

Book IV.
Title VIII.

Concerning condiction for theft.
(De condicione furtive.)

Headnote.

When property was stolen, the owner still remained owner and an action in rem lay to recover it. In condiction it was assumed, nay ordinarily required, that the defendant was owner. Hence condiction for stolen property was an anomaly. Still, it is thought that this action was allowed in comparatively early times. Gaius 4.4 states that it was allowed because of hatred against thieves, but that is no explanation. See Levy, 1 Konkurrenz 281; Pernice, 3 Labeo, 233; 21 Z.S.S. 420. It had the advantage over an action in rem, since recovery of the property could be claimed, though the thief was dead, or though the property was disposed of or destroyed. In the latter case, the claim for the actual property was, of course, merely theoretical. See D. 13.1.7.2; D. 13.1.16.

4.8.1. Emperors Diocletian and Maximian and the Caesars to Hermogenes.

The president of the province will take care to give his decision according to law, well knowing that in an action for the penalty for theft, all defendants are each liable for the whole. But in condiction to recover the money taken by theft, only an election exists to sue one or more, and when full satisfaction is made by one, but then only, the others are released.

Subscribed April 27 (294).

Note.

In the penal action for theft (furti), each was liable for the whole. Payment by one did not release the others. C. 6.2 headnote. But when condiction was brought, payment by one released all. In classical law, and perhaps till Justinian, joinder of issue with one defendant, released all others who might be liable. C. 8.40.28 note. It is now generally recognized that the instant rescript was interpolated, so as to bring it into conformity with Justinian's rule, abolishing the extinctive effect of joinder of issue. Levy, 1 Konkurrenz 284; Eisele, 77 Arch. Civ. Prax. 439; Binder, Korrealobligationen 374.

4.8.2. The same Emperors and the Caesars to Aristaenetus.

It is certain that before the return of stolen property, the responsibility for all damage to it is on the thief.¹

Given May 1 (294).

¹ [Blume] C. 4.7.7.