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, or 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.