

Book IX.
Title XLI.

Concerning examination under torture.
(De quaestionibus.)

Bas. 60.50.22, et seq; Dig. 48.18.

Headnote.

In view of the otherwise enlightened principles of Roman law, the torture of defendants and witnesses, to extort confessions, or evidence, is one of the worst blots upon Roman criminal procedure during the time of the Roman Empire. No free men were put to the torture, legally, during the Republic. Mommsen, Strafrecht 405. But soon after the establishment of the Empire torture became frequent. For some time it was mainly confined to cases of treason. Tac., Ann. 11.22; Suet., Tib. 58.62; Dio. Cass. 57.19; Suet., Dom. 8. But it was gradually extended to other cases. Caligula, however, seems to have used torture indiscriminately. Suet., Calig. c. 32; and Lactantius writes of Galerius: "He first of all degraded those whom he meant to punish; and then not only were inferior magistrates put to the torture by him, but also the chief men in cities, and persons of the most eminent rank, and this, too, in matters of little moment, and civil questions." De mort. persecut. c. 21. What was worse, the most trifling affairs were often considered as treason, as may be found in many passages in Ammianus Marcellinus. See e.g. 14.5; 15.3; 16.8; 18.3; 19.12; 21.16. Domitian put to the torture witnesses in connection with alleged unlawful relation with a vestal virgin. Suet., Dom. c. 10. Later, torture could be used against person accused of practice of magic or other form of divination; counterfitting, forgery, poisoning, adultery and offenses committed by accountants. C. 9.18.7; C. 9.23.1; C. 9.22.21; C. 9.41.3; Nov. 134, c. 12; C. 12.49.1 and 2. These are cases which we find specifically enumerated, and Geib in his Gesch. d. Rom. Criminal. Proc. 617, seems to consider these the only cases in which free men might be tortured. But Dig. 48.18.1 pr, says that "in order to discover crime, resort is generally had to torture." Paul., Sent. 5.14.1, says the same thing. Hence it would seem that, perhaps, the enumerated cases are not the only cases in which torture of persons accused was resorted to, particularly in view of the fact that many crimes, such as robbery on the highways, were considered very serious crimes. Some discrimination, however, was made. While all persons, without regard to rank or station, might be tortured in connection with cases of treason (C. 9.8.4) and the practice of magic (C. 9.18.7), persons of rank, accused of crimes, were not, generally speaking, subjected thereto, excepting, it seems, accountants of the public money. See the constitutions in this title, and C. 9.8.4; C. 9.18.7; C. 12.1.10; C. 12.49.1 and 2. Soldiers too, and their children, and decurions and their children, were, as a rule, exempt. C. 9. 8.4; C. 9. 41.8; C. 9.41.11.1; C. 9.41.16 and 17; C. 10.7.1.2; C. 10.32.33 and note. But see C. 9.22.21 pr; and C. 10.32.40. Free persons who acted merely as witnesses, could not, it would seem, until Justinian's time, be put to the torture, except in cases of treason, unless they equivocated. Dig. 48.18.15; C. 4.20.13; Geib 623. But this would be apt to leave too much discretion to an unmerciful judge. In fact in Dig. 22.5.21.2, there is a statement that a person who fights wild beasts or of similar low station, is not to be credited except

under torture, which would seem to attest occasional torture of witnesses who were free men. See Geib 635. Justinian provided that all plebeians who acted as witnesses might be tortured even in civil cases. Nov. 90, c. 1 and 3.

Slaves were in a different situation from free persons. They might be put under torture for any and all offenses of which they were accused. C. 9.41.15; C. 4.20.8; Paul., Sent. 5.16.1. As a rule they could not be witnesses in civil cases at all. Nov. 90, c. 6. There were some exceptions, however, as noted in laws 12, 13 and 18 herein. But they could be witnesses in all criminal cases, except in cases against the master. In some cases they could testify even against the master. C. 9.41.1 and note. Their testimony was normally taken by torture, and in fact it appears that it could not be taken in any other form. Buckland, Roman Law of Slavery 87; 50 S.Z. 164; Dig. 22.5.21.2. But it was provided that torture should not be resorted to except only in cases of grave crimes (Dig. 48.18.8). Only cases of treason, adultery and poisoning are specifically mentioned. Dig. 48.5.27.6; Dig. 48.18.10.1; C. 9.41.3. But these were doubtless not the only cases. Geib 659. It was, however, further necessary that on the one hand there was need for further testimony, and on the other that there was already some evidence which needed corroboration. The beginning of the investigation could not be made by torture. Dig. 48.18.1.1 and 1.4; C. 9.41.8; Buckland, supra, p. 87. A third person's slave could be tortured without the consent of the master, but only if security or promise had been given for his value. Dig. 48.18.13; Geib 640. And the penalty was double in case of a malicious accusation against a slave by reason of which he was tortured. C. 9.46.6.

A special situation under which slaves were subjected to torture was when a master was killed and aid was not extended by the slaves. This was pursuant to the so-called Silanian Senate decree, and was evidently made necessary by reason of the extensive system of slavery in the Roman Republic and Empire. That situation is more fully dealt with in C. 6.35, which deals with this senate decree.

Some exceptions, temporary or otherwise, were provided for by the law, both in the case of free persons as well as slaves. Thus a child under fourteen years of age was, generally, not to be submitted to torture. That was true also as to a pregnant woman during the time of her pregnancy. So too it is stated that in case of the violent death of a master, insane slaves were not tortured and those who were deaf or dumb or blind were given consideration and not tortured unless, doubtless, their infirmity did not, under the particular circumstances, prevent them from rendering aid. Dig. 48.18.15.1; Paul., Sent. 1.12.5; Dig. 48.19.3; Dig. 29.5.3.8-11.

The law gives a warning not to credit evidence extorted by torture too readily, since it is, from its nature, of a doubtful character, particularly in case where enmity appears. Hence it is stated that the circumstances in each case must be considered. Dig. 48.18.1.23-25. The measure of the torture, and whether a person was to be tortured at all was in the discretion of the judge, and moderation must be generally used. Dig. 48.18.1 and 10. 3; C. 9.41.8; Buckland, supra, p. 88; Geib, supra, 621, 640. In Dig. 48.19.8.3, however, it is stated that many men tortured die during the process. It was provided that the inquiries to be made should not be leading; it could not be asked, for example, as to whether so and so committed the crime, but as to who committed it. Dig. 48.18.1.21. If it was deemed to be necessary that the party should be tortured the second time, this was permitted. Dig. 48.18.18.1. The witnesses were put to the torture either in the court room or in some other room designated by the judge, and under the direction of the judge, and

the evidence was taken down in writing, to be thereafter used in the main trial, and though, perhaps, the same formality was not observed in the torture of accused persons as in the former period when the trial was not before the judge, the practice was, on account of reports in cases of appeal, doubtless continued. Cic., Pro Milo 22; Cicero, Pro Cluent. 65, 66; Procopius 7, 32. See Geib, supra, 621, 622, 632, 632; Mommsen, supra, 432; Nov. 90, c. 3. Various instruments of torture were used, as the rack and instruments in the shape of horses. C. 12.49.1. Both parties had a right to be present with their attorneys at the torture, and might interrogate the witness. Dig. 48.5.27.7. In earlier times searches of houses apparently were permitted for the prosecution, for the purpose of discovering evidence. We find no authority for that in later times. In fact no documents were required to be turned over by a defendant, at least in capital cases (Dig. 49.14.2.2), and probably also in all other criminal cases. C. 2.1.4. See generally, Mommsen, supra, 418-420.

Except as herein indicated, the requirements as to the competency of witnesses, the method of proof by witnesses or documents, the trial of a case generally, and the time and place of holding court were substantially the same in criminal as in civil cases, and will be found more in detail in other parts of this work. See generally Geib 536-538, 612, 622-634. The subject of witnesses is fully dealt with in C. 4.20, documentary evidence in 4.21; attorneys in C. 2.7; trial in C. 3.1; requirements as to written decisions in C. 7.44; appeals in C. 7.62, et seq.

9.41.1. Emperors Severus and Antoninus to Spicius Antigonus.

An examination under torture of slaves should not be made as against the owners, except in crimes of adultery, in cases of accusation for fraud in tax matters and in a crime of treason which appertains to the safety of the emperor. 1. In other cases, though what the slave says against the owner should not be the basis of the decision of the judge, still if the truth is investigated also by other means, the odium (reason) which causes its exclusion fails. But it is plain that slaves cannot be interrogated against their owners in civil cases, even in case of want of proof.

Promulgated January 1 (196).

Note.

As a general rule a slave could not be a witness, or be tortured to give evidence, against his master. While the foregoing constitution seems to admit evidence of a slave, if supplemental to other evidence against his master, this was contrary to the generally accepted rule, and probably does not correctly speak the law on the subject.

Dig. 48.18.1.5 and 1.19; D. 48.18.5; C. 9.41.6 and 7; C. 4.20.8. In fact this same constitution seems to be referred to in Dig. 48.18.1.16, and specifically states that evidence of a slave is not to be admitted against his master. Buckland, Roman Law of Slavery, puts a somewhat different meaning on this constitution. Trajan had admitted such evidence, but subsequent constitutions had repudiated this view. Dig. 48.18.1.19. Not even was it admitted for the master. C. 9.41.6 and 14. Buckland, supra, 88.

There were exceptions to the rule; but some of these only are mentioned in the foregoing constitution. C. 9.11.1, gives a slave the privilege to denounce unlawful relations between a mistress and her slave, which implies that he had a right to testify against her. Buckland, supra, 90. And a slave might be tortured to discover if his master had prompted him to run away to a third person in order to involve him in the liability for

receiving fugitive slaves. C. 6.1.4.4. Buckland, supra, mentions several other exceptions. So in certain cases of incest, it seems, a slave might testify and be tortured against his master. Dig. 48.18.5. After such torture the slave became a public slave, because he would naturally fear to go back to the master against whom he might have given information. Geib 638, 639.

9.41.2. The same Emperors to Catulus.

It is unusual and a bad example that slaves should be heard against guardians or mother of their masters, unless an action on the guardianship is carried on. Promulgated September 11 (204).

9.41.3. Emperor Antoninus said, when he had heard by judicial investigation:

In the first instance the slaves of others are to be interrogated. If the evidence furnished of such grave crime¹, is such as to make the commission thereof likely, the woman herself shall be put under torture; for it is not too much that a woman who took the life of a man by poison should be put under torture.

Promulgated March 26 (216).

9.41.4. A part of a rescript of the Emperor Antoninus.

As those who are convicted and have confessed should not be readily believed when they name as their accomplices those by whom they were apprehended and put in custody, so, if it is plainly proven that the latter have done so after jointly committing the crime, for the purpose of avoiding judgment on themselves, they must not be exempted from public revenge.

Promulgated March 28 (216).

Note.

See 9.2.17.1, which, in so far as confessed criminals are concerned, seems to be inconsistent with this law, unless it means, as it probably does, that all proof of the crime must come from other sources than the accusers.

9.41.5. Emperor Alexander to Respectus.

Not even if the death of the testator is to be avenged, are those who were given their liberty by his last testament to be indiscriminately subjected to torture.

Promulgated March 10 (224).

9.41.6. Emperor Gordian to Herodianus.

It has long been the rule in matters relating to masters or patrons to abstain from interrogation of the household, as of slaves or freedmen of their own or of the mother, so that in capital or civil cases, their statements for or against them could not obtain credence.²

Promulgated May 9 (240).

9.41.7. Emperors Diocletian and Maximian to Urbana.

¹ [Blume] Mentioned later.

² [Blume] C. 4.20.3 and 12.

We would not, even with your consent, permit slaves, shown by clear proof to belong to you, to be produced to give testimony; so much the less should they be compelled to raise their voice against you against your wishes.

Promulgated November 1 (286).

9.41.8. The same Emperors to Sallustianus, President.

We do not permit soldiers to be subjected either to torture or the punishment of plebeians in criminal cases, although they seem to be dismissed before completing their service, excepting, indeed, those who have been dishonorably discharged. This, too, will be observed in the case of sons of soldiers and of veterans. 1. Moreover, it behooves judges in public criminal prosecutions not to commence investigation of the truth by torture, but by first getting credible and probable proofs. 2. And if, induced by these seemingly definite indications, they deem it best for the purpose of searching for the truth to resort to torture, they should then finally do this, if the status of the persons permits. In this manner all our provincials will see the actual proof of our inborn benevolence.

Promulgated without day or consul.

9.41.9. The same Emperors to Charisius, President of Syria.

Resort must be had to all means of interrogation and examination under torture (of the slaves of an inheritance) in connection with the question of the status of free birth, lest strangers thereto, perhaps persons of low birth, may arrogate to themselves the splendid and native rights of free-born persons, or lest, through a contrived investigation, rights of succession may be denied to those to whom they belong and are owing.

Given at Hemesa May 10 (290).

9.41.10. The same Emperors to Ptolemaeus.

Since you say that the testament is forged, it is permitted by the constitutions of the emperors, in order to illuminate the truth, to interrogate under torture the slaves of the inheritance, although liberty was given them by him who claims to be the heir.

Promulgated August 27 (290).

9.41.11. The same Emperors to Boethus.

It pleased the Divine Marcus that the offspring of men of the rank of Eminence³ and Perfection, as far as great grandsons, should not be subjected to the punishments or tortures of plebeians, provided that the offspring of nearer degree, through whom that privilege is transferred to the offspring of remoter degree, is not stained by infamy. 1. That this, too, is to be observed in the case of decurions and their children is stated, for eternal knowledge and remembrance, by the learned Domitianus Ulpianus in his book on public questions.

Promulgated November 27 (290).

³ [Blume] Probably means the highest in rank, the later illustrious persons; the men of the rank of Perfection were those below the former. See Gothofredus ad C. Th. 11.35.1.

Note.

The ranks of Eminence and Perfection here mentioned went subsequently out of use, the three ranks of Justinian's time being those of Clarissimi (honorable), Spectabilissimi (worshipful), and Illustrissimi (illustrious).

9.41.12. The same Emperors to Asper.

The authors of law approve that whenever a question arises as to ownership of slaves, and the truth cannot be illuminated by other proof, they may themselves be interrogated under torture.

Promulgated May 13 (291) at Sirmium.

9.41.13. The same Emperors and Caesar to Philippa.

The rule that slaves of an inheritance may be interrogated if a dispute arises as to the inheritance, cannot aid you. For only when it is uncertain as to whom the inheritance belongs is the truth justly sought through interrogation of the slave who is part of the inheritance. But you, by asserting that the slave is owned in common, do not doubt that a share in him belongs to him, against whom you want the slave to be interrogated; that fact prevents the slave from being examined under torture, since no slave owned in common may be interrogated against an owner who is not said to have killed his co-owner.

Subscribed at Heraclea April 29 (293).

9.41.14. The same Emperors and Caesars to Constantius.

It is clear that a slave cannot be interrogated either in behalf of his present masters or in behalf of those who were his former masters.

Subscribed April 6 (294).

9.41.15. The same Emperors and Caesars to Maximus.

It is not doubted that slaves may be interrogated as to their own act, not only in criminal but also in civil cases; if, for instance, things are delivered by them to others in connection with a deposit, loan or other matters known to the laws.

Subscribed April 9 (294).

9.41.16. Emperors Valentinian, Valens and Gratian to Antonius, Praetorian Prefect of Gaul.

We want decurions to be entirely exempt from punishment by cords and racks (instruments of torture) on account of debts to others, or debts of their own.⁴ The judge will be in danger of capital punishment if that is attempted in contempt and destruction of the order. 1. Such cruel treatment shall be accorded only those municipal senators who are guilty of treason or are accomplices or principals in the execrable practices (of magic).

Given at Trier September 17 (376).

C. Th. 9.35.2.

⁴ [Blume] The debts referred to are those owing to the municipalities. Gothofredus ad C. Th. 11.35.2.

9.41.17. Emperors Arcadius and Honorius to Messala, Praetorian Prefect.

No indignation of the examiners (judges), bending from the path of justice, no venal barbarity of collectors, must induce them to inflict corporal punishment⁵ on innocent person or on those honored with the chief positions in the city (principales). The commendable devotion, shown by the performance of many duties, shall have this reward. The same shall be true as to him who has vacated the office of decurion; for he, too, shall not, on account of his former dignity, suffer examination under torture.

Given August 21 (399).

C. Th. 9.35.6.

Note.

This law refers specifically to exemption of torture on the part of the principales, who were the first in rank - probably ten in all - of the decurions - the senators of the local curia, i.e. senate. But his did not, apparently, though the contrary is indicated by this law and C. 10.32.52, exclude the other decurions from the exemption from torture as is specifically stated at C. 9.41.11; C. 10.32.33. The only exception is stated at C. 9.22.1. 2 Cujacius 1387; Mommsen, Strafrecht 407; Geib 618. But see Gothofredus ad C. Th. 9.35.6.

9.41.18. Emperor Justinian to Demosthenes, Praetorian Prefect.

As to torture of slaves who are a part of an inheritance, we ordain, without observing the distinction in former laws and constitutions, that, whether a dispute is carried on between heirs about the right of inheritance or only about individual articles belonging thereto, or about both, the slaves shall be interrogated only as to individual articles.⁶ And slaves only who have such articles in their possession and control, whether such slaves are still retained in slavery or have been directed to be given freedom, in the last will of the testator, shall be put under torture as to the property belonging to the inheritance, in order to reveal what is unknown; but the oath, prescribed in connection therewith, must first be taken.⁷ (2.58.1.1).

Given at Chalcedon September 17 (529).

⁵ [Blume] As by the cord and rack, or scourging by leaden balls.

⁶ [Blume] i.e. they are not to be interrogated as to who is the heir, but only as to the property. Bas. 60.50.38, scholia.

⁷ [Blume] That he does not ask it out of hatred for the slaves or enmity to the coheirs etc.