

Book IX.  
Title XL.

Concerning calling defendants.  
(De requirendis.)

Bas. 60.49; Dig. 48.17.

Headnote.<sup>1</sup>

There were instances in the earlier period of the Roman Empire that persons accused of crime were condemned while absent. Tac., Ann. 4.21; Agr, c. 41. Even the Emperor Julian is reported to have condemned a man to death in his absence during the year A.D. 361. Amm. Marc. 22.3.6. But these were probably exceptions to the rule. See, however, Mommsen, Strafrecht 333, 334. In any event, as stated in C. 9.2.6, it was an ancient law that no one could be prosecuted (accusari), let alone condemned, in his absence for a crime for which a severe punishment was visited upon the condemned. See also C. 9.9.15; Dig. 48.19.5 pr. Paul., Sent. 5.5A.9, says that in a capital case no person may be condemned or prosecuted (accusari) in his absence. And it is stated in the Digest that Trajan, as well as Severus, stated that to be the rule in general. Dig. 48.16.1 pr; Dig. 48.19.5 pr. "Accusari," properly speaking, applies to a step in the prosecution subsequent to the filing of the information or indictment and appears to refer to the time of the "joinder of issues" in criminal cases. The joinder of issues took place when both parties stated their case, the statement, of the prosecutor constituting the "accusatio" proper. The information might be filed in the absence of the defendant. 2 Cujacius 509; and 9 Cujacius 1282; Geib 529. But the rule first mentioned did not apply to cases where only a pecuniary penalty or infamy, any more than in civil case, were the result. Dig. 48.19.5 pr. In fact it seems not to have applied except in cases involving death, sentence to the mines or other equally severe penalty. See Nov. 69. A note to Bas. 60.49.1 says that it did not apply in case of stellionate. The Emperor Hadrian decided that an exception, too, should be made in case of those who were guilty of unlawfully castrating others. Dig. 48.8.4.2. And a law was enacted in 385 that apparitors of the presidents of provinces might be condemned in their absence. C. 9.47.21. So Zeno provided that contumacious persons of illustrious rank might be shorn of their dignity in their absence. C. 12.1.17.

But as will be seen from the present title, also stated in Dig. 48.17, the absent person charged with a crime, was noted as a person to be cited, an edict was issued and letters sent to the province of the president where the accused was thought to be. In the meantime his property was seized and held, and if the accused did not appear within a year, such property was confiscated without right to get it back. But this did not deprive the accused of the right to purge himself of the crime. After an accusation had been once duly commenced, and the defendant had been brought to court to answer the charge, and thereafter departed, he might then be condemned as though present. C. 9.9.14; Bas. 60.33.19 and note; 2 Cujacius 512.

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<sup>1</sup> Blume penciled in here: "See 1 Pauly-Wissowa "absentia," 119."

9.40.1. Emperor Antoninus to Rusticus.

When grave crime are charged against an absent defendant, the final decision is not usually to be hurried, but he is to be noted as required to appear, not for punishment, but that he may have opportunity of purging himself, if he can. 1. If the person required to appear returns within a year and purges himself of the crime, he shall, in the discretion of the judge, receive back his property which was seized and put into custody; and if, upon his return within the year he has made his presence known, and then dies, he transmits his property to his own heirs, though he has not yet purged himself.

Given (211).

9.40.2. Emperor Constantine to Januarius.

If a man refuses to appear in court within a year from the day that he is accused in court, his property shall be confiscated to the fisc; and if he is found thereafter adjudged to be guilty, he will be subjected to severer punishment, and even though he proves his innocence by the clearest proofs and the plainest showing, still his property shall remain that of the fisc.

Given January 13, and received at Corinth July 28 (319).

C. Th. 9.1.2.

Note.

It will be noted that the burden to purge himself, in a case here contemplated, rested upon the person accused. See Bas. 60.49.7 note.

9.40.3. Emperor Honorius and Theodosius to Palladius, Praetorian Prefect.

In civil causes, an edit summoning a man who hides himself to appear, does not injure his reputation. But the tenor of a criminal edict, strikes with such legal severity, that a person named as accused (not only) can no longer transfer his property but it also injures his good name.

Given at Ravenna July 8 (421).

C. Th. 10.10.29.