

Book IX.
Title IX.

As to the Julian law concerning Adultery and Seduction.
(Ad legem Juliam de adulteriis et de stupro.)

Bas. 60.37.46, et seq; Dig. 48.5.

Headnote.

The crime of adultery rested in later times upon the Julian law passed in the time of Augustus, about 17 B.C. This law also embraced provisions against other acts of unchastity. Adultery, a crime committed with a married woman of honorable station, is sufficiently treated in the within title. Other acts of unchastity, also embraced in the foregoing law, or mentioned in this title, are the following: (1) Stuprum, defined as unlawful sexual relations with a free and respectable woman who was unmarried, that is to say, who was neither the wife nor the concubine of a man. Dig. 48.5.34. The penalty, under Justinian, was corporal punishment with relegation for the common people and forfeiture of half their property for people of rank. Inst. 4.18.4. In case of such relations with a girl under the age of puberty, however, the punishment was, for common people, sentence to the mines, and for people of rank, relegation. Illicit relations with women of low station was not punished. See Colquhoun, Roman Civil Law § 2426-7. Dig. 48.19.38.3. To seduce a woman by presenting her with a gift or a loan, was punishable by deportation or even by death, and corrupted aiders also might be punished with death. Dig. 47.11.1.2. To attempt to seduce a married woman, without abduction, or to attempt to persuade her to leave her husband, was punishable in the discretion of the judge. Dig. 47.11.1 pr. (2) By interpretation, incest - unlawful marriage - came within the inhibition of the Julian law against adultery. A distinction was drawn between marriages considered unclean by custom and marriages which were merely prohibited by statute. In the former case both the man and the woman were punished, but in the latter case the woman, unless at the same time guilty of adultery, was left unpunished, "since a woman is pardoned a mistake caused by ignorance of the law." If such marriage was given up before an accusation was brought, punishment was remitted, but Mommsen thinks that this applied only to marriages prohibited by statute. Dig. 48.5.39; 48.18.5; Paul., Sent. 2.26.15; Coll. Mos. 6.3; Mommsen, Strafrecht 687. Justinian states in Nov. 12, that incest was generally left unpunished, and Bury thinks that this was, perhaps, generally true also with adultery. Bury, 2 Hist. Later Roman Empire 411. What constituted incest will be seen in C. 5.4, particularly in laws 4 and 17 of that title, and in C. 5.5, and the punishment in Justinian's time is mentioned in Nov. 12. (3) If a woman, married to a soldier, remarried before a certain time, after hearing of his death, she was punished as for adultery. Nov. 117, c. 11. (4) Pandering, or procuring, was severely punished under laws enacted by Thoesodius, the Younger, as will be seen in C. 11.41.6 and 7, and Novel 14, where the subject is treated more fully. Husbands who did not divorce a wife whom they caught in the act of adultery, were punished the same as a panderer.

9.9.1. Emperors Severus and Antoninus to Cassia.

The Julian law declares that women do not have the right of making an accusation of adultery, for the purpose of a public prosecution, although they wish to complain of the violation of their marital rights; the law which gives to males the right to bring accusation, pursuant to their rights as husbands, does not give the same privilege to a wife.

Promulgated July 20 (197).

Note.

Adultery was punished primarily for the purpose of preventing unchastity on the part of a wife, so that no offspring from adulterous intercourse might come into the family. Dig. 48.5.6.1. Hence a wife could not accuse a husband of adultery. The accuser must at all times be of the male sex. But the wife was not alone guilty. Her paramour could be accused as well, and in fact in some cases had to be prosecuted and punished before the wife could be prosecuted.

9.9.2. The same Emperors to Cyrus.

The crime of pandering (lenocinium) is committed by those who retain in marriage a wife who is caught in the act of adultery, not by those who suspect their wife of adultery.

Promulgated July 1 (199).

Note.

It was considered incompatible with a man's honor to continue to live with his wife, if he caught her in the act of adultery, and he could not prosecute her, unless he divorced her. Further he was himself deemed guilty of lenocinium, pandering or bawdry, if he did not immediately divorce her. The penalty for that was, at least up to the time of Theodosius, the Younger, the same as that for adultery. Dig. 4.4.37.1. See Mommsen, Strafrecht 701. Other persons were guilty of the same crime, who permitted their house to be used for adultery or fornication; a man who married a woman convicted of adultery; a husband who made the prostitution of his wife a source of gain, and a husband who craftily produced his wife's seducer his opportunity. Dig. 48.5.2.2 and 2.8 pr;¹ Dig. 48.5.29.4;² Paul., Sent. 2.26.8. A husband did not, however, have to put his wife away, unless he actually caught her in the act of adultery; to overlook her transgressions otherwise was not a crime. Dig. 48.5.2.3; Dig. 48.5.29. 4. See law 17 of this title. The law also provided that if a husband dismissed his wife for adultery, but took her back, he was guilty of pandering, since otherwise he would be able to permit the law to be defrauded. Dig. 48.5.33.1; C. 9.9.9. But Justinian provided by Nov. 134, c. 10, that he might take her back with two years. It may well be questioned whether, under this provision, he was compelled to divorce her at all. In case a wife was accused by her husband of adultery, she might set up that her husband was guilty of lenocinium, but that did not free her from punishment, but simply subjected the husband to punishment also. Dig. 48.5.2.5.

¹ In the Watson English translation of the Digest, this last law is shown as 2.9(8) pr.

² This is 30(29).4 in the Watson edition.

9.9.3. Emperor Antoninus to Julianus.

The words, as well as the meaning, of the Julian law concerning the suppression of adultery, in permitting the commission of the crime to be proved by torture of slaves, male or female, requires, for that purpose, the production of slaves only of persons specially contemplated by the law; that is to say, the slaves of the woman and of her legitimate - not her natural - father, in which case such slaves are prohibited to be manumitted or sold within sixty days after dissolution of the matrimony (by act of the husband). But sureties must be given, that in case they should die or their health impaired by the torture, damages will be paid, in case of an acquittal in the case. Promulgated July 18 (213).

9.9.4. Emperor Alexander to Julianus, Proconsul of Narbonne.

If Gracchus, whom Numerius killed, in an act of adultery in the night, was one of those persons who could be killed with impunity, under the Julian law, then, since the act was lawful, no penalty was incurred. The same right must be extended to his sons who obeyed their father. If, however, he had no legal right to kill, but did so rashly, in his grief, then, though he committed murder; the night and his just grief mitigates his act, and he may be sent into exile, (relegated). Promulgated without consul or day.

Note.

A father was permitted to kill his married daughter and her paramour if caught in the act of adultery in his house or in that of her husband, but he must slay them on the spot. And he could not let his daughter go and slay only the adulterer. Dig. 48.5.20-23 and 32. The husband's right was not nearly so extensive. He could under no circumstances slay his wife, and he might kill an adulterer, if caught in the act, only in case he was a panderer, actor, dancer or was convicted of a public crime, without being restored to his rights, or was the freedman of the husband, of his father, of his wife, of his wife's mother or of his child, or was a slave. Justinian gave the husband the right to kill in another case, as mentioned in c. 15, Nov. 117.

9.9.5. The same Emperor to Valens.

An adulterer cannot be accused after five years, counted as a continuous period, from the time that the adultery is said to have been committed. This right of prescription, given by the laws to the defendants, must not be taken away. Promulgated June 13 (223).

9.9.6. The same Emperor to Sebastianus.

A man who, pursuant to his rights as a husband, wants to bring a charge of adultery, has sixty judicial days in which he has the opportunity publicly to go before the judge before whom the adulterer or adulteress may be brought. When the sixty judicial days have passed, the husband may further sue by the right of anyone else (entitled to bring such action)³. 1. And whoever is confident of the justice of the accusation, need be in no fear of the brand of a false accuser; for my divine parents have permitted

³ [Blume] Compare law 16 h.t.

examination under torture of slaves, for the purpose of proof, in the same manner as if the action were prosecuted under the right of a husband.
Promulgated August 12 (223).

Note.

It is noticed that the husband, within sixty days (which commenced to run from the time of divorce - Dig. 48.5.30.1), might bring an action "under his right of husband." That simply means that he did not need to file written charges, and he was not liable to the penalties for malicious prosecution, as he would be in case he filed his charges after that time, and would then be in the same situation as any other prosecutor. C. 9.9.29; Dig. 4.4.37.1. Gothofredus on this law. Nov. 117, c. 9, 4, however, states without discriminating between the method, or time, of making an accusation, that "on account of an accusation made, but not proved, the husband shall be subjected to the same punishment which the wife would have suffered, if the accusation had been proven." This seems to have placed a husband in the same position as other accusers. The right to bring the accusation within the sixty days aforesaid, was also extended to the father, the husband, however, having the preference. Dig. 48.5.2.8; Dig. 48.5.3 and 4; Dig. 48.5.14.2 and 15 pr.⁴ All of the proceedings must, however, be brought within five years from the time of the commission of the offense, as mentioned in the preceding law, and in Dig. 48.5.29.7. See also C. 9.46.2 on the subject of malicious prosecution.

9.9.7. The same Emperor to Herculanius.

A man who becomes the husband of a young woman, subsequent to the time that her virginity was violated, is not a just accuser, and he cannot, therefore, carry on the prosecution under a husband's right, unless the woman was betrothed to him (at the time of the commission of the crime). 1. But if she, herself, with the assistance of her curators, through whom her business must be transacted, brings a prosecution for her injuries, the president of the province will, in view of the magnitude of such crime, if proven, make a strict investigation thereof.
Promulgated December 21 (223).

9.9.8. The same Emperor to Domna.

The Julian law concerning chastity forbids the male and female to be both prosecuted for adultery in the same cause; but they may be prosecuted in succession.
Promulgated January 13 (224).

9.9.9. The same Emperor to Proculus.

It is in accordance with the spirit of chastity of my times that a woman condemned under the Julian law concerning chastity, should pay the legal penalty. And if a man should knowingly marry or remarry a woman condemned for adultery, and who has in some manner escaped capital punishment, he will, by the same law, be punished for pandering (lenocinium).
Promulgated January 26 (224).

Note.

See note to law 2 of this title.

⁴ In Watson these are 15(14).2 and 16(15) pr.

9.9.10. The same Emperor to Demetrianus.

It is not permitted to compromise the prosecution (crimen) of adultery, and the offense of an accuser guilty of collusion and of a man who shuns the search for the truth, is equal. Whoever received a price for a discovered seduction, is subject to the punishment for adultery under the Julian law.

Promulgated May 3 (225).

Note.

As to punishment for collusion in general, see headnote to C. 9.45, where that subject is fully dealt with. In c. 9, 4, of Novel 117, it is stated that the husband who fails to prove an accusation of adultery against his wife, will be punished the same as the wife would have been, if she had been convicted. See note to C. 9.46.10. As to compromise of criminal cases generally, see note to C. 9.22.7.

9.9.11. The same Emperor to Norbanus.

There is no doubt that a husband who retains his wife in marriage, cannot commence an action for adultery.

Promulgated September 1 (226).

Note.

Dig. 48.5.2.4-7, apparently is in contradiction hereof, stating that neither the wife nor the adulterer can offer the defense that the husband retained his wife or was guilty of bawdry in some other way. But law 25 of this title confirms the present law that the defense exists. The explanation seems to be furnished by Enantiophanis, in note to Bas. 28.8.25, that the defense must be raised before the trial, so that the question may be disposed of in a preliminary investigation.

9.9.12. Emperor Gordian to Aquila.

If while marriage between you and your wife subsisted, she became polluted by adultery, you should prosecute her in the usual manner in the province where the adultery was committed; but such accusation for such adultery cannot be brought against her after she has been remarried, if notice of such accusation did not precede her remarriage.

Promulgated December 5 (239).

Note.

There were some peculiar limitations as to prosecuting women for adultery. As we saw by law 8 of this title, the prosecution could not be brought against the wife and her paramour at the same time. If the wife, at the time of the institution of a prosecution, was unmarried, the prosecutor could choose between the two. If she was, however, remarried, she could not be prosecuted, until the adulterer had been prosecuted and convicted. The foregoing law in this title probably does not mean, as it seems to mean, that in case of remarriage she could not be prosecuted at all, but that she could not be prosecuted until the conviction of the paramour. In case the paramour was acquitted, his acquittal operated as her own acquittal; but the converse was not true. If she remarried, however, after the prosecution of the paramour had started, then his acquittal did not operate as her acquittal. Dig. 48.5.17-19.

9.9.13. The same Emperor to Bassus.

Although the man who was condemned for the crime of adultery has not, as you state, been restored to his former rights, nevertheless if your sister, with whom the adultery was said to have been committed, has not been accused, she could not be subjected to punishment or infamy, especially since you state that the accuser has died. Promulgated June 1 (240).

9.9.14. The same Emperor to Silvanus.

It is clear that though an adulteress has departed from the province after the prosecution of the accusation against her (issue having been joined) was commenced, she may still, while absent, be proceeded against as a defendant. Promulgated March 7 (242).

Note.

As to condemnation of absent person, see headnote to C. 9.40. Absence made no difference, if the parties had previously joined issue - which means, after the parties had appeared and stated their respective claims.

9.9.15. The same Emperor to Hilarianus, a Soldier.

If your former wife departed from the province before she was accused of the crime of adultery, she can neither be prosecuted while absent nor it is rightfully asked that she be sent to the province where you perform military service. 1. Of course, since by reason of military service you were not⁵ able to do so, you can (now) accuse her in the customary manner. Nor can the time which you have spent in military duty, rob you of the revenge which you, stricken by marital grief, demand. Promulgated March 12 (242).

Note.

The time, which is stated herein as not running was the sixty-day period during which the husband was able to bring an accusation of adultery "under his rights as husband." That time was judicial time - that is to say, time during which he was able to go into court. Being unable to go to court while absent on military duty, the sixty day period did not run during that time. But the limitation of five years was not affected by such absence. Scholia to Bas. 60.37.57. As to accusation of absent persons, see headnote to C. 9.40. The venue of the case was in the province where the crime was committed and hence she could not be taken to another province where the husband was.

9.9.16. Emperors Valerian and Gallien, and Caesar Valerian to Arcesilaus.

If you demand annulment of the accusation of adultery, you should go before the president before whose tribunal the accusation was instituted. 1. But you, Mr. husband, are in error, in thinking, that if you had simply abandoned the suit, without annulment, that the senate decree would not have applied to you.⁶ The divine emperors have often ordained the contrary. 2. And you must know this additional fact, that you would not have had (without annulment) any further power of instituting such accusation, because

⁵ [Blume] Insert non.

⁶ [Blume] Without such order, an accuser would be punished for malicious prosecution. Dig. 48.16.1.7. Compare law 6 pr, h.t.

both by the decree of the fathers and by the Petronian law, he who fails to prosecute to the end an action for adultery started under a husband's right, is never afterwards permitted to (again) bring an accusation for that crime.
Promulgated May 18 (256).

9.9.17. The same Emperors and Caesar to Victorinus.

You may, without fear of the Julian law concerning the suppression of adultery, take your wife back in marriage, since you have done nothing except to file a bill of complaint, and because you affirm that you have learned that you were incited to bring the accusation by a foolish indignation. 1. For he only is subject to the punishment specified by the law on a certain subject (i.e. on pandering), whose wife has either been publicly condemned for adultery, or who knows her to be an adulteress, and who thus, without being able to pretend ignorance, keeps her as his wife.
Promulgated July 27 (257).

9.9.18. The same Emperors and Caesar to Theodosa.

A man who has two wives will be visited with infamy. For in that connection the law does not give consideration so much to the effect, by which our citizens are prohibited from contracting plural marriages, as to the intention. 1. Still a man, who feigned bachelorhood, when he in fact left a wife in the province and urged you to marry him, may, by a legal accuser, in the usual manner, be charged with the crime of unchastity (stuprum), from which you are free, since you believed yourself to be his wife. 2. Of course, the rector of the province will use every effort to have your property, which you deplore as having been taken by him under pretence of marriage, restored to you. But those things which he promised to give you as his betrothed, how can you effectually claim them, when you were betrothed only in name?
Received at Antioch May 15 (258).

Note.

While plural marriages were unlawful in Rome, it seems to have been left unpunished, except by infamy, until the time of Diocletian, unless the act also constituted adultery, for in that case it was punished as adultery. Dig. 48.5.11.12. In so far as men were concerned, in any event, it was made a distinctive crime by Diocletian (C. 5.5.2), which says that men who have two wives will be branded with infamy and that judges will not leave this crime unavenged, which evidently means that the penalty was in the discretion of the judge. Mommsen, *Strafrecht* 701. But see *Colquhoun* § 2429. Greenidge in *Infamia in Roman Law*, page 128, says in connection with the foregoing constitution: "Bigamy was amply provided for by the criminal law of Rome, and it is not so much the effect in this case as the intention that was considered. So much was this the case that legal disabilities to marriage were no bar to the infamia. If a man was improperly betrothed to a woman whom he could not legally marry, he was none the less visited with the stigma."

9.9.19. Emperors Diocletian and Maximian to Pompeianus.

Although the law is unquestioned that the accuser must be present whenever a charge of adultery is prosecuted, still since we have learned from your letter that Materia, wife of the provost Viator, after examination under torture, has been discovered to have

committed adultery with Julianus, but that she demanded the presence of Viator himself on the eve of the pronouncement of sentence, we do not think that, since the trial is almost finished and the crime has been established by the examination under torture, the provost should be recalled from his watch on the border.
Given December 5 (287).

Note.

See comment on this law at note to C. 9.2.4. It is assumed herein that the husband was present at the beginning of the prosecution.

9.9.20. The same Emperors to Didymus.

The laws punish the detestable wickedness of those who prostitute their modesty to the lust of others, but not those who are seduced by force and whose thoughts are free from blame, and it has been justly considered that the latter's reputation should remain spotless and no one is forbidden to marry them.
Promulgated October 13 (290).

9.9.21. The same Emperors to Silanus.

A certain period is fixed within which wives may be accused of adultery committed by them, and only judicial days are counted in that period. If, accordingly, you were unable to institute the accusation because you were occupied in public affairs, and the prescribed time had not elapsed during which you were charged with such public business, you have full opportunity of making such accusation after you have finished your work by which you were detained. 1. You should, however, hasten to do so as soon as you get time, in order that you may not, if you had unlimited license, hold a threat of a future accusation over your adversary in order to frighten her.
Promulgated October 19 (290).

Note.

The time mentioned herein is the sixty day period in which the accusation might be brought "under the rights of a husband" just as in law 15 of this title.

9.9.22. The same Emperors to Obrimus.

If the woman of whom you had carnal knowledge indiscriminately sold her body and was a common prostitute, you are not guilty of the crime of adultery with her.
Promulgated October 21 (290).

Note.

Adultery under the Roman law was not punished unless committed with a woman of respectable station. Thus, adultery with a prostitute, as shown by the above law, with a waitress at a tavern, as shown by law 28 of this title, was not punishable as such. That was true also in case of an actress. Dig. 48.5.10.2.

9.9.23. The same Emperors to Proculus.

Slaves cannot bring the charge of adultery for violation of their marriage bed.⁷ 1. Moreover, a man who, after divorce, lawfully marries another woman and, on account of

⁷ [Blume] As stated in note to previous law, adultery with women of low condition was not punishable by the penalty affixed to that crime. The law relating to that crime,

fear of prosecution of an accusation and powerful protection (of the accuser), has given gold and silver to him who had instituted the accusation, he may go before the president to recover it and avenge the cupidity for filthy lucre, who, when he has examined the allegations of the parties and has inquired into the truth, and learns that a gift was made by an innocent person on account of fear of prosecution, he will know from plain provisions of the law as to what decision to make. 2. But if it appears that the gift was made as the price of polluted matrimony, and in order to secure immunity, he (the president) will punish the man who, in violation of the senate decree, disgracefully accepted such gift.

Promulgated November 1 (290).

9.9.24. The same Emperors to Sassianus.

Although it is disclosed by reading of the records that you gave way to an ungoverned passion, still since it appears that you seduced a female slave and not a free woman, it is clear that by a decision to that effect, your reputation was injured by you did not become infamous.

Promulgated March 11 (291).

9.9.25. The same Emperors and Caesars to Crispinus.

Since we find that Alexander, who has been accused of a crime (of adultery) has promised to set up the defense that the accuser continued to live with his wife after the discovered adultery, and that he now wants to have his status determined⁸, the order of inquiry should be, first, to investigate the status of Alexander, and if you learn, after a hearing, that he is free, you must give him the right to set up his defense; but if you find him to be a slave, he cannot make such defense, and you must immediately inquire into the crime of adultery, and if you learn that he is guilty thereof, you must decree the punishment fixed by law therefor.

Given August 28 (293).

9.9.26. The same Emperors and Caesars to Phorbus.

The crime of adultery committed with the man whom she afterwards married, is not extinguished by such marriage.

Promulgated December 15 (294).

9.9.27. The same Emperors and Caesars to Concordius, President of Numidia.

We are so interested in chastity that we should remove all doubts of the former law, and direct that in a trial for adultery the truth should be laid bare and that all

moreover, related only to free women and not to female slaves, although a prosecution for malicious injury, outrage, might be brought. Dig. 48.5.6 pr. Male slaves, of course, committing adultery with free women, might be prosecuted. Dig. 48.2.5.

⁸ [Blume] The reply had set up that the accused was a slave, in which case, his defense that the accuser continued to live with his wife was not available. In other cases it was available, since, as stated in law 11 of this title, a husband who continued to live with his wife could not bring such action. The defense had to be made, however, at the beginning of the trial.

defenses should be abolished except that of the lapse of five years and that of pandering, which may be set up against the husband⁹, and the defense available to the wife who remarries after the dissolution of the first marriage and before the accusation is made.¹⁰ For it is undignified that chastity should not be able to be avenged by reason of technicalities of the law.
Promulgated June 1 (295).

Note.

Previous to this time the limitation of five years was cut down by other provisions in the law, for instance that others than the husband and father might bring an accusation for adultery only within four months after the expiration of the sixty days allowed the husband and father. This was changed by the present law. Colquhoun, Roman Civil Law § 2425.

9.9.28. Emperor Constantine to Africanus.

Investigation must be made whether the woman who committed adultery was the mistress of the inn or whether she was a servant, attending to a servile duty, and herself generally offering the wine which leads to want of moderation. If she was the mistress of the inn, she is not excepted from the provisions of the law. But if she waited on the drinkers, the persons accused will go free, since the moral degradation of the woman excludes prosecution of her. For chastity is required only of those women to whom the law applies, and who have the name of house-wives (matrons), but women who by reason of their degraded life, not deemed worthy of consideration by the law, are immune from judicial severity (in case of adultery or unchastity).

Given at Heraclea February 3 (326).

C. Th. 9.7.1.

Note.

It appears from this that a woman who kept a tavern was formerly considered of such a type as not to be subject to the laws relating to adultery. The present law, making her capable of being guilty of that crime was perhaps passed partially because the mother of the Emperor Constantine, who enacted this law, was said to have kept a tavern. Gothofredus. The same Emperor, however, in 336, enacted that senators and other titled persons could not intermarry with them. C. 5.27.1.

9.9.29. The same Emperor to Cuagrius.

Although adultery is considered a public crime, the accusation for which is granted to everyone alike, without any limitation (interpretation) of law, still, in order that marriages may not be disgraced at pleasure, only the nearest relatives shall have the right to bring such accusation, that is to say, father, brother, paternal and maternal uncle, who are incited to do so by reason of true grief. 1. But we give permission to these persons to dismiss the accusation, if they wish¹¹.¹² 2. The husband, above all, should be

⁹ [Blume] i.e. continuing to live with his wife. See laws 2 and 25 of this title.

¹⁰ [Blume] See law 12 of this title.

¹¹ [Blume] See Gothofredus on C. Th. 9.7.2 on this sentence.

¹² [Blume] Abolitio - technical sense of dismissing a complaint by permission of the court.

the avenger of the marriage bed, who may indeed accuse his wife on suspicion, though he may keep her with him if he only suspects her. And the emperors of the past consented that he should not incur the peril (frequently) arising from filing a written information (inscriptionis vinculo), since he may accuse under his right as husband. 3. We direct that outsiders shall be kept from making any accusation; for although the necessity of a written complaint exists in every kind of accusation, some persons nevertheless make such complaints rashly, and seek to cast disgrace upon marriages by false slander. 4. Violators of marriage-chastity should be punished by the sword. Promulgated at Nicomedia April 25 (326). C. Th. 9.7.2.

Note.

Before the enactment of this law anyone else had the right, after the expiration of the first sixty days, after divorce, during which the husband and father alone had the right to bring an accusation, to commence the prosecution. But his law such right was limited to near relatives. The right of persons other than the husband were however even more limited than indicated herein. For as long as the husband retained his wife, and did not divorce her, no one else had any right to bring an accusation against her, unless he first brought an accusation against, and convicted, the husband of bawdry - that is retaining the wife contrary to law. Dig. 48.5.27. The present law, as noted, punished adultery with death. Under the previous Julian law, that had not been true. Under that law the punishment consisted of relegation to some island, and in addition to that the man lost half of his property, and the woman her dowry and one-third of her separate property. The man and woman were sent to different islands. Paul., Sent. 2.26.14. Justinian confirmed the capital punishment as to males, but directed the adulteress to be whipped and confined to a monastery, unless the husband wanted to take her back, which he might do within two years. Nov. 134, c. 10, and c. 12.

9.9.30. Emperors Constantius and Constans to the people.

What is a man after, when he lies, embracing, with a man as with a woman;¹³ when difference of sex disappears; when there is a crime which it does not pay to know; when Venus is changed to some other form; when love is asked for, without being seen? We order the laws to rise up an statutes to be armed with the sword of an avenger¹⁴, so that those who are now or hereafter guilty may become infamous and be subjected to the most exquisite punishment.

Promulgated at Rome December 16 (342). C. Th. 9.7.3.

¹³ Blume seems to have struggled with this law. The text as given was typed on a slip of paper and pasted over the original. However, he penciled in above this a variant that appears to be: "What is a man after, when he lies, embracing, womanlike, with a man, the latter projecting herself to the man?" The "herself" seems inapposite, but the following note makes clear that Blume discerned this as concerning sex between men. Scott's translation is so opaque as to be meaningless. See 7 [15] Scott 16 (where this law is C. 9.9.31).

¹⁴ [Blume] By burning. Gothofredus. He thinks that the reference to the sword is simply a reference to the severity of the punishment.

Note.

The crime here referred to is the unnatural crime of men with men - sodomy. Two other law on the same subject are contained in the Theodosian Code, and Justinian dealt with this subject in Nov. 77 and Nov. 141. The crime appears to have been common in both Greece and Rome. See Symonds, A Problem in Greek Ethics. Hardly one of the earlier emperors of Rome were exempt from the imputation of this crime. e.g. Suet., Aug. § 68; Suet., Caes. 2; Suet., Caligula 25; Suet., Galba 22. It was a matter of comment that Claudius was exempt from this crime. Suet., Claud. 33.2. It is stated by a noted historian that while Justinian in his laws contented himself with imposing the penalty of death for this crime "in practice, he did not scruple to resort to extraordinary punishments. It is recorded that senators and bishops found guilty were shamefully mutilated, or exquisitely tortured, and paraded through the streets of the capital before their execution." 2 Bury, Hist. Later Roman Empire 412.

9.9.31. Emperors Gratian, Valentinian and Theodosius to Cynegius, Praetorian Prefect.

In cases of adultery, examination under torture shall be made, without exception not only of the whole household¹⁵ of the husband, but also of the wife, provided they were in the house at the time when the adultery is said to have been committed.

Given at Constantinople December 11 (385).

C. Th. 9. 7. 4.

9.9.32. Emperors Theodosius, Arcadius and Honorius to Rufinus, Praetorian Prefect.

When an accusation of adultery is instituted, civil claims, by which either dowry is sought to be reclaimed, or any debt is for any reason demanded, which are usually brought forward to obstruct and impede an examination, shall, we order, be referred for separate investigation, and the prosecution shall not be retarded by such obstacles; but whenever an accusation is well laid, that is to say, whenever the right of the accuser (whether under that of a husband or that of a stranger) appears and the time when the action was commenced (and the action seems timely), the crime must be investigated and the nature of the act must be brought to light, since disputes of magnitude take precedence, and a civil suit is postponed to a criminal action, although the former will, as soon as is proper, have due consideration, provided it does not obstruct the (criminal) investigation.

Given at Constantinople December 7 (392).

C. Th. 9.9.7.

Note.

See C. 3.8.4, which puts civil cases aside for criminal cases; C. 9.9.1 requires grave charges to be answered first.

9.9.33. The same Emperors to Rufinus, Praetorian Prefect.

If any persons have been accused of adultery and have defeated the charge under color of near relationship, detracting from belief in the crime by reason of kinship, in that, what is alleged should not be credited as not being capable of being committed, but they

¹⁵ [Blume] Of slaves. See for full treatment of this subject C. 9.41.

thereafter become married to each other, they will clearly prove the crime of which they were accused. 1. Hence, if any persons of this sort are found, we order the severest revenge to be taken upon them and be punished as though the crime were clearly established and confessed.

Given December 4 (393) at Constantinople.

C. Th. 9. 7. 8.

Note.

Note the force given to circumstantial evidence by this and the following constitution.

9.9.34. Emperors Honorius and Theodosius to Palladius, Praetorian Prefect.

If a woman sends a bill of divorce and leaves without giving a legal cause for the bill, we give the right of accusation (for adultery) to the repudiated husband, in order that she may not stain her widowhood by debauchery.

Given at Ravenna March 8 (421).

C. Th. 3.16.2.

9.9.35. Emperor Justinian to Johannes, Praetorian Prefect.

In case a bill of divorce was sent, the founders of the law, because of suspicion of the crime of adultery, order the right of manumission of slaves belonging to a wife, husband or their parents, to be suspended for the period of two months after the bill of divorce was sent, so that they might be examined under torture, if need be. 1. But they say nothing concerning the time during which these slaves should remain as such, on account of the aforementioned reason, in case the wife should die after the dissolution of the marriage in the manner aforesaid. 2. It appears necessary to us that a definite time should be fixed also in such case, on account of the question of dowry; that is to say, whether the husband should have it as a gain or whether it should be restored to the heirs of the woman. We accordingly ordain that two months, likewise, shall pass after the death of the woman, during which the slaves shall remain such, so that the husband may have an opportunity to furnish the proof of adultery through them. But when that time has passed, the heir of the woman shall have the right to give liberty (to the woman's slaves), unless the husband, though desirous to do so, was by his (the heir's) fault prevented from bringing the accusation of adultery.

Given at Constantinople October 28 (532).