

Book VI.
Title II.

Concerning theft and corruption of a slave.
(De furtis et de servo corrupto.)

Dig. 11.3; 47.2; Inst. 4.1; Bas. 60.6.18.

Headnote.

Justinian in his Institutes 4.1.1, says that "theft is the dealing with an object, or with its use or possession, with intent to defraud - an act forbidden by the law of nature." While the intention to steal was an essential element, that alone was not sufficient; there was required, in addition, an actual touching. D. 47.2.52.19. It was not, however, necessary that the property should be actually carried off. Mommsen, Strafrecht 735. Thus a man, entering a room with intention to steal, without more, was not treated as a thief. D. 47.2.21.7. There could be no theft of immovable property, but trees or growing fruit, stones, sand or chalk dug up could be the object thereof. D. 47.2.25 and 57. Ordinarily, the taking or handling of the property must be without the owner's consent, but Justinian made an exception in case a person attempted to corrupt a slave to steal property for him. C. 6.2.20.1. It was necessary that there should be in existence a definite owner who was injured by the theft. D. 47.2.69; D. 47.19.2. Another action, however, was given in such case, namely that for despoiling an inheritance dealt with in C. 9.32. But it was not essential that the thief should know the party that was injured. D. 47.2.43.

Embezzlement, or an action akin to embezzlement, was generally treated as theft, and it was not at all essential in all cases that possession should have unlawful inception. Thus a person who knowingly and without consent of the owner converted a deposit to his own use, was guilty of theft. C. 4.34.3. In fact many dealings with another's property against the owner's consent, would seem to have been treated as theft. Mommsen, supra 738. Thus a creditor who made use of a pledge or sold it, without contract, before the debt was due; a person who received goods to clean and who loaned it; a person who received property as a loan and used it for a different purpose than that which was specified, and which the party loaning it would not sanction, was guilty of theft. Inst. 4.1.6; D. 47.2.40; 48.4; 55 pr; 55.1; 74; 77 pr. So a guardian or curator might steal his ward's property. D. 47.2.33. If a person to whom money was given, for the purpose of having him take it to another, converted all or part of it, he was guilty of theft. C. 6.2.7. Even a renter unlawfully holding over was deemed guilty of stealing the crops. D. 47.2.68.5. Many other illustrations might be given. So, too, a person might be guilty of stealing his own property, as where he purloined it from a pledgee, or sold it. Inst. 4.1.10; D. 47.2.19.5; 20.1; 67. A person who aided in the commission of the offense or who harbored the thief, was guilty the same as the principal; but merely to instigate the offense was not theft, except where one persuaded a slave to run away in order to be stolen, and he was actually stolen. Inst. 4.1.11; D. 47.2.34; 36; 48.1. A person knowingly receiving stolen property might be sued in an action for simple theft. Inst. 4.1.4. If a child understood its delinquency, and was near the age of puberty (12 or 14 years), it might be held guilty of theft. Inst. 4.1.18.

It has often been said that theft was treated under the Roman law not as a public crime, but as a private wrong.¹ That is partially, but not entirely true, particularly during the later time, as will be seen hereafter. A person who lost property by theft might recover it wherever he could find it, from anyone whatsoever. This was called vindicatio, an action in rem, to recover the specific property – an action analogous to our action in replevin, except as to the bond generally required in replevin. Several laws in the within title mention this right.

Another action for that purpose was called *condictio furtiva*, corresponding substantially to the action in detinue at common law, and considered in C. 4. 8. Both of the foregoing actions were simply for the purpose of recovering the property or its value. Aside from these, two other actions were available; one a civil action for the recovery of a penalty, called *actio furti*, and one a criminal action brought as other criminal cases were brought, but it could not be instituted except by a party interested.

Civil action for the recovery of the penalty for theft.

Theft was divided into two classes, one called manifest, where the thief was caught in the commission of the act, and the other not manifest, i.e. secret or simple. The penalty recoverable in the former case was fourfold the value of the property, or the complainant's interest therein, was fixed as of the time of the theft. D. 47.2.50; D. 47.28.1. Condemnation in this action involved infamy. D. 47.2.64.

The party entitled to bring this action was the one who had possession and was interested in not having the property stolen. Thus a pledgee, lessee, trustee, usufructuary could bring the action. If the party who had the property in his possession had received it from the owner, and was responsible to the owner and was solvent, he only, and not the owner, was entitled to bring the suit. If he was insolvent, the owner had such right. Inst. 4.1.15; D. 47.2.10,12,14 and 16; D. 47.2.15 pr. and 15.1. The special case of a man who received property as a loan is treated in C. 6.2.22. A depository had no right to such action, because he was not responsible for the property, except in case of fraud. Inst. 4.1.17; D. 47.2.14.2-4. That was true also as to a general creditor of the owner; and on the same principle, a wife had no such right of action for her dowry, the right being vested in the husband. So, too, a vendee of property who had not yet received possession, had no such right; the action was required to be brought by the vendor for the benefit of the vendee. D. 47.2.14.1;² D. 47.2.49. A guardian could not bring such action, though he was absolutely responsible to the ward. The ward, however, could not require the guardian to make good the loss by theft, unless he assigned his action against the thief to the guardian. D. 47.2.53.3; Hunter, Roman Law 239. One thief could not bring such action against another thief, for possession was required to be in good faith. D. 47.2.11. The action did not, like the action in detinue, lie against the heir of the thief. C. 6.2.15.

The principals of a ship or inn or public stable were responsible for any theft or damage done by those employed by them on the ship, or in the inn or stable. The action was for double damages and was available to, but not against, the heirs. This action was allowed on the theory that more honest employees should have been selected. D. 47.5.1; Inst. 4.5.3; Buckland 593, 594. If, in the cases contemplated, the theft was committed by

¹ Blume penciled in "wrong" above "offense" without clearly lining out the latter. And in the margin adjacent to these lines he wrote "conversion."

² D. 47.2.54(53).3 in Watson.

the principal's own slave, such principal was liable only in a noxal action, in which he had the choice to pay the damages or to surrender the slave, on the theory that theft by such slave should be looked on as common evil. D. 47.5.1.5.³

Criminal Action.

1. We are told by Ulpian, who died in 228 A.D., that as early as his time suits for theft, except where the property involved was insignificant, were generally criminal suits, brought upon written complaint, as in other criminal actions. D. 47.2.93. See also D. 47.1.3; D. 48.19.11.1. The procedure by accusation was applicable in such case. Mommsen supra, 774. Julian, who lived in the middle of the second century A.D., states that the bringing of a criminal suit and restitution of property therein, barred further actions. D. 47.2.57.1. Savigny, System 251. Justinian, in Nov. 134, c. 13, states that a man guilty of theft shall not be punished by death, but by some lighter penalty. The punishment was largely in the discretion of the judge. Von Bar, Hist. Cont. Crim. L. 40; Mommsen, Strafrecht 774.⁴

Certain forms of stealing, more audacious in character, were dealt with severity. Stealing from a fire or shipwreck is mentioned in note to C. 6.2.18. Cattle stealing is considered in C. 9.37. Burglars, and particularly nocturnal thieves, and persons stealing from public baths, were condemned to the public works. D. 47.17.1 and 2; Sherman §929; Mommsen supra, 776, 777. Pickpockets and sneak thieves who, without breaking, went to upper stories in houses, in order to steal, were dealt with more severely than ordinary thieves, and were sentenced to public works or beaten with rods or relegated for a time. D. 47.11 7.

2. The second subject with which the present title deals is an action for corrupting a slave. Anyone by whose instigation or advice another's slave ran away, or became disobedient to his master, or took to dissolute habits, or became worse in any way whatsoever, was liable for twice the damage caused thereby, and in computing such damage, the property which the run-away slave carried off was taken into account. Inst. 4.6.23. To induce a slave to flee to a sanctuary, and thereby cast aspersions on the master, was punished as a crime in the discretion of the judge, the criminal action being in addition to that above mentioned. D. 47.11.5. To conceal or keep another's slave in his power was a crime under the Fabian law, treated at C. 9.20, and a person who stole another's slave would, if he kept him, also become guilty under that law.

6.2.1. Emperors Severus and Antoninus to Theogenes.

If any persons have bought lands with your money upon order of your slaves (who took your money), you must elect whether you prefer to bring an action for the penalty for theft and condiction,⁵ or one on the mandate. For equity does not permit you to pursue an action for the crime and at the same time ask the performance of an equitable contract.

Given April 21 (200).

³ Following this sentence, Blume penciled in "See further headnote C. 4.65.

⁴ Blume penciled in here "See Huvelin, Furtum."

⁵ Here, Blume lined out "for an action in detinue for the property" and penciled in "condiction."

6.2.2. The same Emperors to merchants.

You demand something not in accordance with law, when you do not want to return property acknowledged to be stolen till the price thereof has been paid by the owners. Take care, therefore, to act more cautiously, lest you may not alone sustain damage of this kind,⁶ but also fall under the suspicion of a crime. Promulgated November 29 (204).

6.2.3. Emperor Antoninus to Secundus.

If your stepfather stole and carried away property not yet dedicated to a temple of God, you have an action for the penalty for the theft against him. Promulgated September 8 (215).

Note.

On account of the respect due to parents, no action for theft lay against them by their children. But step-parents were not within this rule. See also law 11 of this title. ⁹ Cujacius 579. No action for theft could be brought by a parent against a child or by a husband and wife against each other. Buckland 573, 574. See also note (b) to C. 6.2.22.

6.2.4. Emperor Alexander to Aurelius Herodis.

You may sue the person whom you allege to have misled your slave, in an action for corrupting the slave, if he corrupted his character. And if he has hidden the misled slave, you may also sue him in an action for the penalty of theft. You are not at all forbidden to carry on these actions by a procurator. Promulgated September 13 (222).

Note.

This law shows that to conceal a slave was treated in the nature of theft of the slave. To corrupt a slave also gave rise to a right of action. Such corruption might take place in various ways: To make a slave do anything which lessened his value; to encourage him, already badly inclined, to steal, corrupt others, commit intentional wrong or ruin his special property, peculium, by debauchery or otherwise; to lead him into vice, idleness, neglect of business, prodigality, flight, disobedience, contempt of his master, trickery, intrigue; to induce him to run to the statue of the emperor to the shame of this master; to induce him to copy, alter or destroy private documents. D. 11.3.1.2; D. 11.1.15; D. 47.2.52.24; D. 47.10.26; Buckland, Roman Law of Slavery 34, note 2. In general actual damage had to be shown. Buckland, *supra* 35.

6.2.5. The same Emperor to Cornelius.

The demand of your adversary, that you state the name of the vendor of the property which you acknowledge to have been in your possession, is proper. For it does not behoove a man desirous of avoiding suspicion alien to an honest man, to say that he has purchased from a transient and unknown person.⁷ Promulgated April 29 (223).

6.2.6. The same Emperor to Pythodorus.

⁶ [Blume] Of losing the value of the stolen property.

⁷ [Blume] See C. 2.1.8; C. 3.31.11; C. 4.19.2 note.

Whoever knowingly sells, gives away or in any other manner alienates a slave of another without the consent of the master, cannot diminish the latter's right; and if he purloins or detains him, he commits theft.

Promulgated December 27 (228).

6.2.7. The same Emperor to Datus.

If the person to whom, as you state, you gave money, for the purpose of carrying it to your mother, delivers a smaller quantity, and converts the remainder to his own use, he commits theft.

Promulgated June 4 (228).

6.2.8. The same Emperor to Valens.

A collector of tribute is also liable to an action for the penalty for theft, if he, when you are not, to his knowledge, in default in paying tribute, because nothing was owing, abducted or sold your female slave. The result is that the purchaser cannot become owner of her by usucaption (prescription) and you have the right to bring an action in rem to recover her.

Promulgated February 20 (231).

6.2.9. Emperors Diocletian and Maximian and the Caesars to Aedesius.

The loss of a slave, stolen or forcibly abducted, is, although he died before he was offered back to you, that of the robber or the thief, and they are subject to the legal penalty.⁸

Subscribed at Sirmium February 7 (293).

6.2.10. The same Emperors and the Caesars to Valerius.

If the president of the province learns that slaves stolen or kidnapped have been sold, then, since the right of usucaption cannot, before the slaves are returned to their master, be enjoyed by the purchaser, because of the adhering vice, and he also learns that you are the successor (by inheritance) of the party who owned the slaves, he will take care that the latter be restored to you.

Without day or consul (293).

Note.

Property that was stolen or possessed by force was not prescriptible, until after it had first come back into the possession of the owner with his knowledge. D. 41.3.41; Gaius 2.45.49; Buckland 248.

6.2.11. The same Emperors and the Caesars to Demosthenes.

As to the things which you state in your petition to have been carried off by the stepmother of your ward under the age of puberty, go before the rector of the province, who, if he learns that she stole anything, after he for whom you bring your supplication, became the owner thereof, will not overlook to formulate the condemnation in an action

⁸ [Blume] See headnote C. 4.31.

on theft for fourfold, if the theft was detected in the commission, and for twofold if it was not so detected.⁹

Given August 26 (293) at Viminacium.

6.2.12. The same Emperors and the Caesars to Quintilla.

The offspring of a stolen female slave, born at the home of the thief, cannot become the property of anyone by usucaption before coming into the possession of the master, and the thief of the mother will also be subject to an action for the penalty for theft on account of such offspring. 1. Wherefore you are not prohibited from bringing an action for the penalty for theft and an action in detinue (condictio), or a real action (vindicatio) against the possessor, as the one which carries a penalty cannot be barred by the election to bring the other. 2. For the law is not doubtful that outside of the penalty there is also the right to pursue the property, since even those who have bought the slaves of others may, if the facts were not unknown to them, be sued in an action for the penalty for theft.

Given at Sirmium October 15 (293).

Note.

The condictio here called in detinue, was a personal action which lay against the thief himself or his heir. The vindicatio, an action in rem, lay against any person whatsoever, including the thief, his heirs and strangers, whoever might be in possession of the stolen property. In the latter action, the existence of the property was required to be shown; this was not necessary where the personal action lay and was brought, since the value of the property might in such case be recovered. Buckland 577, 578.

6.2.13. The same Emperors and the Caesars to Domnus.

After a settlement as to theft, the laws forbid action in court. But if you made no compromise, but only received part of the stolen property, you may recover the remainder by condictio, or a real action, and also bring an action for the penalty for theft before the president.

Given at Sirmium December 1 (293).

6.2.14. The same Emperors and Caesars to Dionysius.

Those who knowingly received property stolen by a slave, may be sued by you not only as to the property received, but also for the penalty for theft.

Given at Sirmium December 25 (293).

6.2.15. The same Emperors and the Caesars to Socratia.

You should not be unaware that heirs cannot be held in an action for the penalty for theft. But you can sue the holder of stolen documents in an action in rem.

Given at Sirmium December 30 (293).

6.2.16. The same Emperors and the Caesars to Artemedorus and others.

If anyone took your slave for the purpose of raising him and sold him, he committed theft.

Given at Viminacium October 1 (294).

⁹ [Blume] See note to law 3 of this title.

6.2.17. The same Emperors and the Caesars to Cono.

Although common usage does not permit a widow to become defendant for the crime of despoiling an inheritance, any more than in an action for the penalty for theft, still the heirs, children of the decedent, are not forbidden to bring an action in rem to recover the property of the father, which she has in her possession.

Given December 13 (294).

Note.

To despoil an inheritance was, of course, similar to theft, and for that reason could not be brought against parents any more than an action for theft, which is referred to in note to law 3 of this title. The former action is dealt with at C. 9.32 and law 4 of that title is to the same effect as the present law.

6.2.18. The same Emperors and the Caesars to Dionysodorus.

An owner, as the rule of the perpetual edict declares, has an action for fourfold (of the value of the property taken) against a person who has taken anything from a shipwreck or fire, if the action is brought within the judicial year. After that time an action lies to recover the simple value (of the property taken) aside from the punishment formerly fixed.

Subscribed at Nicomedia December 30 (294).

Note.

A person who stole anything from a fire other than building material was liable under the law against public violence treated in C. 9.12; D. 48.6. 3.3. A law of Hadrian provided that owners of coast land who took property washed ashore from a shipwreck should be treated as highway robbers. D. 47.9.7. And a law of Antoninus provided that any persons who took such property from a shipwreck should, if only a little was taken, be whipped; in case the property taken was considerable, free persons should be whipped and banished for three years, poor persons being sentenced to some public work for the same period; and that slaves should be shipped¹⁰ and sentenced to the mines. D. 47.9.4.1. See also D. 48.7.1.2. If property was stolen on the shore, not under the excitement of a shipwreck, this fell under the head of simple theft. D. 47.9.3 pr.; 3.6; 4.1.

6.2.19. The same Emperors and the Caesars to Mnesitheus.

A pretended procurator commits theft by receiving a deposit or collecting a debt without the consent of the owner, and aside from the restitution of the property, may be sued for double the value thereof, in an action for the penalty for theft, where the thief is not caught in the act (*nec manifesti*).

Without day or consul.

6.2.20. Emperor Justinian to Julianus, Praetorian Prefect.

If anyone tried to persuade another's slave to steal and bring to him any property of the slave's master, and the slave made this known to the master, and by the latter's consent took the property to the evil author of this attempted persuasion, who was discovered in the detention of the property, the ancients doubted to what action the receiver of the property was subject, whether he was liable by reason of the theft or for

¹⁰ This should be "whipped," according to the Digest entry cited.

wanting to corrupt the slave, or not alone for the theft but also for corruption of the slave. 1. Settling this dispute, we decide that not only an action for the penalty for theft but also one for corruption of the slave shall lie against him. For although the slave has not in fact been corrupted, still the plan of the corrupter was to destroy the probity of the slave, and though no theft was actually committed according to the rule of law, since only a person who takes the property of an owner against the latter's consent is considered as having committed a theft, still he is liable in an action for the penalty of theft on account of his evil intention. So, too, on account of his depravity, an action is not unjustly given against him for corruption a slave, so that he shall be subject to the penal action as though the slave had in fact been corrupted, lest, through impunity therefrom, he should make the same attempt on another slave who might be corrupted.

Given August 1 (530).

6.2.21. The same Emperor to Julianus, Praetorian Prefect.

It was questioned among the ancients whether in case a slave, possessed by someone in good faith, should commit a theft of the property of another or of such possessor in good faith, the latter (in case property was stolen from him) had a noxal action for the penalty for theft against the true owner, or whether such possessor himself might be sued by the party from whom the property was stolen. 1. And since ancient jurisprudence adopted a general rule that anyone liable to a noxal action of theft on account of a slave, has no noxal action for the penalty of such theft against another, some, through conjecture, interpreted this rule to mean that such action did not lie against a possessor in good faith, but that the latter rightly had a noxal action against the true owner, if property was stolen from him by the slave; that such possessor in good faith might bring such noxal action, for a theft committed by the slave, after the latter came back into possession of the true owner; and not only for property stolen by the slave while in his, the former's possession, but also for that stolen by such slave while escaping from such possessor in good faith and before he returned to the power of the true owner. 2. This interpretation resulted from conjecture; but we, considering the foregoing rule more closely and with deeper insight, interpret it to have the following meaning: 3. Since the possessor in good faith possesses the thief, thinking that he is the owner, he is justly liable to others in a noxal action, if the slave should steal property from others during that time, and that he himself should not have an action against the true owner, according to the rule which holds that whoever has an action of theft against another is not himself liable to such action. But if he ceases in his detention of the slave and the latter is found in the possession of the true owner; that is to say, for the property stolen from him by such slave during the time that the latter is in possession of the true owner or previously, after he, the possessor in good faith, ceased to detain him, though not yet returned to the true owner. 4. In this manner, the rule becomes consistent; for the party who has an action for the penalty for theft against the owner, cannot himself be held liable to others in such action. Thus making a distinction as to time, the ancient doubt is hereby settled, and the possessor in good faith has a right of action during a definite period and is not subject to any action, and the true owner during another period is not subject to, but may bring, such action. 5. But if a person who is free, although held as slave by another in good faith, commits a theft, it is rightly held, and there can be no doubt, that such person, so recognized as free, may be sued for the penalty for theft by such possessor in good

faith, and the latter cannot be sued if theft is committed against another, but the thief himself must answer for the theft; for the general rule was adopted only as to slaves, and a noxal action is impossible and unknown to our laws, where the thief is not a slave, but is free and his own master.

Given at Constantinople October 1 (530).

Note.

In a noxal action, the owner or possessor of a slave had a right to surrender the slave instead of paying the damages.

Doubts had existed in the case mentioned in this law: If a slave in my possession, in good faith, stole from X or from me, it had been questioned whether I was liable to X, or could sue the true owner. Some had held that the good faith-possessor was not liable and could sue the true owner when the slave got back to him, for what he took while with the good-faith-possessor, or before he got back to the owner. Justinian corrects this rule. See Buckland, Roman Law of Slavery 337, 338, where this law is discussed.

6.2.22. The same Emperor to Julianus, Praetorian Prefect.

The law is clear that when a theft is perpetrated, an action for the penalty therefore lies in favor of a party who is interested in the non-commission thereof. 1. but it was questioned among the ancient interpreters of the law in case anyone loaned any of his property to another and the thing loaned was stolen, whether an action for the penalty for theft against the thief might be instituted by the party who received the property for use, in case he was solvent, because he himself could be sued for the property by the owner in an action on the loan. 1a. And they almost all agreed that he had the right of action, unless he was insolvent; for in the latter event they held that the owner only had the right of action for the penalty for theft. 1b. But a grave doubt arose in the following case: If at the time of the commission of the theft the borrower of the property was solvent, but he was afterward, before the commencement of the action, the right of which he previously had, reduced to want, did he, in such case retain the right of action, which he had once acquired, or did it become that of the owner? Did such right, in such case, pass from the one to the other? 1c. And there is another subdivision in the treatment of this subject: If the borrower of the property is only partially solvent, so that he cannot make a total but only partial satisfaction, has he the right of action for the penalty of theft in such a case, or not? 1d. So, we, in settling all such doubts of the ancients, or rather clearing up what we may call their vagaries, have deemed it best that a simpler rule should obtain in such a difficult situation; that is to say, it shall be in the discretion of the owner, whether to commence an action against the borrower of the property, or an action for the penalty for theft against the party who stole it, and whichever course he elects to pursue, he cannot change it and have recourse to the other. 1e. If he elects to pursue the thief, the person receiving the use of the property shall be entirely release, but if he sues the borrower, he has no action for the penalty for theft against the thief, which action may then be brought by the borrower, provided that the owner sues such borrower with knowledge that the property was stolen. 2. But if the lender institutes the action on the loan, not knowing or doubting whether the property is in possession of the person receiving it, but afterwards discovers the facts, and then wants to abandon the action on the loan and sue for the penalty for theft, he shall have permission to do so and sue the thief, without let or hindrance, since he commenced the action on the loan against the

receiver thereof, while still in the position of uncertainty. If, however, the borrower has already compensated the owner, then the thief is altogether free from an action for the penalty for theft by the owner, and the borrower who compensated the owner for the property loaned is substituted for the latter. It is also clear, beyond a doubt, that if the owner first instituted the action on the loan, without knowing of the theft, but afterward, on learning the facts, proceeded against the thief, the party who received the loan is entirely released, whatever may be the outcome of the case against the thief. The same rule applies whether the person who received the loan is solvent in whole or in part. 3. Again a doubt arose as to what the rule should be in the following case: If a person had borrowed property which another had taken by theft, and the thief, beaten in a suit (by the borrower), was condemned not only for the thing stolen but also for the penalty of the theft, and thereupon the owner of the property wanted the benefit of the whole condemnation by reason of the fact that it arose in connection with this property- should he, in such case, receive only his property or its value, or also the penal sum? 3a. And although different ideas existed among the ancients, Papinian even contradicting himself, we, in settling the dispute, think that notwithstanding the inconsistent position of Papinian, his opinion should be followed, not his first, but his second, in which he held that the gain should not belong to the owner; for where the risk is, there the gain should be, and the person receiving the property as a loan should not be solely subject to a loss, but should also be permitted to hope for gain.¹¹ 4. Since, moreover, a third doubt has arisen on this subject, why not also decide that? The law is clear, beyond a doubt, that a husband cannot sue his wife in an action for the penalty for theft during the subsistence of the marriage, because the law blushes to give such an atrocious action among persons so joined to each other.¹² So the following question arose in the minds of the ancients: 4a. A man borrowed property, and it was stolen by his wife. It was questioned whether the owner had an action for the penalty for theft against the woman, or whether the husband, on account of the interrelation of the matter, since he was subject to an action on the loan, could bring an action for the penalty for theft. 4b. And the authorities of law greatly disputed among themselves as to the law in such case. The point is elucidated by the present law and the preceding provisions in this constitution. 4c. For we give an election to the owner against whom he wishes to proceed, whether against the party receiving the loan or the party who commits the theft. If the owner proceeds against the husband, the latter cannot, on account of matrimonial delicacy, bring an action for the penalty for theft, but one for removal of the property. The owner, however, has complete liberty to sue the husband on the loan or the woman in an action for the penalty for theft; provided that, if the husband who received the loan is solvent, no action for the penalty for theft shall be brought against the woman, lest this situation between husband and wife who do not live together harmoniously, give rise to some trickery, through which, perchance, the wife,

¹¹ [Blume] The case contemplated is, no doubt, one where the owner neglects to make his election, and wants to take no risk, but in the hope of making all the profit out of another's suit.

¹² [Blume] Theft by a wife or husband of the other's property was not the subject of an action for the penalty of theft, but of a special action for removing the property. That was true also in case of some other relatives, the relationship making an action involving infamy unsuitable. D. 25.2; Buckland, Roman Law 574. See also note to law 3 of this title.

with the consent of her husband, might be dragged into court to suffer painful
condemnation for theft.
Given November 17 (530).