the principal if his willingness to let his dependant enter into contracts with third parties could be established. The practical usefulness and commercial feature of the *actiones institoria* and *exercitoria*, accessorially of the *actio tributoria* conceived as a lesser evil, may explain the label of *superiores actiones* adopted by Gaius,⁵³ and underlines the lesser importance of those remedies included in *triplex hoc edictum*: possibly marginal in practice, the *actiones de peculio*, *de in rem verso*, or *quod iussu* retained all along their major legal interest.⁵⁴

The very existence of legal remedies such as the *actiones adiecticiae qualitatis* does not imply that business people resorted to them on an equal, or even regular, basis. Like so many other legal institutions of praetorian law, the *actiones adiecticiae qualitatis* are products of the Republican period. Among them, the *actio de peculio* and, to a lesser extent, the *actiones tributoria* and *quod iussu* seem better adapted to a situation of relative proximity among economic actors, in the context of local or regional trade. On the other hand, the *actiones institoria* and, a fortiori, *exercitoria* are suited for a wider commercial space, on an interprovincial, Mediterranean or even global scale.

The impracticality of the *actio de peculio* for reasons stated above and the trend toward simplification, however tentative, started by the – necessarily – later creation of the *actio tributoria* may have led to the development of the commercial features of the *actiones adiecticiae qualitatis*, thus bolstering the case for the posteriority of the *actiones institoria* and *exercitoria*, a *communis opinio* which I have been trying to disrupt for many years.⁵⁵ However, both Gaius and Ulpian unambiguously speak against it.

The main commercial feature of the *actiones tributoria*, *institoria* and *exercitoria* (the so-called *actiones superiores*) lies in the reduction and cancellation of the privileges of the *dominus/paterfamilias*, who eventually stands on an equal footing with other creditors of the *peculium* and must accept liability *in tributum* or *in solidum* for the debts contracted by his dependants/agents. To echo another Paul, the apostle and author of the Epistle to the Galatians

⁵³ D.14.5.1 (Gaius 9 ad Ed. Prov.): ‘Omnia proconsul agit, ut qui contraxit cum eo, qui in aliena potestate sit, etiamsi deficient superiores actiones, id est exercitoria institoria tributoriae, nihilo minus tamen in quantum ex bono et aequo res patitur suum consequatur. Sive enim iussu eius, cuius in potestate sit, negotium gestum fuerit, in solidum eo nomine iudicium pollicetur: sive non iussu, sed tamen in rem eius versum fuerit, eatenus introducit actionem, quatenus in rem eius versum fuerit: sive neutrum eorum sit, de peculio actionem constituit’.

⁵⁴ D.15.1.1.1 (Ulpian. 29 ad Ed.): ‘Est autem triplex hoc edictum: aut enim de peculio aut de in rem verso aut quod iussu hinc oritur actio’.

⁵⁵ Best represented lately by De Ligt (1999), pp. 205–26.

(3:28), it could be said that a 'world' economy cannot afford to make a distinction between freeborn and slaves, citizens and foreigners, men and women, adults and minors, Latin and non-Latin speakers.⁵⁶ The *actiones institoria* and *exercitoria* celebrate the priority of businesses over individuals.

Lastly, let us stress that the picture we get about the history of the *actiones adiecticiae qualitatis*, from their creation in the mid or late Republic through the classical period until the time of the compilers, is based less on the reconstruction of the praetorian edict than on the classical jurists' opinions, mostly in the second and third centuries CE. The chronological distance between the time of their conception and that of the legal controversies surrounding them up to half a millennium later reflects the perennial adequacy of the solutions offered by the Republican praetors to no less perennial problems raised by the organisation of trade. Obviously, both were still relevant enough in the sixth century to find their way into Justinian's Digest.

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⁵⁶ D.14.1.1.4 (Ulpian. 28 ad Ed.): 'Cuius autem condicionis sit magister iste, nihil interest, utrum liber an servus, et utrum exercitoris an alienus: sed nec cuius aetatis sit, intererit, sibi imputaturo qui praeposuit'. Ibid. 16: 'Parvi autem refert, qui exercet masculus sit an mulier, pater familias an filius familias vel servus: pupillus autem si navem exerceat, exigemus tutoris auctoritatem'. D.14.3.7.1 Ibid.: 'Parvi autem refert, quis sit institor, masculus an femina, liber an servus proprius vel alienus. Item quisquis praeposuit: nam et si mulier praeposuit, competit institoria exemplo exercitoriae actionis et si mulier sit praeposita, tenebitur etiam ipsa. Sed et si filia familias sit vel ancilla praeposita, competit institoria actio'. D.14.3.8 (Gaius 9 ad Ed. Prov.): 'Nam et plerique pueros puellasque tabernis praeponunt'. D.15.1.3.2 (Ulpian. 29 ad Ed.): 'Parvi autem refert, servus quis masculi an mulieris fuerit: nam de peculio et mulier convenietur'.

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