

Book IX.
Title XLVII.

Concerning punishments.
(De poenis.)

Bas. 60.51.40; Dig. 48.19.

Headnote.

We already have noted at C. 9.2.9 that even though the proof of the charge on which an accused was tried, might fail, he still might be punished, if it appeared upon the trial that he was guilty of some other crime, and this subject need not be further mentioned. It is pointed out by Geib and other authorities that there was a tendency from the time of Constantine on, to abridge the discretion of judges in administering the law. That is doubtless true, and was due mainly to the fact that the emperors became more like oriental despots, retiring more and more from the active management of affairs, as a result of which corruption of officials became more prevalent, and which, in turn, brought about the requirement, frequently of little effect, that judges must strictly keep themselves within the limits of the law. In C. 9.12.8, for instance, judges are threatened with infamy if they delay or neglect to punish crime or extend immunity or assess a lighter penalty than provided by law. It is clearly seen that this law was aimed at the corruption of judges. Notwithstanding these facts, however, the punishment meted out for crime was not uniform, and in the nature of things could not be, because of the difference of circumstances in the different cases. Thus it is, for instance, said - a point already noted - that the severity of the punishment frequently depended upon the intention with which a crime was committed. Dig. 48.19.5.2. Gradation in punishment existed, a few illustrations of which may be here given. If, for instance, a conflagration was purposely caused in a city, plebeians guilty thereof were thrown to the beasts; others were put to death or deported to an island. An action for malicious insult, instituted maliciously, was penalized by exile or relegation or removal from rank. In cases of malicious insults the circumstances and the station in life of the parties concerned were taken into consideration; slaves were scourged; plebeians flogged; persons of rank relegated or forbidden to do certain things. Persons combining to raise the price of produce were sometimes forbidden to engage in their business, sometimes relegated; plebeians were sentenced to public work. In case of violation of sepulchers, plebeians guilty thereof were punished with death; persons of rank, however, were either deported or relegated. Plebeians guilty of robbery from the person were sentenced to public work, temporarily or permanently; persons of rank guilty thereof lost their rank or were ordered out of the country. So considerable gradation in punishment existed in case of cattle raiding or stealing, depending on the kind and number taken, and whether the thieves were armed or not. Dig. 47.9. D. 47.12.1; D. 47.10.43; D. 47.11. 6 pr; D. 47.12.11; D. 47.18.1.1; D. 47.14.1 and 2. In many instances, in fact, the penalty entirely rested in the discretion of the judge, as in cases of abandonment of a prosecution without order of court; or of interference with the relations between married people or people engaged to be married; or of instigating a slave to flee to a statue of the emperor, thereby insulting the master; or of collusion in criminal cases; or of robbery from a shipwreck; or of masquerading as a

soldier or carrying a forged imperial passport. C. 9.45.2; C. 9.1.3; Dig. 47.11.1¹ and 15.2; Dig. 48.16.7.1 and 7.1.2;² D. 48.10.27.2. In Dig. 48.19.13 it is expressly stated that judges may severely or lightly punish, within the limits of the law. Where the same act was prohibited by several laws, only one penalty was imposed. Dig. 48.2.14.

Notwithstanding this gradation in penalties, there were certain fundamental defects in the system of meting out punishment under the Roman law - defects which show an utter disregard for the criminal, without saying anything about the fact that the Romans knew nothing of the theory that punishment should be largely for the correction of criminals. Identical punishments were meted out for crimes of a very different nature and which naturally would seem to suggest different penalties. Thus the same punishment of deportation was inflicted for an act of violence whereby no injury was wrought, for the seduction of a virgin, and for murder perpetrated by poisoning. Von Bar., Hist. Cont. Crim. Law, p. 48. Anyone who, merely in order to satisfy his curiosity, opened a testament of a man during his lifetime, was deported, and a prisoner who escaped might, if he had been sentenced to the mines for ten years, be compelled to stay in the mines for the remainder of his life. Dig. 48.19.38.7 and 8.7.³ A punishment might be increased simply because like crimes were frequently committed in a locality. Dig. 48.19.8.10. And there is a lack of definiteness, met with not only in the definition of crimes, but also frequently in the punishment to be meted out. Thus where the penalty was almost wholly in the discretion of the judge, room clearly was left for abuses.

It must also be pointed out, a fact already sufficiently plain from what has already been said, that there existed class-distinction in the assessment of penalties, a fact which has been severely condemned by many of the modern writers on Roman law. This distinction consisted sometimes in the severity, sometimes in the character thereof. The main distinction was made between slaves, free persons who were plebeians, and free persons of rank. The persons of rank here referred to, and generally when that term is used, included all persons who had the title of senator (honorable) or a higher title, together with their agnatic descendants to the third degree; decurions, too, were included. And in a broad sense, veterans also were included in that designation; at least like privileges as to titled persons were generally extended to them and to their children. See Mommsen, Strafrecht 1033, 1034. These persons, e.g., could not be flogged, for that was considered degrading; plebeians might be flogged, but it was not as severe as the flogging of slaves. Dig. 48.19.28.2 and 16; Dig. 48.19.10 pr. It is stated further that decurions, members of the municipal senates, could not be sentenced to the mines, or hanged or burned; that parents and their children have the same rights, and that the same privilege is extended to all who are forbidden to be whipped; that is to say, to persons of rank. A similar right was also extended to veterans. Dig. 48.19.9.11-14; D. 48.19.28. 5; C. 9.47.3 and 5. These persons, too, were exempt from being thrown to wild beasts (C. 9.47.12). The penalty of death, while frequently imposed on plebeians, was not, except in case of treason, generally, at least until after the second century of our era, imposed on persons of rank, deportation being, as a rule, but not without exception, deemed a sufficient

¹ It appears as if this should be 11.5

² These two references seem to be erroneous; D. 47.9.3-7 address robbery from a shipwreck.

³ It appears as if this should be merely 8, not 8.7.

punishment. Von Bar, Hist. Cont. Crim. Law 47; 2 Strachan-Davidson, Problems Roman Crim. L. 173-175. See Mommsen, Strafrecht 943. The latter punishment took effect only on the assignment of an island by an emperor, so that practically it was beyond the power of the provincial governor. 2 Strachan-Davidson, supra, 173.

The severest penalty was death. One form is described in the case of parricide in C. 9.17, and need not be further mentioned. It was an exceptional punishment. The lightest form of death was by decapitation. Some criminals were burned alive, some hanged, some thrown to the wild beasts, some were condemned to fight as gladiators. Crucifixion was abolished by Constantine, as was also condemnation to fight with gladiators. Soz.,¹ Ecc. Hist. 8; C. 11.44.1. By imperial favor, the choice of the method of death might be given to a condemned criminal. Dig. 48.19.8.1. Another penalty inflicted was that of deportation, which might be made to places where life was tolerable and again to places where the offender might expect an early death. This penalty was imposed on men of rank. In place of it slaves and plebeians were sentenced to the mines - to dig out the metal from the earth - or perpetually condemned to metal work or to other public work, such as cleaning sewers, mending highways or working in the public baths. This form of penalty was not known in Republican times and was introduced by Tiberius. Mommsen, supra, 949. There were many mines in various provinces, and if there was none in the province where the prisoner was condemned, he was sent into one where there was a mine. Dig. 48.19.8.4. Criminals sent to the mines were under military guard, were compelled to wear chains (Dig. 48.19.8.6), and, as shown by constitution 17 of this title, were, up to the time of that law, branded on the forehead. If they became weak on account of age, or were sick so as to be unable to work longer, they might, if they had served ten years, be sent to relatives. Dig. 48.19.22. Sentence to the mines was for life. Women, however, might only be sentenced to serve those working in the mines, and their sentence might be only for a time. Dig. 48.19.8.8; 28.6; Von Bar, Hist. Cont. Crim. L., 36, 37. Mention is also made of another kind of penal labor; younger persons were used, for example, in the hunting sports in the circus or as dancers, especially as sword dancers in public theaters. Dig. 48.19.8.11; Von Bar, supra, 37.

The forms of punishment above mentioned involved either physical death or civil death - loss of status as citizen; all three forms were therefore considered to be capital punishment. Dig. 48.19.2 pr and 28 pr. 1. The last citation, however, states that the penalty of death, sentence to the mines and deportation are to be so considered. Other forms were not capital and might consist of relegation, a mild form of deportation involving no loss of the rights of a citizen, temporary sentence to public work, flogging, loss of rank, prohibition to carry on a certain trade or profession for a limited time, or fine. Dig. 48.19.6.2; D. 48.19.7 and 8 pr. 1; Geib, 605. Nov. 134, c. 13, mentions mutilation. It was not recognized as a legal penalty either under the Republic or under the Empire up to the time of Constantine, who, in Code Th. 10.10.2, enacted in 319 A.D., provided that the tongue of an informer should be torn out by the roots. A later law, enacted in 365, however, provided for punishment by the sword. Leo I condemned the persons who were implicated in the murder of Proterius, Patriarch of Alexandria, to excision of the tongue and deportation. 2 Bury, Hist. Later Roman Empire 415. And the practice evidently became more frequent from that time on. It is said by the historian above cited that this practice seems to have been prompted by the rather childish idea that, if the member which sinned suffered, the punishment was fitly adjusted to the crime.

But he says further that in pointing out the barbarous and repulsive character thereof, we should not forget "that in the seventeenth century it was still the practice in England to lop off hands and ears." P. 415, supra. Most of the punishments involved infamy in addition to the other penalties.

Prisons were used for the purpose of keeping persons accused in custody until conviction, but were not ordinarily used for the purpose of punishment, although the practice seems not to have been uniform. Dig. 48.19.8.9; D. 48.19.35; Mommsen, supra, 963, 964. It should be further noted that there was a limitation on judges as to imposition of fines and the amount thereof, as fully appears in C. 1.54. If a defendant who was fined was without means to pay, work in the mines or corporal punishment was substituted. Mommsen, Strafrecht, 1029.

9.47.1. Emperor Titus Aelius Antoninus.

Also condemned to perpetual, penal work are in a situation not dissimilar from those who are deported to an island.
Promulgated without day or consul.

9.47.2. Emperor Antoninus to Valerius.

My procurator, who did not function as president, was unable to impose a punishment on you, and you, accordingly, needlessly fear a decision which was not supported by any rule of law.
Promulgated June 26 (212).

Note.

Similar is C. 7.45.10.

9.47.3. The same Emperor to Geminius.

It is clear that a decurion must not be sentenced to public work.

9.47.4. The same Emperor to Marina.

If the boy, concerning whom you send you supplication, was conceived before the mother was sentenced to the mine, his status, after birth, is that of his mother previous to her condemnation.

9.47.5. The same Emperor to Senecio.

Veterans are also shown honor in this: That their offspring, but only to the first degree, may not be sentenced to a mine or to public work, but are to be relegated to an island.

9.47.6. The same Emperor to Apio.

It is incredible, as you allege, that a free person has been condemned to be kept in perpetual chains; for this can hardly be done in the case of slaves.
Promulgated February 11 (214).

9.47.7. Emperor Alexander to Isodorus.

Immunity from punishment for offenses is not given because of age, provided the accused is of such an age during which the crime which is charged may happen.

Note.

He must be at least near the age of puberty, so that he knows what he is doing.

9.47.8. The same Emperor to Victorinus.

The property of those deported to an island, by a judge having jurisdiction, is confiscated for the fisc, but not that of those who are relegated, unless it was taken by a special decision, (to that effect).

Note.

This law, so far as it relates to confiscation, was virtually abrogated by Nov. 134, c. 12, 2.

9.47.9. The same Emperor to Demetrianus.

If it is shown that your mother was the daughter of a decurion, it will appear that she must not be sentenced to the mines or to metallic work.

9.47.10. The same Emperor to Catulinus.

A slave ordered to be returned, by sentence of the president of the province, to his master, under punishment of chains, without setting a time-limit, must remain in chains perpetually.

Promulgated August 24 (224).

9.47.11. Emperor Gordian to Attianus.

Free persons, as well as slaves, may be sentenced to the mines.

9.47.12. Emperors Diocletian and Maximian said in council:

The sons of decurions must not be thrown to beasts. And when the people voice their disapproval, the emperors said further: The meaningless voices of the people are not to be listened to; no attention must be paid to them whenever they want a guilty person absolved from crime or an innocent person condemned.

Without day or consul.

Note.

Sherman, 2 Roman Law 471, states that by reason of C. 11.44 punishment by being thrown to the wild beasts was abolished by Constantine.

9.47.13. The same Emperors to Ursianus.

If a slave is condemned by any sentence, and the right of property in him is not in any manner taken away, it is proper that he should remain the slave of his master.

Note.

If condemned to the mines or deported, though subsequently liberated, he belongs to the fisc. Bas. 60.51.50 note.

9.47.14. The same Emperors and the Caesars to Vitalis.

If the time fixed by a temporary punishment to public work has not yet expired, it is proper that it should be awaited, since a ready remission of punishment is not for the public interest, lest crimes be committed rashly.

Note.

Bas. 60.51.51 states this law as follows: "If anyone is sentenced to public work, the time fixed should be awaited. For it is not just that punishment should be remitted by an imperial rescript, lest offenses be encouraged." A note says that the emperor frequently issues a general pardon, releasing persons that are condemned; that this constitution says that such general remission from punishment should not benefit those sentenced to public work for a limited time, but that they should serve out their time.

9.47.15. The same Emperors and Caesars to Agathemerus.

The president of the province is not permitted to revoke a punishment inflicted by his decision.

Note.

The right of pardon or of changing a sentence was exclusively within the power of the emperor. Dig. 48.19.27 pr; Geib, Gesch. Rom. Criminal proc. 675.

9.47.16. Emperor Constantine to Catullinus.

Whoever is about to give a decision, should maintain this moderation that he does not impose a capital or a severe sentence on anyone until, in prosecutions for adultery, homicide or magic, the accused is convicted either by his own confession, or, certainly, by the concordant testimony of witnesses who testify in the ordinary manner or under torture, and he is thus detected in the crime charged, so that he himself can scarcely deny the crime which he committed.

Given at Treves November 3 (314), and received at Hadrumetum April 17 (315).

C. Th. 9.40.1.

Note.

Basilica 60.51.53, applies the principle of the law generally and to all crimes, and that is, doubtless, the purport of the law. Gothofredus states, which is probably true, that at the time this law was passed, only the crimes here mentioned were punished by death - as "capital" punishment is to be understood here.

9.47.17. The same Emperor to Eumelius.

If anyone shall have been condemned to a mine, on account of the nature of the discovered crimes of which he was convicted, his face shall not be branded, since the penalty of condemnation may equally well be marked on his hands or the calves of his legs, so that the face, which is shaped in the likeness of the beauty of God, may not be stained.

Given at Cavillunum.

C. Th. 9. 40. 2.

9.47.18. Emperor Constantius to Theodorus, President of Arabia.

If time is given before sentence to defendants convicted by clear proof, an opportunity lies open to the greatest criminals to supplicate (the emperor), or to evade, by trickery, the punishment imposed by the president, as well as by his staff, when, in fact, in cases of homicide or other grave and proven crimes, the punishment should not be deferred. The law should, therefore, hereafter be observed according to the character of

the crime, and the sentence against criminals and dangerous persons pronounced (without delay).

Given October 15 (346).

C. Th. 9.40.4.

Note.

In the reign of Tiberius it was provided by a senate decree that the execution of those condemned to death should be put off for ten days. Suet., Tib. c. 75; Dio Cass. 57.20. Sidonius 1Ep. 7, 12, states this to have been thirty days. In any event, that was evidently thought to be the law at that time - in the fifth century. Law 20 of this title directs execution to be put off for 30 days, but as there shown, Geib thinks that this was not the rule. He seems to base that opinion partially on the foregoing law and partially on C. 9.9.5. The opinion of Geib may be doubted, in view of the foregoing constitution inserted in the Code. In any event, execution was deferred in some cases. Thus a woman who was pregnant could not be executed during her pregnancy. Dig. 48.19.3. And capital punishment could not be carried out against decurions until report had been made to the emperor and the sentence confirmed. Dig. 48.19.27.1; Geib, supra, 670. Nor could a sentence be executed upon a clergyman until he had been ousted from his position. Geib, supra, 499, 670, citing Nov. 83, pr 2, 2; Nov. 123, c. 21, 1. Where a person was sentenced to death, he was executed by an officer of the court. In the meantime he was kept in prison. The execution was public, and his corpse was generally given to his relatives or friends, the immediate property which the deceased had about him, going to the treasury of the court. Geib, supra, 671, 672. It should further be borne in mind that generally speaking there was a right of appeal, and the sentence could not be carried out during that time. In fact during such appeal a defendant was not considered as a condemned man. Dig. 48.19.2.2. See C. 7.65.2.

9.47.19. Emperors Valentinian and Valens and Gratian to Olybrius, City Prefect.

No one shall, as punishment for an offense, be assigned to bakers or some guild when he belongs to another guild; but everyone shall be punished with suitable severity for the crime which he is found to have committed.

Given April 11 (365).

C. Th. 9. 40. 9.

Note.

Previous to this by several laws - C. Th. 9.40.3.5.6 and 7 - punishment by assignment to the trade of bakers had been provided.

9.47.20. Emperors Gratian, Valentinian and Theodosius to Flavius, Praetorian Prefect of Illyricum.

If we shall at any time direct, contrary to our custom, that in view of the particular crime, an extraordinary punishment should be inflicted on certain persons, we do not want them to suffer their punishment or receive their sentence immediately; but their fate and fortune shall be in suspense for thirty days. They shall, however, be guarded and chained and carefully watched (in the usual manner).

Given at Verona August 18 (382).

C. Th. 9.40.13.

Note.

Gothofredus thinks that this law should be referred to the year A.D. 390, and that it was enacted subsequent to the massacre of 7,000 citizens of Thessalonica by order to Theodosius, after a sedition had taken place in that city. As to that sedition and massacre, see also Sozomen, E. Hist. 7, c. 25; Hodgkin, Dynasty of Theodosius 120-122; Gibbon, Roman Empire, c. 27. But Gothofredus is probably mistaken as to the authorship and that the real author was Gratian. Mommsen, Strafrecht 912 and note. See as to a law similar in tenor to this, C. 9.4.2. See also law 18 of the present title, which evidently limits this law to the cases mentioned - namely when an unusual penalty is directed to be inflicted. Geib, supra, 671, thinks that this law represented merely a pious wish of the emperor, was not the rule and does not affect the law that executions should be carried into effect speedily. But the reason for the opinion does not appear convincing.

9.47.21. The same Emperors and Arcadius to Principius, Praetorian Prefect.

In order that the depraved and venal perfidy of the members of the official staff (apparitorum) may no longer work with impunity against the public good, we order that proceedings for proper punishment be taken also against the guilty (of them) who may be absent.

Given June 1 (385).

C. Th. 9.40.14.

Note.

To same effect see C. 12.57.6. Ordinarily absent persons could not be condemned.

9.47.22. Emperors Arcadius and Honorius to Eutyhianus, Praetorian Prefect.

We order that where there is guilt, there shall be punishment. 1. We relieve from anxiety relatives, acquaintances, friends, who are not accomplices of a crime, for kinship or friendship is no crime. Let the responsibility for offenses, accordingly, rest upon the authors thereof, and let fear progress no further than where crime is found. Let this be known to all the judges.

Given at Constantinople July 25 (399).

C. Th. 9.40.18.

Note.

See C. 9.8.5 which involves children and particularly sons, in the crime of treason.

9.47.23. Emperors Honorius and Theodosius to Anthemius, Praetorian Prefect.

All who were condemned to exile in various places and are found to have been in custody in prison for the time fixed, shall be absolved from (further) punishment, released from their chains and freed from custody, without fear of the miseries of exile.

1. Let one atonement for a crime by immeasurable sufferings be enough, and those who have long been deprived of the breath of free air and of the sight of light, burdened by the

weight of chains in a narrow space⁴, not also be compelled to suffer the punishment of exile.

Given April 18 (414).

C. Th. 9.40.22.

9.47.24. The same Emperors to Monaxius, Praetorian Prefect.

We direct the governors of provinces to be called upon to see that those who have been sentenced to exile for a limited time as a punishment for their crime shall not, after that time has elapsed, be kept in prison-enclosures or in the place in which they lived as exiles.

Given at Eudoxiopolis August 30 (416).

C. Th. 9.40.23.

9.47.25. The same Emperors to Monaxius, Praetorian Prefect.

Persons who teach barbarians how to build ships - an art previously unknown to them - shall be visited with capital punishment.

Given at Constantinople September 24 (419).

C. Th. 9.40.24.

Note.

See C. 4.41 for various matters forbidden in connection with barbarians.

9.47.26. Emperor Justinian to Mena, Praetorian Prefect. (Synopsis in Greek).

The constitution forbids those who are sent into exile to be kept in custody in the places to which they have been sent, and that no one shall be relegated to the castle Gypsum or to any fortress. 1. But if the crime merits death, they shall suffer that punishment; if banishment, either perpetual or temporary, then they shall be sent into exile, but not be ordered into custody in the place to which they are sent; but sent into the province which the judge fixes, except the provinces and cities excepted below, and they shall be permitted to live in any part of the province into which they were sent, but they shall not depart therefrom and shall not be guilty of raising any disturbance while there. 2. But if such person leaves the province, or raise a disturbance which there, he shall be punished by death, inflicted either by the president of that province or by the president of the province to which he flees. 3. Persons who are thrown into prison in this imperial city shall not be kept therein beyond the time fixed for prisoners in the foregoing title⁵. 4. Likewise also in the provinces the inquisition of crimes shall be completed in shorter time; and if anyone is deemed to merit exile, he shall be relegated, not to a prison, but to a province, except those which are excepted, and they, too, shall suffer death, if they either depart therefrom or conduct themselves turbulently while there. 5. The constitution permits the presidents of Alexandria or the Thebaid alone to relegate them to Gypsum⁶, or Oasis⁷, either for six months, or at most for a year. 6. If the exile is

⁴ [Blume] The text is "non intra breve spatium" - in no narrow a space. Probably the "non" should, as in the text of the Theodosian Code, be omitted, or spatium should be translated "time" - so as to read "long burdened by the weight of chains."

⁵ [Blume] Evidently lost.

⁶ [Blume] Gypsum, a fortress in Egypt.

perpetual, they shall be sent neither to Gypsum nor Oasis, nor into custody in any province, but, as stated, into a province as a whole, and if they commit any offense, or fail to obey the orders of the president who relegated them, they shall suffer death. 7. The constitution directs the members of the official staff of the presidents to remind the latter of this law, and not to retain anyone in exile beyond the time of his exile, but to immediately dismiss him without damage or delay, and he who dares to take anything (from the prisoner) shall return four-fold of that amount. 8. The presidents, moreover, are forbidden to relegate anyone to the provinces and cities mentioned in the list attached to this constitution.⁸ 9. The bishops of the places shall take care that these provisions as to those who are relegated, either perpetually or for a limited time, are observed. Given at Constantinople January 18 (529).

⁷ [Blume] Oasis, an island formed by the Nile, noted for large flies and gnats as large as bees, which might kill persons. Athanasius was relegated to this island by Constantine the Great. Bas. 60.51.63 note.

⁸ [Blume] This list is lost.