

Book IX.
Title XLVI.

Concerning malicious accusers.
(De calumniatoribus.)

Bas. 60.1.28; Dig. 48.16.

9.46.1. Emperor Alexander to Sabinus.

It is the custom to punish malicious prosecution, when the cause is decided, in the presence of the accuser. Hence your request, that the malicious prosecution of the accuser be punished, made after the case has already been decided (and the parties have left court) is contrary to custom.¹

Note.

In former times, while the jury system prevailed, the jury, after their verdict had to consider whether there was sufficient evidence to authorize the charges or not, in order to determine whether the penalty for malicious prosecution should be inflicted. Strachan-Davidson, 2 Problems of the Roman Cr. L. 137. In other words, as indicated above, this fact had to be determined in connection with the original trial, or, it seems, the penalty for malicious prosecution could not be assessed. In Dig. 48.16.1.3 it is said that the adjudication as to whether the prosecution was malicious prosecution is made at the time of the decision. If the judge says that the case has not been proven, the accuser is held not guilty of malicious prosecution; but if he says that the accuser has knowingly brought a false accusation, the penalty therefor is assessed as a matter of law.

9.46.2. The same Emperor to Apollonia.

A mother is among those persons who, without fear of being considered a malicious accuser, may avenge the death of her son. That benefit of the senate decree exists also in other public trials. And an outside heir, who follows up the suspicion which the deceased expressed concerning his death², is, on that account, exempt from the charge of malicious accusation, since there is a great difference between a voluntary accusation, and one made pursuant to the duty as heir.
Promulgated June 26 (224).

Note.

It was deemed advisable by the Roman law that accusations might be freely brought in certain cases without exposing the accuser to the charge of malicious prosecution. That was true in cases of prosecution for the death of near relatives, as is shown by the within law and also by law 4 of this title. To the same effect is Dig. 48.1.14. See also Geib 580. That was true also in cases of prosecution of adultery by a father or a husband in their capacity as such - that is, if they brought the accusation

¹ [Blume] The defendant must ask, before a decision in the case that the accuser should be held as malicious prosecutor, and the order to that effect should be made at the time and as part of the decision of the court on the main case. Greek Commentators on Bas. 60.1.28.

² [Blume] It was his duty to prosecute. Bas. 60.1.29 note; C. 6.35.

within sixty days, after divorce. Coll. Mos. 4.4. If they did not bring the accusation within that time, that is to say, in their capacity as such, but as one of the public generally, they might be guilty of malicious prosecution the same as anyone else. Do. See also C. 9.9.29 and note to C. 9.9.6. It is stated, however, in Dig. 48.5.30, that if a father knowingly institutes a false accusation for adultery, he is liable the same as anyone else. And in Dig. 48.14.3 it is stated that a husband, accusing in his rights as such, will not escape the penalty for malicious accusation, which is interpreted by Geib, supra, page 580, to refer to an accusation known to be false. In fact in Nov. 117, c. 9, sec. 4, it is stated that a husband who fails to prove adultery against his wife will suffer the penalty which his wife would have suffered, if convicted, thus putting him in the same position, evidently, as any other person.

So too, guardians and curators, bringing an accusation on behalf of their wards, were not to be considered guilty of malicious prosecution unless that fact appeared plainly. C. 9.1.2.

9.46.3. The same Emperor to Eumelianus.

Whoever is adjudged not to have proven the accusation which he brought, does not suffer loss of his reputation unless he is pronounced guilty of malicious prosecution. For the accuser, who may have had a just reason for resorting to the accusation, is not considered a calumniator from the fact alone that the accused has been discharged.

9.46.4. Emperors Carus, Carinus and Numerian to Archelous.

The punishment of malicious prosecution does not apply in an accusation for the death of a father.

Promulgated November 21 (283).

9.46.5. Emperors Diocletian and Maximian to Caesius.

The danger of being pronounced a malicious accuser applies only in trials of public prosecutions and not in causes involving the questions of freedom, which contain private quarrels.

Note.

This law refers to public crimes, and it has been held by some, that the punishment mentioned in law ten of this title applied only to cases of public crimes as such, as distinguished from so-called extraordinary or other crimes. But the law doubtless here merely distinguishes between civil and criminal cases, and that is the view taken by Geib, supra, page 579.

9.46.6. The same Emperors and the Caesars to Domitius.

A penalty for double (the damage) is provided in favor of masters, under the Julian law, against an accuser, by reason of whose malicious accusation such masters' slaves are tortured.

9.46.7. Emperors Valentinian and Valens to Valerianus.

Your Sincerity will not order anyone for examination before your court, till he who attempts to prove the genuineness of his grief, has complied with the usual

requirements³, inasmuch as, according to the rule of the ancient law, the man who began a prosecution was given revenge, if he told the truth, and punishment, if he was guilty of deceit.

Given at Rheims November 25 (366).

C. Th. 9.1.9.

9.46.8. Emperors Gratian, Valentinian and Theodosius to Menander, Vicar of Asia.

It has been stated in our constitutions and those of our parents that those who should presume to bring an accusation in the name of others should be considered as informers. 1. When it is found therefore that an accusation was unfounded, the punishment of infamy, shall follow the most malicious accuser, so that each and every person may hereafter know that it is not permitted to put in motion the action of the judge in a matter which cannot be proven.

Given at Constantinople May 8 (385).

C. Th. 9.39.2.

Note.

It is believed by Geib, supra, p. 582, that the instigator of the accusation was not punished as severely as the accuser himself; that is to say, that the penalty in law 10 of this title was not applied. In the Theodosian Code the penalty fixed was deportation. As to infamy, see C. 2.11.16.

9.46.9. The same Emperors to Florus, Praetorian Prefect.

False accusers, especially after the production of the accused, will not be excused by any legal pretext or by setting up any excuse. No general or special order of dismissal of prosecution (*abolitio*) shall aid or assist such persons; no special or general imperial pardon (*indulgentia*) shall let them escape punishment.⁴

Given at Constantinople May 18 (382).

C. Th. 9.37.3.

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

Whoever institutes an accusation may know that reckless lying will not remain unpunished, since retaliation in punishment calls for revenge upon malicious accusers.

Given at Ravenna August 6 (423).

C. Th. 9.2.17.

Note.

The penalty for malicious prosecution here mentioned is that of retaliation (*talio*); that is to say the penalty which the accused would have suffered, if convicted. This is such an extraordinary penalty, inflicted in addition to infamy, that it needs further comment. The subject has already been referred to in headnote to 9.45. It is thought by Mommsen, Strafrecht, p. 496, approved by 2 Strachan-Davidson, supra, 139, that this principle was definitely introduced by Constantine by the law in C. 9.12.7. It had,

³ [Blume] Signed a complaint and given surety.

⁴ In the inside back cover of the manuscript Blume wrote: "C. 9.46.9—velut derivata excusatione?" (whereas Kruger's Latin text gives velut derivata accusatione).

however, long been known. Augustus provided for such retaliation in case an accuser should renew a charge discontinued by a general imperial order and should fail to establish it. Suet., Aug. 32. See also Suet., Dom. c. 9. It is mentioned in C. 9.9.10, of the year A.D. 225, in connection with collusion, and states that anyone who is guilty thereof in connection with the crime of adultery shall suffer the penalty as for adultery. In C. 9.2.17, it is stated that if a man deems another guilty of a crime he shall file a written complaint, submit himself to the same custody as the accused and suffer the same penalty as the accused, if convicted, in case of malicious prosecution. That constitution was issued in A.D. 423. In C. 9.12.7, already referred to, of date A.D. 319, the Emperor Constantine provides that in an accusation for violence, if the accuser cannot prove his accusation, he will receive the sentence which the accused would otherwise have received. The same statement is made in connection with the accusation of adultery by a husband against his wife, as shown by Nov. 17, c. 9, 4. These statements doubtless imply that the accusation must have been really malicious and not in good faith.

That this penalty was the general penalty for malicious prosecution is assumed by the authorities, and is in addition to the places referred to in the Code and in the Justinian Novels, attested by writers and in a number of constitutions contained in the Theodosian Code. Geib, supra, p. 578, note 149, to which may be added C. Th. 9.1.7 and 9.2.3. The penalty must have been a powerful deterrent of bringing unjust accusations. Some persons were exempt from this penalty, as shown in law 2 and note thereto, but it appears to have been inflicted even on officials. C. 12.22.1; Bas. 60.33.20 note; Bas. 60.35.22, note; Geib, supra, 585; Mommsen, supra, 497; Note to C. 9.4.6.5; Dig. 48.16.3. And this doubtless contributed to the fact - since the officials would hesitate to expose themselves to the danger of such penalty - that the accusatorial system of procedure continued to exist along with the inquisitorial. Mommsen, supra, 497.