Book IX.
Title II.

Concerning accusations and criminal complaints.
(De accusationibus et inscriptionibus.)

9.2.1. Emperor Alexander to Marcianus.

The president of the province is not unaware that persons who dig up boundary marks should be restrained by punishment in the discretion of the judge.
Promulgated July 29 (222).

9.2.2. The same Emperor to Syrus.

If a slave is accused of a crime, his master may defend him and appear in court to answer the claims of the accuser. 1. But after the crime is proven, not the master, but the servant will suffer condemnation therefor. For a master is permitted to defend his slaves, in order that he may make every proper showing in excuse.[1]
Promulgated November 21 (222).

9.2.3. The same Emperor to Stephanides.

The laws relating to public prosecutions also permit absent persons, accused of capital crimes, to be defended by procurators.
Promulgated November 2 (223).

Note.

As has already been noted, the main trial could not go on, since an absent person could not, ordinarily, be prosecuted. Hence the procurator who is here authorized to appear and defend him could, ordinarily, do nothing more than to present the excuse of the defendant for being absent. Note to Bas. 60.33.16.

9.2.4. Emperor Gordian to Archelaus.

If an accuser is absent from court without contumacy, and the president of the province, called (him) but once, upon being asked, and thereupon, without investigation, gave a decision that the accused against whom you brought your complaint should be released, the criminal proceeding is still pending, since it could not be dismissed, when the accuser was not guilty of contempt or of (punishable) delay, and the accusation may be tried in the usual mode of judicial procedure, before the same judge or before his successor.
Promulgated March 7 (241).

Note.

If the accuser did not appear against the accused, the proceeding was ordinarily dismissed, for as the defendant could not be prosecuted in his absence (C. 9.40), neither could the accuser be represented merely by agent, although he might have, and usually did have, the assistance of an attorney. It was necessary, ordinarily, for him to be present in person. C. 9.9.19; Dig. 48.1.13.1; Paul., Sent. 5.4.12 and 5.9; Geib 595; Esmein, Hist.

[1] [Blume] A master was not responsible for the crimes of his slave; C. 3.41.4; but he must deliver him up, if the latter is accused. C. 3.42.2.

Cont. Crim. Proc. 23, note; Geib, supra, p. 602. An exception was made for persons of illustrious rank in accusation for malicious insult. C. 9.35.11, and Nov. 71. Some one else, however, might, where the accuser was absent, bring another accusation within a limited time. Dig. 48.2.2 and 4; Dig. 48.2.11.2; Geib, 594. But in order that the judge might have jurisdiction to dismiss the complaint at all, or rather, strike the name of the defendant from the information or indictment, it was necessary for the accuser to be contumacious, and in order to make him so, it was necessary to call him by edict. It was a rule of law, apparently established in an early period, that when a case came up, the parties were called three times, one call after the other. We have a similar custom where the defendant is absent, and this was doubtless taken from the Roman law. If a party did not appear, three edicts were issued at three different times, some days apart, or at times only a so-called peremptory edict was issued to take the place of the others, the course to be pursued depending, in the discretion of the judge, on the circumstances. C. 9.1.3; C. 10.11.8.7a; Dig. 5.1.68-73; Dig. 48.1.10; Dig. 42.1.53.1; Nov. 112, c. 3; Geib, supra, 593-4. But a party was not contumacious, who by reason of sickness or other good reason had an excuse. Dig. 42.1.53.2; Dig. 48.1.13.2. This was true in the case of an accused, as well as of an accuser. Geib, supra, 596. See also C. 3.1.13 and note (e) and headnote; C. 7.43.

Dismissal did not always follow where the accuser was contumaciously absent; but where the evidence was such as to substantially establish the guilt of the defendant, the prosecution was continued under the direction of the judge, but only, it seems, after direction of the emperor. C. 9.9.19; C. 9.42.2; Geib, supra, 594-5.

9.2.5. The same Emperor to Paulinus.

A person properly accused is not any the less held for a crime or for aggravated injuries, because he says that someone else commissioned him to do the act. For it is not unknown that in such case, besides the principal defendant, the person also, who commissioned him, may himself be summoned.
Promulgated September 11 (241).

9.2.6. The same Emperor to Avidianus.

It is ancient law that an absent person cannot be prosecuted (accusari) for a capital crime, but is only to be noted, if he is not present, as one to be summoned.[2] And since, therefore, you say that you were wrongly sentenced to the mine by the president of the province, while you were absent, and without your knowledge, and when you were not notified of any accusation, you should, in order that, as you say, the truth may be brought out while you are present to defend yourself, go before the praetorian prefect, who, in accordance with his sense of justice, will undo what he learns to have been done by a new procedure, contrary to the rule of the constitutions.
Promulgated April 2 (243).

9.2.7. The same Emperor to Proculus.

It is not unknown that matters reported to the presidents by their official staff, may be investigated without the customary procedure of filing a complaint. Whether the

[2] [Blume] i.e. an order issued for his appearance. See C. 9.40 and headnote.

charge, made in the report, is false or not, must be determined upon investigation at the trial. Promulgated January 6 (244).

Note.

As to false reports by officers, see C. 12.22.1; also note (d) to 9.4.6, from Bas. 60.35.22. It was pointed out at note to C. 9. 1. 3, that there were two different methods of commencing criminal suits, one by a private individual, who must file a written information or indictment, and one by officials, in their official capacity. These methods are as a rule respectively called accusatorial and inquisitorial. Esmein, supra, p. 13. The former was the main method during the Roman Republic. Esmein, supra, 18. While the procedure remained mainly accusatorial during the Empire, the inquisitorial became more and more predominant, and the former lost much, if not most, of its significance. Geib, supra, 515, 522; Von Bar, supra, 47. As pointed out in headnote to C. 10. 11, it was not considered honorable to act as an informer, and while informers were encouraged and rewarded, in connection with some crimes, on the whole such practice was discouraged, and the inquisitorial procedure necessarily had to take the place of the accusatorial. We find references to the duty of officers in connection with crimes in the Digest. Thus it is said in Dig. 1.18.13: "It may be expected from any president of character and conduct that he should take care that the province which he governs shall be settled and orderly. This he will have no difficulty in bringing about, if he studiously aims at securing that the province shall be clear of bad characters, and he accordingly seeks them out; in fact he is bound to seek out persons guilty of sacrilege, highway robbers, manstealers and thieves and punish them according to their respective offenses." The Novels of Justinian which deal with officials are full of such directions, and it is probable that the grave crimes which affected the public generally were, in the absence of a private accuser, prosecuted by public officials by virtue of their office. We have evidence to that effect in connection with treason, counterfeiting, parricide and other murder, the practice of magic, unlawful violence, rape, falsification, unlawful combination to raise the price of corn, libel (probably of public officials), unlawful connection of a free woman with her slave, certain forms of irreligion and incest. Mommsen, Strafrecht 350, 351. But the absence of definite statements in the law, as we find it, is probably no evidence that many other crimes were not treated in the same way. Though we have no definite evidence to that effect, adultery was probably not ordinarily prosecuted in the absence of a private accuser. See Mommsen, supra, 351. Palming off a supposititious child could be prosecuted only by an interested party. Dig. 48.1.30.1. We find it stated that incest will not be readily prosecuted if no such accuser appears. Dig. 48.5.37.7. And, generally speaking, all private delicts, unless also a public crime, and of a grave character, could not be prosecuted under any other condition, but the line of demarcation is not definite. See Mommsen, p. 368. The like is probably true as to all other crimes which might be prosecuted only by the interested parties. Aside from private accusations, the main authorities, in bringing criminals before the courts, were doubtless the police officers. These were called irenarchs in the Grecian provinces, particularly in Asia Minor, and are mentioned in C. 10.77.1. There were at one time 3,000 and later 4,500 officials in Rome, who had to perform police duty in addition to looking after fires. Mommsen, Strafrecht, 311. Mention is made of police officers in Egypt and other portions of the Empire, and we can readily believe, particularly because of prevalence of highway robbery, that they were found in every town and city of any

size. By Nov. 15, c. 6, defenders of cities, who at that time doubtless were the highest magistrates of most of the provincial municipalities, were given power to punish for small offenses; but in other cases it was their duty to send accused persons to the proper judge. The report of the result of the investigation of the arresting officer was sent along. C. 1.55.6 and 7; Nov. 15, c. 6; Dig. 48.3.6.1; Mommsen, Strafrecht 309. In addition to these officials, the duty to report crimes and help in the prosecution thereof devolved upon imperial officials, particularly the commandants at the stations of the public post (stationarii) and the police connected therewith (curiosi or agentes in rebus), for much opportunity was afforded them in the performance of the other duties to discover criminals. C. 12.22.1. These stationarii seem originally to have been police officers stationed at various places in the Empire, particularly for the purpose of apprehending highway-robbers. 9 Cujacius 1295-1296. In fact the law seems to have required, in later times, at least in certain cases, that all officials, even though not connected with the courts, should denounce crimes to the proper authorities. C. 1.5.16.1. Geib, supra, 530. See also generally on this subject, Mommsen, Strafrecht, 297-322; Geib, supra, 466, 480-486, 492, 493, 521-536. As indicated by the constitution here annotated, no written information or indictment was necessary to be filed, where a crime was investigated and reported by a public official. Geib, supra, 515.

9.2.8. Copy of an imperial letter of Diocletian and Maximian.

If any one thinks himself injured by another an wants to make complaint, he should not run to the police (stationarios), but go before the presidential court, and should either file a written complaint or state his complaint in open court (apud acta).
Promulgated without day or consul.

9.2.9. The same Emperors to Honoratus.

Whenever a man has been accused of a public crime, a complaint for the same crime cannot be filed against him by another. But if several crimes arise out of the same act, and he has been accused of one of them, he may be accused of the others by some other person. 2. The judge, however, shall hear the evidence of all the crimes, and shall not give a separate decision as to one of them, before he has fully investigated the others also.
Promulgated August 18 (289).

Note.

The procedure here mentioned is, of course, entirely different from the procedure in the courts of Anglo-Saxon jurisprudence. See note C. 3.8.3. It was the aim of the later Roman law not to leave unpunished a crime if the same were disclosed upon the trial of a case, even though the particular trial related to a different offense. In such case it was the duty of the court to interfere by virtue of his office and impose the proper punishment for whatever crime was disclosed to have been committed. See C. 9.42.2; C. 9.45.2; C. 4.19.24; C. 4.20.14; Geib, supra, 527, 653, 654, 655; note. C. 3.8.3. In fact it seems that where a crime was disclosed in a civil case, punishment for the crime might be imposed in that case. See C. 9.22.23. But where several crimes appeared to have been committed by the accused on trial, the penalty assessed was not, in practice, the sum of the penalties of all the crimes, but simply a penalty more sever than prescribed by law for the gravest. Geib, supra, 656. See C. 9.13.1. And where different penalties were merely

prescribed for the same act, only one penalty was imposed, and in such case, in fact, but one information could be filed. Dig. 48. 2. 14. See note C. 9.31.1; headnote C. 9.47; Mommson 890, 891. See note Savigny, 5 System 207, 251.

Only one pending accusation was permissible. D. 48.2.11.2. And if the defendant had once been tried, whether convicted or acquitted, or if case was dismissed by consent of court (C. 9.42.1), the case was res adjudicata, except that the emperor could permit a second accusation. D. 43.29.3.13; D. 48.2.7.2; Planck 26. But if one, specially interested, was absent, he might bring a second accusation. D. 48.2.7.2. And if the first accuser had first been convicted of collusion with defendant, then, too, a second accusation was permissible. D. 47.15.3.1. And that was true also if the first accuser abandoned his suit. D. 48.2.11.2; also law 9 h.t.

9.2.10. The same Emperors to Ursa.

Whoever makes a promise as to the result of a transaction, the decision on which is in the power and mind of the judge, commits no less a crime on account of the unlawful promise, than he who, contrary to law, purchases this kind of a promise.
Promulgated October 30 (290).

Note.

Probably the officials about the judge are referred to as the persons making such promises.

9.2.11. The same Emperors to Crispinus, most dear to us, Greeting:

If anyone thinks of prosecuting a crime of homicide (of which the person whom he deems guilty has already been acquitted), he should, according to the rule of public law, accuse of collusion the man who filed the first accusation for homicide against the person deemed guilty, but failed to prove the crime, on account of which the accused was acquitted. For that requirement is properly made by the statutes of the emperors, our parents, and by the rules of law. But if he does not think that he should do that, order him to prosecute the connected crime, that is to say, that of the herdsmen and robbers, and prosecute that in court, since, if it appear that this has been committed by the accused, he will, in order to avenge the public, be subjected to the (penalties of the) laws.
Given April 6 (292).

Note.

Reference in the latter part of this law is probably made to the herdsmen in middle and lower Italy, who committed crimes of robbery and murder on the highways. And it was of interest to the state, that, though one of the parties should happen to be acquitted of the crime of murder, the second crime above referred to, that of robbery, should nevertheless be avenged. See note to transl. by Sentennis etc., referring to Godefredus on Theod., C. 9.30.2.5. This law also refers to a second prosecution, and intimates that a man once acquitted cannot be prosecuted again. That is stated to be the rule in Dig. 48.2.7. 2. But at the same place also appears the remarkable statement, that if a man wants to prosecute another for a wrong committed against himself, and finds that a third person had already instituted a prosecution for the same offense, and he knew nothing of it, and the defendant was acquitted, he might, in such case, bring an accusation without reference to the acquittal. Reading this law, however, in conjunction with the foregoing constitution, it would seem that before such second accusation might be instituted, a

showing of collusion between the first accuser and the defendant should be shown, and this solution is, in fact, stated in note to Bas. 60.34.7.

9.2.12. The same Emperors and Caesars to Aurelius.

The act of one voluntarily plunging (to death), cannot endanger a person innocent of the crime.

Subscribed at Sirmium May 19 (293).

Note.

In comment to Basilica 60.33.25, it is said: "Quite often a man is accused, and is said to be responsible for a suicide, because he is the creditor of the person who killed himself (by plunging to death) and demanded payment from him."

9.2.13. Emperors Gratian, Valentinian and Theodosius to Marinianus, Vicar of Spain.

If any one wants to accuse slaves, resort shall not be had to torture till he has fixed his own responsibility by a written complaint (and has given the usual undertaking).

Given May 27 (383) at Patavia.

Note.

As to torture of slaves, and generally, see C. 9.41 and headnote.

9.2.14. The same Emperors and Arcadius to Cynegius, Praetorian Prefect.

All the judges must severally know that they must not, in public accusations, rely on decrees obtained, when asked, at the hands of the municipal senate, or on reports which must be sent by public officials, but that they must inquire into the truth.

Given at Constantinople April 30 (385).

Note.

Reference here is doubtless made to decrees passed by municipal senates condemning a certain individual for a certain crime. This constitution says that such decrees must not be accepted as true, but must be investigated, just as reports sent by public officials, for example by municipal magistrates who sent an accused to the president to be tried, which was similar to a proceeding with us, under which a justice of a peace binds a defendant over to the district court. See law 7 of this title, and C. 12.22.1; and note (d) to C. 9.4.6, as to false reports of officers. See Bas. 60.33.27; Godefroi on C. Th. 9.1.15.

9.2.15. The same Emperors to Tatianus, Praetorian Prefect.

Titled persons must personally appear in court in criminal cases when the case by reason of a written complaint demands their presence, although in civil case they may conduct their suits by procurators.

Given at Milan February 15 (390).

Note.

Bas. 60.33.28, states this law as follows: "Powerful persons must personally conduct a criminal case, a civil case by procurator."

9.2.16. Emperors Arcadius and Honorius to Pasiphilus.

It is proper that criminal cases be commence by written complaints which specify the nature of the crime and the time thereof, so that both parties may be restrained by a

method worthy of the laws. If this order is, perchance, disregarded, the members of the official staff (of the judge) who enters the audience chamber (secretarium) shall be punished by a fine of five pounds of gold.
Given at Milan December 24 (395).

Note.

The law provides for written complaints, so that no unimportant cases will be brought into the audience chamber of the judge, i.e. laid before the judge by the proper clerk. A written complaint restrains both parties - the accuser, by reason of the surety he must give to prosecute the complaint, the accused, because he must defend it.

9.2.17. Emperors Honorius and Theodosius to the Consuls, Praetors, Tribunes of the People and Senate, greeting:

We direct that the rules long ago made for criminal cases shall be maintained. A man whose life is put in danger, shall not be immediately considered as defendant, simply because he could be (was) accused, lest innocence be trampled on. Whatsoever person charges another with a crime, must come into court, give the name of the accused, make himself responsible by signing a written complaint, submit to a similar custody (as the accused), taking into consideration his rank, and know that false accusation will not go unpunished, since equality of penalty demands that false accusers should be visited with an avenging punishment.[3] 1. Let no one, however, who confesses to his own guilt under torture, flatter himself that by incriminating another he may hope for pardon on account of his accomplice, or that he may be associated with a man of rank by reason of the common interest in the crime, or that he may suffer death jointly with his enemy, or that he may be saved by the effort or privilege of the man whom he named, since the ancient law does not even permit those who confess to be interrogated as to the guilt of others. No one, therefore, who confesses to his own crime shall be interrogated as to the guilt of others.
Given at Ravenna August 6 (423)
C. Th. 2.1.8.

Note.

Basilica 60.33.30, states this law as follows: "A man accused of a crime shall not be immediately considered guilty, but the accuser must first come into court, point out the accused, sign a complaint, submit to similar custody, preserving the difference in rank, knowing that a malicious prosecution will not go unpunished. For a similar punishment will be visited upon him. No defendant, moreover, who confesses his own guilt, may hope for pardon on account of an associate, for he will be punished in the meantime. Inquiry will be made whether the facts by him stated as to his associate are true (without reference, however, to the person confessing)."

See also C. 9.41.4; C. 9.4.1; C. 9.8.3.

The peculiar provision herein that the accuser should submit to like custody as the accused, or as stated in C. 9.3.2, that both should be treated alike, is, of course, entirely unlike the practice in the United States. Geib, supra, p. 589, says that it was of no practical importance. Whether he means that it was not carried out, is not clear. In any event, the law made such provision and must have been carried out at times. But just

[3] [Blume] See note to C. 9.46.10 as to punishment for malicious prosecution.

what does it mean? In note to 9.1.3, it is seen that the accuser must furnish a surety. But it must at times have happened that he could not do so; and he probably could be put into actual custody - assuming that the defendant was arrested - only where he did not furnish such surety. In like manner the defendant, at least in cases where he was a free man, had the right to furnish bail, except for grave offenses, and could be put into actual custody - at least theoretically - only where he did not furnish it. C. 9.4.6. It is in this sense, therefore, that the requirement of equal treatment of the parties must be understood, and it seems to be so treated in note to Bas. 60.33.30. An accuser, however, who was a person of rank, could not be thrown into prison, and he was, incase he did not furnish a surety, committed to the custody of some other person of honorably station, or of soldiers. This is what is indicated by the requirement that the difference in rank should be observed. See Gothofr. on this law. Colquhoun § 2464.