

Book III.
Title XLI.

Concerning noxal actions (for torts committed by slaves.)
(De noxalibus actionibus.)

D. 9.4; Inst. 4.8; Bas. 60.5.44.

Headnote.

Slaves. The number of slaves in the Roman empire was large. It has been estimated that the number of slaves in the city of Rome at one time was half as numerous again as he free, but others consider this too high an estimate. See Friedlander, 4 Roman Life and Manners 19. When Roman conquests, however, were over, aided by constant manumissions, the number of slaves probably decreased, although every well-to-do household doubtless still had them. Slave trade continued for many centuries and the were brought from among Asiatics, Germans and Schthians. Dill, Roman Society Last Century 297; Bury, 2 History of the Later Roman Empire 317. They were employed, raised and trained, to serve in almost every occupation. Almost any industry in which freemen are now employed might be carried on by slaves. In the decline of the empire, however, there was a tendency to exclude slaves from responsible classes of employment, and to leave these in the hands of freemen. Buckland, Roman Law of Slavery 7. One employment was, with few exceptions, barred to them, and that was the army, although we have it on record that they were invited to serve as soldiers in a case of an emergency. C. Th. 7.13.16.

A slave was ranked as an object of movable property, and we find several places in the Code in which the price at which he was valued is given. C. 6.43.3; C. 6.46.6; C. 7.7.1. He might, therefore, be the object of theft and robbery. C. 6.2. He might even be the object of insult, but no action arose in favor of the slave, but only in favor of his master, and then only when the insult to the slave could be construed as an insult to the master. D. 47.10.15; headnote C. 9.35.¹ It may, however, be noted that beginning with the time of Seneca, the slaves in the Roman empire commenced to be treated more like human beings. Justinian, in fact, prided himself in his legislation for, and consideration given, slaves. Manumission was favored in every way. See C. 6.1 et seq. and C. 7.1 et seq.

The responsibility of the slave was recognized within the sphere of criminal law, and he could be prosecuted for a crime committed by him the same as a free man. But in the civil law, his personality in respect of third parties was submerged in that of his master. In fact his own master could not sue him, for whatever property he had belonged to the master. The slave had no status in the courts. C. 3.1.6 and 7. It was only in exceptional cases that slaves could be accusers in a criminal case, or that they had a status in a civil case. Buckland, Roman Law of Slavery 83-86. Their testimony was ordinarily taken under torture, and in civil cases it was accepted only in exceptional cases. Headnote C. 9.41.

A slave having no status I court could not be sued on his contracts. Neither could he be sued in a civil case for a tort. C. 3.1.6; C. 3.32.20. His master, however, might be

¹ Blume has penciled in adjacent to these sentences a note that appears to say "Contra Egypt, 50 SZ 163."

liable on his contracts, if entered into with the former's authority (see headnote C. 4.27), and the master was also liable to be sued for the tort of his slave. An action of that kind was called a noxal action, the term "noxia" from which noxal is taken being at times applied to the slave himself, at times to the tort which he committed. D. 9.4.1; Inst. 4.8.1 and 2. In such a suit, the master had the option either to deliver up the slave or to pay whatever damages were assessed. If the slave was manumitted after the commission of the tort against a third person, the tort followed the tortfeasors (noxia caput sequitur); in other words, the slave himself who, by the manumission, became a free man, could still be sued therefor. That, however, applied only to torts committed against third persons. C. 4.14.4 and 6.

3.41.1. Emperor Alexander to Marcellus.

If the money itself is still in existence, which you say was carried away from the property inherited from your father, by a person who clearly appears to be a free person, you are not forbidden to bring an action to recover it, or an action to have it produced. Although, generally, a tort follows the person of the tortfeasor, and a manumitted slave may be sued in an action for the penalty of theft, which does not follow his heir, yet when a slave steals anything from the master, and commits a theft, an action for the penalty of theft does not lie against him even though he is subsequently manumitted, unless he steals the things after manumission.
Promulgated November 19 (223).

Note.

In this case, as the Basilica (Bas. 60.5.44) explains this law, the decedent left a son and a slave, and gave the latter conditional liberty, and while the condition was still pending and not fulfilled—in other words, while the slave was still a slave, he stole some property from the inheritance. Afterwards the condition was fulfilled and the slave acquired his liberty. The son thereupon wanted to bring an action against the manumitted slave on account of the property stolen while the latter was in slavery. Now the foregoing law states: (1) If the property still exists, it may be recovered either by an action in rem or by an action for production; (2) while generally—where third persons are involved—the tort follows the tortfeasor, so that if the theft had been committed against a third person, the slave would have been liable in an action for the penalty of theft even after manumission (C. 4.14.4), he is not so liable where, as in this case, he stole the property from his master while in slavery.

No action for such theft could be brought by a master against his own slave, nor could it be brought against him after his manumission. C. 4.14.6; Buckland, Roman Law of Slavery 107. In the case at hand, the old master was dead, but the son, who was his father's heir, became the new master while the condition for freedom was not fulfilled; so that the theft was in any event committed against the master.

3.41.2. Emperor Gordian to Quintillianus and others.

If your slaves, without your knowledge or against your order, cut down trees with the intention of theft, for which they are also subject to proper punishment under the law relating to forests, you needlessly fear that you are liable for anything more than the delivery of the tortfeasor, since masters, if sued in a noxal action for torts of their slaves, of which they are ignorant or which they have forbidden, can only be condemned to either deliver the tortfeasor or pay the damage.

Promulgated June 3 (239).

3.41.3. Emperors Diocletian and Maximian and the Caesars to Eutychius.

You are not forbidden to go before the president of the province if you prepare to bring an accusation of kidnapping against a slave in the usual manner; or if you prefer to sue the master of the misled slave in a noxal action (for kidnapping) or for the penalty of theft, the president of the province will accommodate you by investigating the matter, not unaware that if you choose to sue the master, but fail to prove that the tort was committed with his consent, he has the choice to deliver up the slave or pay the damage and penalty. Promulgated at Sirmium October 3 (293).

Note.

As to the crime of kidnapping, see C. 9.20; as to the penalty for theft, see C. 6.2 and headnote. It must be borne in mind that an action for penalty for theft was different from the action in which the property stolen could be recovered. The property could be recovered without reference to the penalty. See C. 4.8. It may be further noticed that the slave could be prosecuted in a criminal action with which, however, the master had nothing to do, unless he wanted to defend the slave. See C. 9.12.4.

3.41.4. The same Emperors and Caesars to Sosius.

If a slave without the master's knowledge, or with his knowledge but without power to prevent it, robs your property, you may sue his master for fourfold damage, if the judicial year² has not elapsed, and for simple damage if such year has already passed. If the master prefers to deliver up the slave for satisfaction, still you are not forbidden to sue him for the amount of property which he received. If the robbery was committed with his knowledge and ability to prevent it, the privilege to deliver up the slave in satisfaction is taken away and he may be sued for, and compelled to pay, the entire damages awarded. 1. If, however, you want to institute a criminal accusation on account of the slave ravishing your wife, then you must do so, not against the master, but against the slave who, as you say, committed the crime. Promulgated at Sirmium December 15 (293).

Note.

When the master was sued in a noxal action he had the right either to deliver up the slave, or pay the damage. In either event, however, he was also required to deliver up any property which the slave had taken by means of the robbery. And, as stated, if the robbery was committed with the knowledge of the master, when he had the power to prevent it, he was liable for all of the damages. If the master was a participant in the crime, he was guilty the same as the slave.

3.41.5. The same Emperors and Caesars to Menophitus.

If a slave took a female slave from you together with other things by secret theft, with the aid and knowledge of the master, then, since no civil action between a free person and a slave can be brought, you may sue the master on account of the tort, in a penal action for double penalty, and to recover the property by a real action, or by a *condictio*.

² [Blume] As to judicial year, see note C. 2.50.1. As to fourfold penalty for robbery, in case an action was brought within a judicial year, see C. 9.33.

Written March 28 (294).

Note.

Theft was divided into open and secret theft. A quadruple penalty could be recovered for the former, double penalty for the latter. C. 6.2, headnote. At the same time, as already noted in the preceding law, the property itself could be recovered.