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Observations on the problem of theft between spouses in Roman law – forms of perpetration in D. 25, 2 (De actione rerum amotarum)**

Abstract

Although the dogmatically coherent elaboration of perpetrator forms is the merit of modern criminal law, it is quite clear that the ancient Roman jurists were conscious of the "prefigurations" of these forms of perpetration and of their main aspects. However, these regulations cannot primarily be found in Roman (public) criminal law, but in private law, as in Roman law, a significant number of criminal offences were considered a *delictum,* which was adjudicated in the framework of a procedure created especially for private law. These regulations of perpetration forms are remarkable in the examination of theft, especially of theft between spouses. The examination of sources concerning *actio rerum amotarum* (the applicable action in case of theft between spouses) therefore plays an important role with a view to perpetrators, because the act as well as the action has a close connection to *furtum* and to the *actio furti* (the applicable action in a case of common theft).

In this paper, we intend to present how different forms of perpetration appear in sources concerning theft between spouses and *actio rerum amotarum*. This essay aims to provide help in determining the *rei persecutoria* or *poenalis* nature of this action, understanding its evolution and clarifying the original Roman concept and character of the underlying act. We also examine how constructions, fundamentally developed in the framework of *furtum,* can be used by the examination of the act and the perpetrator of *actio rerum amotarum,* in order to have a closer view of the problem of theft between spouses in Roman law.

Keywords: *actio rerum amotarum, actio furti,* theft between spouses, perpetrator forms in Roman law, *poenalis* or *rei persecutoria* nature of the *actio rerum amotarum*

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I. Introduction

Despite the fact that the particular, dogmatically coherent elaboration of perpetrator forms (the different meaning of "offenders" and "accessories") is a construct of modern criminal law, it is quite clear that the ancient Roman jurists were conscious of the "prefigurations" of these forms of perpetration and their main aspects.[1] In the primary sources, a different system of perpetrator forms is recognisable, with its main characteristic features and a well-defined terminology, which shows us some conformity with the legal terms used nowadays.[2]

However – as Ferenc Benedek has already pointed out during his examination of this subject[3] – these regulations are not primarily found in Roman (public) criminal law.[4] The reason for this phenomenon is that Roman jurists, who were the main shapers of classical Roman law and whose work, examination and success in this law field was unbelievably important, directed their efforts towards private law in particular, and not criminal law. "Fortunately", in Roman law, a significant number of criminal offences were considered *delicta,* adjudicated in the framework of a procedure created especially for private law, so the statements of jurists, concerning forms of perpetration, can be found in sources dealing with these procedures. The aforementioned distinction[5] is remarkable

[1] Concerning the accessory, see V. M. Amaya Garcia, Coautoría y complicidad: estudio histórico y *jurisprudencial,* (Editorial Dykinson, Madrid, 1993).

[2] As we can see below, with reference to accessory forms, on the one hand, the definition *ope consilio* is the typically used form for both the physical and psychological abettor; on the other hand, the term *auctor* is also generally used in the meaning of instigator. From now on, we will use the modern legal terms of forms of perpetration in favour of clarity. See more Siklósi I., *Római magánjog [Roman private law],* (ELTE Eötvös Kiadó, Budapest, 2021) 1604–1605.

[3] Benedek F., A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], in *Studies in Honour of Professor Imre Molnár on the occasion of his 70th birthday,* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2004) 45–61., especially 45–48.

[4] This does not mean that these perpetration forms would not be important in the framework of *crimina*. See Th. Mommsen, *Römisches Strafrecht,* (Duncker & Humblot, Leipzig, 1899) 991, in connection with *crimen maiestatis* (based on Paul. 5, 29, 2 [the referred part, Paul. 5, 22, 2 is incorrect]), furthermore – also in connection with *crimen maiestatis,* and *adulterium* – G. Rizzelli, Ope consilio dolo malo, (1993–1994) (35–36) *BIDR,* 293–313. To the questions relating to criminal law in general, see Zlinszky J., *Római büntetőjog [Roman criminal law],* (Nemzeti Tankönyvkiadó, Budapest, 1991).

[5] It is not a coincidence that the Italian Romanist Paolo Ferretti examined the problems of accessories monographically in the framework of theft and the *actio furti* (additionally, he examined D. 25, 2, 20, concerning the *actio rerum amotarum,* which will also be explained later). See P. Ferretti, *Complicità e furto nel diritto romano,* (Dott. A. Giuffrè Editore, Milano, 2005). It can be generally stated that, in the literature, problems of accessories are mainly analysed with regard to theft; see L. Winkel, „Sciens dolo malo" et „ope consiliove": ancêtres des conceptions modernes?, in *Mélanges Felix Wubbe,* (Fribourg, 1993) 571–585.; G. MacCormack, Ope Consilio Furtum Factum, (1983) 51 (3) *TR,* 271–293.; J. A. Ch. Thomas, Contrectatio, Complicity and Furtum, 13 (1962) (13) *IURA,* 70–88.

in the examination of theft,[6] so the examination of sources concerning *actio rerum amotarum* (hereinafter: *a.r.a.*) plays an important role for their perpetrators, because the act, as well as the action, has a close connection to *furtum* and to the *actio furti* – even if the differences between these two are as significant and characteristic as their similarity.

During the examination of *a.r.a.*, the legal nature of this action has great importance, whether it is an *actio rei persecutoria* or *poenalis*. According to the convincing argumentation[7] of the German Romanist Andreas Wacke (with respect to Ernst Levy's previously stated theory[8]), who has processed this action in the greatest detail so far, the action had a *rei persecutoria* nature, despite it containing some penal character too. This opinion cannot be considered as a unanimous one, as different opinions also exist in the literature.[9] With respect to the underlying "original" act and life situation which motivated the development of this action, we consider it as a delict-based but *rei persecutoria* action, in accordance with its classical form and function and the next source:

D. 25, 2, 21, 5. *Haec actio licet ex delicto nascatur, tamen rei persecutionem continet (...)*

This is why the underlying act – theft between spouses – is so special and suitable for the examination of perpetration forms.

A brief summary of the main characteristic "substantive law" features of theft between spouses, which make it different from common theft and relevant to perpetration forms, belongs to the introductory part as well, and it is necessary to understand the statements that follow. The underlying act must be the *amotio* (C. 5, 21, 2; D 25, 2, 11 pr.), which is a qualified form of *contrectatio* (Gai. 3, 195), because *contrectatio* by itself is irrelevant at this point. Whether the act was considered as a *furtum* is a controversial question in the sources; more arguments exist that conclude it was considered as a theft, or more precisely, the opinion, which states its non-theft nature would be hard to prove (D. 25, 2, 1). Spending, selling, donating and usage of goods (consumption), as well as concealing of goods during divorce also underlie this action (D. 25, 2, 3, 3; D. 25, 2, 17, 1). A valid marriage *(sine manu)* must exist between the parties at the time of perpetration, otherwise there is no legal ground for the use of this type of action (although living

[6] In this question, we refer to the work of Marton, G., *A furtum, mint delictum privatum [Furtum as delictum privatum],* (Hegedüs és Sándor Könyvkiadóhivatala, Debrecen, 1911), in which the author examined and defined *furtum* and *actio furti* in an unexcelled manner, from both a substantive and procedural law perspective. We must specially highlight Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 178–195., because the author deals with the issue of accessories in this part (often also successfully criticising Mommsen), to which we will refer later.

[7] A. Wacke, *Actio rerum amotarum,* (Forschungen zum römischen Recht, 17. Abhandlung, Böhlau Verlag, Köln and Graz, 1963).

[8] E. Levy, *Privatstrafe und Schadenersatz im klassischen römischen Recht,* (Verlag von Franz Vahlen, Berlin, 1915) 115.

[9] E. Valiño, Las Relaciones Básicas de las Acciones Adyecticias, (1968) (38) *Anuario de historia del derecho español,* 431–437.

together during the marriage is not a condition of it). *Actio furti* can be initiated between non-married parties, or parties with a non-valid marriage (D. 25, 2, 2; D. 25, 2, 15 pr.; D. 25, 2, 3 pr.). As a rule,[10] an action can only be initiated after the dissolution of the marriage, and this status must endure until the end of the whole procedure (*secutum divortium,* following the act; D. 25, 2, 25). Finally, the sources declare that the offence is always intentional; it must be committed via *divortii causa* (moreover, it only can be committed via *divortii causa*), in order to demand the appropriated goods with *a.r.a*., the *divortii causa* of which was not identical to the *divortii faciendi causa* (C. 5, 21, 2).[11]

II. Certain perpetrator forms

Moving on to certain perpetrator forms, the fact that only one of the spouses can commit this act (as an offender) is obvious and can simply be deduced from the aforementioned circumstances.[12]

> C. 5, 21, 2. *Divortii gratia rebus uxoris amotis a marito vel ab uxore mariti rerum amotarum edicto perpetuo permittitur actio.*

[10] There is one exception in the sources – C. 6, 2, 22, 4 –, but we do not want to pay attention to it in this essay, because it is irrelevant from the aspect of perpetration forms.

[11] Concerning *divortii faciendi causa,* see Wacke, *Actio rerum amotarum,* 45. Other intentions were taken into account, i.e., if the appropriation were committed *mortis causa,* or the wife committed the act *"cum de viri vita desperasset".* In these cases, the form of the appropriate action was *a.r.a. utilis*. Since these cases are exceptional and sources do not deal with the theoretical perpetration forms of them, we shall not discuss them further.

[12] The question arises whether either spouse could have been the perpetrator of that crime or not. According to sources, originally only the wife could have committed the crime as a perpetrator, and this changed only later, in classical Roman law, when the husband could be a perpetrator too. Henceforth, we will examine the action from this classical perspective, where either spouse could have been the perpetrator of this act (or more precisely, both ex-spouses could have been sued with *a.r.a.*). – Anyway, the question is dissentingly interpreted in the literature: A. Guarino, *Diritto privato romano,* (Editore Jovene, Napoli, 2001) 581. considered the wife as the only possible perpetrator; M. Talamanca, *Istituzioni di diritto romano,* (Dott. A. Giuffrè Editore, Milano, 1990) 144. presumed that the husband became a possible perpetrator only in the late classical era; whilst M. Kaser, *Das römische Privatrecht,* (Verlag C. H. Beck, München, 1971–1975) II. 436[30]. supposed that, generally, this change occurred before Justinian. B. Forgó-Feldner, Zurückbehaltungsrecht (retentio), in U. Babusiaux et al., *Handbuch des Römischen Privatrechts,* (Mohr Siebeck, 2023) 3048. et seq. believes that suing a husband must have been a "rarity", and considers its ground to be the *honor matrimonii* and its function to be the protection of the *parapherna*. Concerning this concept, we can refer to the case in Ulp. D. 23, 3, 9, 3, which is analysed thoroughly by Siklósi I., *A custodia-felelősség problémái a római jogban [Problems of custodia-liability in Roman law],* (ELTE Eötvös Kiadó, Budapest, 2021) 313–323. In connection with the property of the wife beyond dotal goods, see however M. Garcia Garrido, *Ius Uxorium. El régimen patrimonial de la mujer casada en derecho romano,* (Consejo Superíor de Investigaciones Científicas: Cuadernos del Instituto Jurídico Español, núm. 9, Roma and Madrid, 1958) 100., who states that, despite the property management of the wife's personal property by the husband, the wife *„tiene una completa autonomía patrimonial para disponer de sus bienes"*.

Only the wife and the husband were able to commit this crime as offenders, because they were the only ones who met the special subjective requirements of the underlying offence.

The next step is to examine how multiple persons' perpetration forms can be taken into consideration in this action, and we immediately face the problematics of joint offenders. Committing this act as joint offenders is impossible in a logical sense, because it obviously cannot be jointly committed by "several wives" or "several husbands"; however, free persons (we will examine the case of slaves later) other than spouses can take part in the perpetration. In these cases, almost every single general requirement[13] of joint perpetration is realised; however, one main special requirement is still missing, because a legitimate marriage cannot exist between joint offenders and the victim. With respect to joint perpetration, they cannot be regarded as joint offenders, so they can only be taken into consideration as abettors of the offender spouse, or as individual perpetrators (and so joint offenders, but only in relation to each other at most).[14] However, one thing is certain; *a.r.a.* cannot be initiated against them (D. 25, 2, 17 pr. also excludes the opportunity to initiate this action because of a missing legitimate marriage, even if not precisely in this context). The question arises; which action could be initiated against these "joint offenders"? The available sources unfortunately do not give us an unambiguous solution; *actio furti* may be an option in accordance with D. 25, 2, 17 pr. and D. 25, 2, 19.[15]

After this, we would like to examine another problematic issue, the indirect offender. Benedek points out that this kind of perpetration form also appears[16] in the sources of Roman law, typically in two situations: first, when someone commits a crime by using a person under their power (who, with respect to this, must obey their master's orders; these are mainly slaves or persons under *patria potestas*);[17] second, when the *ius imperandi* establishes the legal obligation of a *persona sui iuris* acting according to someone else's orders. The sources do not deal with the second case in the field of *a.r.a.*

[13] Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 182., referring to *rerum amotio: dolus,* the intent (in this case: *divortii causa*), the common object, on which the underlying act is realised and the common act of commission *(amotio).*

[14] Conversely, it is possible that a spouse acts as a "partner" of the thieves and, in this relation, she can be a joint offender, but this is irrelevant from the aspect of the *a.r.a.;* furthermore, since the *actio furti* cannot be initiated against her (even as a joint offender), the question therefore has no importance (at least not in the field of criminal law).

[15] Actually, the relation is not clear between the wife and the thieves in this source; the offence may made in the abovementioned way.

[16] Benedek, A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], 53–55.

[17] For these two cases see jointly D. 50, 17, 4.

and in the framework of Roman family law, regarding the position of the wife,[18] only the first case is possible, when the wife commits this act by using her slave.

> D. 25, 2, 21, 1. *Si servus mulieris iussu dominae*[19] *divortii causa res amoverit, Pedius putat nec furtum eum facere, quoniam nihil lucri sui causa contrectet nec videri furtum facienti opem ferre, cum mulier furtum non faciat, quamvis servus in facinoribus domino dicto audiens esse non debeat: sed rerum amotarum actio erit.*

The legal reasoning of the wife's status is very interesting, namely why she is an indirect offender instead of an instigator: when the slave takes away things belonging to the husband *divorti causa* on the wife's command, the slave him/herself does not commit theft, because there is one requirement missing: it must be committed *lucri sui causa;* however, the slave cannot be considered as someone used for theft, and furthermore there is no legal ground to initiate *a.r.a.* against them, because the slave does not fulfil the qualification requirements to be an offender in this act. The wife will therefore be accountable in this case as an indirect offender, because she fulfils all the special personal requirements to be an offender, and even the slave commits *rerum amotio*[20] in favour and on the command of her.

In relation to our next subject, forms of accessories, one main question arises in the field of *a.r.a.:* is it possible for a spouse to be an accessory, or can a spouse only be an offender, whose conduct can possibly be aided by an accessory? As already stated above, the perpetrator's position can be fulfilled exclusively by one of the spouses and, if someone else is involved, the liability of "fellow perpetrators" will be adjudged upon different grounds (regardless of whether they were truly perpetrators of another crime or accessories). In this way, we can narrow down our question and conceive it more precisely: does one spouse's commission as an accessory underlie his/her liability for *a.r.a.?*

Firstly, the form of instigator needs to be examined. The sources use a special term for the instigator, which is *"auctor",* and for the instigator's behaviour towards the

[18] The sources mention only this case; henceforth, we would like to pay attention also to that in this essay; however, it is also true that the husband, using his *patria potestas,* could also commit the *amotio* by using one of his family members under his power. The sources do not say anything about this case, but excluding it from the field of application of *a.r.a.* would not be reasonable. Additionally, the lack of this case in the sources may refer to the fact that this action could originally have been initiated only against the wife.

[19] This wording can also be considered consistent. As Benedek, A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], 53. pointed out, the expression *"mandavit vel iussit"* relating to the abettor should lead the jurists to recognise the perpetration form of indirect offender. For concrete sources see D. 9, 2, 37 pr., D. 50, 17, 169 pr. etc.

[20] Wacke, *Actio rerum amotarum,* 36. et seq. states that, actually, the wife herself is the perpetrator and the slave is merely her "extended arm". M. Pennitz, Diebstahlsklage (actio furti), in U. Babusiaux et al., *Handbuch des Römischen Privatrechts,* (Mohr Siebeck, 2023) 2619[186]. refers to the exclusion of *noxae deditio* regarding this text. See also Thomas, Contrectatio, Complicity and Furtum, 81. et seq. and 88.

offender, which is *"mandavit vel iussit".* As mentioned above, Benedek stated that a strong connection also exists in the legal terminology between the terms used for the instigator and the indirect offender – the above cited source is a concrete example (D. 25, 2, 21, 1), where the typical term *"iussum"* refers to a case when the wife commits the crime as an indirect offender. Therefore, in this title of the Digest, there is no specific instance for instigation. However, the act set out in the next fragment can be interpreted in various ways:

> D. 25, 2, 19. *Sed et si divortii tempore fures in domum mariti induxerit et per eos res amoverit, ita ut ipsa non contrectaverit, rerum amotarum iudicio tenebitur. Verum est itaque quod Labeo scripsit uxorem rerum amotarum teneri, etiamsi ad eam res non pervenerit.*

As the relation between the wife and the thieves (who have been let into the house by the wife) is not clarified in the text, we have the opportunity to consider the consequences derived from the different constructions.[21]

Theoretically, we can consider the wife to be the instigator of the thieves; the interpretation by Wacke refers to this as well.[22] According to this, the wife did not just help the thieves to enter the house, but she incited their intention of theft. In this case, the wife will be liable for the *rerum amotio,* although she did not even commit *contrectatio,* and regardless of whether she obtained the appropriated goods and the fact that the liability of the thieves would probably have to be judged with another *actio* (e.g. *actio furti*). As such, the conclusion is that, in the field of application of *a.r.a.,* it seems to be sufficient if the special subjective requirements are fulfilled by the accessory, or, the converse, if one of the spouses commits a relevant act, at least as an accessory.[23]

[21] According to this source, we can exclude the perpetration form of offender (because the wife herself does not commit *amotio* [despite the text stating, *"per eos res amoverit";* she does not even l actually ay her hands on the taken things, and it turns out from another text that she, in a particular case, does not even obtain them: *"etiamsi ad eam res non pervenerit"*]), of indirect offender (because the liability of the thieves is not excluded) and of the psychological abettor (because, with letting the thieves into the house, she acts physically anyway), but any other activity can occur. For the consequences of the joint offenders perpetration form, see above. Regarding all these circumstances, we will henceforth examine this text with a view to perpetration forms of instigator and physical abettor.

[22] Wacke, *Actio rerum amotarum,* 38. However, in the author's opinion, this was rather exceptional, because in this case the thieves were the offenders. The exceptionality of the case is corroborated by the statement cited from Labeo.

[23] At first glance it may seem strange, because the accessory would only be accountable for the act if the offender commits the crime, but in this case, as only one of the spouses can be an offender, it is out of question. It therefore seems that the behaviour of the wife inducing the thieves, as far as we think about instigation, was originally aimed at committing a theft (thus the wife can be an instigator of theft) but, with regard to the special nature of the commission's time *(divortii tempore),* the committed act can be taken into consideration as an act underlying *a.r.a.* (but the special requirement must exist for the institution of this *actio*). – Theoretically, it cannot be excluded that the spouse has an instigator, so that another person induces the spouse to commit this crime, because the special personal qualification of the offender is achieved. Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],*

However, it is also possible to consider the wife's act as that of a physical abettor. She can be an abettor of the thieves,[24] letting them into the house; there is a remarkable similarity between this behaviour *("fures in domum mariti induxerit")* and the next one, which is mentioned in the sources expressly as abetment *(ope consilio)* in the field of theft:[25]

> Inst. 4, 1, 11. *Interdum furti tenetur, qui ipse furtum non fecerit: qualis est cuius ope et consilio furtum factum est. (...) ope consilio eius quoque furtum admitti videtur, qui (...) ostium effringit, ut alius furtum faceret (...)*

The wife will be accountable with *a.r.a.,* even for acting as an abettor; in other words, even if, as in the above cited case, she just lets the thieves into the house, without actually obtaining the stolen items afterwards: this is also corroborated by the following text:

> D. 25, 2, 20. *Si rem, quam maritus bona fide emerat, uxor amovit vel opem furi tulit idque fecit divortii causa, rerum amotarum iudicio damnabitur.*

Although, in this case too, the thief is the offender, and the wife just *"opem tulit"* (i.e. – in accordance with the consistent[26] legal parlance of the sources – she provides physical abetment to the thief), *a.r.a.* can be initiated against her, even if she does not act within the framework of the crime.[27]

III. Conclusion

Finally, we can see, even after this brief study of this topic, that although different legal terms exist in the sources for different perpetrator forms of theft between spouses, the legal consequences of this crime are not distinguished, as for instance in

189. – concerning abetment in the field of theft – also emphasises that "there is no need to fulfil the criteria of theft in the assistant's act; moreover it must not happen, otherwise the participation would no longer be assistance but joint offence". Hence, only accessories can participate in this situation, but the sources do not mention their liability for it.

[24] As we already mentioned, the text does not inform us accurately about the relation between the wife and the thieves, but the expression *"per eos res amoverit"* refers to a higher level of cooperation, which is beyond the activity of "normal" complicity.

[25] Concerning this source, see MacCormack, Ope Consilio Furtum Factum, 291., who – citing the following parts of the text as well – emphasises, that "To be made liable as an accomplice one must have contributed some positive act of assistance. This approach is reflected in the language with which Justinian introduces his comment on Gaius 3, 202 (...). As a result of this ruling the word *consilio* in the phrase *ope consilio* takes on a more extended significance. It retains the sense of 'intention that a theft be committed', but acquires in addition the sense of 'knowledge that a theft is being committed'.".

[26] The phrase *"opem ferre"* is also frequent (see e.g. the above cited D.25, 2, 21, 1).

[27] There is again no information about the thief's liability but, based on the above-mentioned circumstances, if other requirements are also fulfilled, *actio furti* can be initiated against the thief.

the case of a common theft.[28] The sources simply declare that any specific form of perpetration underlies this action *("sed rerum amotarum actio erit", "rerum amotarum iudicio tenebitur", "rerum amotarum iudicio damnabitur").*[29] All these expose the cognate (or even mutual) roots of this action with theft, but also show divergence from it, and highlight, on the one hand from a substantive law aspect, the characteristics of the act (and all of the special statutory elements of this crime) underlying the *a.r.a.,* especially the different intent *(divortii causa),* by which, during the application of this action, there is no need to examine the intention of financial gain, a fundamental element of theft (*animus lucri* [*sui*] *faciendi;* inasmuch as the crime typically results in a profit). On the other hand, from a procedural point of view, they expose the combined *poenalis* and *rei persecutoria* nature of this action, of which (at least as it is regulated in the Digest) *rei persecutoria* characteristics are ostensibly significant and much more dominant.

We can hope that this essay will provide help to determine the *poenalis* or *rei persecutoria* nature of the *a.r.a*., to understand the evolution of this action and to clarify the original character and concept of the underlying act. As was already stated as a premise, the distinctive elaboration of perpetrator forms by Roman jurists was made in the framework of "private crimes", *delicta,* particularly of *furtum*. Why the praetor decided to create a unique action, which is basically quite similar to the *actio furti* regarding the underlying act, but treats the act quite differently at the same time, can be found in the special nature and characteristics of the underlying act and, with regard to them, in principles of legal policy. In conclusion, we can affirm that constructions, fundamentally developed in the framework of *furtum,* can be well used by the examination of the act and the perpetrator of *a.r.a*.

[28] Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 179–181., 182[9]., 192. Marton stresses that "even if caught in the act, the abettor will be sued only with *furti nec manifesti actio*"; furthermore, "the abettor is not exposed to *condictio furtiva* and other *rei persecutoria* actions" (*cf.* D. 13, 1, 6).

[29] In the light of this statement, another question arises, namely is it possible at all for a spouse to be an accessory in this crime? If the offender can only be one of the spouses and the liability of the accessory always belongs to the offender's, an accessory will therefore only be liable for the crime if the offender actually commits the crime, then it must be excluded for a spouse to be an accessory, as well as for others to be an offender. We see however in the sources that acts of accessories also underlie the action; so the question arises whether these cases are, in a modern term, forms of a *delictum sui generis*, in which the acts of an accessory will mean the completed criminal offence. We also find it possible to assume that this may correlate with the preponderant *rei persecutoria* nature of this *actio*.