Book III.
Title VIII.

Concerning the order of trials.
(De ordine judiciorum.)

Bas. 7.3.33.

3.8.1. Emperors Severus and Antoninus to Marcellina.

Go before the president of the province and show that the testament of Fabius Praesens is broken by the birth of a posthumous son. His investigation is not hindered by the fact that a question of personal status is raised, although he cannot decide question of personal status. For it is the duty of the judge investigating matters of inheritance to try every incidental question connected with the subject, since he gives judgment not concerning the status but concerning the inheritance.
Given November 19 (203).

Note.

The rescript has been much disputed. Savigny, System holds that in this case the action was brought by a guardian of a minor son claiming a part of the inheritance because the will became invalid. See Savigny, 6 System 298, 441; Planck, Mehrheit der Rechtsstrigkeiten. A will became invalid when a posthumous child was born, unless special provisions for it had been made. Headnote 6.29.

The rescript assumes that ordinarily the president did not have the power to investigate questions of freedom, but only if the question arose incidentally. The next law, and C. 7.19.1; and C. 7.19.3 assume that he had such power in the first instance. It is probable that the law was changed soon after this rescript. Pernice, 7 Z.S.S. (I) 111, 112; Plank, supra 61. In disputes between persons and the fisc (the public treasury), the fiscal procurator decided the case. C. 3.22.5; 10 Cujas 874; see Bas. 7.3.33.

3.8.2. Emperor Antoninus to Magnilla.

If no question as to your descent is raised by those whom you say are paternal cousins, go before the president, and, a referee having been appointed, try the action of partition of the inheritance. But if they question your descent, then the same president will take care that that question be tried first according to the rules of law.
Promulgated July 23 (213).

Note.

The rescript was written in 213 A.D., when cases in Rome and Italy at least were tried under the formulary procedure, the facts being determined by a referee (judex). In Justinian's time, as already seen, reference to a referee was not necessary.

It will be noted that preliminary matters were directed to be tried first. An illustration is found in C. 8.1.3, by which the question of possession was directed to be determined before trying the right to title. As to the preliminary question of freedom, see also C. 7.19.2.

3.8.3. Emperors Valerian and Gallien to Demetrius.

If an inquiry into crime incidentally arises in a civil suit, or if a criminal case is first commenced and a civil action is added, the judge has power to decide both the civil and criminal case at the same time.

Promulgated (262).

Note.

The foregoing law, speaking of a decision in a criminal and a civil suit at the same time, and the next law dealing with successive trials in a civil and criminal case, need special mention. See 3 Bethmann-Hollweg 186, note 9.

Cujacius, in vol. 2, 13, on C. 3.8, says: "Whenever several questions arise in one suit, the order of procedure is so arranged so that one of the questions is disposed of before the other, for instance the criminal case before the civil, the question of instantaneous possession before the question of title; the question of status before that involving the inheritance. But it is in the discretion of the judge, either to follow this order or to combine and consolidate the questions, as the criminal and the civil, and as we learn from Symmachus, that of possession with that of title. And in some cases, he is directed to let the civil case precede the criminal case." To the same effect see 7 Cujacius 217; 7 Obs. c. 39.

The general rule undoubtedly was that the question of greater moment should be decided first. Thus if an inheritance was claimed under a testament, but a defendant contended that the testament was forged, the suit as to the inheritance was stayed until the question of forgery was tried. D. 5.3.5.1.[1] So if it was claimed that possession of property had been taken by force, the civil case as to possession gave way to the criminal case as to violence. D. 5.1.37. See also D. 5.3.7 pr. and 1. And the rule that a question of minor importance must give way to that of greater moment is stated in D. 5.1.54. The principle applied when two different crimes were involved. D. 9.1.1; Mommson, Strafrecht 891.

The rule was not universal. If an accusation of forgery was made for the purpose of delay—and it was evidently in the discretion of the judge to determine that point—the civil case was not stayed. C. 9.22.2. And it seems to have become the rule in cases where the question of forgery was raised to permit the civil case to proceed without reference to the question of crime involved therein. C. 9.22.23 and 24. In some cases in fact, the civil case or question was directed to be tried first, because it governed the proposed criminal case, and hence was of greater importance. Thus where the question was as to whether a slave was kidnapped or not, the civil question as to ownership was heard first, "for, (says the law) if it appears that you have title to the slave, it is clear that with the ownership known, the criminal action fails." See further, C. 9.9.25. In a purely civil case, too, certain questions were often necessary to be decided before others. The point, for instance, of whether a man claiming property was free, or a slave, was often necessary to be decided first, before determining the right to the property; for if the claimant was a slave, he could not hold or claim property. Law C. 7.19. So it is said in C. 8.1.3 that when a dispute arises as to ownership, the question of possession shall be tried first. To the same effect is C. 3.32.13; C. 3.39.3. C. 3.8.3 states that a criminal and civil case might be decided at the same time, thus bearing out the statement of Cujacius above quoted that it was in the discretion of the judge whether to consolidate the questions before him or not. The rule must have been applicable only with modification where a civil case was referred to a referee, for criminal cases, at least those of importance, were not triable before him. See 9 Cujacius 1361, who maintains that no criminal cases could be tried by him, contrary to what is said in note C. 3.3.2. If the

[1] Blume has penciled in to the adjacent margin: "exceptio praejudicialis; Sav. Sys. 6.4.35-7."

question of forgery arose in a civil case before a referee, he had the right to decide the case before him, though it involved such question (C. 9.22.11), but he did not, it would seem, have the further right to decide that a crime had been committed, and meet out punishment therefor. But if the questions of civil and criminal liability arose in a case tried before a magistrate with plenary jurisdiction, then, it would seen, both questions could be decided at the same time, although the usual practice seems to have been, as stated in C. 3.8.4, to stay the civil case, if that was on trial, in order to first try the criminal case. It is not at all clear whether, if a criminal case was commenced and tried, and a civil liability appeared therein, the latter question could be decided even in the absence of the commencement of the civil case in the regular way. Nor is the procedure clear where a criminal liability appeared in a civil case. It was probably in the discretion of the judge (1) either to ignore the criminal liability, or (2) to direct the proper party to file a criminal accusation, if the party desired the judge to take cognizance of the crime as such, or (3) to decide the criminal case and inflict punishment therefor at the same time without the filing of a written accusation by anyone, as seems to be indicated by C. 9.22.23, or to hold the accused for a subsequent trial. C. 4. 19. 24. This procedure is so foreign to that in the United States, that it is well, at this place, to point out, briefly, some of the peculiarities of Roman criminal procedure.

Geib at 653, in his work on Procedure in Roman Criminal Law, says that in the later period of the empire it became the duty of the officials to see that crimes did not go unpunished; that it was not so much a question whether a defendant was guilty of this crime or that, but whether he was guilty of any crime at all, and though the prosecution might have been commenced by a private accusation and the defendant was discharged because the particular accusation was not proved, this did not benefit the defendant, who was, not withstanding such acquittal, punished for the crime disclosed by the evidence. In C. 9.2.9, the rule is stated that if several crimes arose out of the same act and he was accused of one of the crimes, he might be accused of the others, but that the judge should hear the evidence as to all of the crimes and should not give a separate decision as to one of them, before fully investigating the others also, the inference being left that only punishment should be imposed, the severity of depending on the character of the evidence and on the maximum penalty prescribed by law for the various crimes. See Geib 665. The defendant, accordingly, could be put on trial for more than one crime, within the jurisdiction of the judge (see D. 48.2.7.5). That course was not permissible in a previous period in the special tribunals created for the trial of special criminal cases, as mentioned in headnote to C. 9. But the course mentioned was pursued even in that period in cases that were tried before the emperor or the senate, as stated by Quintillian, Inst. 3.10.1, where he says: “When there are several questions, they may be either of the same kind, as in charge of extortion; or of different kinds, as in a sacrilege and homicide at the same time. This union of charges does not now occur in public trials, because the praetor takes cognizance of each according to a fixed law, but is frequent in the causes tried before the emperors and the senate, and used to be common in those that came before the people, and disputes between private people often require one judge to determine as to many different points of law.”

The foregoing serves to illustrate C. 3.8.3, that criminal and civil cases might be decided at the same time. The question as to whether a criminal case barred the institution of a civil suit or vice versa, is considered in C. 9.31.1 and note.

3.8.4. Emperor Constantine to Calpulmanus.

Since it often happens that a civil proceeding is interrupted in order to first inquire into a crime, which is done in order that the question of greater moment rightly be preferred to the lesser, whenever the criminal matter is disposed of in any manner, the civil cause must be decided as if brought into court anew, so that the end of the criminal process becomes, as it were, the beginning of the civil proceeding from the day that a decision between the parties has been rendered (in the criminal matter).
Given March 15 (336).