

Book IX.
Title IV.

Concerning the custody of person accused.
(De custodia reorum.)

9.4.1. Emperor Constantine to Florentius (Imperial Procurator, Rationalis).

In whatever cause a defendant is produced in court, whether at the behest of a private accuser, or of the officials who look after the public welfare, a trial should be had at once, so that the guilty may be punished, and the innocent absolved. 1. If the accuser is absent for a time, or the presence of accomplices appears necessary, they should be produced as soon as possible. 2. In the meantime the defendant should not be put in iron handcuffs which fit tight to the bones, but in loose chains - if, forsooth, the nature of the crime demands the severity of chains - so that the accused may not be in pains, while (at the same time) his custody is insured. 3. He should not suffer while shut up in the darkness of a dungeon beneath the surface of the earth, but should be nourished by the light of the sun. When night has doubled the necessity of the watch, he shall be put in vestibules of the prison, in a salubrious place. As soon as the day returns, and with the rise of the sun, he shall be led back to the open light, so that he may not perish by confinement in prison, which would be unfortunate for the innocent and not sufficiently severe for the guilty. 4. This, too, must be observed, that neither those who perform the duties of jailor¹ (strator), nor their servants, shall be permitted to sell their cruelty to the accusers, nor deliver innocent people to death in the confines of the prison, nor let them waste away in misery, without a hearing. 5. Not only will the judge incur the risk of loss of his reputation, but he will also be in danger, if he does not immediately subject to capital punishment the person and his servants who have the custody of and who have enfeebled any prisoner by starvation or otherwise, beyond the proper time.

Given at Serdica June 30 (320).

Note.

The foregoing legislation would indicate that prisoners were often abused, and this, in fact, is attested, by some of the writers who lived after the enactment of this law, and Geib, supra, 568, thinks that on the whole the present law did not help conditions very much, and that the plight of prisoners generally was a sorry one. Geib, supra, 567-8, citing Libanius de cust. Reor., and Augustinus ep. 113-115.

9.4.2. The same Emperor to Euagrius.

If a man is seized for an offense or crime, which deserves the bars and the squalor of a prison, and when heard in court and his crime is clear, he shall be put in prison, and later (again) be heard in court. 1. For in this manner the commission of the crime will be mentioned in public, so that the extreme cruelty of the judge will to some extent appear to be restrained and moderated.

Given at Heraclea February 3 (326).

¹ [Blume] The same as the commentariensis mentioned in laws 4 and 5 of this title. Godefredus at C. Theod. 9.3.1. See note to C. 9.3.2.

Note.

The law is somewhat obscure. Bas. 9.35.19, states it thus: "A person accused of a grave crime, and who on that account deserves the chains of a prison, shall be led forth and heard in court. If he is convicted, he shall not pay the penalty immediately, but shall again be thrown into prison, again be led forth, and again be heard. For delay will moderate the ire of the judge." See also C. 9.47.20.

9.4.3. Emperor Constantius to Acindynus, Praetorian Prefect.

While one room of a prison encloses several intermingled prisoners, we ordain by this law, that although person guilty of crimes of the same nature may be put together, still men and women must be kept in separately guarded rooms in the prison.

Given April 5 (340).

Note.

See Nov. 134, c. 9, 1 as to imprisonment of women.

9.4.4. Emperors Valentinian, Valens and Gratian to Probus, Praetorian Prefect.

The custody and care of person to be confined in jail belongs to the sheriff (commentariensis), and he must not think that an abject and low hireling (jailor) is to be brought before the judge (to be made the scapegoat), if a defendant has escaped in any manner, and he will be visited with the same punishment, to which the accused who escaped would have been shown to be subject. If the sheriff is necessarily absent on duty, his aide shall exercise the same care, and shall be subject to the same rigor of the law.

Given June 29 (371).

Note.

The commentariensis, herein translated "sheriff," was much more than the sheriff in the modern sense of that term, and had not alone the duties of the latter, but he was also what we might call the clerk of the department of the court dealing with criminal cases, filing criminal complaints and keeping the records of all criminal cases. His office was one of the most important under the judges and he had process-servers, jailors, lictors and other ministerial officers under him. See note to C. 9.3.2.

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

In reference to those who are held in prison, we direct, by this plain provision, that swift punishment shall be visited upon him who is guilty, and the torture of long incarceration shall not be inflicted on him who is to be released. 1. And we order, moreover, that every thirty days the sheriff shall report (to the judge) the number of prisoners, the nature of crimes, the date on which the prisoners were confined, and their ages. We direct that (if this order is violated) the official staff (of the judge) will be compelled to pay a fine of 20 pounds of gold to our treasury, and the negligent, spineless judge, who is such only in name, shall be shorn of his office, and, though not deprived of his property, he shall be punished by a fine of ten pounds of gold.

Given at Constantinople December 30 (380).

9.4.6. Emperor Justinian to Mena, Praetorian Prefect.

We want no one to be thrown into custody (prison) without the order of the illustrious, worshipful or honorable judges of this fair city, or of the provincial magistrates or defenders of the cities. 1. Moreover, the reverend bishops of each place shall examine those who have been or will be imprisoned one day a week, on the fourth or sixth day thereof, and diligently inquire into the cause of their detention, whether they are slaves or free, and whether confined because of debt or on account of homicide or some other accusation.² 2. If they are slaves, they shall, within twenty days, be chastised or returned to the masters; or dismissed if the masters do not appear.³ 3. If a free person shall be thrown into prison on account of a civil case, he shall be released, if he furnishes sureties; if he has no sureties, the cause shall be decided within thirty days and he himself shall be released. But if more time is necessary, he shall be admitted to bail till the end of the suit, by a simple guaranty for his appearance, on oath; and if he absents himself before the cause is decided, in violation of his oath, he shall lose his property. 4. If a free person, accused of a crime, is incarcerated, he shall be released if sureties are furnished; if he has no sureties, he shall be kept in custody only six months, within which time the cause shall be decided, unless he is accused of a capital crime. 5. For such person shall not be released by giving sureties, if he is accused by public officers; but again the suit must be finished within six months.⁴ If he has not been accused by public officers, but by a private accuser, he shall be admitted to bail by giving sureties. But if he cannot give sureties, he shall not be kept in custody longer than one year, within which time the case must be entirely finished. 6. If it appears likely, however, that he is guilty, he shall remain in custody till the cause is terminated.⁵ 7. Thereafter the decision rendered against the persons in custody shall be carried into effect, whether corporally or pecuniarily; in a civil case he shall be permitted to make an assignment of his property (and be released).⁶ When the bishops have given warning, the magistrates, as well as their staff, must bear in mind that (in case they pay no attention thereto) they must pay ten pounds (of gold into the treasury). Permission is given to the reverend, officiating bishops, that if they observe that anything has been neglected by the illustrious, worshipful or honorable, officiating magistrates, or by the official staff which obeys them, they have permission to report this to us, so that proper action may be taken against those who are negligent.

Given at Constantinople January 18 (529).

² [Blume] These provisions also found in C. 1.4.22; and see C. 1.4.9.

³ [Blume] This sentence is incomplete and is rendered in one of the sources as follows: "A slave in custody must be released in twenty days, if innocent, and returned to his master; if convicted, he must be punished."

⁴ [Blume] There is added here, in Bas. 60.35.22: "and the public officers must know that if they have made a false report (known to be false), they will be liable to the same penalty to which the accused, if guilty, would have been subjected." To the same effect is C. 12.22.1.

⁵ [Blume] As to completing a criminal case at all events, see C. 9.44 and C. 3.1.13 pr.

⁶ [Blume] See on this, Headnote (1) to C. 7.53, and Headnote to C. 7.71.

Note.

Bail. It appears from this that a person accused of a crime might, in cases not involving capital punishment - that is death, deportation or sentence to the mine or to public work for life - be admitted to bail by giving surety. It appears, however, that this law was frequently violated in practice. Geib, supra, 569, citing Libanius, de custod reor. 440. If a person confessed his crime, he could not be admitted to bail, but was confined in prison till sentence. Dig. 48.3.5. Persons of illustrious rank were admitted to bail without furnishing sureties; that is to say, by simply giving their own recognizance on oath. C. 12.1.17. Women could not, after the enactment of Nov. 134, c. 9, 1, attached to this title, be committed to jail at all, but were confined in a monastery till after trial.

Nor was it an invariable rule in other cases that accused persons were committed to jail. It is stated in Dig. 48.3.1, that the judge must determine whether the accused should be (1) thrown into prison, (2) committed to the custody of a soldier, or (3) be permitted to give bail. It was the custom, while Rome was a republic, to commit an accused, at least when of honorable station, to the custody of some person of similar rank. This was called *custodia libera* - free custody - but appears to have gone out of use after the establishment of the empire. If the accused was committed to military custody, usually two soldiers were assigned, and they were responsible for his appearance in court, and were punished according to circumstances, if the prisoner escaped. When his escape was aided by his guards, even the penalty of death might be visited upon them (D. 48.3.12 and 14.1), just as a jailor was punished, if he let his prisoner escape. Dig. 48.3.8.

If the accused was admitted to bail, and he escaped with the connivance of his surety, the latter, in addition to the penalty of the bond, or if none were expressed, the penalty fixed by the judge, was subject to such additional punishment as might be visited upon him in the discretion of the judge. Dig. 48.3.4. If prisoners committed to jail were guilty of a conspiracy to break jail, they were punished severely, even though not guilty of the crime with which they were charged. Dig. 48.3.13. As to imprisonment in civil cases see note C. 2.11[?].4.

c. 9, 1. Nov. 134 (A.D. 556).

But if a woman is accused of a crime on account of which it is necessary to guard her, she shall be permitted to have a surety answer for her appearance; if she swears that she cannot find a surety, she shall take an oath that she will appear in court (and so be released). If the crime of which she is accused is serious, she shall be confined in a monastery or hermitage, or put in charge of some women by whom she may be kept chaste and guarded, while free, until her crime is proven; thereafter she will be dealt with as provided by law. We do not want a woman to be thrown into prison or guarded by men for any debt, public or private, or for any crime, so that her chastity may not be violated through opportunity furnished thereby. 2. No woman that is a nun or an ascetic shall be taken from the nunnery or hermitage by any proceeding in court.