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# THE LEGAL REGULATION OF BUSINESS ACTIVITY OF *FILIAE FAMILIAS* IN THE PRINCIPATE PERIOD (*ACTIO DE PECULIO*)

The current article is the continuation of my research concerning the legal regulation of conducting business by *filiae familias*[1].

According to the fact that most sources, which are to be analyzed originate from the Digests of Justinian, I feel that it is right to presume their authenticity which was formulated by W. Bojarski[2]. However, it does not mean that I pass over with silence the views concerning interpolations of some source texts formulated by remarkable Romanists.

In the beginning, it is necessary to place some remarks referring to the judicial remedy of *actio de peculio*. Gaius mentions this claim the following way:

G.4.69: *Quia tamen superius mentionem habuimus de actione, qua in peculium filiorum familias servorumque ageretur, opus est, ut de hac actione et de caeteris, quae eorundem nomine in parentes dominosve dari solent, diligentius admoneamus.*

In the above quoted extract of his *Institutiones*, the jurist claims that it is an action granted in accordance with estate entrusted to manage by sons under power and slaves against their ascendants of owners. Gaius also adds that about this claim and also other, which are given according to a similar title against power keepers, he will inform in detail which he actually does in further parts of his lecture (G.4,70–74). Claims, about which the jurist speaks in words *de hac actione et caeteris* were jointly called actions *adiecticiae quali-*

[1] See: E. Ejankowska, *Regulacja prawna działalności gospodarczej filiae familias (actio institoria i actio exercitoria) w prawie rzymskim*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego, Seria prawnicza" 2006, no. 37, Prawo 4, p. 100–108.

[2] W. Bojarski, *Remarks on Textual Reconstruction in Roman Law* [in:] *Le droit romain et le monde contemporain. Melanges a la memoire de Henryk Kupiszewski*, eds. W. Wołodkiewicz, M. Zabłocka, Varsovie 1996, p. 83–89.

*tatis* (meaning additional claims) by glossarists in the Middle Ages. This term had its justification in sources due to the fact that praetors added a new *actio* to the already existing one in the civil law[3]. The aim of those legal remedies was the extension of responsibility onto family superiors and owners of slaves for contractual obligations of their dependents. As it is already known, *ius civile* did not provide such a liability[4]. Placing formulas of such claims in the preatorial edict guaranteed legal security to contractors towards slaves and *alieni iuris* persons in some fields of economic activity. They could place theirs claims against possessors of power if they experienced damage due to transactions conducted with their dependents. One of such claims was *actio de peculio*, which was performed by a praetor in accordance with contracts conducted by *alieni iuris* persons and slaves conducting economic activity based on *peculium*[5].

In order to consider premises of usage and the character of this claim, it is neccessary to perform an analysis of this formula:

*Formula actionis depositi de peculio; Quod Aulus Agerius apud Stichum, qui in Numerii Negidii potestate est, mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Stichum, si liber esset ex iure Quiritum Aulo Agerio dare facere oporteret ex fide bona iudex Numerium Negidium Aulo Agerio dum taxat de peculio* (…) *condemnato si non paret absolvito*[6].

The above presented formula is based in the civil claim of deposit (*action depositi*) which could be utilized if a safekeeping agreement was conducted between two Roman citizens having full financial capacity. However, *actio depositi directa* could not be made if a slave was the safe keeper because he did not have capacity to act in court proceedings in the light of civil law. That is why the praetor *in intentio* of the claim mentioned the name of the slave and authorized the judge to investigate that in case the slave was a free person (*si liber esset ex iure Quiritium*), he was obliged to perform to the benefit of the claimant (*Aulo*

[3] This term was based on sources because praetors actually added a new action to the already existing in the principle of protection of civil law. (Ulp.D.14, 1,5,1: *…hoc enim edicto non transfertur actio, sed addicitur).*

[4] D.50,17,133: *Melior condicio nostra per servos fieri potest, deterior fieri non potest*. See: G.3,104.

[5] The term *peculium* was used in sources to describe distinguished masses of estate, which regardless of their origin – formed an ownership of the one performing power and even laws of estate if he passed them to the administering person. About the institution of peculium see: G. Micolië, *Pècule et capacitè patrimoniale – Etude sur le pècule profectice, depuis l'èdit de peculio jusqu'la fin de l'èpoce classique*, Lyon 1932; M. Kaser, *Das Römische Privatrecht*, I (hereinafter RPR I), München 1971, p. 55–59; A. Kirschenbaum, *Sons, Slaves,and Freedmen in Roman Commerce*, Jerusalem 1987, p. 33–62. In Polish literature: I. Żeber, *A Study of the 'Peculium' of a Slave in Pre-Classical Roman Law*, Wrocław 1981.

[6] O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung* (3 ed.) (hereinafter EP), Leipzig 1927, p. 282.

*Agerio dare facere oporteret ex fide bona*). Next, if he declared that the claim of the claimant is justified, he should sentence the owner of the slave to pay the *peculium* (*dumtaxat de peculio condemnato*)[7].

The same way of development refers to other claims which were utilized to sue the owner of a slave, to whom *peculium* was assigned for contracts conducted by the last one[8]. Each civil claim, on which *actio de peculio* was based, was a sort of framework of the formula of the praetor (*actio utilis*) and the limitation of liability of the possessor to the amount of the *peculium* was placed in the *condemnatio* clause.

The fact that the claim was used to secure liabilities contracted by dependents is determined by its character:

D.15,1,21,3 (Ulp.29 ad ed.): *Si dominus vel pater recuset de peculio actionem non est audiendus, sed cogendus est quasi aliam quamvis personalem actionem suscipere.*

From the above cited source it directly arises that *actio de peculio* did not belong to *actiones in rem*, although the premise of its utilization was the existence of *peculio* estate. So, that is an *actio in personam*, which was utilized against the possessor of power (*dominus vel pater*) as the owner of *peculium*[9]. It meant that the claims of the petitioner could be covered by whichever part of the familial estate, and not limited to the objects forming a *peculium*. However, the *peculium* – as it is fairly stated by A. Kirschenbaum[10] – was only the basis of liability and a determinant of liability limits of the owner of a slave or a familial superior[11].

It needs to be kept in mind that the above mentioned obligations really existed in the economic sphere but in the pre – classical period did not have any security in the provisions of civil law. In the classical period they were part of the so called *obligationes naturales*. Thanks to the praetor, who agreed to include debts

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[7] About the condemnation clause (called *condemnatio cum taxatione*) see: G.4,72a; A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, *s.v. peculium*, p. 624; J. Sondel, *Słownik łacińsko-polski dla prawnikow i historyków*, Krakow 1997, *s.v. condemnatio cum taxatione*, p. 193.

[8] The formulas of these claims are presented in: W. Buckland, *The Roman Law of Slavery*, Cambridge 1908, p. 211–213.

[9] See: *ibidem*, p. 207.

[10] A. Kirschenbaum, *Sons, Slaves*…, p. 50.

[11] G.4,73: *Cum autem quaeritur, quantum in peculio sit, ante deducitur, quod patri dominove, quique in eius potestate sit a filio servove debetur, et quod superest, hoc solum peculium esse intellegitur. Aliquando tamen id quod ei debet filius servusve, qui in potestate patris dominive sit, non deducitur ex peculio, velut si is, cui debet, in huius ipsius peculio sit.* According to Gaius, in order to determine the value of the *peculio* estate (*quantum in peculio sit*) debts, which were made by the son or slave by his superior and everyone under the power of the last one, should be deducted from the whole of assets (*in eius potestate sit*). What remained (*quod superset*) after the deduction of assets, which were at the possessor of power or his subordinates towards the administrator of *peculium* (*a filio servove debetur*). See: Ulp.D.15,1,5,4; Ulp. D.15,1,9,3–4; Ulp.D.15,1,7,6; Ulp.D.15,1,9,4; Ulp. D.15,2,1 pr.

and receivables while estimating the value of *peculium.* He also considered arisen sorts of obligations among people within joint power and among them and the possessor of power, they had a legal value[12].

As it is already known, *actio de peculio* could be utilized as a consequence of translations which were conducted by persons being in charge of the *peculium* and contractors from outside the family circle[13]. So, was it necessary for these actions to be accompanied by the knowledge and consent of the possessor of the power? Certainly no, because the sole granting of a concession for conducting economic activity based on *peculium* (*concessio administrationis*) was the authorization to perform actions which did not require a special consent of the possessor of power. What is more, obligations of slaves and *alieni iuris* persons did not have to remain in accordance with *peculium*[14]. Moreover, the owner of a slave could not prevent to sue him by means of *actio de peculio* even if he clearly prohibited conducting agreements with his slaves, which is mentioned by Gaius in the extract of his comment to the provincial edict.

D.15,1,29,1 (Gai.lib.9 ad ed. provin.): *Etiamsi prohibuerit contrahi cum servo dominus, erit in eum de peculio actio.*

The jurist talks only about the slave (*servo*) but, while using *argumentum a minori ad maius* – we can assume that this provision also refers to a son dependent of *patria potestas*.

*Actio de peculio* was a claim which had no time limit but the condition of its utilization was the existence of *peculium* (Paul.D.21,1,57,1 and Gai.D.15,1,27,8). If *peculium* expired, regardless of the cause, the legal basis for this claim would be dismissed. The maintenance of such a state would threaten the security of trade and it would also be contradictory to the equity rule of the praetor (*aequitas*). That is why the praetor established a reasonable solution, which is mentioned by Ulpian:

D.15,2,1,pr. (Ulp.lib.29 ad ed): *Post mortem eius qui in alterius potestate fuerit, posteave quam 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, quo primum de ea re experiundi potestas erit, iudicium dabo.*

As it arises from the statement of the jurist, the praetor issued a one year deadline to submit *actio de peculio* due to reasons which have been successively estimated in the edict. They were the following: death or liberation (in reference to the son) and death, liberation and alienation (in reference to the slave) and also

[12] According to this matter see: A. Kirschenbaum, *Sons, Slaves*…, p. 51; R. Sohm, *Instytucje, historia i system rzymskiego prawa prywatnego*, Warszawa 1945, p. 462; R. Taubenschlag, *Rzymskie prawo prywatne*, Warszawa 1969, p. 215.

[13] O. Lenel, EP, p. 276: *Quod cum eo, qui in alterius potestate esset negotium gestum erit, dumtaxat de peculio et si quid dolo malo eius in cuius potestate erit factum erit, quo minus peculii esset* (…) *in cuius potestate erit, iudicium dabo*.

[14] Ulp.D.3,5,8 and D.15,1,27,8.

devious acting by the possessor of power (*si quid dolo malo eius in cuius potestate est factum erit*), which would lead to the decrease of peculium (*quo minus peculii esset*). The result of such a decision of the praetor was the change of character of the claim which became *actio temporalis* that is *actio de peculio annalis* in case one of the above mentioned circumstances occured[15].

In case of the settlement towards creditors by *peculio* estate, it was performed in the order of applications (C.4,26,7,3), and the rule *occupantis melior est condicio* (Gai.D.15,1,10) was current.

Additionally, it must be pointed out that administratively, actions performed by slaves as administrators of *peculium* did not raise the same legal results which were connected to analogical actions of sons under the power of a father. Obligations of slaves in the light of *ius civile* of the classical period were only *obligationes naturales*, but the sons of the family generally remained obliged civilly[16]. That is why in case of conducting a transaction with a son provided with *peculium*, the contractor gained two debtors, which is clearly explained by Ulpian:

D.15,1,44 (Ulp.lib.63 ad ed.): *Si cum filio familias contraxerit, duos habet debitores filium in solidum et patrem dumtaxat de peculio*.

In this place the jurist also determines the scope of liability of each of the debtors; *filius familias* is liable to the full of the obligation due (*in solidum*) but the *pater familias* only to the amount of *peculium* (*dumtaxat de peculio*). The creditor could with the help of *actio civilis* sue the son or – predicting the voidness of a possible property foreclosure – utilize *actio de peculio* against the father. In case of submission of a claim against one of two debtors there was no consumption of a procedural claim due to *litis contestatio*, because the ongoing

[15] See: O. Lenel, EP, p. 277; S. Perozzi, *Istituzioni di diritto Romano*, I, Milano 1947, p. 218; S. Solazzi, *Studi sul "actio de peculio", Scritti di diritto Romano*, I, Napoli 1955, p. 184–186.

[16] About the ability to be obliged of the *filia familias* and the capacity to act in court proceedings see: V. Arangio-Ruiz, *Istituzioni di diritto romano*, Napoli 1957, p. 58–411; D. Daube, *Roman Law-Linguistic, Social and Philosophical Aspects*, Edinburgh 1969, p. 89; P. Bonfante, *Corso di diritto romano, Diritto di famiglia*, I, Roma 1925, p. 93; J.F. Gardner, *Being a Roman Citizen*, London 1993, p. 72; A. Kirschenbaum, *Sons, Slaves*…, p. 58; R. Monier, *Manuel elementaire de droit romain*, II, Paris 1948, p. 260 & I, p. 254; G. Scherillo, *Corso di istituzioni di diritto romano*, Milano 1984, p. 206; S. Solazzi, *Sulla capacita del filius familias di stare in giudicio, Scritti di diritto romano*, I, Napoli 1955, p. 113–115. Generally, the son of the family could not be sued (until the passing of Senatus Consultum Macedonianum) only in case when he was granted a financial loan; about the subject extensively M. Zabłocka, *Granice stosowania „Senatus Consultum Macedonianum"*, „Czasopismo Prawno-Historyczne" 1981, vol. 33, no. 2, p. 11–29. According to F. Schulz (*Classicasl Roman Law*, p. 267) the possibility to contract obligations by *filius familias* was an exception from the rule current in the pre – classical and classical law, according to which a child dependent of *patria potestas* could not be a party of obligations. Also compare with R. Sohm, *Instytucje*…, p. 179; and R. Taubenschlag, *Rzymskie prawo*…, p. 107; A. Watson, *Slavery and Development of Roman Private Law*, BIDR 1987, no. 90/190, p. 110.

proceedings were based on administrative power (*iudicium imperio continens*). And so, one of three conditions necessary for the consumption of the proceedings *ipso iure*, did not occur[17].

It is hard to predict that a claim submitted against the second one of the debtors becomes void due to *exceptio rei iudicatae* or *exceptio rei in iudicium deductae*, because that will not be proceedings among the same parties (*inter easdem personas*)[18].

That is why it cannot be justified that according to A. Kirschenbaum, in case of suing *pater familias*, it would not be possible to perform an action later against *filius familias* because during the first process the consumption of the claim had occurred[19].

As it can be noticed, in the Institutions of Gaius (G.4,69; 4,73), and in the formula of the claim placed in the reconstruction of the edict of the praetor, no female persons are mentioned. The practice of establishment of administration of the *peculio* assets for the daughter of the family cannot raise any doubts, because an amount of sources remains. This amount is not plentiful but we do gain information about the existence of *peculium filiae familias* in the principate period[20]. In this place a question arises whether in Roman law, *actio de peculio* was applicable due to business activity of dependent daughters, which was performed on the basis of the estate administrated by them.

The main point leading to the analysis of this matter is the statement of Ulpian concerning the clause of the edict referring to three claims: *actio de peculio*, *actio de in rem verso* and *actio quod iussu*[21]:

D.15,1,1,1–3 (Ulp.lib.29 ad ed.): *Est autem triplex hoc edictum aut enim de peculio aut de in rem verso aut quod iussu hinc oritur actio. 2. Verba autem edicti talia sunt: „Quod cum eo, qui in alterius potestate esset, negotium gestum erit". 3. De eo loquitur, non de ea: sed tamen et ob eam quae est et feminini sexus dabitur ex hoc edicto actio.*

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[17] G.4,106: *Et si quidem imperio continenti iudicio actum fuerit, sive in rem, sive in personam, sive ea formula, quae in factum concepta est, sive ea, quae in ius habet intentionem, postea nihilo minus ipso iure de eadem re agi potest et ideo necessaria est exeptio rei iudicate vel in iudicium deductae*. Also compare G.3,181; G.4,103–109 and remarks of W. Osuchowski about this subject (*Zarys rzymskiego prawa prywatnego*, Warszawa 1966, p. 183).

[18] Ulp.D.44,2,3: *Iulianus libro tertio digestorum respondit exceptionem rei iudicate obstare, quotiens eadem quaestio inter easdem personas revocatur: et ideo et si singulis rebus petitis hereditatem petat vel contra exceptione summovebitur*. Also compare Ulp.D.44,2,7,4.

[19] A. Kirschenbaum, *Sons, Slaves*…, p. 65.

[20] About the subject of *peculium filiae familias* see: M. Garcia-Garrido, *Ius uxorium. El regimen patrmonial de la mujer casada en derecho Romano*, Roma–Madrid 1958, p. 7–31; P.E. Corbett, *The Roman Law of Marriage*, Oxford 1934 (reprint 1979), p. 111; E. Cuq, *Manuel institutions juridiques des Romains*, Paris 1928, p. 143; E. Ejankowska, *Peculium filiae familias w okresie późnej republiki rzymskiej i pryncypatu*, „Czasopismo Prawno-Historyczne" 2005, vol. 57, no. 2, p. 239–249.

[21] See: O. Lenel, EP, p. 275: *Quod cum eo qui in aliena est potestate negotium gestum esse dicitur vel de peculio seu quod iussu aut de in rem verso*.

The jurist cites a part of a clause of the edict of the praetor about actions performed with the one who remains under control and admits that it applies to male, a not female sex. However, he states that each of these claims can be applied also due to actions of females.

The above mentioned statement of Ulpian should be treated as a general rule and the sources which will be analyzed below are its specification.

The text of Gaius states about the possibility of utilization of the claims of praetors due to business activity of daughters under power or female slaves. His extract referring to *actio de peculio* sounds as follows:

D.15,1,27pr. (Gai.lib.9 ad ed provin.): *Et ancillarum nomine et filiarum familias in peculio actio datur: maxime si qua sarcinatrix aut textrix erit aut aliquod artificium vulgare exerceat, datur propter eam actio: depositi quoque et comodati actionem dandam earum nomine Iulianus ait:* (…).

The text generally is treated as an altered one but this does not refer to the extract (*Et ancillarum … datur*), which concerns the extension of *actio de peculio* on *filia familias* and *ancilla*[22]. The second part of the sentence can be a result of actions of compilers, but it is not totally sure[23]. M. Garcia-Garrido points that words such as *sarcinatrix* and *textrix* were present in the original text of Gaius. For such an opinion – according to the Romanist – is the fact that the word *sarcinator*, a male equivalent of *sarcinatrix* is repeated in the Institutions of Gaius (G.3,143; 3,162; 3,205; 3,206). The settlement of this doubt is not necessary in this point because engagement in business activity mentioned in this source (*…si qua sarcinatrix aut textrix erit aut aliquod artificium vulgare exerceat…*) was not a necessary condition to grant *actio de peculio*[24].

Gaius also cites the opinion of Julian, who expressed his consent towards the admission of *actio de peculio*, if a female slave or daughter under power performed a safekeeping or bailment contract[25].

The confirmation of the opinion of Julian is the statement of Ulpian contained in a part of his commentary to the edict of the praetor:

D.13,6,3,4 (Ulp.lib.29 ad ed.): *Si filio familias servove commodatum sit, dumtaxat de peculio agendum erit: cum filio autem familias ipso et directo quis poterit, sed et si ancillae vel filiae familias commodaverit, dumtaxat de peculio erit agendum*[26].

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[22] About the subject of alteration see: M. Garcia-Garrido, *Ius uxorium…*, p. 15–16. The author cites remarks of Romanists pointing the changed performed by compilers. They regard the following phrases: 1) *in peculio actio datur* (S. Solazzi, *Sulla capacitá…*, p. 158); 2) *depositi vel quoque et commodati* (E. De Ruggiero, *Depositum vel comodatum*, BIDR 1907, no. 19, p. 29) and the extract: *maxime…propter eam actio* (G. Heck, *Die fiducia cum amico contracta*, ZSS 1899, no. 10, p. 126).

[23] See: M. Garcia-Garrido, *Ius uxorium…*, p. 16.

[24] M. Garcia-Garrido, *Ius uxorium…*, p. 16 (no.41).

[25] About this subject: *ibidem*, p. 17; S. Solazzi, *Sulla capacitá…*, p. 158.

[26] About this source see S. Solazzi (*Sulla capacitá…*, p. 157), according to whom the text of Ulpian could be altered. The author supposes that in the original statement of the jurist, the responsibility of *patris familias* due to a contract conducted by a daughter was more limited as in reference to the son.

The jurist believes that in case conducting a bailment contract with a *filius familias, actio de peculio* should be performed, that is a claim against the possessor of power on the basis of which it was possible to sue him only to the amount of *peculium* (*dumtaxat de peculio agendum erit*). Next, he adds that in such a situation it was possible to directly sue the son (*cum filio autem familias ipso et directo quis poterit*). However, if a female slave or daughter under power was one of the parties of *commodatum* agreement, then – according to Ulpian – only a *peculio* claim would be possible (*dumtaxat de peculio erit agendum*). From the above cited text, it directly arises that *filius familias* – on the contrary to filia familias – could contract an obligation and also be sued. The daughter remaining under *patria potestas* was in this case treated just like a female slave (*ancilla*). Agreements conducted by her and also by other persons mentioned by Gaius (G.3,104) actually existed and they were treated as natural obligations in the classical period of law[27].

The possibility of utilization of a claim against *pater familias* due to actions performed by the daughter administering *peculium* can be deduced from another statement of the jurist:

D.3,5,13(14) (Ulp.lib.10 ad ed.): *Si filius familias negotia gessisse proponatur, aequissimum erit in patrem quoque actionem dari, sive peculium habet sive in rem patris sui vertit: et si ancilla simili modo*.

Ulpian states that in case of conducting a legal act (*negotia gessisse*) by a son who has *peculium* (*peculium habet*) or if he increased benefits of his familial superior (*sive in rem patris sui vertit*), a claim should be placed also against the father (*in patrem quoque actionem dari*). According to the jurist such a solution in case of the son can be utilized if the subject performing was a female slave (*et si ancilla simili modo*)[28]. Despite the fact that Ulpian does not use the word *filia familias* but *ancilla* in this case – according to *argumentum a minori ad maius* – it can be assumed that this claim could also be utilized by the contractor of the daughter who administered *peculium.*

The texts of Paulus and Ulpian deserve special attention. It arises from them that *actio de peculio* could be filed against *pater familias,* if a married *filia familias* – due to divorce (*divortii causa*) – would take some belongings from the household of the husband. As it is known, if in such case occurred *uxor sui iuris* – the husband would be entitled to file an *actio rerum amotarum* (claim to return

[27] About natural obligations of *filiae familias* see: E. Ejankowska, *Położenie prawne 'filiae familias' i jej udział w obrocie prawno-gospodarczym państwa rzymskiego w okresie późnej republiki i pryncypatu* (a non-published doctoral thesis), Rzeszów 2003, chapter 2 at 4, p. 66 and following, with sources and literature indicated therein.

[28] Using the word *ancilla* by Upian raises doubts of S. Solazzi (*Sulla capacitá*…, p. 157–158), who believes that in reference to this matter it would be more relevant to compare the situation of *filius familias* and *servus* or *filia familias.*

taken things)[29] against her. A question arises concerning the security of praetor law for the husband if appropriation of belongings was performed by a wife under the power of his *patris familias*. The answer can be found in of the texts of Paulus:

D.25,2,3,4 (Paul.lib.7 ad Sab.): *Si filia familias res amoverit, Mela Fulcinius aiunt de peculio dandam actionem, quia displicuit eam furti obligari; vel in ipsam ob res amotas dari actionem*[30]*, sed si pater adiuncta filia de dote agat, non aliter ei dandam actionem, quam si filiam rerum amotarum iudicio in solidum et cum satisdatione defendat, sed mortua filia in patrem rerum amotarum actionem dari non oportere Proculus ait, nisi quatenus ex ed re pater locupletior*.

The jurist cites the view of Mela and Fulcinius, who believe that in such a situation *actio de peculio* against the superior of the family can be granted because it seems appropriate to acknowledge *filiae familias* as responsible for the theft or an action against her can be placed[31]. Next, the same jurists add that if the father with the consent of the daughter (*pater adiuncta filia*) placed a claim to return dowry, then a claim *in solium* should be granted against him without any limits to the amount of *peculium*. And in case of death of *filiae familias* – according to the opinion of the cited Proculus – the familial superior should not be sued. Unless, as the jurist adds, the father benefitted from it (*nisi quatenus ex ea re pater locupletior sit*), that is – the enrichment would be a consequence of the fact that *filia familias* had taken some belongings from the household of the husband.

The possibility to sue *patris familias* due to the above mentioned cause is discussed by Paulus in accordance with the words of Julian:

D.13,1,19 (Paul.lib.3 ad Nerat.): *Iulianus ex persona filiae, quae res amovit, dandam in patrem condictionem in peculium respondit*[32].

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[29] Paul.D.25,2,1: *Rerum amotarum iudicium singulare introductum est adversus eam quae uxor fuit, quia non placuit cum ea furti agere posse: quibusdam existimantibus ne quidem furtum eam facere, ut Nerva Cassio, quia societas vitae quodammodo dominam eam faceret: aliis ut Sabino et Proculo, furto quidem eam facere, sicuti filia patri faciat, sed furti non esse actionem constituto iure, in qua sententia et Iulianus rectissime est.* A thorough analysis of this source is performed by A. Wacke (*Actio rerum amotarum*, Graz 1963, p. 86–87), who points out that for Sabinius and Proculus *res amovere* was a construction closest to a delict , whereas Nerva and Cassius were for the idea to treat this action in the category of *negotium*. Also see: P. Bonfante, *Corso di diritto*, I, p. 209; R. Sohm, *Instytucje*…, p. 517. See: D.25,1,2: *Nam in honorem matrimonii turpis actio adversus uxorem negatur*.

[30] About difficulties related to the interpretation of the phrase "*vel in ipsam ob res amotas dari actionem*" writes A.Wacke (*Actio rerum*…, pp. 130, no. 9) and he points literature regarding this matter.

[31] A different interpretation of this extract – considering the conclusions arisen from its comparison to other text of Paulus (D.25,2,6,2) – presents S. Solazzi (*Sulla capacitá*…, p. 140–141) and in the last phrase of deliberations he concludes that these sources should be treated as being altered. This view is not shared by: P. Huvelin, *Études sur le furtum dans le tres droit romaine*, Paris 192, p. 599 at M. Garcia-Garrido, *Ius uxorium*…, p. 18.

[32] According to S. Solazzi (*Sulla capacitá*…, p. 142) here it concerns a claim being a substitution of *condictio furtiva*, thanks to which it was possible to claim return of the value of belongings taken by *filia familias* from the household of the husband. Also see A. Kirschenbaum, *Sons,*

A. Wacke – while analyzing the text – comes to the conclusion that Julianus cited by Paulus agrees to grant *condictio de peculio* probably because in reference to the current state in which a wife *alieni iuris* had taken some belongings, which were included in her *peculium*[33].

Another source which is necessary for the discussed matter is the extract of Ulpian:

D.15,1,13,12 (Ulp.lib.29 ad ed.): *Ex furtiva causa filio quidem familias condici posse constat. An vero in patrem vel in dominum de peculio danda est, quaeritur: et est verius, in quantum locupletior dominus factus esset ex furto facto, actionem de peculio dandam: idem Labeo probat, quia iniquissimum est ex furto servi dominum locupletari impune. Nam et circa rerum amotarum actionem filiae familias nomine in id quod ad patrem pervenit competit actio de peculio*[34].

The jurist considers to grant not only *conditio furtiva* but also *actio rerum amotarum* due to theft (*furtum*). Ulpian states that in case such a delict was committed by a son, it was possible to utilize *condictio furtiva* (*actio rei persequendae* claim) against him. Later, he states that it would be more justified (*verius*) to sue the possessor of power on the basis of *actio de peculio* with the limits to the amount of enrichment, which would raise on his side due to theft (*in quantum locupletior dominus factus esset ex furto facto*). In order to support his statement, Ulpian cites the opinion of Labeon, according to whom it is "highly unjust" for an owner of a slave to remain unpunishedly enriched due to a theft performed by him (*ex furto servi*). As – adds the jurist – also due to taking away belongings of the household of the husband by *filia familias*, *action de peculio* can be granted. It is limited to the amount of the enrichment, which has become a share of the father (*in id quod ad patrem pervenit*)[35].

As it arises from the above performed analysis of sources concerning *actio de peculio*, it was granted – both to a slave and son – because of business activity of *filiae familias*, to whom *peculium* was entrusted. It means that in the princi-

*Slaves*…, p. 52; M. Kaser, *Das Römische*…, I, p. 517; H. Insadowski, *Rzymskie prawo małżeńskie a chrześcijaństwo*, Lublin 1935, p. 242.

[33] A. Wacke, *Actio rerum*…, p. 138–139.

[34] P. Huvelin, *Études sur le furtum*…, p. 599 believes that the last sentence (*Nam… de peculio*) was not written by Labeon but compilers because it refers to *filia familias* and not *servus* to whom the jurist clearly refers his reasoning. Moreover, the utilization of the expression *nam et* seems suspicious to him. P. Zanzucchi has a different point of view (*Il divieto delle azioni famose e la reverentia tra coniugi in diritto romano*, RISG 1906, no. 42, p. 19), which proves that *nam et* also occurs in other texts of Ulpian. A. Wacke (*Actio rerum*…, p. 136–137) suggests that in the text there are some discrepancies but – according to him – they can be explained by the fact that the jurist was for the possibility of performing one and the other claim or (in a wrongly formulated phrase of the final extract) only pointed some similarities between these two claims.

[35] See: Pap.D.25,2,3,5: *Viva quoque filia, quod ad patrem ex rebus amotis pervenit, utili iudicio petendum est*.

pate period there was a legal rule which enabled the daughter to participate in legal and business treading. However, this action was also used as an equivalent of *actio rerum amotarum* in a situation, when the wife was subordinated to the power of a family leader in agnation family of her origin.

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## Summary

The application of *actio de peculio* due to *filiae familias* – in the principate period – is not an often discussed topic in literature. This claim was one of additional actions, the aim of which was 35 to include the family superiors and owners of slaves in the responsibility for contractual obligations. Not only in Gaius Institutions (G.4,69–4,77), but also in the formula of the claim of the reconstruction of the praetorian edict written by. O Lenel, no feminine persons are included. However, it arises from other sources that this action could have been applied due to business activity of daughters, which was performed on the basis of *peculium*. *Actio de peculio* – in reference to a married daughter being a subordinate of the father – also had another function; it was the equivalent of *actio rerum amotarum*.

*Keywords: actio de peculio*, daugther under *patria potestas*, peculio property, *actio rerum amotarum*, principate, complaint, praetorian law

## ZASTOSOWANIE *ACTIO DE PECULIO* Z POWODU *FILIAE FAMILIAS* W OKRESIE PRYNCYPATU

## Streszczenie

Zastosowanie *actio de peculio* z powodu *filiae familias* w okresie pryncypatu nie jest zagadnieniem często poruszanym w literaturze przedmiotu. Skarga ta należała do powództw o charakterze dodatkowym, których celem było rozciągnięcie odpowiedzialności na zwierzchników familijnych i właścicieli niewolników za zobowiązania kontraktowe osób im podległych. Jakkolwiek zarówno w Instytucjach Gaiusa (G.4,69–4,77), jak i w formule skargi zamieszczonej w rekonstrukcji edyktu pretorskiego zredagowanego przez O. Lenela nie są wymienione osoby płci żeńskiej, z innych tekstów źródłowych wynika, że powództwo to mogło być stosowane ze względu na działalność gospodarczą, którą córki rodziny prowadziły w oparciu o *peculium*. *Actio de peculio* w odniesieniu do zamężnej córki podległej władzy ojcowskiej spełniała też inną rolę – była odpowiednikiem *actio rerum amotarum*.

*Słowa kluczowe: actio de peculio*, córka podległa *patria potestas*, majątek pekuliarny, *actio rerum amotarum*, pryncypat, powództwo, prawo pretorskie