

Book IX.

Dealing with Criminal Law and Procedure.

Headnote.

The Romans divided crimes into public and private, or, perhaps more correctly, prosecutions were either public or private. These terms are, however, misleading for us, unless understood in the proper sense. There was no distinction in the form of trial, after the so-called extraordinary procedure was adopted by Diocletian; that is to say, after trials no longer were held before a jury but solely before a judge, assisted, generally by a counsellor. Jury trials in criminal cases commenced to go out of use with the empire and entirely ceased toward the end of the second century of our era. The term "public crime" refers, in the main, in Justinian's time, to those crimes for which, with some exceptions, as in adultery, anyone of the public might file an accusation, while in connection with private crimes or delicts, the accusation might be brought only by the party interested. The main private crimes or delicts consisted, as classified in Roman law, of theft, considered at C. 6.2; robbery, that is to say, violent theft, considered at C. 9.33; insult or willful personal wrong, considered at C. 9.35, and wrongful damage to property, considered at C. 3.35. Theft, robbery and willful personal wrong were, however, particularly in later times, frequently punished criminally in similar manner as other crimes. And it is apparent that robbery, and theft by breaking, involve the essential elements of unlawful violence, and might, doubtless, at all times be considered public crimes. See Dig. 47.8.2.24; Mommsen, Strafrecht 661 note 5. Palming of a supposititious child might be prosecuted only by an interested party. Dig. 48.10.30.1. The so-called public crimes consisted mainly of violations of the criminal laws passed in the late Republican period, or during the early empire. These were treason, adultery, in a limited sense, murder and poisoning, parricide, theft or embezzlement of public property or property devoted to religion, unlawful violence or force, bribery, official maladministration, ravishment of virgins, man stealing, falsification, like forgery and the like, except as mentioned, and illegal combination to raise the price of corn. Inst. 4.18; Dig. 48.1.1. Additions were, however, occasionally made to the list of public crimes; both by extending the earlier laws as well as by making independent laws. To be a Manichaean or Donatist was, for instance, made such crime by C. 1.5.4. Some crimes were called extraordinary, when the nature of the punishment was not defined by any specific law, but was left to the discretion of the judge; as violation of a tomb, removing landmarks, forcing prisons, sheltering and abetting thieves, stellionate and other offenses. Mackenzie, Roman Law 408. While some of these, as stellionate, were not considered as public crimes - that is to say, could not be prosecuted except at the instance of the injured party - it is probable, though the point is not as clear as could be wished, that most of them might be prosecuted as other public crimes, and hence were not characteristically distinct from the latter. See Mommsen, *supra*, 192, 194; Geib, Gesch. d. R. Criminal Proc. 403.

It is frequently pointed out by authors that Roman Criminal Law was never developed along logical lines. That is true, and is doubtless due, at least in part, to the fact that the real beginning of that law took a peculiar turn. Beginning with about 149 B.C. there were instituted what were called *quaestiones perpetuae*; that is to say, standing

tribunals for the trial of certain criminal cases. These tribunals consisted of a presiding judge and a jury - the persons changing from time to time. Special laws were passed for various crimes, and a special tribunal was established to try the cases arising under a particular law. Instead of a criminal court, or tribunal, having, as with us, jurisdiction to try criminal cases in general, these special tribunals could try cases only arising under a particular law, namely the one for which it was specially created. This system naturally led to a peculiar result. Perhaps in order not to create too many of these special tribunals, crimes of diverse character were at times embodied in one law. Thus carrying weapons with the intention of killing someone or merely with the intention to accomplish a theft, the manufacture or purchase of poison which was eventually to be given to someone, the starting of fire in the city of Rome or immediate vicinity, the bearing of false witness for the purpose of causing capital punishment to be inflicted on another, the bribery of unfairness of a judge with the same end in view - these were all included in one and the same statute which forbade intentional homicide. Von Bar, Hist. Cont. Crim. L. 20 note. The special tribunals referred to, continued to the end of the Republic, and partially to the close of the second century of our era. Mommsen, supra, 219. Hence the existence of special laws and special tribunals naturally became fixed in the ideas of the people, and, perhaps, as a consequence, the additions, made at times to the body of criminal laws, were often made by way of additions to the laws already existing. This brought within the scope of the original law, violation of acts very foreign thereto. For instance, the law concerning assassins came to include provisions punishing the crime of castration and the crime of making evil sacrifices. Dig. 48.8.4 and 13. Again, the law on the crime of forgery came to include a provision punishing anyone who took money for suppressing evidence, and anyone who, in writing a testament for another, wrote out a disposition in his own favor. C. 9.23.3; Dig. 48.10.15 pr. It is hardly necessary to point out, that one further, necessary result was that acts entirely different in their nature and deserving different punishments, sometimes entailed one and the same penalty, as shown in headnote to title 47 of this book.

It is, possibly, partially for the reasons stated, that the laws of Sulla, Pompey and Augustus "were still the foundation of the law which was in force in the reign of Justinian." 2 Bury, Hist. Later Roman Empire 410. Yet commencing with the beginning of the empire, the criminal law began to change gradually. Some torts came to be treated as crimes, as shown by the fact that, even in the beginning of the third century, theft was generally punished under the criminal, rather than the civil, law. So swindling, stellionate, was added to the category of crimes. The criminal law was extended not only by prohibiting more acts and treating a violation thereof as a crime, but also by making, on the whole, the penalties more severe. This is true, for instance, in the case of adultery. In fact, largely through the impulse of Christianity, sexual crimes were treated with a severity that "amazes a modern reader." Some new laws were rendered necessary through the invasion of the empire by the barbarians. To instruct them in the art of shipbuilding, and trade in weapons and other articles which might aid them in war, became criminal. C. 9.47.25; C. 4.41.2; C. 4.63.2. So as individuals became powerful magnates, and the empire felt the impulses of feudalism, private prisons, and armed bodyguards, were prohibited. C. 9.5; C. 9.12.10. And a number of other laws, which affected the existence of the state, and the honor and integrity of various officers, were put upon the statute books from time to time.

The famous jurists of the empire had, of course, a powerful influence upon the criminal as well as the civil law, not alone by defining more definitely what was and what was not a crime, but also in establishing certain principles for the safety and protection of the individual in other ways. We "owe them our thanks," for the maxims that "in interpreting the laws, penalties are to be softened rather than increased," and that "it is better that a crime should be left unpunished than that an innocent person should be condemned," and "no one is punished for thoughts alone," and for other maxims. Von Bar, *supra*, 52. It may, however, be mentioned at this time, that a crime, to be punishable, need not necessarily be completed. An attempted crime was punished the same as though completed, except that the fact that it was incomplete was taken into consideration in fixing the penalty. Mommsen, *supra*, 97, 98; Dig. 48.19.16.8; Paul., Sent. 5.4.14. Some overt act, however, was necessary.

Some crimes are dealt with in other books of the Code. The references thereto, aside from those already mentioned, will be found in the notes to the laws in this book or in the index. A few, not otherwise mentioned, will be referred to here: (1) To bury the dead in a city (the law was probably made for Rome) entailed a penalty of 4,000 sesterces. Dig. 47. 12. 3. 5. See Paul., Sent. 1.21.2.3. (2) Illegal combinations to raise the price of corn was punished in some cases by a fine, in others by forbidding a trade, or by relegation for persons of rank and by forced labor for plebeians. Dig. 47.11.6 pr; Inst. 4.18.11; Mommsen, *supra*, 852. (3) Most forms of gambling were forbidden even in Republican times, but little is known of the penalty. The money lost might be recovered. C. 3.43.1; Mommsen, *supra*, 860, 861; Conquhoun § 2146. (4) In later times the consent of the emperor was required for the formation of new corporations or guilds, and to organize one contrary to law was punished severely. Dig. 47.22.2 and 3. Many corporations for lawful purposes, particularly those for trade, commerce and religious or charitable purposes, existed and were permitted. Trade guilds were general, and sons were generally compelled to follow the trade of their father. See article "collegium" in Smith's Dict. of G. & R. Ant; Mommsen, Strafrecht 875-877. (5) Local police-regulations existed for cities in connection with buildings. C. 8.10. (6) The subject of fiscal informers is treated in C. 10.11.

The subject of appeal is treated in C. 7.61 et seq. The subject of jurisdiction of judges and courts will be found in another part of this work. One peculiarity may here be briefly pointed out, namely that officialdom constituted a class by itself, and crimes committed by the members thereof were generally triable only before their superior officers - the highest officers being responsible to, and punishable by, the emperor alone. See C. 3.24 and note. Geib, *supra*, 500-506; Mommsen, *supra*, 289-290. The law, however, appears to have been modified by Justinian, who, by Nov. 8. 12, and Nov. 69. 1, seems to give the governor of a province plenary power over crimes committed in a province. Mommsen, *supra*, 290. Soldiers were ordinarily subject only to the jurisdiction of military courts, though that was not true in actions brought by soldiers against private persons. C. 9.3.1; C. 1.26.4; C. 1.46.2; Mommsen, *supra*, 289. While clergymen were, in general, subject to the civil courts in criminal matters (Nov. 83), a special imperial order was necessary to bring bishops before them. Nov. 123, c. 8. Attempts by the clergy to prevent the enforcement of criminal laws were forbidden under heavy pecuniary penalties. C. 1.4.6 (C. 11.30.57); C. 7.62.29.

Title I.

Those who may not accuse.
(Qui accusare non possint.)

9.1.1. Emperors Severus and Antoninus to Silvanus.

You must first answer the accusations of the grave crimes made against you by your opponent, namely those of murder and infliction of wounds, and the judge will determine from the result thereof whether you should be permitted to prosecute him (for some other crime), although you have already filed a criminal complaint.
Promulgated March 11 (195).

Note.

Where a crime directly affected another or his near relative, he might bring an accusation therefor, which had to be, generally, in writing, as noted under law 3 of this title. And substantially every one had the right to bring an accusation for treason, counterfeiting or combinations for the control of corn. But in other case the right to bring an accusation was limited, and the tendency, in fact, had been for some time prior to Justinian, to limit, rather than extend the right. Certain crimes, as we have already seen, were not such as could be publicly prosecuted; only the parties directly interested had the right to institute a prosecution therefor. Under C. 9.9.29, it is provided that the right to bring an accusation for adultery was limited to a husband, father or other near relative. So, as shown by the constitution here annotated, and constitution 19 of this title, a person himself accused could not prosecute his accuser, unless it was for a graver crime, but a complaint was permitted to be filed in the meantime; for the graver crime was then tried first. It was a general principle that an accused person must first be shown to be innocent before he could prosecute another, and a convicted person could not, aside from the excepted cases, prosecute another at all. Dig. 48.1.5; Dig. 48.2.4 pr. In fact, as shown at C. 11.60, an accused person lost many of his rights of citizenship. Persons who could not bring an accusation, unless in one of the excepted case, included women, minors, soldiers, infamous person, freedmen against patrons, children and other members of a household against the master thereof; one near relative against another, at least of a grave crime; and persons who had been adjudged guilty of malicious prosecution, collusion or abandoning an accusation and persons not worth fifty gold pieces. See the laws in this and the next title. Dig. 48.2; Geib, supra, 515-518; Mommsen, supra, 369-372. If there were several accusers, the judge gave the right to the person best fitted therefor, and who appeared to have the better right under the circumstances. Dig. 48.2.16.

9.1.2. Emperor Antoninus to Ingenuus.

If your guardians or curators suspect and consider as forged the receipts by which Secundinus says he can prove the payment of the money to Ingenuus, they are not forbidden to file a complaint of forgery in their own name, since it cannot be done in the name of another. 1. For guardians and curators who, in accordance with their duty and at their peril, administer the property of minors under the age of puberty and of adolescents, are not easily branded with infamy by a decision (against them), unless their accusation appears to the judge to be plainly malicious.
Promulgated September 20 (205).

Note.

Ordinarily no one could prosecute a case by a procurator. See note to 9.2.4. Nor could a complaint be filed by one man for another. But where a minor's rights, who could not himself file the complaint, were involved, his guardian was, of course, given that right, without being considered an informer. See note C. 9.46.2 on the subject of malicious prosecution.

9.1.3. Emperor Alexander to Rufus.

Persons who institute a public accusation, will not be permitted to do so except by a written complaint, and unless they furnish a surety that they will prosecute the suit. 1. If they should not be present after giving the surety, they must be admonished by an edict to be present to prosecute the suit, and if they fail to comply, they shall not only be punished in the discretion of the judge, but shall also be compelled to pay the expense which the defendant incurred in connection with the complaint and in connection with the journey to court.

Promulgated February 3 (222).

Note.

There were two methods of instituting a public prosecution, one by officials, considered at length at C. 9.27, and one by private individuals, mentioned in the foregoing constitution and in many others in this and the next title. It was necessary for the accuser to file a written complaint. There were a few exceptions, as in the case of women in certain cases (C. 9.1.5 and 12), and in the case of cattle-raiding. C. 9.47. A surety had to be furnished that the accuser would continue to prosecute the action, for he could not abandon the prosecution at will, as appears more fully at titles 42 and 45 of this book. In case a surety could not be furnished, the accuser had to submit to custody, as will be more fully noted at C. 9.2.17. The information had to be definite, giving the time, including the month, definite place where the crime was committed and who committed it. Dig. 48.2.3 pr. If defective, it was quashed, but a new information might thereupon be filed. It had to be subscribed by the accuser, or by someone else for him, in case the former could not write. Dig. 48.2.3.1 and 2. If an accuser died, the effect was a dismissal of the proceeding, but a new proceeding might be commenced by someone else within thirty days. Dig. 48.2.3.4.

It had been the custom during the republic and the early empire for the accused to appear in court along with the accuser, so as to give the former the opportunity of objecting to the filing of the information. But this was, in any event, the exception in the later time, and it was not necessary for the accused to be present, although as shown in title 40 of this book, the accused if absent could not be further proceeded against, until at least cited to appear. Geib, *supra*, 548-551.

The information or indictment filed, to be effective, must be accepted by the judge, which, of course, usually followed at once, although, in exceptional case, he doubtless made a preliminary investigation to determine as to whether to accept it or not, as is customary with prosecuting attorneys today. If accepted, the accused then lost many of his rights as a citizen, as has already been pointed out, and as more fully stated at C. 10.60. Upon the acceptance of the information, an order of arrest was issued and the defendant was arrested, as will be more fully treated in titles three and four of this book. Where the defendant was not in the province, a citation was issued, as fully shown in title

40 of this book. And except, perhaps, in cases where the accused was present at the time of the filing of the information, he was entitled to a statement from the accuser as to the main points on which the latter relied. Paul., Sent. 5.16.14; Geib, supra, 560. And if necessary, the accused was entitled to time to prepare his case. Dig. 48. 18. 18. 9. For further steps, see note to C. 9.2.4, and 9.3.2.

9.1.4. The same Emperor to Dionysius,

If your wife thinks of avenging the death of her cousin, let her go before the president of her province.

Promulgated June 16 (222).

9.1.5. The same Emperor to Marcellina.

A woman is not permitted by the senate decree to accuse one of the crime under the Cornelian law,¹ unless the matter affects herself. Since, therefore, your sons have guardians or curators, the latter should deliberate whether they should accuse as false the documents by which you say the opponent of your sons has won.

Promulgated October 1 (222).

9.1.6. The same Emperor to Probus.

You cannot again resort to the accusation which you acknowledge to have abandoned.

Promulgated May 3 (224).

Note.

See next law, and also C. 9.44.2; C. 9.45.6.

9.1.7. The same Emperor to Felix.

If she who brings an accusation delays to bring on the trial, the proper judge will set a definite time to prosecute the accusation to the end, and if she fails to act within that time, she will be considered to have renounced her prosecution.

Promulgated August 18 (230).

9.1.8. Emperor Gordian to Gaius, a soldier.

Soldiers are not prohibited from bringing actions in the nature of public prosecutions, if they prosecute their own injuries or those of their family. We therefore permit you to avenge the death of your cousin.

Promulgated July 16 (238).

9.1.9. The same Emperor to Severianus.

The proper judge will not be unaware that the woman who alleges that she is avenging the death of her son, will not rashly be permitted to bring an accusation till she has first proved that she is the mother.

Promulgated March 2 (239).

¹ [Blume] Forgery, etc. See also 9.22.19.

9.1.10. The same Emperor to Mucatraulus, a soldier.

If you are prosecuting a crime, by which injury was inflicted on you and yours, bind yourself by the customary complaint in writing, so that the president of the province may consent to act as judge.

Promulgated August 1 (239).

9.1.11. Emperor Philip and Caesar Philip to Saturninus.

You aver that your property was designedly burned by your opponent. You may, accordingly, prosecute him under the Cornelian law² concerning assassins.

Promulgated June 19 (244).

9.1.12. Emperors Diocletian and Maximian and the Caesars to Corinthia.

A woman may not accuse anyone of a crime tried by public prosecution, except for certain reasons, that is to say, if she prosecutes for an injury to her or to her family, pursuant to statutes anciently enacted by which she is permitted to do so only when specially permitted, and without the requirement of a written complaint. Hence, when application to the president of the province is made, he will first examine whether the crime is one for which a woman is not prohibited to bring an accusation.

Subscribed April 27 (293).

9.1.13. The same Emperors and Caesars to Asclepius.

If a brother accused a brother of a grave and capital crime, and not of a light offense, he is not alone not to be heard, but must also be visited with the punishment of relegation.³

Given January 23 (294).

9.1.14. The same Emperors and Caesars to Aelia.

You may, if parental love and natural feeling does not restrain your intention, bring an accusation against your son before the president of the province, because of snares which you contend he laid against your life.

Subscribed February 14 (294).

9.1.15. The same Emperors and Caesars to Lupio.

If your reputation is good⁴, you are not forbidden to institute, at the risk of malicious prosecution, an accusation for crime.

² [Blume] This law was passed in 81 B.C. and dealt with assassins and poisoners. See title 16. The penalty for arson was death in serious cases; otherwise less severe. Dig. 48.8.10; Dig. 48.19.28.12. For negligent burning a man was whipped. Dig. 1.15.4. A civil action lay for burning property under the Aquilian law. C. 3.35.2.

³ [Blume] Exile without necessary loss of property and not to a place as severe as that when a man was deported. Deportation involved, until the enactment of Nov. 134, c. 13, 2, confiscation of property, unless stated to the contrary; relegation did not, unless specifically so stated. A brother might accuse a brother of one of the lighter offenses. See law 18 of this title.

⁴ [Blume] i.e. if not infamous.

Subscribed February 27 (294).

9.1.16. The same Emperors and Caesars to Callitychus.

Your demand that a man who has already accused two persons (as parties guilty of the crime), should not be permitted, contrary to law, to bring a third accusation, accords with the rule of law, unless he prosecutes for an injury to him or his.

Subscribed at Nicomedia November 20 (294).

9.1.17. Part of the decision of the same Emperors and Caesars given January 9 (299) in the consulship of Diocletian (VII) and Maximian VI.

We believe it iniquitous and inconsistent with the felicity of our times, that Thaumastus, though he is free-born,⁵ should be able to accuse the man in whose house, it is clear, he dwelt from his early childhood; hence the mention of a criminal suit of Thaumastus against Symmachus must cease. Of course, if the same Thaumastus is confident that he has a civil claim, he may try it in the presidential court.

9.1.18. The same Emperors and Caesars to Julianus.

If you accuse your sister of light offenses, you are not forbidden to set in motion an accusation in the presidential tribunal, where the offenses, rashly committed, will be visited with proper punishment.⁶

Given February 27 (304).

9.1.19. Emperors Valentinian, Valens and Gratian to Laodicius, President of Sardinia.

According to the holding of the ancient founders of the law, accused persons are forbidden, when not prosecuting for injuries to them and to theirs, to bring recriminatory charges of equal or less gravity against the accusers⁷, until they have cleared themselves of the accusation by which they are pursued; although they may file complaints against the accusers, pending the accusation (against themselves).

Given August 12 (374) at Carnuntum.

9.1.20. Emperors Arcadius and Honorius to Eutychianus, Praetorian Prefect.

If any member or a slave of a household should become informer or accuser of any crime, seeking the loss of the good name, of the life or the property of the man in whose household he was, or by whom he was owned, he shall, before the production of witnesses, before any trial, in the very act of exposing the crime, and at the very beginning of the accusation, be punished by the avenging sword. For an unholy voice should be silence rather than heard. We except, however, the accusation of treason.⁸

Given November 8 (397) at Constantinople.

⁵ [Blume] If a freedman, he would not be able to bring an accusation because of that fact.

⁶ [Blume] No accusation of a grave crime might have been brought. Law 13, this title.

⁷ [Blume] Where the counter-charge was of a graver charge, that was tried first. Law 1 of this title.

⁸ [Blume] See also C. 10.11.6.

9.1.21. Emperors Honorius and Theodosius say to the Consuls, Praetors, Tribunes of the People, Senate, greeting.

If freedmen should presume to become accusers of their manumitter or the latter's heirs, they shall be visited by the same punishment as slaves, and shall suffer the penalties before they begin the prohibited accusation.

Given at Ravenna August 6 (423).