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THE ROLE OF MASTER'S WILL AND CAUSA PECULIARIS FOR THE CREATION OF THE PECULIUM

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SUMMARY

Slaves can have their own *quasi patrimonium – peculium*. It consists of property granted by their masters or acquired from third parties. The focus of this article is to clarify the nature of the *concessio peculii* and answer the question whether it is the act which creates the *peculium*. Furthermore, it explores the role of the master's will and *causa peculiaris* for the creation of the *peculium*. Finally, the study considers the way for creation of the *peculium* without the master's will through the acquisition of property from third parties.

KEY WORDS

Peculium; Actio De Peculuio; *Concessio Peculii*

A small part of the research on the *peculium* and the *actio de peculio* pays a special attention to the creation of the *peculium* and the moment of its occurrence. Researchers mainly focus on its content and on the limits of the master's liability. This is most likely because Roman jurists themselves did

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not examine this legal issue in detail, which, however, does not mean that they did not distinguish between the creation of the *peculium* and any other investment of a property in it. Jurisprudence normally considers firstly whether the *peculium* was granted in favour of the slave at all, which in turn brings its existence and the limited liability of the master under the *actio de peculio et de in rem verso*. From this moment onwards, the slave could get more property, which will accordingly affect the liability of his master.

The different authors imply distinct perspectives of the limited liability of the master for the activity of their slaves and sons in power. Buckland and Mandry[2] for instance regard the phrase *concessio peculii* as an act creating the *peculium*. Maria Miceli and Eisele[3] consider it in terms of the slave-master internal relations. Thus, this is the moment when the creditors of the slave could bring legal actions directly against his master. Jean-Jacques Aubert[4] considers the *peculium* creation again as figuring out the extent of the master's liability. Andreas Wacke,[5] like Miceli, explored the possibility of the slaves in making the deals on behalf of their masters bringing the focus of his research on *libera administratio*. Pesaresi[6] stressed the procedural aspects of *actio de peculio* as a mark for the creation of the *peculium*.

CONCESSIO PECULII

The assignment of property to the slave *peculium* by the master happens through a *concessio peculii*. So, the questions on this act of the master should clarify whether it creates the *peculium* and what is its legal content and whether *concessio peculii* is a legal term in the strict sense of the word.

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[2] G. von Mandry, Das gemeine Familiengüterrecht: mit Ausschluss des ehelichen Güterrechtes. Tübingen, Laupp 1876, S. 69; W. W. Buckland. *The Roman law of slavery: The condition of the slave in private law from Augustus to Justinian.* Cambridge, CUP, 1908 (repr. 2010), p. 197.

[3] F. Eisele. IV. Zum römischen Sklavenrecht (I. 25 § 1 de usufr. 7,1.). *ZSSRG RA*, 26, 1 (1905), SS. 66 – 83; M. Miceli. Studi sulla rappresentanza nel diritto romano. Milano Giuffrè. 2008.

[4] J.-J. Aubert, Dumtaxat de peculio: What's in a Peculium, or Establishing the Extent of the Principal's Liability. *P. J. du Plessis (ed.), New Frontiers Law and Society in the Roman World*, Edinburgh, EUP, 2013, pp. 192 – 206.

[5] A. Wacke. Die libera administratio peculii. Zur Verfügungsmacht von Hauskindern und Sklaven über ihr Sondergut. *T. Finkenauer (Hrsg.). Sklaverei und Freilassung im römischen Recht.* Berlin, Heidelberg, Springer, 2006.

[6] R. Pesaresi. Studi sull'*actio de peculio.* Bari, Cacucci. 2012.

According to Buckland, the rules for getting property in the *peculium* should also apply to its creation,[7] as he believes that there are sufficient similarities between the two moments and so there is no reason not to apply them. The author adds that the slaves were able to detain and manage the things of the *peculium* as their own property.[8] Mandry also views the *concessio* as an act by which the *peculium* is created[9] and clarifies that the will of the master to assign *res peculiaria* is not merely to give its real possession to the slave, but eventually to make him inherit the property up on the manumission. Both authors do not explain why the concession is the act creating the *peculium* and do not consider the hypotheses of its establishing with property from a third party without a *concessio*. Wacke argues that *concessio peculii* can also be conducted silently, but without of explicit consideration whether this is the act creating the *peculium*.[10]

The investment of property in the *peculium* by the master is expressed by the word *concessio*, which can be translated as „grant“ or „assignment“.[11] But is this formally the establishing act of the *peculium*, or is it an act to give to the slave the possession over the peculiar property?

Paul in his book on Sabin (*D. 15.1.8. Paul. l. 4 ad Sab.*) states that *concessio* takes place after the fulfilment of two requirements: 1) to make the actual transfer of a thing, and 2) to consider transferred property as part of the slave's *peculium*. Although it is part of the master's patrimony, the actual shift of the possession is also required, so the will of the master is not sufficient, and we could find some explanations for this in the discussed text.

> Non statim quod dominus voluit ex re sua peculii esse, peculium fecit, sed si tradidit aut, cum apud eum esset, pro tradito habuit:

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[7] Buckland himself points out that the texts he refers to refer to the subsequent acquisition of property and not to its initial creation and accepts that these rules should be common. Cfr. Buckland (1908), p. 197.

[8] Buckland (2010), p. 187. De facto property of the slave: rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis sed iuris est, D. 41. 2. 49. 1; 41. 1. 10. pr., 1; G. 2. 86; I. 2. 9.pr.

[9] According to him, however, this act is not legal, but factual and does not need a special form of validity. Cfr. Mandry (1876).

[10] According to Malina Novkirishka, the classical lawyers do not figure out the name, type and nature of the act creating the peculium. She assumes that the relations (fixed at the accounting level) require a declaration of intent such as declaratio, most often using the verbs concedere and constituire, which the impression that the establishment of the peculium infers different form, besides the concessio, but it is not specified which one. Cfr. M. Новкиришка-Стоянова. Peculium и actio de peculio. Ius romanum 1 (2019), с. 210 – 250.

[11] Cfr. C. T. Lewis, and C. Short, *A Latin dictionary: founded on Andrew's ed. of Freund's Latin dictionary*, 1966.

> desiderat enim res naturalem dationem. Contra autem simul atque noluit, peculium servi desinit peculium esse.
> Not as soon as the master wishes one of his things to be a *peculium*, he makes it a *peculium*, but if he gives it or, if it has already been with him, to consider it as given: the natural giving of the thing is necessary. Conversely, once he wants it no more, the *peculium* of the slave ceases to be a *peculium*.

According to the civil law, as said by Sabin, not only the will of the master is required for the creation of the *peculium*, but the thing must also be actually transferred from the patrimony of the master to the *peculium* of the slave (*naturalis datio*).[12] As an exception to the general rule, it should accept transfer performance only when the good is already in the real possession of the slave. Though, for its withdrawal of the *peculium*, it is sufficient for the master only to manifest his unwillingness to treat the thing like this, and it promptly ceases to be such. Even if there is no transfer in the legal sense of the word, to consider the property in the *peculium* of the slave it was necessary to give it him *de facto*, which is comparable to the shift under civil law. The possession of the slave over the property is a factual act, which, however, has legal consequences. The purpose of the above cited text is to secure the turnover preventing any abuses by the master, who could easily deceive his own creditors if there is requirement for actual transfer, „fictitiously separating" elements of his property as *peculium* given to the slaves. A confirmation of this attitude is another text of Pomponius,[13] where the jurist considered as invalid a fictitious obligation of the master to the slave. The master thus increased the *peculium* „on paper", misleading the creditors, convinced that they negotiate with a solvent[14] slave or a son in power. However, the master had no real intention to fulfil his „obligation" to the *peculium*, and thus its value will not actually increase and there would be no real property in the *peculium* to satisfy the creditors.[15]

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[12] Otto Karlowa also interpreted naturalis datio in this sense. According to Mandry, the term naturalis datio is used to emphasize the difference with the withdrawal of property, in which only the intention of the master is sufficient. O. Karlowa, *Römische Rechtsgeschichte, T. II.* Leipzig, Veit, 1901 (Nd 1997).

[13] D. 15.1.4.1. Pomp. l. 7 ad Sab. Sed hoc ita verum puto, si debito servum liberare voluit dominus, ut, etiamsi nuda voluntate remiserit dominus quod debuerit, desinat servus debitor esse: si vero nomina ita fecerit dominus, ut quasi debitorem se servo faceret, cum re vera debitor non esset, contra puto: re enim, non verbis peculium augendum est.

[14] On the importance of solvency cfr. Wacke (2006) and Buckland (1908/2010).

[15] This rule is entirely in favour of the master, because if those fictitious obligations were to be valid, he would have to fulfil them. Furthermore, they could

So, *concessio peculii* is the actual assignment of a property by the master to the *peculium* of the slave. In a broader sense, *concessio* can be any assignment, where the verb *concedere* simply means the granting act allowing an action against the master. Thus, *concessio* had no strict legal meaning and its connotation depends on the context. It did not in itself give rise to rights and obligations between the slave and the master, and therefore cannot be qualified as a legal act.

The *dominus* could had transfer the property to the slave also without *concessio*, but in these cases the master-slave relation resembles the position **of creditor and debtor**. This should be the case when, e.g., the master lends sum of money to the slave, and so, the later, should pay back them. In the case of *concessio*, however, there is no such an obligation for the slave, because the sum always moves in one direction. As Mandry[16] notes, *concessio* is a unilateral declaration of the master not requiring acceptance by the slave. However, it is not acceptable to think that the master always has a donor's intent providing the slave with *peculium* or augmenting its value. It is normal to expect the slave to run the business making profit. Through the *concessio* the master could invest some resources in the *peculium* without losing his right to be his quasi-creditor or debtor in a separate relationship.

If we compare the *peculium* with the limited liability companies under the modern Company law[17], we can say that the master is in a similar position to that of the sole owner of such structures. And so, *res peculiaria* plays the role of the first contribution in the registered capital. This in the ancient times was the informal act of *concessio* of some property to the slave, making him its „manager". Thus, the master could increase or decrease the *peculium*, and so, he could be both a creditor and a debtor of his slave, just as the modern-law „sole owner" in person could be the creditor or the debtor of his company.

Upon depreciation of the assets in the *peculium* the master could lend some new money increasing his credit or concede more property, but this time gratuitously, thus, the slave would not have an obligation to return it (*D. 15.1.4.5*

be computed in the deductions and eventually increase the amount of the peculium.

[16] Mandry (1876).

[17] According to Anton Rudokvas, the reason Roman law did not create the concept of a legal entity is precisely the peculium, which allows the separation of a property and the limitation of the owner's liability to its amount, like modern Limited Liability Companies. He refers to D.15.2.3. Pump. l. 4 ad Q. Muc., according to which the peculium retains its individuality even after the death of the slave or his manumission. Cfr. A. D. Rudokvas. Peculium ed il problema della persona giuridica nel Diritto Romano. *Revista Chilena de Historia del Derecho,* 22 (2010), pp. 125 – 129.

Pomp. l. 7 ad sab.). The depletion of the property in the *peculium* does not cease its existence, and the master may make a new *concessio* at his discretion.

> D. 15.1.4.5 Pomp. 7 ad sab. Si aere alieno dominico exhauriatur peculium servi, res tamen in causa peculiaria manent: nam si aut servo donasset debitum dominus aut nomine servi alius domino intulisset, peculium suppletur nec est nova concessione domini opus.
> When the borrowed master's money exhausts the *peculium* of the slave, the things remain on the basis of *peculium*: because if the master has released the debt of the slave or someone else has paid the master on behalf of the slave, the *peculium* will be supplemented and no new *concessio* from the master will be needed.

The debt of the slave to the master may exceed the amount of the property in the *peculium*, so, if a creditor sues his master with *actio de peculio*, he will deduct his claims against the slave, and so, the plaintiff will not be able to direct the execution to the *peculium*. Pomponius gives us information that, nevertheless, the *peculium* would not disappear because at any time the master can „donate (forgive) the debt"[18] of his slave or to receive payment from a third party. In these cases, there will be no need for a new *concessio*.[19] This means that the master actually remits the debt value to the *peculium*, which is a form of concession on the basis of donation. This example shows that the concession can take various forms. In the relationship between the slave and the master, the property can pass freely from the *peculium* to the *dominus* patrimony and vice versa, without the need to follow the formal requirements for the transfer of property, because in the legal sense there is no relocation of property. The ownership changes only upon a formal act of transfer if manumitted the slave. Only then the property in the *peculium* will also become his legal ownership.

The master may repeatedly concede assets in the *peculium* of his slave. However, not every assignment should be an act of creating a new *peculium*. Thus, the concession and the creation of the *peculium* are two separate concepts. *Concessio* is **not the legal act by which the** *peculium* **is created** in favour of the slave, but it is a general concept without **a strict legal and tech-**

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[18] Donare debitum.

[19] Maria Miceli points out that the master cannot dispose of the peculiar property completely freely while it is in this form. He is free to withdraw it at any time, but if the property is peculiar, it serves as a guarantee for creditors. Cfr. M. Miceli. *Sulla struttura formulare delle '*actiones adiecticiae qualitatis. Torino, Giappichelli, 2001.

nical meaning as assignment of property from the patrimony of the master to the peculium. It could be in the form of actual transfer of property (*D. 15.1.8. Paul. l. 4 ad Sab.*) or through another legal act such as remission of debt (*D. 15.1.4.5 Pomp. l. 7 ad Sab*). The concession itself does not describe either an act of creating the legal obligation,[20] nor a disposal transaction,[21] but is a general concept for the transfer of possession and separating the property by the owner.

CREATION OF THE PECULIUM BY THE MASTER

The creation of the *peculium* by the master is commented on by Marcian (*D. 15.1.40.1 Marc. l. 5 reg.*), who compares it to a slave who is born, lives and dies:

> Quomodo autem peculium nascitur, quaesitum est. Et ita veteres distinguunt, si id adquisiit servus quod dominus necesse non habet praestare, id esse peculium, si vero tunicas aut aliquid simile quod ei dominus necesse habet praestare, non esse peculium. Ita igitur nascitur peculium: crescit, cum auctum fuerit: decrescit, cum servi vicarii moriuntur, res intercidunt: moritur, cum ademptum sit.
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> Yet it is asked how the *peculium* is born. And so, the old ones distinguish, if the slave received what the master did not need to provide, it is *peculium*. If indeed a tunic or something like that, which the master had to provide, is not a *peculium*. And so, the *peculium* is born; increases when supplemented; decreases when vicar dies, the things perish; dies, once taken away.

It is not clear from the quoted text what the metaphor for the birth of the *peculium* used by the „ancient jurists“ (*veteres*, connote the Republican jurists) means, and whether this is still relevant in the time of Marcian, as well. However, there must be such a connection, because the text begins with: „How is the *peculium* born?“ and ends with: „This is the way the *peculium* is born.“ The sense should be that the *peculium* is „born“ by investing property

[20] Acts creating legal obligations are the sale, loan, etc so, the party is bound, but the act itself does not transfer ownership.
[21] The disposal act is the one transferring the ownership, the respective good or right.

in it, and the old authors[22] have distinguished between such cases. The assignment of property by the master takes place through *concessio*, which in turn requires the slave to get the actual possession of the thing, i.e., without it, there is no *peculium* created. There could not be an initially „empty *peculium*", so, it had appeared only upon the first grant of property, shifting to the slave the real possession.

The master may express his will to grant property in the *peculium* silently or by implied actions.[23] This is clear from the following texts (*D. 15.3.3.3. Ulp. l. 29 ad ed.; D. 15.1.25: Pomp. l. 23 ad Sab.*).

> D. 15.3.3.3. Ulp. l. 29 ad ed. Proinde si servus sumpsit pecuniam, ut se aleret et vestiret secundum consuetudinem domini, id est usque ad eum modum, quem dominus ei praestare consueverat, in rem videri domini vertisse labeo scribit. Ergo idem erit et in filio.
> Thus, if the slave takes some money to eat and dress following the custom of the master, i.e., everything in this way, which the master is accustomed to give him, it seems to turn back to the master, writes Labeo. So, the same should apply to the son.

and

> D. 15.1.25: Pomp. l. 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.
> For clothing, the *peculium* arises, when it is given by the master in the manner that he wanted the slave would use this clothing permanently and it is given to him on this basis that no one else would use it and thus should be reserved for his use. But if this garment is given by the master for a certain use at a certain time, for example, when he accompanies him or when he serves the diners, this garment is not a peculium.

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[22] According to Aubert, the birth of the peculium can take place in diverse ways and refers to a text from the 11th book of the Institutions of Florentine, D. 15.1.39 Florent. 11 Inst., cfr. Aubert (2013).

[23] Mandry (1876) and Buckland (2010): D. 15.1.49 Pomp. l. 4 ad Q. M. pr. Non solum id peculium est, quod dominus servo concessit, verum id quoque, quod ignorante quidem eo adquisitum sit, tamen, si rescisset, passurus erat esse in peculio.

In case the slave has been given some money to buy clothing or food that was within the custom of the master, they will turn back to the master's patrimony and will not belong to the slave's *peculium* (*D. 15.3.3.3 Ulp. l. 29 ad Ed.*), unlike the instances when he was exceptionally given something. It is clear from the context that the clothing and the food were purchased with money that did not belong to the slave (most likely master's money), because otherwise they would become part of the *peculium*. The case considered by Ulpian in the context of the question whether there will be a theft if the slave uses his master's money to buy clothing for himself without his consent as Pomponius suggested (*D. 15.1.4.2 Pomp. l. 7 ad Sab.*),[24] One could easily see the answer: once the slave got the clothes and food following the custom of his master, they will become a part of master's patrimony and the jurist considered them as his enrichment. The master should take diligent care of his slaves, and his failure could make the slave buying some food and clothing to the ordinary extent without prior consent. The responsibility of the master to third persons, creditors of the slave, would be under the *actio de in rem verso* (*D. 15.1.40.1 Marc. l. 5 Regul*). However, if granted the garment for permanent use to the slave and with the explicit note that it shall not be given to another person, it will be part of the *peculium* (*D. 15.1.25 Pomp. l. 23 ad Sab.*). Neither Labeo (according to Ulpian), nor Pomponius consider in these texts an explicit will of the owner that the property should be a part of the *peculium* and respectively a statement for its withdrawal is lacking as well. However, there is another requirement to deem the property as part of it. In any case, the master can, by his own explicit will, grant a property as a *peculium* to a slave, but what if such a statement is lacking. The above consultations describe practical situations where jurists considered a property as *peculium* despite the lack of an explicit will. In the first place it is when the master acts with his necessary care about his slave (*D. 15.1.40.1 Marc. l. 5 Reg. ...necesse non habet praestare, ... non esse peculium*), the garments will not become part of the slave *peculium*. If someone else gave the money instead of him, there will be an instance of enriching the master and accordingly the *actio de in rem verso* will be available (*D. 15.3.3.3. Ulp. l. 29 ad Ed. ...in rem videri domini vertisse labeo scribit*).

If there was support made with no explicit will exceeding the necessary care of the master, then the assessment whether the property becomes a part of the *peculium* depends on its purpose referring to the *peculium* assets. The

[24] If the slave seizes property from the peculium without having the right to do so, he commits theft. Cfr. D. 15.1.4.2 Pomp. l. 7 ad Sab. 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.

will of the master is often unclear or even absent, which is why in these cases the Roman jurists give priority to the connection between the property and the *peculium*. This is the case by Pomponius where the slave got the clothing for his permanent use (*D. 15.1.25: Pomp. l. 23 ad Sab. ...ut eo vestitu servum perpetuo uti vellet eoque nomine ei traderet*), and is became part of his *peculium*, as it purpose is to serve the slave constantly, and at the same time there is no duty for the master to provide them, since this clothing falls outside the necessary care. However, if he wishes, he can make any garment part of the *peculium*.

The connection between the property and the *peculium* (*causa peculiaris*) is most clear in Papinian consultation:

> D. 41.2.44.1 Pap. l. 23 Quaest. Quaesitum est, cur ex peculii causa per servum ignorantibus possessio quaereretur. Dixi utilitatis causa iure singulari receptum, ne cogerentur domini per momenta species et causas peculiorum inquirere. Nec tamen eo pertinere speciem istam, ut animo videatur adquiri possessio: nam si non ex causa peculiari quaeratur aliquid, scientiam quidem domini esse necessariam, sed corpore servi quaeri possessionem.
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> The question was asked why possession is acquired by slaves for their masters, even when they know nothing of it, on the basis of a cause that concerns their *peculium*. I said that this was accepted by the lawyers to meet the requirements of practice and by virtue of *ius singulare* in order that masters would not be obliged to find out at every moment the contents and the modes of acquisition of their *peculia*. This does not mean, however, that the master is considered to acquire possession by will alone [*animo*], for if something is acquired [by a slave] not on the basis of a *causa peculiaris*, the knowledge of the acquisition by the master is required, but one acquires possession by the corpus of the slave.[25]

Papinian considers the case where a master acquires possession of a thing through his slave, without an explicit knowledge of it. According to Hans Ankum[26] it is impractical and even impossible for the master to know about any acquisition of property from slaves. Papinian based his decision precisely on the *utilitatis causa iure singulari*, i.e., of practical necessity (accepted exceptionally for the specific case). The actions of the slave directed at third parties are *de facto* equated with the actions of the master and achieve the

[25] This is the translation proposed by Hans Ankum, cfr. H. Ankum. The Functions of Expressions with Utilitatis Causa in the Works of the Classical Roman lawyers. *Fundamina: A Journal of Legal History,* 16, 1 (2010), pp. 5 – 22.
[26] Ankum (2010).

result of direct representation. According to Papinian this is an exception to the general rule, which is justified by *utilitatis causa*.[27] He makes an important distinction when the will of the master will be needed, namely in cases where the acquisition is not in the *peculium*. The reason for this is that then the property will go to the patrimony of the master, for which obviously the will of his slave will not be enough, but the master's own *animus*, respectively *scientia*, was necessary. When it goes to the *peculium*, then the will of the slave will be quite sufficient to get the possession.

Paul, Book 54 On the Edict, referring to Sabine, Julian, and Cassius, states the following:

> D. 41.2.1.5. Paul. l. 54 ad Ed. Item adquirimus possessionem per servum aut filium, qui in potestate est, et quidem earum rerum, quas peculiariter tenent, etiam ignorantes, sicut Sabino et Cassio et Iuliano placuit, quia nostra voluntate intellegantur possidere, qui eis peculium habere permiserimus. Igitur ex causa peculiari et infans et furiosus adquirunt possessionem et usucapiunt, et heres, si hereditarius servus emat.
> We also acquire possession through a slave or a son under paternal power, and this is the case with property that is *peculium*, even when we do not know [about it], as Sabin believes. Cassius and Julian: because those who we have allowed to have *peculium* are considered to rule with our will. Therefore, in connection with the *peculium*, both a minor and a madman may acquire possession, acquire by *usucapio*, [as well as] an heir, if the slave, part of the inheritance, buys [something].

According to Paul possession of a thing can be acquired through a slave or son in power holding it like a *peculium*, even when the master does not know (*ignorans*) about the acquired possession. While Paul's teacher and predecessor, Papinian, presents us with a more conservative approach, referring to a decision in this sense given exceptionally in view of the practicality of *utilitatis causa iure singulari*. Paul[28], in turn, sets out the opinion as a general rule. The dogmatic argument is that by granting property in the *peculium*, consent is also given for that property to be possessed by a slave or son in power. *Causa peculiaris* will ultimately determine whether the slave can acquire possession for his master even when he does not know that the thing is

[27] In the internal relations between the slave and the master, a similar fiction is also formed about the capacity of the slave, who is presented as a quasi-debtor: ut quasi debitorem se servo faceret, D. 15.1.4.1 Pomp. 7 to Sat. However, these relations are always resolved in such a way as to protect the position of the master and should be described by the definition of „quasi“.
[28] Ankum (2010).

in his possession. If there is no connection between the property and the *peculium*, to be able to acquire possession from the master, his own animus will be needed.

The slave is in possession of the property as a part of *peculium*, without having legal ownership over it. The powers of the master include the possibility to withdraw the provided property from the *peculium* at any time. Thus, there is no need to introduce complex rules about the subjective element in the creation of the *peculium*. Any property in the possession of a slave is a *peculium*, as far as it clear from the express will of the master or has been connected accordingly with its increase (*causa peculiaris*[29]) and the master has not withdrawn it. The mechanism by which abusing will be prevented and a balance will be achieved is the so-called free administration (*adminisratio*), i.e., the master enables the slave to make disposition transactions with the thing of the *peculium*. Without *libera administratio*, the slave cannot freely dispose of the property in the *peculium*, and any disposition transaction should be approved by his master. This way he keeps control over the transactions of the slave. In a highly developed economy, such a solution provides additional security for the creditors of the slave *peculium* without intimidation of the master's interests, who retains control.

THE ROLE OF THE MASTER'S WILL FOR THE CREATION OF THE PECULIUM OF THE VICARIUS

There was a discussion between the Roman jurists Labeo and Tubero[30] about the nature of the *peculium*, which was later reflected in the Digests of

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[29] Richard Gamauf also supports that as far as the property was acquired in connection with the peculium (causa peculiaris), there is no need for the consent of the master. According to him this allows the masters to give the slaves and their vicars the management of property in remote territories, adding that most likely the master also gives the „free management“ (libera administratio). Cfr. R. Gamauf. Slaves doing business: the role of Roman law in the economy of a Roman household, *European Review of History,* 16, 3 (2009), pp. 331 – 346. The possession of the master over the thing begins through a slave, which would allow a possible acquisition by usucapio.

[30] This is not the only discussion concerning the peculium. Cfr. J.-J. Aubert, Productive investments in agriculture: Instrumentum fundi and peculium in the later Roman Republic. J. Carlsen e E. Lo Cascio (ed.). Agricoltura e scambi nell'Italia tardo-repubblicana. Bari, Edipuglia, 2010, pp. 167 – 185.

Celsus (in the section entitled *si certum petetur*) and in Ulpian's commentary on the edict.

> D. 15.1.6. Cels. l. 6 Dig. Definitio peculii quam tubero exposuit, ut labeo ait, ad vicariorum peculia non pertinet, quod falsum est: nam eo ipso, quod dominus servo peculium constituit, etiam vicario constituisse existimandus est.
> The definition of *peculium*, which was expressed by Tubero, as Labeo says, does not refer to the *peculia* of the *vicaria*, which is incorrect. Because what the master has established for the slave is considered to have been established for the *vicarius* as well.

From *D. 15.1.6. Cels. l. 6 Dig.* it is not clear whether Labeo and Celsus agree or disagree. However, if we make a connection with *D. 15.1.7. Ulp. l. 29 ad Ed.*[31] it is clear that Celsus has accepted Tubero's definition, against which Labeo had objected. Thus, Celsus retold Labeo's opinion as the phrase begins with *ut Labeo ait*. Then follows his own understanding that the general rule for the creation of the *peculium* cannot be applied to the *peculium* of the *vicarius*, and afterwards the words of Celsus himself, that this is not true. In the last part Celsus concludes that what the master has created for a slave should affect also the *vicarius*. The fragment coming from the Digests of Celsus is not lucid enough to clarify Labeo's conclusion, so it needs more explanation, and so, the compilers used the text of Ulpian. It follows immediately the paraphrase of Celsus – *D. 15.1.7 Ulp. l. 29 ad Ed.* They did not have the original version of Labeo's Commentary on the Praetorian Edict on their disposal. Thus, they relied on the knowledge of Ulpian, who made it clear enough that Celsus had confirmed Tubero's sentence, apparently rejecting Labeo's conclusion.

According to Tubero's definition of *peculium*, the necessary element for its creation is the will of the master. There is no text to show Labeo's original opinion, but we could imagine its content based on Celsius' Digests. Labeo criticises Tubero's definition because it does not include the *peculium* of the *vicarius*. Most likely his argument was that the slave did not have the authority to create a *peculium* in favour of his *vicarius* without the consent of the master. On the other hand, Celsus' counterargument is that the *peculium* of the *vicarius* is considered to be automatically given by the initial granting of the *peculium* to the slave.[32]

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[31] D. 15.1.7 Ulp. l. 29 ad ed. pr. Quam Tuberonis sententiam et ipse Celsus probat.

[32] The transfer of property between the master and the slave and between the slave and the vicarius does not require formal legal transactions, such as mancipatio. This is because in the legal sense, property always remains with the master.

We can see the reason behind Celsus' critique of Tubero's definition. Given that under the general rules the position of the *vicarius* in relation to the slave is identical to that of the slave in relation to the master, there is no need to introduce special rules to confuse the already set up system. This means that there could be two possibilities: 1) the will of the master is always required, both to grant the *peculium* to the slave and the *vicarius*, or 2) the will of the master is not required at all. It is clear from the text that according to Labeo the *peculium* of the *vicarius* should enter the *peculium* of the master's slave, which excludes option 1.[33] Celsus, for his part, adheres to Tubero's definition and clarifies in addition that the *peculium* was set up in favour of the *vicarius*, which requires no explicit will of the master, because it is considered automatically given with the first concession of the *peculium* to the slave.

CREATION OF THE PECULIUM WITH THIRD PARTY PROPERTY

The slave may acquire property in his *peculium* from third parties. However, we need to investigate *D. 15.1.7.1 Ulp. l. 29 ad Ed.*, to see whether it is possible to create a *peculium* in these cases entirely without the will of the master.

> Et adicit pupillum vel furiosum constituere quidem peculium servo non posse: verum ante constitutum, id est ante furorem vel a patre pupilli, non adimetur ex his causis. Quae sententia vera est et congruit cum eo, quod Marcellus apud Iulianum notans adicit „posse fieri, ut apud alterum ex dominis servus peculium habeat, apud alterum non, ut puta si alter ex dominis furiosus sit vel pupillus, 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.
>
> And he adds that a pupil or a madman cannot create a *peculium* of a slave, but certainly if created before, i.e., before madness or from the father of the pupil, will not be withdrawn on these grounds. This opinion is true and coincides with what Marcel, as

[33] М. Мишкић. Ограничена одговорност код адјектицијских тужби. *Српска правна мисао,* 23, 50 (2017), 61 – 77. Labeo could not have meant that the express will of the master is always required.

> he notes to Julian, adds: a slave could have a *peculium* by one of the masters and by the other not; (which, as is said, it is accepted) the slave cannot have a *peculium* without concession from the master. However, I believe that it is not necessary for the master to grant *peculium* in order for the slave to have it, but not to withdraw it, to have it". Another is the case with the free management of the peculium: because it must be explicitly ceded.

Ulpian begins the text with an explanation of the possibility of the madman and the *pupilus* to withdraw the *peculium* of the slave. We find a similar legal argument in *D. 15.1.3.4 Ulp. l. 29 ad Ed.,*[34] which is very clear that the ward is not entitled to carry out a *concessio peculii*[35] alone. However, if such *peculium* is given already beforehand, the ward and the guardian will be still liable even without the consent of the latter to create it. The action will arise in any case not because the slave was given the permission to have the *peculium*, but because he was not prohibited to hold it. The meaning of *D. 15.1.3.4. Gai. l. 9 ad Ed. prov*. is that the *peculium* will continue to exist until it is withdrawn.

At first glance, the case in the text is quite similar to the one in *D. 15.1.7.1 Ulp. l. 29 ad Ed*. Though, a closer view shows that Marcel in his notes on Julian (as quoted by Ulpian),[36] discusses a case where a slave jointly owned by two masters could have a *peculium* on basis of the concession given by the first one of them, beyond the will of the second, who was an incapacitated person. So, the slave will hold the *peculium* only under the first master, as the rule the jurist abides stipulates that no *peculium* is possible if not the consent of the master. Thus, only the one with full capacity could follow it. In the end, the general conclusion goes beyond the case of the madman and the pupil. The judges (upon instruction of the pretor) should confirm the *peculium* not by proving that the master had conceded it, but that the slave was not deprived of it.[37] Ulpian in the end contrasts the *concessio* to the *libera administratio*,[38] which requires the express will of the master.

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[34] D. 15.1.3.4 Ulp. l. 29 ad ed. In furiosi quoque curatorem dicimus dandam de peculio actionem: nam et huius servus peculium habere potest, non si fuerit concessum, ut habeat, sed si non fuerit prohibitum, ne habeat. As for the madman and the guardian, we say that actio de peculio is given, because the slave could have peculium, not because he was allowed to have, but if he was not forbidden to have it.

[35] Cfr. Mandry (1876), who holds that the reason for this solution is the donating nature of the concessio.

[36] Aubert (2007).

[37] Cfr. (Wacke 2006).

[38] Administration (administratio) and the creation of the peculium (concessio peculii) are two separate concepts. The administration of the peculium may be

Ulpian gives the definition of Tubero (*D. 15.1.5.4 Ulp. l. 29 ad Ed.*), points out Celsus' opinion (*D. 15.1.7 Ulp. l. 29 ad Ed.*), and then Marcel's opinion. (*D. 15.1.7.1 Ulp. l. 29 ad Ed.*). According to the latter the express will of the master is not required for the assignment of property in the *peculium*, but it is sufficient that he would not withdraw. Ulpian though summarizing and systematizing the earlier opinions, not expressly agree them, but also not oppose them. Marcel's position implies the that to acquire property in the *peculium*, it is not necessary for the master explicitly to „concede“ it (*concessio peculii*), but it is sufficient not to take it out. This presupposes his knowledge since there could not be withdrawal if he knew nothing about it. Until the revocation the property should be part of the *peculium* that already exists. This is why if the slave gets property, but his master did not give him *peculium*, there would be nowhere to acquire. When the master understands about the property and if he refrains from rejecting it, then it is part of the *peculium* or will respectively create it, because this was his will.

There is another question: what happens when the slave receives property from a third party without the concession of his master? Who will get the property and is the will of the master necessary in these cases? The answers can be found in a comment of Florentine Institutes (*D. 15.1.39 Flor. l. 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.
> The *peculium* also consists of what someone has provided through his savings or has earned through his services, to be given by someone, as well as if someone wished a slave to receive as his own patrimony.

Florentine comment on various cases should be in the context „On the *peculium* Bequeath“ (*de peculio legato*), according to Lenel.[39] The reason for

given by the master on a case-by-case basis or generally in the form of a libera administratio. When the slave has this authorization, he will be able to conduct disposition transactions, including those by which transferred the ownership. It is debatable whether a slave can perform mancipatio even if the master has provided administratio. For the two main points of view in this scientific dispute *v.* Hans Ankum (Ankum, H. Mancipatio by Slaves in Classical Roman Law. Acta Juridica 1 (1976), pp. 1 – 13 [= Mancipatio by slaves in classical Roman law? *W. de Vos, W. Dean, I. Leeman (eds). Essays in Honour of Ben Beinart vol 1.* (Cape Town, Wetton, Johannesburg*),* 1-18] and Alessandro Corbino (A. Corbino. La legittimazione a ‘mancipare’ per incarico del proprietario. Iura 27 (1976), p. 50 sq.).

[39] O. Lenel. *Palingenesia iuris civilis. I.* Leipzig, Tauchnitz, 1889, col. 178, fr. 38.

Lenel to classify this text as *de peculio legato* perhaps comes from the words *velut proprium patrimonium* –which means „like his own *patrimonium*“.[40] The slave receives with the covenant the respective property v*elut proprium patrimonium*, and upon his manumission the *peculium* becomes his patrimony. Florentine sets out the criteria to judge whether the property in question is part of the *peculium* or not.[41] Part of the *peculium* are the savings of the slave, as well as the things received in exchange for the services he rendered. The text raises two main problems: 1) how to interpret the second sentence „*idque velut proprium patrimonium servum suum habere quis voluerit*“ and more precisely whether *suum* refers to the slave or to the *patrimonium*;[42] and 2) how to relate the two sentences to each other considering the „*vel... idque*“ construction. The answers will show us whether the *peculium* of the slave can be created with property given by a third party, and not by the master.

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[40] Patricio Lazo does not consider the text from the point of a bequeath of peculium. According to him this text is an example that the property in the peculium is de facto property of the slave. However, there is no other source presenting the property in the peculium as patrimonium of the slave. Cfr. P. Lazo, La „merx peculiaris“ como patrimonio especial. *Revista de estudios histórico-jurídicos,* 3, 5 (2013), pp. 179 – 191.

[41] Gamauf (2009).

[42] In Alan Watson edition of the Digests (Watson, 1998), book 15 was translated by Tony Weir, where he reads the text as follows: „or has been allowed by his master to keep as his own“, i.e., „Or [the slave] was allowed by his master to keep as his own“. The meaning of this translation is that in addition to the above two grounds (savings and performance of a certain service), the slave can receive property in his peculium and after permission, i.e., provision of property by his master, cfr. A. Watson, *The Digest of Justinian. Vol. 1.* Philadelphia, University of Pennsylvania Press, 1998, p. 458. In the Italian translation edited by S. Schipani, the translation is „o di ciò che qualcuno avrà voluto che il servo avesse come proprio patrimonio”, i.e. „Or what one would like a slave to own as his own property.“ Like the English, this part of the sentence is equivalent to the other two hypotheses of getting property by slaves. *Cfr.* S. Schipani (a cura di). *Iustiniani Augusti Digesta seu Pandectae.* Digesti o pandette dell'imperatore Giustiniano. Testo e traduzione. Volume III. 12-19. Con la collaborazione di L. Lantella. Contributi di Cervenca, Gallo, Gnoli, Palma, Petrucci, Saccoccio, Santucci, Tafaro, Talamanca, Vincenti, Zannini. Milano, Giuffrè, 2007. According to the German translation from 1995 the second part of the cited text should be translated as follows: „presupposed [by the requirement] that the owner wants his slave to have it as his own property. Cfr. O. Behrends, und R. Knütel, und B. Kupisch, und H. H. Seiler, (Hrsg). Corpus iuris civilis*: Digesten, 11 – 20 Text und Übersetzung.* Heidelberg. Müller, 1995.

It is possible to read the phrase „*idque velut proprium patrimonium servum suum habere quis voluerit*" in two ways. The first one: „and someone wished that his slave should have it as his own patrimony".[43] In this translation *suum* is associated with *quis*, not with *patrimonium*. The use of *quis* instead of *dominus* is still plausible, especially considering that this is a legal text. If the meaning was that the slave belonged to the person concerned, the reader should understand the *dominus* by the used pronoun. Besides, the master may at any time supply property to the slave as a *peculium*. However, given that the text is surely a bequeath, it is possible that this wording opposes the legatee to the heir. This is exactly the case that Ulpian discusses in *D. 15.2.1.7. Ulp. l. 29 ad Ed*,[44] when the heir has to transfer the *peculium* to the legatee, but has the right to demand security for possible claims from the creditors of the *peculium*.

The other possible translation is: „and someone wished the slave should have had it as his own patrimony." This translation means that not only the master but also any third party can provide property to the slave, which can subsequently become his own patrimony upon manumission.[45] Given the context, Florentine for sure makes list of property in the *peculium* that was not provided by the master and was not connected to the usual peculiar activ-

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[43] There is no word for owner or master in the Latin text, instead Florentine used the indefinite pronoun „someone". All the cited translations, with the exception of the one edited by Schipani, indicate that it is someone who wants his slave to have his own property. „Someone" (quis) is associated with „his" (suus). someone (implying that this is the master) wanted his slave to have his own patrimony (quis voluerit servum suum proprium patrimonium habere). In the version supported here, a connection is made between the possessive pronoun and one's own patrimony: ... as when someone wanted the slave to have as his own patrimony.

[44] Et ait Caecilius teneri, quia peculium penes eum sit, qui tradendo id legatario se liberavit. Pegasus autem caveri heredi debere ait ab eo, cui peculium legatum sit, quia ad eum veniunt creditores: ergo si tradiderit sine cautione, erit conveniendus Cecilius thinks he is responsible because the peculium is in the possession of the one who is released by transferring it to the legate. However, Pegasus believes that the heir should be given security by the one to whom the peculium was given by will, because the creditors can claim it.

Most likely, this refers to Cecilius Sabinus, who is a contemporary of Pegasus, not Cecilius Africanus. In this sense cfr. Behrends, Knütel, Kupisch, Seiler (1995).

[45] In case of the manumission of the slave, the peculium will become his patrimony, and before that moment it is in a state of quasi-patrimony. D. 15.1.47.6 Paul. l. 4 ad Plaut. Quae diximus in emptore et venditore, eadem sunt et si alio quovis genere dominium mutatum sit, ut legato, dotis datione, quia quasi patrimonium liberi hominis peculium servi intellegitur, ubicumque esset.

ity. So, the more probable meaning of the text is that any third party can provide property to a slave. If this property is in the form of a *peculium*, it will be part of the patrimony of the master, who can withdraw it from it at any time if he wishes to do so.

Next, we need to analyse what is the relation between the two sentences in the text, combined with *idque*. It is obviously a matter of some opposition. While in the first half of the text we have a clear enumeration through the conjunction *vel*, the second half is distinguished by *idque*. If the three hypotheses were equal, such a construction would be illogical.

It is possible to reduce the text within its logical construction considering the following as starting point:

a = What someone has secured through his savings.

B = Donated because of services rendered.

C = Someone wanted the slave to acquire as his patrimony.

Possible interpretations of the text are:

1. The hypotheses are equal: a, b or c
2. The first two hypotheses depend on the third – a or b, if c is present
3. The first hypothesis – a, is independent, and the second requires the simultaneous presence of b and c.

From a purely linguistic point of view, we cannot exclude any of the possible interpretations. Considering Ulpian's view on the bequeath *(D. 15.1.7.1 Ulp. l. 29 ad Ed.)* it is possible to see that in the general case the acquisition of property can take place without the express will of the master, and the answer does not depend on the subordination of the first sentence to the second one (because the will of the master is not needed). The semantic opposition between the two sentences, where the first two hypotheses (setting aside the savings and the reward for services given) refer to slave and son in power, while the third (*velut proprium patrimonium servum suum habere quis voluerit*) focusses only the slave.

The question is still: whether it is possible for a *peculium* to be created through the acquisition of property from a third party? In view of the analysis of *D. 15.1.7.1 Ulp. l. 29 ad Ed.*, it is possible to conclude that the will of the master is always required to create the *peculium*. On the other hand, again Ulpian (*D. 33.8.8.8 Ulp. l. 25 ad Sab.*) informs us that when the peculium is bequeathed to a third party, a certain part of the peculiar property remains for the slave, unless otherwise provided.

> D. 33.8.8.8 Ulp. l. 25 ad Sab. … sic tamen, ut incrementa ex rebus peculiaribus ad eum perveniant, ut puta partus ancillarum vel fetus pecorum: quod autem ex operis suis vel ex alia re accedit, id, si alii quam ipsi legetur peculium, non debebitur. Hoc

> utrumque Iulianus secundum voluntatem testatoris scribit: cum enim ipsi suum peculium legatur, verisimile est eum omne augmentum ad ipsum pertinere voluisse, cui patrimonium manumisso futurum est, cum alii, non
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> … But in such a way that the increase of the property in the *peculium* goes to him [the legatee], such as the *fetus* of the slave-woman or of the cattle. But whatever is received after his own [slave's] work or other property has been done, it will not be owed if the *peculium* is bequeathed to anyone else' than his own slave. Julian says that both cases must be in accordance with the will of the testator: because when his own *peculium* is bequeathed to a slave, it is probable that the testator had in mind all his increase to belong to him, to whom he will be a patrimony after manumission; for external persons – no.

The case is as follows: the *peculium* of a slave is bequeathed and the property that will pass to the legatee is discussed, depending on whether he is his own slave or another one's (*si alii*[46] *quam ipsi legetur peculium*). If legatee is his own slave, the presumption is that the testator wanted him to acquire all the property from the *peculium* together with his increases, including the property acquired by third parties in exchange for labour provided by him or other similar property („personal property"). Conversely, any other person will acquire the basic assets, including its increase like the *fetus* of slave woman or the livestock, but not the above-mentioned „personal property", which naturally is very closely tied to the slave and is consequence of his own savings and labour.

The *peculium* in general is quasi-patrimony of the slave and can be said to be his personal property, as long as the master does not withdraw it. However, the property provided by the master differs from the property that the slave receives through his own labour or in another form of personal merit. This property not only is part of the *peculium* but is also more closely connected with the personality of the slave, which is why the Roman jurists provided special rules for it. Given that this property is considered separate from the general *peculium* in the context of the legacy, as well as its strictly personal nature, it is quite possible that it becomes a *peculium* without the need for any

[46] Alii can be understood as a slave of another or any other person. The translation preferred by Francesca Scotti, referring to Pasquale Voci, is that it is about any person other than the slave. *Cfr.* F. Scotti. *Il testamento nel diritto romano: studi esegetici.* Roma, Aracne, 2012, pp. 1 – 819, P. Voci. *Diritto ereditario romano: Parte speciale. Successione ab intestato. Successione testamentaria.* Milano, Giuffrè. 1963.

will from the master. Moreover, from a practical point of view, the master probably often did not know at all about the exact amount of this property.

CONCLUSIONS

The legal regulation of the *peculium* corresponds to the economic and political development of Roman society. There is no need for constant intervention from the master in order for a slave to acquire property in his *peculium*. He can acquire on his own grounds, and the master still has the power to withdraw it whenever he desires.

In summary, the following conclusions can be drawn.

In the first place, the concession is the actual transfer of property from the master to the slave, which can be done repeatedly. There are no direct legal consequences from the transfer of property between the slave and the master, but in the case of manumission of the slave the master may grant the property in the *peculium* to him, from which moment the respective rights and obligations will change their state from factual to legal.

Second, the *peculium* is created from the moment property is invested in it. In cases where the property is initially provided by the master (through *concessio*), it becomes *peculium* from the moment of its actual transfer and accordingly it is created from the same moment. There can be no definite answer as to what will happen when property is provided by a third party to the slave and there is no pre-created *peculium* by the master. Following the general rules about the creation of the *peculium*, it can be assumed that this cannot happen without the will of the master. On the other hand, however, the exegesis of *D. 33.8.8.8 Ulp. l. 25 ad Sab.* gives reason to believe that the slaves had private property separate from the general *peculium* provided by the master.

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