Book VII.
Title XLIII.

How and when a judge should give his decision in the presence of the parties or when one of them is absent.
(Quomodo et quando judex sententiam proferre debet praesentibus partibus vel una absente.)

Bas. 9.1.50 seq; Paul. Sent. 5.5a.

7.43.1. Emperor Titus Aelius Antoninus to Publicius.

You are not compelled to always give judgment against an absent party, by reason of the note of my father, in which he stated that a decision was also usually given against absent parties. For that means that you may condemn an absent party, not that you must always do so.
Without day or consul.

Note.

The ordinary rule was that all interested parties should be present when a decision was given, otherwise it was binding only on those who were present. D. 42.1.47 pr. But this was true only when a party was not contumaciously absent. An absent, undefended defendant, who had notice of the commencement of an action, was, after default, cited by citations or edicts to appear and defend the suit. But, as stated in the instant law, the proceedings did not necessarily result in a judgment against the defendant. It did so only where the plaintiff had a good cause of action against the defendant. The court took careful proof, though only in a summary manner. C. 3.13.3; C. 7.65.1. Steinwenter, Studien zum Rom. Verseaumnissverfahren 54-56. The law was applicable only to the extraordinary procedure, not the formulary procedure. Under the latter, judgment was entered against a party who failed to appear, without investigation of the merits, provided, however that issues had been joined. 6 Pauly-Wissowa R.E. 418. That was true also under the Twelve Tables.

7.43.2. Emperor Gordian to Severus.

It is certain that a decision may be given by a judge against those who were cited, but refused to appear, although the reason for the issuance of a peremptory edict fails. Subscribed July 29 (239).

Note.

The meaning of this rescript is obscure, and has not been interpreted uniformly. Its meaning seems to be that, ordinarily, a judgment might be rendered when the peremptory edict was issued, though the reason for it, by reason of the defendant having a good excuse, had failed. The judgment in such case was not, ordinarily, void, although, if the defendant had a good excuse, he might appeal, or obtain restitution of rights. Steinwenter, supra 59, 3, note, thinks the law is in conflict with D. 42.1.45.2; D. 42.1.54 pr, which hold that a judgment rendered against an undefended minor or against a man absent on public business was void. But the instant law was probably intended to cover the general rule, and not the exceptions. 9 Cujacius 991, interprets the law to mean that a

judgment might be rendered after three edicts, or other notices, had been given, making it unnecessary to issue a peremptory edict.

7.42.3. The same Emperor to Antistius.

A judgment which you say was pronounced in your absence, without you knowledge, and while undefended, cannot be vacated, if you did not petition against the decision immediately after leaning of it. For a decision thus given is only invalid when not followed by assent thereto (by reason of acquiescence).
Promulgated June 10 (239).

Note.

Compare with laws 7 and 11. Law 7 states that the decision was void, if default proceedings had not been properly taken. In the instant case, the decision was voidable merely. The default proceedings had evidently been properly taken, but were by edicts, posted up, and the defendant did not know of them. He claimed that he had an excuse. In such case he was required to take steps immediately to have the situation corrected. "Querella," complaint, according to Steinwenter, supra 67, is to be accepted as meaning an appeal, as in law 11, and this appeal had to be taken within two or three days after receiving knowledge of the judgment. If he did not do so, he was held to acquiesce in the decision. According to Steinwenter, supra 57, this was true also if laws 4 and 5 of this title were violated. See also Puchta, Inst. § 180.

Law 11 of this title is similar to the instant law, except that issues had been joined in the former, while it does not appear whether that was true in the instant law. Default proceedings were required if the defendant was absent, after as well as before joinder of issues. See also C. 5.58.2, as to acquiescence in a decision.

7.43.4. Emperor Philip to Domitius.

If, as you state, your opponent obtained a decision in his favor from the referee appointed for the cause, on a holiday, while you were absent and ignorant thereof, as though you were contumaciously absent, the president will not unjustly again refer the matter for investigation and termination to another judge.
Promulgated October 11 (244).

7.43.5. The same and Caesar Philip to Longinus.

If, as you state, the president of the province had appointed a certain place for the trial of a case, but your opponent went secretly before him in another place and he gave judgment against you while absent, such action has no legal effect.
No day or consul.

7.43.6. Emperors Valerian and Gallienus to Domitius.

If the president treated an appeal, made ready by his assistant, as abandoned by your minors over the age of puberty (adultis), and did so at the time when the minors had no curator, he will take up the matter again if you go before him. For the minors cannot

be prejudiced by a decision made when they were without legal defense and assistance of a curator.[1]

7.43.7. Emperors Diocletian and Maximian to Marinus.

It is certain that a decision given against parties who are absent without contumacy, not having been summoned by the usual notices (denuntiationes), is invalid. Promulgated March 30 (290).

Note.

The notices here mentioned do not appear to refer to the original notice or summons in the case, at the time of the commencement of the action, in as much as the plural is mentioned, but to notices given thereafter in order to put the defendant in default.

The law treats of "usual" notices required in order to put the defendant in default, so that judgment might be rendered. Steinwenter, supra 32-33, thinks that these notices were private notices, just as the notices mentioned in law 9 of this title. It is clear, however, that giving denuntiationes - notices - served on the defendant personally, was not the only method by which the defendant might be notified. Litterae - notices - might be served on the defendant if he lived in a distant district. So edicts might be issued, which were posted up. The term "denuntiatio" had many meanings, and in this law seems to refer to notice given in any manner authorized by law, including edicts. The instant law seems to clearly indicate that a man could not be held to be contumacious, so as to authorize the entry of a judgment, until the usual notices of the nature mentioned had been given. In order to harmonize this law with laws 3 and 11 hereof, we must assume that the usual notices had there been given. See C. 3.13.

7.43.8. The same Emperors to Claudia.

When the time for the presence of your opponent has been fixed, and the usual formality of law had been observed, and your opponent had been admonished to appear by three notices (litterae), or by one peremptory edict, serving in place of all, and he persevered in his contumacy, it was in harmony with law, for the president of the province to hear the allegations of the party present, or his successor will do so. If your opponent has been cited by him three times but contumaciously refuses to appear, it will be proper either to give you possession of his property in order to force him to appear an occupy the roll of claimant, or to hear you claims and give judgment according to law. Promulgated September 29 (290).

Note.

The first part of the instant law "when the time for the presence of your opponent had passed" etc. shows that summons of the suit had been served in the regular manner, and this summons is distinguished from the subsequent notices necessary in proceedings on default, and indicates that service of summons was necessary before default proceedings were instituted. Steinwenter, supra 42, 151, 191.

The law mentions three litterae being sent. As already shown they were used only when the defendant lived in a distant district. They were intended to be served

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[1] [Blume] A judgment against them without proper representation was void. Steinwenter, supra 58-60.

personally. As already indicated, three edicts, or one peremptory edict could be used instead. Apparently an option was given to take immediate judgment after default proceedings were completed. That appears to be modified by C. 7.39.8.3. See 45 Z.S.S. 77; 25 Z.S.S. 158.

The instant law shows that default proceedings were possible in actions in rem, for it refers to such actions. Steinwenter, supra 152. That had not been possible formerly. Idem 149. But while the instant law indicates that final judgment was possible immediately (after proper default proceedings) that portion of the law seems to have been modified by later legislation making no final judgment possible until a year had passed after the default proceedings had been completed. See C. 3.1.13; C. 7.39.8.3. This whole title shows the abundance of notices necessary to permit the entry of judgment.

7. 43.9. The same Emperors to Leontius.

It is a wholesome provision that three citations (denuntiationes) to contumacious parties, to take the place of a peremptory edict, are sufficient.
Promulgated October 22 (290).

7.43.10. The same Emperors to Blaesius.

Since you did not leave voluntarily, but through necessity, the rule of law does not permit the decision rendered against you while absent, in view of the necessity of such absence, to prejudice you.
Promulgated May 13 (291).

Note.

Sickness, unavoidable casualty and absence on public business excused a defendant who failed to appear pursuant to proceeding on default. C. 2.53.1; Steinwenter, supra 68. In some cases, as shown in law 2 hereof, a judgment rendered against an absent person was absolutely void. In other cases, however, it was valid, unless an appeal was taken, or unless restitution of rights was granted, as shown by laws 3 and 11. Default proceedings, of course, were always necessary.

7.43.11.

If, as you state, the dispute was commenced while the parties were all present, and judgment was thereafter given against you while absent, and you did not appeal within the time fixed, many imperial constitutions oppose your demand to have the decision vacated.

Note.

In the instant case, the judgment was valid, unless an appeal was taken.
9 Cujacius 990, conjectures that no default proceedings by three edicts etc. had been taken, but that the judgment was valid nevertheless, unless a good excuse existed for the absence, which could be shown on the appeal. That perhaps was true before the time of Justinian. But under Justinian, as shown by C. 3.1.13, default proceedings were just as necessary, if a defendant deserted a case after joinder of issues, as before such joinder. And law 7 of this title states that without such default proceedings a judgment would be void. The instant law does not state whether such default proceedings had been taken, and the compilers, therefore, were able to leave it in the Code without change, but we must construe it as though such proceedings had been taken. It may be that edicts had

been posted, and the defendant did not know it. In that situation the judgment was perfectly valid, as in law 3 hereof. He could appeal within two or three days (later ten days), after learning of the judgment. But the appeal would be of benefit only, if the absence was in fact excusable. If not, no appeal could be taken. C. 7.65.1; Nov. 82, c. 5; Steinwenter, supra 145, note.