

Book IX.  
Title III.

Concerning producing and transmitting persons accused.  
(De exhibendis vel transmittendis reis).

9.3.1. Emperors Valentinian and Valens to Valentinus, Consular at Picenum.

If a soldier found in a province commits a public crime, the rector of the province shall put him in custody<sup>1</sup>, and thus report to the master of the soldiery concerning the merits of the cause or the status of the person.<sup>2</sup>

Given at Milan January 21 (365).

9.3.2. Emperors Gratian, Valentinian and Theodosius, to Eutropius, Praetorian Prefect.

No one shall be chained in prison before he is convicted. If a defendant is requested to be summoned from a distance, such request of an accuser must not be granted till he has made himself responsible, according to the customary law. 2. And the accused who is to be brought to court must be given a period of sufficient days, not less than thirty, by the judge or magistrates of the place, to arrange his affairs and console his saddened household gods<sup>3</sup>, and the person sent to bring him to court shall have no opportunity left to extort anything from him on account of the time given him. 3. When the accused subsequently comes before the judge, he, represented by counsel, must answer the questions asked him by the judge. He shall be treated, in like manner as the accuser, till the trial has disclosed a difference.

Given at Constantinople December 30 (380).

Note.

It will be noted from this, in the first place, that an accused was entitled to counsel. Again, he had the right, perhaps in all cases, as Geib, supra, 567, seems to treat it, or at least where he lived at a distance from court, to have thirty days before going to court, and arrange his affairs, if he wished it. During that time, however, he was under surveillance. Augustine alludes to this law in Epist. 115, as follows:

"On the following day I sent a letter requesting that he (the prisoner) should be allowed the privilege which the emperor appointed in case such as his, namely that persons summoned to appear to be tried should in the municipal court be interrogated whether they desired to spend thirty days under adequate surveillance in the town, in order to arrange their affairs, or find funds for the expense of their trial. \*\*\* I trust also that he (the magistrate) will not overlook the fact that the laws have been violated in his having been suddenly carried off, without being brought, as was enacted by the emperor, before the municipal court, in order to his being asked whether he wished to accept the benefit of the delay of thirty days, so that in this way we may get the affair settled between him and his adversary."

It will be further noted that upon the arrival before the judge, the prisoner was to be interrogated, doubtless for the purpose of obtaining a confession from him. The judge

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<sup>1</sup> [Blume] Of an apparitor of a judge - see next law.

<sup>2</sup> [Blume] The rector had no jurisdiction of a soldier. Note C. 1.46.2.

<sup>3</sup> [Blume] i.e. arrange his family affairs.

was directed to take a part in this. C. 3.1.9. In fact, the judge also generally directed the proceedings and made inquiries upon the main trial of the case. C. 9.22.22. Amm. Marc. 29.1.25 and 33. This inquisitorial system was the forerunner of the same system in some of the continental countries in Europe. Sherman, 2 Roman Law § 938. See Geib, supra, p. 614. Unless the defendant was a privileged person, he might be put to torture a will be more fully shown at title 41 of this book. See also Esmein, supra, 28.

The subject of equal treatment of the accuser and accused, in reference to custody, is treated in note to C. 9.2.17.

The so-called commentariensis, mentioned in laws 4 and 5 of the next title, was the person whose duties were somewhat analogous to that of a sheriff, but who in addition thereto had the duties of our clerk of courts in criminal matters. He was the assistant of the judge in the administration of the criminal law. Through him the accusation was filed, the accused arrested and kept in prison and examined and tortured. After sentence, he carried out the punishment. He had a number of assistants under him, including shorthand and other writers, keeper of records and jailors. 3 Bethmann-Hollweg 147-147; Geib, supra, 564.

It was permitted to arrest an accused at any time and at any place, except only that the accused persons might take refuge in churches where they could not be arrested. C. 1.12, laws 2, 3, 6. This was but a continuance of the idea of sacredness of former heathen places. This right of protection, however, was taken away, if it ever existed, from persons accused of murder, adultery and ravishers of virgins. Nov. 17, cc. 5 and 7. Geib 565.

9.3.3. Emperors Valentinian, Theodosius and Arcadius to Drepanius, Proconsul of Africa.

We direct that no one shall be dragged into court, till the judge has directed his production.

Given at Milan February 4 (390).