

Book IV.
Title XXVI.¹

Concerning a transaction carried on with one who is in another's power, or actions as to special property (peculium) or, because of authority given, or benefit accruing. (Quod cum eo qui in aliena est potestate negotium esse dicitur vel de peculio seu quod jussu aut de in rem verso).

Headnote.

Children under paternal power, while able to make contracts, could not, in early law, make themselves personally liable thereof. That rule continued as to daughters during classical (Gaius. 3.104) and probably to Diocletian's time, but this disability as to sons was probably removed long before the empire. Slaves, while permitted to make contracts, could not be sued thereon. Gaius. 3.104; C. 4.14. The head of the family received whatever benefit might be derived from any contract of his unemancipated children and slaves, but they could not make his condition worse (law 6 h.t.; C. 2.3.3 and 13). If, however, he authorized them to enter into a contract, he was personally liable thereon. If no such authority was given, or no ratification followed, a creditor under their contract was generally helpless, except under the following facts: (1). The head of the family, instead of employing his children and slaves directly, often gave them what is called a peculium, special property, set apart for them, to be managed and controlled by them, without making the former responsible for the debts incurred in connection with such management. This peculium, probably consisting in early times of small savings and allowances, often consisted in later times, particularly in the case of slaves, of large amounts of property. Though managed or controlled by the child or slave, the head of the family was the actual owner thereof. He could enlarge it, diminish it, or withdraw it entirely, except in so far as that would defraud creditors. D. 15.1.21. Nevertheless, the peculium was, during the time that it existed, and for one year after it had ceased to exist by reason of death, emancipation or alienation (laws 7 and 11 h.t.), considered in the nature of a trust fund out of which the debts of the children or slaves could be satisfied. It could not, however, be reached by direct proceedings against the latter, but was reached by an action (similar to garnishment) against the head of the family (action de peculio), and the debts were satisfied as far as the fund reached. (2). If the head of the family received the benefit of such contracts—e.g. received a loan, or money borrowed by a child or slave was expended on his land, the creditor was given an action (in rem verso) to recover the amount of such benefit, and this was true, though the amount had first been made part of the peculium, but was later taken out of it by the child or slave, and expended for the benefit of the head of the family. D. 15.3.5.3. (3). Sons under paternal power (and later daughters), theoretically liable to the full extent of their debts, could ordinarily, aside from what has been said, be compelled to pay their contractual debts to the extent that they were able, unless the debt was contracted in violation of law, e.g., in violation of the Macedonian senate decree mentioned at C. 4.28. See law 2 h.t.

¹ [Blume] Rev. 4/2/32.

4.26.1. Emperors Severus and Antoninus to Aelius.

When an unemancipated son is appointed guardian or curator, his father may be sued in an action on the guardianship or on implied agency to the extent of the special property (peculium) of the son, and to the extent of the benefit which accrues to him (the father) therefrom. But if the son was made decurions with his father's consent, and is appointed guardian by the (municipal) magistrates, the father is responsible for the whole, since that burden must be understood as having been introduced in pattern of other civic duties.

Given November 7 (196).

Note.

When an unemancipated son was appointed as decurions—as a member of a municipal senate—by the consent of his father, the later became surety for the son for the proper performance of a civic duty. C. 10.32.1. This provision does not appear in the Basilica.

4.26.2. The same Emperors to Annius.

In the interpretation of the perpetual edict, it was declared that no right of action is granted on a contract made with an unemancipated son who did not accept his paternal inheritance, whether such contract was on his own motion or by the wish of the person in whose power he was, and whether the proceeds of the contract became a part of the special property (peculium) of the son or part of the property of the father, except only in so far as the son is able to pay.

Promulgated November 24 (196).

Note.

The edict here mentioned is found in D. 14.5.2. A son under power could be sued the same as any other man. D. 44.7.39. But if he was emancipated, or disinherited, or he did not accept his father's inheritance, he could claim what is called the benefit of competence, namely to be condemned in a suit on his contract only to the amount which he was able to pay. This was one of the peculiar institutes of the Roman law. See C. 5.18.8 note. But it was justly applied in this instance, since the property of a son under paternal power was ordinarily that of his father. The benefit could not be claimed by him, if he was guilty of fraud in misrepresenting his status, or of tort. D. 14.5.2 and 4. See also law 8 h.t.

4.26.3. Emperor Antoninus to Artemon.

If you made a loan to the slave of Prisca without the latter's mandate or writing or authorization, still if that sum was expended by proper expenditures for the benefit of the mistress, go and sue her in an action for benefit received, and you will receive what shall appear to be owing you pursuant to the rule of law.

Given June 29 (215).

4.26.4. The same Emperor to Leontius.

If you, under your father's contract, received money pursuant to his authorization (jussu), and you did not accept an inheritance from him, you uselessly fear that you may be sued by his creditors.²

Given December 28 (216).

4.26.5. Emperor Alexander to Asclepiades.

Nothing prevents to sue unemancipated sons in a proper action, if, when they were over twenty-five years of age they became surety for others. But if you are sued only as to the special property (peculium), you may use whatever defenses you have. Promulgated December 8 (223).

Note.

The rescript is evidently directed to the father of the son who had become surety for others, and he, the father, was sought to be held liable. But he could be held only to the extent of the net peculium. This peculium ceased to exist when the son died. And all rights of action to reach it ceased when a year from that time had passed. Laws 7 and 11 h.t.

4.26.6. Emperors Valerian and Gallienus and the Caesar Valerian to Matrona.

If your slave borrowed money without your permission and in place of interest granted to the lender the right of habitation, such lender cannot by reason thereof claim any right of hospitality from you, since the act of the slave did not bind you; and if he enters upon your property, you will be protected against his intrusion, by the authority of a competent judge.

Given June 20 (259).

4.26.7. Emperors Diocletian and Maximian and the Caesars to Crescens.

The law is clear that a person who makes a loan to a slave has an action against the master for the slave's special property (peculium) as long as the slave lives, and within a year after his death, and if the loan was used for the master's benefit, he has a right of praetorian action even after the year.

1. If money, therefore, was used for the master's benefit, you can sue his heirs for the amount so used.

2. If, however, this cannot be shown, it follows that you may, if the slave is living, sue the master for the slave's special property (peculium); if such slave has already been taken from among human affairs, or has been sold or manumitted, and the year has not passed, then you may (likewise) sue the master for the former special property.

3. If, on the other hand, you contracted with a free person who transacted the business of the man whom you mention in your petition, relying on the former, you can see that you have no right of action against the principal, unless the money was used for his benefit, or he ratified the contract.

Given at Byzantium April 5 (293).

Note.

² [Blume] In this case the son was not liable at all. The contract was the direct contract of the father, the son acting merely in the nature of a messenger to get the money. Had the son accepted the inheritance, he would have been liable as heir.

Par. 3 contemplates that the person acting for the principal was unauthorized. The provision that the principal could nevertheless be held under the conditions stated is thought interpolated. Girard 710. C. 2.24.4 seems inconsistent herewith, but Tuhr, Actio d. i.r.v. 305-307 thinks that in that case, the principal did not receive the benefit of the loan, and so it is not inconsistent. That a principal was liable for the loan made by one acting on his behalf though unauthorized, at least to the extent of the benefit received is indicated in C. 8.15.1; C. 5.70.2.1. And that was undoubtedly the law at least under Justinian, except as limited by law 13. h.t. See C. 4.2.13.

4.26.8 (9). The same Emperors and the Caesars to Isidorus.

If you become debtor on some other contract and not by reason of an unlawful loan,³ or because you become surety for your father, you are liable both while still in the power of your father, you are liable both while still in the power of your father as well as when, by his death, you became your own master; and that for the whole if you become your father's heir,⁴ otherwise, according to the rule of the edict, in so far as you are able to pay. And even if you become your own master by emancipation, you are likewise, as you must know, subject to be sued.

Given at Byzantium April 8 (293).

4.26.9 (8). The same Emperors and the Caesars to Diogenius.

If you became surety for your son who was then in your power, by way of a mandate (to loan him money) or if a contract (of loan) was entered into with him pursuant to your authorization (jussu), you know that you must, if you obligated yourself therefor, pay both the principal and interest, in order that the property which was pledged may be released. And if you became surety by stipulation for money borrowed, you are, without question, liable on the obligation.

Given April 29 (294).

4.26.10. The same Emperors and the Caesars to Aphrodesius.

If slaves who have free management of their special property (peculium) have sold mares heavy with foals, the master has no right to annul the sale. 1. But if slaves who do not have free management of their peculium sell the master's property without his knowledge, they cannot transfer ownership which they do not have to another, nor does such transfer give a lawful beginning of possession (so as to set the statute of limitation in motion) to those who know the servile condition of the seller. Hence, it is clear that a defense of possession during the prescriptive period cannot avail such possessors, and persons therefore, who buy such movable property (from such a slave) are liable, in an action on theft (furti).

Given at Sirmium October 2 (294).

³ [Blume] Prohibited by the Macedonian Senate Decree. C. 4. 28.

⁴ [Blume] The fact that a son was his father's heir did not necessarily determine that the son was liable for his whole contractual debt, incurred while he was under paternal power. When he received only a small share of the inheritance, he was condemned only in an amount that he was able to pay, and he might be granted that benefit in the discretion of the judge even when he received a considerable share. D. 14.5.2.1; D. 14.5.2.4 pr. See law 2 h.t.

4.26.11. The same Emperors and the Caesars to Attalus.

There is no doubt that a person who contracts with a female slave, who could not legally obligate herself, has (nevertheless), while she is living, and within a judicial year thereafter, an action against the master to the extent that her special property (peculium) was increased thereby.

4.26.12. The same Emperors and the Caesars to Victor.

It is declared in the perpetual edict that a master cannot be made liable by his slave, and creditors have only an action for the latter's special property, after deducting what he naturally owes to his master; or if any amount accrued to the latter's benefit, they may also sue for that.

Given at Sirmium January 20 (294).

Note.

A slave could not be sued for a debt, and his peculium could be taken away. Yet, practically, he dealt with his master as with anyone else, when he had a peculium, and could owe him. It was a natural debt.

4.26.13. Emperors Honorius and Theodosius to Johannes, Praetorian Prefect.

It is clear that masters are liable in a praetorian action called "by his order" (quod jussu), if they direct a certain sum to be paid to the slave or agent (actor).

1. We, therefore, ordain in perpetuity by this edictal law, that a person who makes a loan to a slave, serf, lessee, procurator or manager (actor) of a landed-possession, he must know that the owners of the possession or the cultivators of the suit, cannot be made liable thereunder.

2. Nor must friendly letters, in which men often comment an absent person, be so construed as to give ground for the pretense that money, which was not asked for, was paid out for the benefit of the farm, since the owner cannot be held liable unless he expressly asked that it be furnished.

3. Creditors must suffer the loss, if they loan money to such persons, without the order of the master, or without expressly taking sureties.

4. Of course, we give permission to the creditor that, if a manager, actor, slave, or procurator of landed-estates has made a complete settlement of his accounts (with the owner), an analogous action lies concerning the special property (peculium).⁵

⁵ [Blume] See C. 4.65.27.