

Book VII.
Title LXII.

Concerning appeals and references.
(De appellationibus et consultationibus.)

Bas. 9.1.95 et seq; D. 49.1.1.

Headnote.

(1) Appeals.

Appeals were practically unknown under the Roman republic. One magistrate might interfere with another magistrate called intercession (*intercessio*), and a defendant in a criminal case might appeal to the mercy of the people. But otherwise there was no appeal. But a radical change in this respect took place under the emperors, commencing with Augustus. Agrippa, in addressing Augustus told him that "you yourself must try in person the referred and the appealed cases which come to you from the higher officials, from the procurators, from the city prefect, from the sub-censor and the prefects of food supply and of the watch. No single one of them should have such absolute powers of decision and such independence that a case cannot be appealed from him." The emperors, considering themselves as the fountain of all law and justice, must, for a time, have been flattered at the obeisance paid to them. But as people became accustomed to take appeals, the work connected therewith must finally have become a burden, and so we find from the beginning of the empire to Justinian's time, a gradual shifting of the burden into other hands.

(2) Appellate Courts - to which courts appeals were taken.

This subject is somewhat involved, and it may be well to give a general outline thereof at this place. As just noted, it was at first considered, that appeals from the various judges of the empire should go direct to the emperor. But even Augustus devolved the duty of trying cases that were appealed on others. Thus he referred appeal-cases involving citizens to the city prefect, and cases involving foreigners to ex-consuls. Suet., *Aug.* c. 33. The person who thus heard the appeal, was - except in appeals from inferior courts - said to hear it in place of the emperor (*vice sacra*). Phrases such as "*secundum sacrum auditorium*" and "*secundum sacri iudicii formam*" express the same idea, the emperor being considered sacred, and those sitting in his place being considered substitutes for his sacred person. Some of the emperors permitted the Senate to act as an appellate court, but its power was intermittent, and it practically ceased to function in judicial matters, as an independent tribunal after the second century of our era. The main appellate judges seem, during most of the time, to have been the city prefects (of Rome and Constantinople) and the praetorian prefects. Without entering into any particular discussion as to the earlier period, except as it may be necessary to illustrate the subject, the legislation in force, or put in force, in Justinian's time discloses about the following situation:

(a) Fiscal matters were tried by fiscal agents, and appeals from them went, at least during later times, to the illustrious counts of the crown domain and the imperial exchequer.

C. 7.62.26. These cases did not fall within the jurisdiction of the ordinary judges, and must be considered in a class by themselves.

(b) The judgments of a provincial municipal court (consisting of the so-called *duumviri* - magistrates - and in later times, of the defenders of the cities) were appealable to the governors of the provinces. D. 49.1.21 pr; D. 49.4.1.3 and 4; C. 7.62.5; Nov. 15, c. 5; 2 Bethmann-Hollweg 46; 3 Bethmann-Hollweg 106.

(c) It will be remembered that the governors of provinces frequently referred cases to be tried by referees (*judices pedanei*). Judgments from these referees were appealable to the governor who appointed them. D. 45.1.122.5; D. 49.1.1 and 3; D. 49.1.21.1; D. 49.3.1.1-3. And the rule, in fact, was general, that any other magistrates, as, for instance, the city prefect, or a man specially appointed by the emperor as judge in a case, who appointed a referee, heard an appeal taken from such referee. See C. 7.62.32; C. 3.4.1; note C. 3.1.5. If the emperor appointed a referee or special judge, and the latter was not of illustrious rank, the appeal from him was heard by the praetorian prefect and the quaestor; an appeal taken from persons of illustrious rank was referred to one or two men of illustrious rank, depending of the amount, and was heard in the full imperial consistory if the amount involved exceeded twenty pounds of gold. C. 7.62.32.4; C. 7.62.37; Nov. 82, c. 4. In fact, when an appeal to the emperor personally is referred to, it virtually means an appeal to the imperial consistory.

(d) While the rule was quite uniform in the two cases just mentioned, there was no uniformity in other matters and changes were made from time to time. We find no regular gradation of appellate courts. It is well in the first place to point out that civil judges had no power in military matters and that a soldier who was a defendant in a civil case could not be compelled to go into a civil court. C. 1.29.1; 3 Bethmann-Hollweg 85; 57, note 63;¹ note C. 1.46.2. The subject of appeals in all the cases tried by military authorities is not entirely clear, but C. 7.62.38, contains a definite provision that appeals from dukes, commanders of the military forces on the borders, were to be heard by the master of offices and the quaestor, although we should have expected such appeals to have been heard by one of the Masters of the Soldiers. See 3 Bethmann-Hollweg 85-86; Boak, Master of Offices 41-42. The masters of the military forces, who were of illustrious rank, had original jurisdiction in many, if not all, cases in which soldiers were involved (C. 3.13.3; C. 9. 3. 1; 3 Bethmann-Hollweg 85), and appeals from him lay to the emperor in the same manner as from other magistrates of illustrious rank. That he heard some cases on appeal is shown by law 33 of the present title.

(e) In the further consideration of this subject, the administrative machinery of the empire - and we confine ourselves to the period after Constantine - must be borne in mind. In this connection the cities of Rome and Constantinople stood apart from the rest of the empire. In Rome the highest judicial office was the city prefect. He had original jurisdiction not only in the city but also in the territory within one hundred miles thereof. Appeals from inferior judges in that territory, which included the municipal magistrates in the various cities outside of Rome, praetors, master of the census, and the prefects of the food supply and of the watch within the city, went to him. C. 7.62.17; [3?] Bethmann-Hollweg 362. Appeals from him were to the emperor.

¹ Blume penciled a question mark above this reference.

The administrative and judicial machinery of Constantinople was somewhat modeled after Rome. The inferior judges consisted of three praetors (C. 1.39.2), master of the census (3 Bethmann-Hollweg 66 note 56), and special judges. By Novel 82, enacted in 539 A.D., Justinian appointed twelve special judges, five of illustrious, and seven of worshipful or honorable rank. These judges might be designated to try a case by anyone of the illustrious magistrates, and not by the city prefect alone. An appeal from them lay to the magistrate that appointed them, except that where the designation had been made by the emperor. The provision for appeal, mentioned in c. 4, is somewhat obscure and reads as follows: "Let it be observed, that if an appeal is taken from the pedanei iudices (special judges) or from the men of glorious rank, then if the case is one which has been referred to them by ourselves, it shall, depending on the amount involved, be decided in council (in commune) by our glorious magistrates, or referred to others according to the custom of imperial consultations. But if the cases have been referred to them by our glorious magistrates, the appeal shall be taken to the magistrates that referred the case, to be by them decided in the manner aforesaid." It is altogether uncertain who the appellate judges were to be in case the reference to the special judges was made by the emperor. It is likely that if the appeal was from one not of illustrious rank, it was to be decided as an ordinary appeal by the praetorian prefect and the quaestor, as contemplated in C. 62.32; but if the appeal was from one of the judges who was of illustrious rank, it was to be heard in the manner contemplated by law 37 of this title, namely by one or two specially appointed imperial commissioners if the amount involved was not to exceed twenty pounds of gold, or in the imperial consistory if the amount involved was greater than that. But see Cujacius on Nov. 82. The appeal in the manner of imperial consultation will be explained directly.

It may be further said here that Justinian, by Novel 80, enacted in 530, created the office of inquisitor (quaesitor) for Constantinople, to whom he gave jurisdiction in criminal cases. The Novel says nothing on the subject of appeals, but an appeal from him lay, doubtless, to the city prefect, since appeals were permitted in substantially all cases. Nov. 23, c. 1.

(f) We come then to the subject of appeals from the provinces in the ordinary civil and criminal cases, and in this connection we must bear in mind the division of the empire in prefectures, vicarages and provinces, as outlined in book 1 of the Code (C. 1.27). Generally speaking, the appeals from the governors of provinces were taken to the court of the praetorian prefects, or their representatives, the vicars. Some exceptions to this rule existed. Thus the city prefect of Rome had appellate jurisdiction in the territory within one hundred miles of the city, and at times even more extensively. The city prefect of Constantinople had appellate jurisdiction in Lydia, Bithynia, Paphlagonia and other near places mentioned in C. 7.62.23. By Novels 41 and 50, the quaestor of the army, a sort of paymaster general, was given jurisdiction in certain appeals from Caria, Cyprus, Mysia, Scythia and the Cyclades islands, to be heard in conjunction with the quaestor of the palace. By Novel 75, enacted in 537 A.D., appeals from Sicily were taken to the quaestor at Constantinople, the occidental portion of the empire having previously been overrun by the barbarians. Excepted, too, from the general rule was the proconsul of Africa, the appeals from whom went directly to the emperor, until the later modification mentioned directly. So, too, the proconsul of Achaia was directly responsible to the praetorian prefect of Illyria, without the intervention of any vicar. The

reason for the difference lay in the fact that proconsuls were of worshipful - the second - rank (spectabiles), while other provincial governors, generally known by the name of consular, rector, corrector or president, were of honorable rank (clarissimi), the lowest rank among the three main ranks of titled persons. With these exceptions, appeals from the governors of provinces were taken either to the vicar, the representative of the praetorian prefect, in places where there was a vicar - for they were absent in some places - or direct to the praetorian prefect, depending upon who was the nearest. C. Th. 1.10.7; Nov. Mart. 1.2; 3 Bethmann-Hollweg 56. The count of the Orient, located at Antioch, and the so-called Augustal prefect, located at Alexandria, occupied, substantially, the place of a vicar. This system was modified by Novel 23, as explained in the next subdivision, making certain civil cases involving a limited amount appealable only to men of worshipful rank, and making the decision therein final.

(g) Appeals from the vicars, including the count of the Orient and the Augustal prefect, and from the proconsuls - in other words from magistrates of worshipful rank - were not, however, taken to the praetorian prefects, showing the lack of a regular gradation of appellate courts, but were taken direct to the emperor. This system was modified in 398 A.D. by C. 7.62.29, when it was ordered that criminal cases appealed from these magistrates should be taken "ad amplissimas potestates," by which Gothofredus in his commentary to C. Th. 9.40.16, understands the praetorian prefect, and it is true that the office of that magistrate is frequently designated as "amplissima" - most extensive, powerful, as in C. 1.29.1; C. 1.51.11; C. 10.23.4; C. 10.23.3; C. 11.43.5; C. 12.9.1. It is possible, however, if not probable, though the point is not clear, that the quaestor was associated with him in 440 A.D. by C. 7.62.32, making all appeals from judges of worshipful rank uniformly reviewable by these men.

This system was again modified as to civil cases by Novel 23, as already referred to in the previous subdivision. It provided that appeals from judges below the rank of worshipful, which involved not to exceed ten pounds of gold, should be heard by the worshipful magistrates, namely proconsuls, vicars etc., and that the decision therein should be final, and not further appealable, leaving other cases, involving a greater amount appealable as previously, such appeals to be heard, unless the case was tried by a person of illustrious rank, by the praetorian prefect and the quaestor according to the provisions of law 32 of this title. To the same effect are provisions in Novels 24-31 and Edict 8, c. 1.

(h) This, then, leaves to be considered appeals from magistrates or specially appointed judges of illustrious rank. Appeals from praetorian prefects, who were of that rank, were not allowed (C. 7.42.1; Nov. 82, c. 12; Nov. 119, c. 5), although supplication against their decision was allowed, as explained at C. 7.42.1. By law 32 of this title, the emperor consented to take cognizance of all appeals taken from judges of illustrious rank, which included the city prefect, master of offices, quaestor, masters of the forces, and specially appointed judges of that rank. But in 529, by C. 7.62.37, materially curtailed even that right. Under that provision, which appears to be confirmatory of a previously existed practice, appealed cases involving, in some cases not more than ten pounds of gold, and in other cases not more than 500 solidi, were referred to one special commissioner of illustrious rank; if they involved over that amount and up to twenty pounds of gold, they were referred to the quaestor and to two special commissioners of illustrious rank, and only cases involving more than that amount were heard in the full imperial council, at

which the emperor might be present or not. Thus while in the beginning all cases that were appealed from any of the judges might be heard by the emperor, the cases actually examined by him became fewer and fewer as time went by, until finally the cases heard by him became exceptions. It must not, however, be understood that the emperor was debarred from taking jurisdiction in any case in which he wished to do so, notwithstanding the existence of the rules above mentioned. 3 Bethmann-Hollweg 89, 90; Geib 683, 684. The imperial council heretofore mentioned, consisted of the emperor, the illustrious magistrates, the consistorian counts - counts of the first rank - and other men of illustrious and worshipful rank. 3 Bethmann-Hollweg 94-97; Nov. 62; note C. 12.10.2.

(i) It might easily happen that an appeal would be sent to the wrong appellate court. But this made no difference, unless an appeal was taken to a court inferior to the one that tried the case. Except as mentioned, the proper authority would regard the appeal as properly taken. D. 49.1.1.3; 2 Bethmann-Hollweg 707.

(3) Appeals from appellate courts.

An appeal might be taken from an appellate court, except where the law provided otherwise. Thus, as already stated, no appeals lay from the decision of the praetorian prefect, and civil cases heard on appeal by judges of worshipful rank, and involving not to exceed ten pounds of gold, were not appealable. But other cases might be appealed from an appellate court. Thus an appeal might be taken from a referee appointed by the president, to the president himself, and from there to the praetorian prefect or city prefect. See D. 4.4.38; D. 45.1.22.5; Geib 675, 676, 680, 685; C. 7.62.19. But no more than two appeals could be taken in the same case. C. 7.70.1. Thus in the last illustration, no appeal could be taken from the city prefect, since such appeal would have been the third in the same cause.

(4) Kinds of appeals.

There were two kinds of appeal. One of these was what may be called the ordinary appeal in which there was an actual retrial of the case, with the proceedings similar to those that applied in the court below, and the appeal was not decided merely upon the record made in the lower court. Geib 690. Witnesses might be examined and documents introduced in the appellate court, with some limitations as noted in C. 7.62.6 and C. 7.63.4. It would seem, however, that this refers to new witnesses and new documents and that a complete record of the case, including the testimony of witnesses heard in the court below, was sent to the appeal court in all cases where such record existed, which was always true, at least in cases tried by governors of provinces and other persons of equal rank, and probably before all referees after the formulary system was abolished and the case was tried by the so-called extraordinary procedure. C. 4.20.20; Nov. 90, c. 4. 3 Bethmann-Hollweg 279. During the formulary procedure such record seems to have been made. 2 Bethmann-Hollweg 709-710. In any event, C. 7.62.24, and Nov. 126, c. 3, required the trial judge to give the appellant a copy of the records, without limiting that record, and without limiting that requirement to cases on appeal by the method of consultation. It is doubtful that the so-called ordinary appeal to the emperor's court or his delegates existed in Justinian's time.

The other kind of appeal was one in the manner of consultation, or report (consultatio), in which the record of the case, as made in the trial of the case, was sent up, and examined upon that record, although later by C. 7.62.37, nova - new things - were permitted to be introduced into that record. In other words, under this method, the appeal was substantially heard upon the record made in the case below, just as most appeal cases, or cases on writs of error, are heard in the ordinary appellate court in the United States (appeals from justices of the peace to a higher court ordinarily excepted). This method was similar to the method of referring a case before final decision to the emperor already described in C. 7.61. It seems that this method was introduced in all appeals direct to the emperor, and was the exclusive method in appeals taken to him from the time of Constantine on. 3 Bethmann-Hollweg 333, 335. This method was apparently extended to other cases. Thus under C. 7.62.38, appeals from dukes were to be heard by the master of offices and the quaestor by the method of consultation. Appeals from the moderator of Hellespontus, the praetor of Paphlagonia and the pro-consul of Cappadocia were directed to be heard by the praetorian prefect and quaestor by the same method. Nov. 28, c. 8; Nov. 29, c. 5; Nov. 30, c. 10. These provisions in the Novels, however, are inconsistent with the provisions of C. 7.62.32, which provided that appeals to be heard by the praetorian prefect and the quaestor should be the ordinary appeals. 3 Bethmann-Hollweg 335, states that appeals to the emperor only were by the method of consultation - evidently including all the appeals mentioned in law 37 of this title - and that in the other appeals, mentioned to be made by the method of consultation, only certain ceremonies usual in such appeals were retained, but that in other respects these appeals were by the ordinary method.² Law 38 of this title is not, however, inconsistent with law 32 of this title, and the subject may not be altogether free from doubt. Appeals from Italy were, by Novel 75, directed to be taken by the method of consultation, and examined by the quaestor; but the decision was required to be confirmed by the emperor; so that these appeals may, doubtless, be classed among the appeals made direct to the emperor, the quaestor acting simply as the same sort of examiner.

7.62.1. Decision of Severus, given through Marcus Priscus, January 13 (209) in the consul of Pompeianus and Avitus.

The president of the province should first decide to whom the right of possession belongs and then try the crime of violence. If he fails to do so, and appeal is justly taken.

Note.

As a rule criminal cases took precedence over civil cases. C. 3.8.4; C. 9.9.32. But the rule was different in the case where a man was forcibly dispossessed. C. 9.12.7. In that case it was important to first try the civil case so far as the question of possession was concerned and to put the right party in possession. See 9 Cujacius 1035, 1036.

² [Blume] Hartmann in 2 Pauly-Wissowa R.E. states that the hearings in appeals of this kind, as in ordinary appeals, were oral. That statement would seem to be misleading. We can hardly assume that the record sent to the appellate court was substantially useless. It is probable that in all cases the appeal was heard upon the record made in the court below, and that only new matters were or might be oral. Bethmann-Hollweg is not clear on this point.

7.62.2. Emperor Alexander to Plarianus.

You demand nothing new in asking that, although the authority of an imperial rescript was interposed, you should not be denied the opportunity to appeal.

Note.

In Bas. 9.1 96, this law is interpreted as follows: "Although an imperial rescript was produced by one of the parties, the other party may, nevertheless appeal."

The law doubtless relates to the rescript obtained in a case commenced by a supplication to the emperor, answered by a rescript. This proceeding is fully described in headnote to C. 1.19. The judge in such case would - generally - follow the principles of law stated in the rescript. Nevertheless, as the present law says, an appeal was given in such case the same as in any other, so that there was no special advantage in such proceeding in this respect. The result of an appeal would, however probably correspond with the rescript, unless the facts were shown to be different. D. 49.1.1.1.

7.62.3. Emperor Gordian to Victor.

It has often been decided that when an appeal is demanded, though refused by judge, nothing must be done to hinder deliberation (as to the next step that appellant might want to take) and everything must remain in the situation in which it was at the time of the decision.

Note.

It is difficult to tell just what is meant in this law by the "deliberation" there mentioned. The translation here follows that of Otto, Schilling & Sintennis. See also law 13 of this title and note.

7.62.4. Emperor Philip and Caesar Philip to Probus.

If you were appointed to the office of scrivener (of a municipality) and you did not appeal, the appointment cannot be annulled.

Note.

Certain persons in a municipality were subject to the performance of civic duties - to accept posts of duty at certain times. The selections, designations or appointments, were made by the local senate. Appeals from this designation might be taken to the president within a limited time (two months - C. 7.63.1), but if no appeal was taken, the designation could not be vacated. See to the same effect laws 7 and 11. But it was required to be made in lawful manner by the local senate in lawful meeting. If not so made, the designation was void, and no appeal therefrom was necessary. See C. 10.32, and subsequent titles, dealing with decurions generally. If a man chosen as magistrate of a city appealed from the appointment, someone else was temporarily chosen in his place. If the appeal was ultimately found not to have been well taken, the administration of affairs in the meantime were at his risk. D. 49.1.21; D. 49.10.1.

7.62.5. Emperors Diocletian and Maximian to Valerius.

If the president of the province to whom you took an appeal learns that the time fixed for filing the report on appeal (apostoli), did not expire by your negligence, but by the accidental fact that the man who carried it died, he will, in accordance with the usual rule, grant your request (permitting the appeal, notwithstanding).

Note.

A person desiring to appeal was required to do so orally or by written notice of appeal within ten days from the time that the judgment was rendered. Note law 6 of this title. It thereupon became the duty of the judge, without request to furnish appellant with a notice directed to the appellate court notifying the latter that the appeal had been taken, called *apostoli* or *litterae dimissoriae*. 2 Bethmann-Hollweg 708-709. And he was further required within thirty days to furnish the appellant with a record of the proceedings. Nov. 126, c. 3. The appellant was thereupon required to file this notice and record with the appellate court within a certain time designated by law, and treated more fully in title 63 of this book. If he failed to do so, but had an excuse, he might be granted further time. More liberal provisions were made by C. 7.63.2, which see.

7.62.6. The same Emperors and Caesars say:

Judges who hear and decide appeals must consider, in giving their judgment, that when an appeal is taken from a final judgment rendered in a terminated litigation, it is not lawful that the matter be sent back for any purpose to the trial judge, but that the whole case should be determined by their own decision, since the good intended by the law seems to be that, after decision by the appellate judge, recourse should not be necessary to be had to the judge from whom the appeal was taken. Hence litigants, to be sent back to the provinces, may know that every occasion (for a new trial) is entirely removed and taken away, since it is only permitted, when an appeal is taken, to decide whether it is unjust or just. 1. If a litigant thinks that he omitted some claims in the court below which he ought to have made, he may make them before the appellate judge, since it is our desire that only justice shall prevail in trials, and that a, perhaps necessary matter, should not seem to be excluded. 2. If, moreover, anyone thinks after an appeal is taken, that necessary witnesses should be produced, by whom he could show the truth, which he thinks has not been brought out, to the appellate judge, and the judge thinks this advisable to be done, the former must pay expenses (of the witnesses) of making the journey, since justice requires that they be paid by the party who thinks that to call them will be to his interest. 3. As to those who appeal in capital cases - which may not be done by themselves or others for them until the whole cause has been heard and tried and a decision has been given - we ordain the following: If the appellant is detained in custody because of inability to furnish a proper surety, the judge shall furnish him with a copy of his decision, and send it and any statements in refutation to the proper bureau. These papers must be accompanied by a clear report of the transactions that have taken place, so that after considering the points, they may be decided as the circumstances of each may demand. 4. In order that appeals may not be taken inconsiderately and indiscriminately, a man who takes an appeal that is without merit, shall suffer a moderate penalty at the hands of the proper judge. 5. If a man wants to appeal in a case which is his own, and which he has lost, he must file his petition on appeal on the same or the next day (after the decision). A man, however, protecting another's interest, must, under the same circumstances, appeal on the third day. 6. The judge, when an appeal is taken, must, without request of an appellant, and without delay, give to the latter the report of the taking of an appeal and no bond to lodge the appeal (in the appellate court) shall hereafter be required.

Without day or consul - (about 294 A.D.).

Note.

This law deals with various subjects. In the first place it was required that the appellate judges should find whether the appeal was warranted or not, and give judgment accordingly. They were bound to give final judgment in the appellate court without remitting the case back for a new trial in the court below. To that end the record made below was not binding, but new allegations could be made and new testimony could be introduced. See headnote (4) to this title. The meaning of this is not altogether clear. C. 7.63.4, states that new matters might be introduced, provided they did not relate to an entirely new subject. That law relates to appeals by the method of consultation (on the record as made below), and good reasons existed therefore for the provision. C. 7.62.36, providing substantially that appeals could not be interposed against interlocutory judgments, states that if the trial judge refused to let a party introduce witnesses or documentary evidence, this might be done on appeal, and it is at least clear that new testimony or evidence might be introduced on appeal in such cases, in order to enable the appellate court to finally determine the case. C. 7.50.2, indicates that new points, constituting a new defense, might be raised in the appellate court, though the meaning of that law is not clear. What makes it more interesting is C. Th. 11.30.52, which provides that "nothing shall be determined in the examination on appeal concerning such part of a transaction, which was not in the beginning, before the president, brought forward or proven." Gothofredus, in his commentary on that law, and comparing it with C. 7.63.4, states it as his opinion that the law was that no entirely new point could be introduced. 6 Donellus 458, states the same opinion, and 3 Bethmann-Hollweg 331, note 38, seems to concur. See 9 Cujacius 1039. But the provision of the Theodosian Code just mentioned was omitted from the Justinian Code, and seems to leave the provisions of law 6 supra with a broader meaning, though, on the whole, the opinion of the foregoing authorities is probably correct. See also C. 8.35.4.

If a defendant in a criminal case was unable to furnish a surety, he was kept in prison, as is also stated in law 12 of this title. He could not appear in appellate court by agent. D. 49.9.1; Paul. 5.25.1. So an appeal in such case was taken by the method of consultation, that is to say, upon the record made in the court below, which was sent to the appellate court. The report of the proceedings was required to be full and complete, just as in cases referred to the emperor before final decision, and dealt with at C. 7.61. Law 15 of this title provides for a complete report in such appeals.

An appeal was required to be taken within two or three days after the rendition of judgment. This time, however, was made uniform and lengthened to ten days by Nov. 23, c. 1. An appeal might be taken orally at the time of the pronouncement of the decision, or a written notice of appeal given later. Law 14 of this title. An appeal from a judgment rendered against an absent party might be taken by the latter within 2 or 3 (later doubtless 10) days after knowledge thereof. D. 49.4.1.15.

Formerly an appellant had been required to demand the notice of appeal, to the appellate court, within a few days after judgment had been rendered. 3 Bethmann-Hollweg 329. But such requirement was eliminated by the present law, and it was made the duty of the court to furnish such notice to the appellant without a demand therefore. Under C. 7.62.24, and Nov. 126, c. 3, the judge was required to furnish a copy of the record to the appellant, and probably the notification of appeal, within thirty days after the appeal was taken. The notification of the appeal was called "apostoli" or "litterae

dimissoriae," the purport of which was simply that "Lucius Titius has appealed from such and such a decision, which was decided between the parties." D. 49.6.1. Hence, properly speaking, this notification did not, apparently, include a record of the proceedings, although law 24 of this law throws some doubt upon it. Hunter 1248, says that when the appeal was to the emperor, the notification was called *relatio* - report.

7.62.7. The same to Neo.

Persons appointed to a municipal position of burden (*munera*), or to the *decurionate*, or to magistracies in a city, ratify the appointment by acquiescence, if they do not appeal, even though they have been granted exemption by the emperors. If, therefore, you have been called to a municipal position and you have appealed, show before the president of the province that your appeal is just.³

7.62.8. The same to Oppianus.

If a decision was given against a man over twenty-five years old, and the rector learns that the grounds of the appeal subsequently taken were not presented (in the appellate court) within time fixed and that the matter was not compromised pending the appeal, he will see that the judgment will be carried out.

Note.

In the present case the appeal was probably to the president, upon whom devolved the duty to carry out the decision of the referees appointed by him. An appellant had only a certain, limited time within which to prosecute the appeal. If the time had passed, but an excuse existed, appellant might have further time. Law 5 of this title. C. 7.62.2, treats further of this subject.

7.62.9. The same: Hail, Heraclida, very dear to us.

The principal of a suit may prosecute an appeal, which his procurator in the litigation took, even in the absence of the latter.

7.62.10. The same to Titianus.

If an agent (*actor*) appointed by a curator (of a minor over the age of puberty) lost his case, he as well as the curator may appeal; but the curator alone can continue the proceedings on appeal. 1. But if the minor has in the meantime received the rights of majority⁴ or has arrived at legal age, he may prosecute the appeal in his own name. Subscribed at Viminacium September 30 (294).

7.62.11. The same to Aurelius.

Citizens and inhabitants who do not appeal when lawfully appointed to a position in the city, will not, even though they have clear excuses, be permitted to prove them.⁵ December 16.

³ [Blume] See note to law 4 of this title.

⁴ [Blume] See C. 2.44.1.

⁵ [Blume] See note to law 4 of this title.

7.62.12. Emperor Constantine to Catullinus.

It is not right, that when an appellant in a civil suit has filed his petition for appeal, he should be imprisoned or suffer any injury or torments or contumely. But if appellants in criminal cases⁶ cannot furnish a suitable surety, they should, though they have the right to appeal, be detained in custody in the same condition as before the appeal.⁷

Given at Trier November 3 (314); published at Hadrumentum April 17 (314).

C. Th. 11.30.2.

7.62.13. The same to Petronius Probianus, saluting:

After you, in civil causes between private persons, have promised to consult, or refer the matter to, the emperor, or after the formalities of an appeal taken from you have been perfected, you should refuse to grant any further hearing on anything though specially asked (and granted by the emperor) or to extend any favoritism in any manner, but upon compliance with the formalities pursuant to former statutes, all matters must be sent to our court.

Given at Arelatum August 13; Promulgated at Theveste October 15 (316).

C. Th. 11.30.5.

Note.

An appeal suspended the decision from which the appeal was taken, and nothing more could be done therein by the judge who tried the case, except to make a report of the case to the appellate court. An exception existed in the case where the right of instantaneous possession was tried. While there was an appeal from such case, the judgment was not suspended during appeal. C. 7.69.1. Bas. 9.1.107, briefly states the present law as follows: "Whoever accepts an appeal, must give no decision thereafter, but the appeal is to be completed."

7.62.14. The same to Bassus, City Prefect.

Litigants in civil as well as criminal cases may, when the matter adjudicated demands it,⁸ appeal orally, immediately (when the decision is given), and no written petition is then necessary.

Given at Sirmium June 6 (317)

C. Th. 11.30.7.

Notes.

An appeal might be taken at the time the decision was rendered by simply stating "I appeal." D. 49.1.2; D. 49.1.5.5. Otherwise a written notice of appeal (*libelli appellatorii*) was necessary, containing the name of the appellant, against whom the appeal was taken, and the decision from which the appeal was taken. The part of the decision against which objection existed was not required to be stated, and the reason

⁶ [Blume] Of such nature as to warrant imprisonment, as homicides, prisoners, adulterers and sorcerers. Gothofredus ad C. Th. 11.30.2.

⁷ [Blume] See note to law 6 of this title.

⁸ [Blume] i.e. when an appealable decision is rendered. See also note to law 6 of this title.

given for taking the appeal did not bind the appellant, but other reasons might be given later. 2 Bethmann-Hollweg 707; D. 29.1.1.4; D. 29.1.3 pr. 1, 2 and 3;⁹ D. 49.1.13 pr.

7.62.15. The same to Severus, Vicar.

In order that it may not be necessary to refer cases which are brought before us back for trial, we direct that a full report shall be attached to the records. For we shall feel compelled to abstain from giving a decision whenever there is cause to fear that a suit might be decided without complete knowledge, taking away the opportunity of a hearing. Hence a judge will be branded with eternal infamy, if everything which the litigants produced for elucidation and as proof, cannot be found embodied in the records or attached thereto.¹⁰

Given at Aquileia June 22 (319).

C. Th. 11.30.9.

7.62.16. The same to Maximus.

Judges, too, who try a case in the emperor's stead (*qui imaginem principalis disceptationis accipiunt*), must permit the right of appeal.

Given at Sirmium January 12 (321).

C. Th. 11.30.11.

Note.

The phrase "*qui imaginem principalis disceptationis accipiunt*" means the same as to try the case in the emperor's stead, to hear the case *vice sacra*. Gothofredus ad C. Th. 11.30.11. The phraseology "to hear the case in the emperor's stead," refers to the exercise of the highest judicial power, and while at times apparently referring to the trial of a case in the first instance (3 Bethmann-Hollweg 63; Cassiodorus 6.15), it generally meant to hear a case on appeal - the appeals from municipal courts and from referees appointed by a governor, however, excepted. See Headnote to this title. That appeals might be taken from appellate judges is shown in headnote to this title, subdivision 3.

7.62.17. The same to Julianus, City Prefect.

If in a case before either praetor one of the parties takes an appeal, while the case is investigated, the appellant must take it to the court of the city prefect.

Note.

Reference here is doubtless to the praetors at Rome, from whom, as shown in headnote to this title, subdivision 2d, appeals were taken to the city prefect.

7.62.18. The same to Victor, Imperial Procurator (*rationalis*) of the City of Rome.

Sine some debtors of the fisc, who have been ordered to pay a sum of money, elude the execution of the judgment by taking an appeal, and do not bother to ask for a copy of the report (of appeal) or offer any refutatory statements, it is our opinion, that if the appellant fails to see that the formalities attendant upon an appeal are complied with in the time fixed for that purpose, he shall be considered to have abandoned the appeal and the debt shall be collected immediately.

⁹ It appears as if these references should be to D. 49 rather than D. 29.

¹⁰ [Blume] See law 6 of this title and note.

Given July 31 (327)
C. Th. 11.30.14.

Note.

Appeals in fiscal cases were at the time of the enactment of this law taken direct to the emperor, and were, therefore, by the method of consultation - upon the record made below - which is indicated by the fact that a report and statements in refutation were required to be sent in. Such appeals were taken direct to the emperor up to at least the year 339 A.D. C. Th. 11.30.18. Some time after that date, the exact time of which is unknown, but some time before the year 559 A.D., such appeals were directed to be taken to the highest fiscal officers of the empire. C. Th. 11.30.28. That remained the law in Justinian's time. C. 7.62.26.

7.62.19. The same to all provincials.

We permit an appeal to be taken from pro-consuls, counts, and those (vicars) who decide cases in place of the prefects, whether on appeal or by (special) assignment, or in the course of their ordinary jurisdiction (exordine); and the judge must furnish a copy of the report to the appellant, and must send us the records, together with refutatory statements of the parties, along with his report. But we do not permit an appeal from the praetorian prefects. 1. And if the defeated party alleges that an appeal taken was not allowed by the judge, he may go before the prefects, and may litigate the matter anew before them as though the appeal had been allowed. If it appears that he appealed without cause, he will depart, branded with infamy, and lose his suit; but if he prevails, it is necessary to report the name of the judge to us who refused to receive the appeal, so that he may be visited with proper punishment.

Given August 1, and promulgated at Constantinople September 1 (331).
C. Th. 11.30.16.

Note.

The present law shows that at the time of its enactment appeals from judges of worshipful rank (pro-consuls, vicars) were still directly to the emperor, and that by the method of consultation. We further learn from it that appeals lay from a decision in an appellate court.

The law further informs us that a judge refused an appeal at his peril, and that the only safe course for him to pursue was to allow the appeal, unless it was obviously not appealable, and even in such case he was permitted to consult the emperor. If the judge refused the appeal, the party wishing to appeal could appeal from such refusal within four months, six months, or a year, depending on the circumstances, as shown by law 31 of this title, which should be read in connection herewith. See also C. 7.76.2; Nov. 82, c. 12. The judge thereupon was required to report to the appellate court the grounds of his refusal, giving the appellant a copy thereof. D. 49.5.6. If the grounds were justified, the appellant, the judge, was punished, as shown by the present law. See also laws 21 and 24 of this title; 2 Bethmann-Hollweg 708; 3 Bethmann-Hollweg 329. An appellant was forbidden, at the risk of a pecuniary penalty, to insult the judge from whom the appeal was taken. D. 49.1.8.

7.62.20. Emperor Constantius to Albinus.

The right of appeal exists in large and small cases. For a judge should not think that he is insulted because a litigant resorts to an appeal.

Given April 7 (341).

Note.

From what cases an appeal lies.

The present law brings us to the question as to what cases were appealable. The legislation during the time of the empire wavered considerably on this point. At one time interlocutory judgments were apparently appealable, although this was, with some exceptions, later forbidden. Justinian laid down the rule that no appeal could be taken from an interlocutory order, but only from final decisions. Law 36 of this title. C. 1.4.2; C. 3.1.16; C. 7.45.16; C. 7.65.7. The emperor, however, made this point somewhat doubtful by the provisions of C. 7.45.15, whereby it was permitted for a judge to give a final decision on some definite point involved in a suit. 3 Bethmann-Hollweg 327.

Generally speaking, all cases were appealable, whether, as the present law says, the cases were important or unimportant, and including cases, as stated by law 25 of this title, wherein a fine had been imposed. But there were some exceptions. Laws 4 and 8 of title 65 of this book forbid appeals in fiscal matters, where the debt was clearly due. In other fiscal cases, however, appeals were allowed. Laws 18 and 26 of this title. No appeal lay from the execution of a judgment, unless in exceptional cases. D. 49.1.4 pr, and 1. So no appeal existed from the emperor, or senate, or party appointed by the emperor as judge without right of appeal. Mommsen (at 276) says that a delegation of cases without right of appeal was frequently made, though legal literature says nothing about it. D. 49.2.1 pr. 1 and 2. That was true also in the case of the praetorian prefect, as we saw at C. 7.42. If a man was appointed as guardian, he might appeal only from the rejection of his excuses. D. 49.4.1.1. So, as seen by several laws herein, a man might appeal from an appointment to a municipal office. Formerly no appeal lay from an arbitrator agreed to by the parties. But Nov. 82, c. 11, provided that the appellant first paid the penalty provided in such cases by law. In criminal cases, the tendency of law during part of the fourth and during the fifth centuries was to cut off the right of appeal in certain cases. 2 Strachan-Davidson 181-183. And this, despite the fact, that in several laws of this title, judges were threatened if they refused to allow an appeal, and that despite the fact that law 30 of this title states that only appeals from praetorian prefects were not allowed. Thus Constantine ordered in 317 A.D. that the man detected in manifest violence should be punished by death without the right of appeal. C. 9.12.6. In 321 A.D. the same emperor ordered that a private person guilty of uttering false coin should not be permitted to appeal from the sentence condemning him, though other persons were more leniently dealt with. C. 9.24.1. In 344 A.D. the Emperor Constantine ordered that execution of a sentence for murder and other grave crimes, should not, where the defendant was convicted by clear proof, be deferred. C. 9.47.18. And to a similar effect is C. 7.65.2, enacted two years later, in which it was provided that no murderer, poisoner, magician, adulterer, and persons guilty of open violence should be permitted to appeal, if they were convicted by witnesses, and in addition thereto, had confessed. But nothing is said as to the character of the confession, and Strachan-Davidson remarks that "from the context it is clear that the confession may be wrung out by torture or the threat of torture." For other illustrations see C. 7.65.

7.62.21. The same to Lollianus, Praetorian Prefect.

Since the ordinary judges (rectors, presidents, correctors) think (at times) that they should reject an appeal, we direct that if anyone refuses an appeal, which is not taken from an execution (of a judgment), but from a decision terminating the dispute, he must pay thirty pounds of gold into our treasury; and his staff must pay another thirty pounds, if it does not strenuously resist and oppose him on the records and show him what the law requires.¹¹

Given at Messadensia July 25 (355), and promulgated at Cappua.

C. Th. 11.30.25.

7.62.22. The same to Volusianus, Praetorian Prefect.

When a decision is given which relates to heirless possessions and to property which is pursuant to law, taken from unworthy persons, and anyone thinks he should appeal, his appeal must be admitted.

Given July 30 (355).

C. Th. 11.30.26.

7.26.23. The same to the Senate.

If an appeal is taken from Bithynia, Paphlagonia, Lydia, the Hellespont, the islands and Phoygia solutaris, Europe, Rhodopa and Haeminontum, it must be taken to the court of the city prefect (at Constantinople).¹²

Given May 3 (361).

C. Th. 11.6.1.

7.62.24. Emperors Valentinian and Valens, saluting, say to the Senate of the City of Carthage.

Not only is the necessity of accepting an appeal imposed on judges, but a period of thirty days from the date of the decision is also fixed within which the records, together with the report, must be furnished the litigants. The judge and his staff will be subject to a fine if the requirements are violated in any respect.

Given at Milan February 4 (364).

C. Th. 11.30.32.

Note.

See also note to law 6 of this title. This law, as well as c. 3 of Nov. 126, provides that a report and the records should be furnished the parties. Mommsen 472, seems to take the view that there was no provision in the law for furnishing the records except in appeals by the method of consultation. It is not likely that this would be true. The language of the present law is not so confined. Further, if it is true, as mentioned in note to law 6 of this title, that new matters in the appellate court were such as related to the points brought before the lower court, then it might frequently happen that whether a new point was raised could be determined only from the record. Presumably, it was required

¹¹ [Blume] See notes to laws 19 and 20 of this title.

¹² [Blume] See headnote to this title, subdivision 2.

to contain everything including the evidence. See law 15 of this title and headnote to C. 9.41.

7.62.25. Emperors Gratian, Valentinian and Theodosius to Syagrius, Praetorian Prefect.

We order that appeals shall also be permitted from fines imposed by judges.

Given June 18 (380).

C. Th. 11.30.38.

7.62.26. The same Emperors and Arcadius to Pelagius, Count of the Crown Domain.

If an appeal is taken from the decision of an auditor of accounts (discursor) or comptroller (rationalis), the matter shall be referred to Your Sincerity, so that if the unimportance of the matter or the distance does not permit the litigants to come to your court, you may refer the matter to the rector of a province of whom you approve.¹³

Given at Milan February 15 (385).

C. Th. 11.30.45.

7.62.27. Emperors Arcadius and Honorius to Ennodius, Pro-consul of Africa.

Nominations (in a city) made by petitions or edicts (of the president) without a public meeting are not valid. Nor is it necessary, if the usual formality is lacking, to appeal therefrom.¹⁴

Given at Milan May 15 (395).

C. Th. 11.30.53.

7.62.28. The same to Nebridius, Pro-consul of Asia.

If anyone has filed a petition of appeal, he has the right to change his mind and receive his petition back, so that he may not be deprived of the benefit of a just repentance.

Given at Constantinople July 22 (396).

Note.

Abandonment of an appeal had formerly been forbidden, except within three days after taking it. C. Th. 11.30.48 and 65.

7.62.29. The same to Etychianus, Praetorian Prefect.

No clergymen, monks or those called "companions" (synoditae)¹⁵, shall, by force or assumption of authority claim or detain men who are sentenced to punishment and condemned for the heinousness of their crimes. We do not, however, deny them the right, out of humanitarian consideration, to appeal, if time permits¹⁶, and have the case carefully reviewed, when it is thought that justice was, through error or partiality of the judge, subverted as against the welfare of a man, upon this condition (however) that if pro-consuls, the count of the Orient, the Augustal prefect, or vicars were the judges, the

¹³ [Blume] See note to law 18 of this title.

¹⁴ [Blume] See note to law 4 of this title.

¹⁵ [Blume] The synoditae - meaning companions - were a variety of monks.

¹⁶ [Blume] If time permits - this phrase probably means, not if circumstances permit, but if made within the legal time. 2 Strachan-Davidson 182 note 6.

case must not be referred to Our Clemency, but to the praetorian prefect (amplissimas potestates), who shall have plenary jurisdiction in such cases and who, if the circumstances and the crime demand it, may the better meet out the proper punishment. Given at Mnizum July 27 (398).

What persons may take an appeal.

The foregoing law gave clergymen and monks the right to appeal a criminal case in which a third person was the defendant and the party condemned. This was one of the peculiarities of the imperial Roman law "out of humanitarian considerations." The right here granted is also stated in D. 49.1.6. So a mother had the right to appeal a case on behalf of her son. D. 49.5.1.1. So master could appeal on behalf of a slave, either personally or through agent, though the slave, too, had the right of appeal. D. 49.1.15 and 18. But a slave could not appeal for his master. D. 49.1.28 pr. And in general, only interested parties could appeal. D. 49.1.5 pr. If, however, a person was privy to a suit of another, he was not forbidden to appeal from a judgment. For instance, a judgment against a man's agent might be appealed by the principal. Law 9 of this title. The same right was granted to others who were really in some way interested in a suit, for instance, as sureties or otherwise. D. 49.1.4.3; D. 49.1.4 and 5. If a man had promised before the decision not to appeal, he was bound by his promise. D. 49.2.1.3. And a man who was contumaciously absent had no right of appeal. C. 7.65.1. And that was true also, where an apparitor, a member of an official staff, was condemned by his chief, the magistrate. C. 7.65.3.

The provisions in the first part of the foregoing law (C. 7.62.29) were made necessary by reason of the disorders of society in the empire. Oppression and arbitrary judicial conduct became so great that the clergy assumed the prerogative of mercy, and they doubtless felt it to be necessary. 2 Strachan-Davidson 216-217. In note to C. 9.3.2, is cited an epistle of St. Augustine, showing his efforts to intercede for an accused person, and his hopes that the case might be settled, and like efforts were doubtless made by other members of the clergy. Part of this law is found in C. 1.4.6.

7.62.30. The same to Theodorus.

If anyone wants to escape from a decision of a suspected judge by taking an appeal, he shall have complete right to do so, nor need he be in fear of the anger of the judge, as he may also appeal from the very wrong which he may suffer at his hands, especially as appeals only from the praetorian prefect are forbidden under penalty of loss of the case. All, then, may know that they may appeal from wrongs received and from suspected judges, in cases involving capital punishment, as well as in those which involve the loss of property.

Given at Milan January 7 (399).

7.62.31. Emperors Honorius and Theodosius to Asclepiodotus, Praetorian Prefect.

If an appeal which must be heard either by Your Amplitude or by the city prefect is not accepted by the judge below, or if he refuses to furnish the letter of notification (apostoli) of the appeal, after he has accepted such appeal, the litigant has (in the latter case), according to ancient law, one year after the decision is rendered in which to make complaint of this iniquity and notify the opponent; or if an appeal is not accepted in cases

in which a review is sought by decisions of inferior appellate judges, the litigant has six months in which to do these things. 1. But if a referee refuses to accept an appeal or make his report, the period granted is four months. When these things, which we have provided, have been done, the appellant must observe the times known to have been provided for appeals.

Given at Constantinople March 30 (423).

C. Th. 11.30.67.

Note.

See note to law 19 of this title, which shows that this law related merely to appeals from a refusal of a judge to accept an appeal. The time during which an appeal in the main case was required to be taken, did not commence to run until after the appeal from the refusal of the lower court to accept the appeal in the main case, had been completed. D. 49.5.5.5, states: "He whose appeal is not accepted (in the court below) must go before the competent judge or the emperor within the time fixed for appeals - *intra constituta appellatoria tempora*." The time fixed - *appellatoria tempora* - is evidently the time fixed for appeals from the refusal of the lower court to accept the appeal. Otherwise this provision would be inconsistent with the foregoing constitution.

7.62.32. Emperors Theodosius and Valentinian.

We direct that appeals from judges of worshipful rank which implore the decision of our majesty by the method of consultation (upon the record made in lower court), must no longer be expected to be heard by us, in order that the interests of litigants may not suffer, while we are very busy and cannot, in looking after the interests of the world, give the proper attention to the affairs of individuals. 1. If an appeal is taken from pro-consuls, or the Augustal prefect, or the count of the Orient, or vicars, the illustrious praetorian prefect, who is at our court, and the illustrious quaestor of our Palace, who resides at trials in the imperial court in appeal cases shall assume jurisdiction in the dispute in the same order, in the same for, and at the same times as other disputes are terminated within the legal time (*die fatali*) in hearings in the imperial court on appeal. And this shall apply although one or the other of the aforesaid judges of worshipful rank has accepted appeals (from his decision) pursuant to his authority as judge in place of the emperor (*ut sacri iudices*).¹⁷ 1a. But if an appeal is taken from a duke who, at the same time is also a president of a province, the prefect alone will hear the appeal in place of the emperor in the ordinary way.¹⁸ 2. In all appeals, introduced in place of appeals by consultation (to the emperor), the imperial clerks of the bureau of correspondence (*epistolares*) shall accept from the appellants and file the letter of notification (*apostolos*)

¹⁷ [Blume] i.e. the appeal from judges of worshipful rank are to be heard as here indicated, even though the appeal is from a decision on appeal. This shows that appeals might be taken from appellate courts.

¹⁸ [Blume] In law 38 of this title appeals from a ducal court are directed to be heard by the master of offices and the quaestor. The two laws evidently do not refer to the same thing. The present law deals with appeals from a duke who also acted as president. Law 38 evidently deals with appeals from a duke, who was of worshipful rank, acting in a higher capacity than a president, and generally, in military affairs. The point is somewhat doubtful, however.

of appeal, and the record of the proceedings had before the judge from whom an appeal is taken, and shall lay the case before the aforesaid illustrious judges, and take and write down the proceedings and furnish the litigants a copy thereof, the official staff of those with whom the quaestor acts in the case, carrying out the final decision. 3. These provisions apply when an appeal is taken from a judge who did not try the case pursuant to special assignment. For if decisions of judges who tried a case pursuant to special assignment are suspended by appeal, the judges who assigned the causes to be tried must decide upon review, whether the appeal is justly or unjustly taken.¹⁹ 4. We have deemed it expedient to add also to this salutary law, that if Our Serenity, upon application, has assigned a case for trial to a private, and not an illustrious person, or to more than one, as is usual, and his or their finding is suspended by appeal, the magnificent praetorian prefect who is at our court, together with the illustrious quaestor, shall (begin to) hear the case on the last day of the period for appeal (temporali die). 4a. Our clerks of the imperial bureau of petitions (libellenses) shall receive and file the record of the proceedings before such judges (referees), lay the case before the appellate judges, take and write the proceedings down and furnish the litigants with a copy thereof. They shall also take down the proceedings before judges (referees), though illustrious, who try a case upon special assignment by us, if the cases are heard at the court of our majesty. L 5. Of course, if the decisions of illustrious and magnificent judges shall have been suspended by appeal, that is to say, the decisions of those which may be suspended by appeal, we shall hear the case ourselves, by the method of appeal by consultation, although the case was originally assigned to a private and not to an illustrious person, who, however, thereafter and at the time of his decision, had the illustrious rank conferred upon him. The same rule is to be applied if some other man who has not attained the illustrious dignity, is associated with him in the trial of the case. 6. Anything not specially mentioned in this law must be understood as still governed by the regulations of former laws and constitutions. Enacted about May 21 (440).

Note.

The present law is a most important law on the subject of appeals. We stated in the headnote to this title that the tendency was to limit the number of cases heard by the emperor more and more as time went on. In law 29 of this title appeals in criminal cases were directed to the praetorian prefect instead of to the emperor, if taken from judges of worshipful rank - and appeals from judges of lower rank could be appealed only to other judges. The present law compliments that law, and under it no appeals from judges of worshipful rank could be taken to the emperor. Cases referred by a magistrate could be taken only to the magistrate who made the reference. Where a case was referred by the emperor, but not to a man of illustrious rank, the appeal was heard by the praetorian prefect and the quaestor. In other words, after the enactment of this constitution, only appeals from persons of illustrious rank were entertained by the emperor himself. Even this right was limited, as shown by law 37 of this title. This law was modified by Nov.

¹⁹ [Blume] i.e. appeals from a referee are to be appealed to the authority that referred the case, in accordance with the general rule.

23, and other provisions, providing that appeals heard by judges of worshipful rank which involved \$1500 (or \$2160)²⁰ or less, were not appealable.

7.62.33. The same to Cyrus, Praetorian Prefect.

In case an apparitor of the master of the soldiers (magisteriae potestates) is engaged in a suit in the provinces, with a curia or with apparitors of the provincial president, as to his status or is detained in a province because he owes tribute or imposts, and the decision of the rector of the province is suspended by appeal, the merits of the appeal must be reviewed by Your Sublimity, together with the magnificent master of the soldiers, although the latter assigned the case to be tried by the rector of the province. Given at Constantinople March 6 (441).

Nov. Th. 7.4.6-8.

Note.

This law does not show that the praetorian prefect participated in hearing all appeals which were also heard by the master of soldiers. But in this case the governor of a province had decided the case, and appeals from him lay generally to the praetorian prefect. Hence in such case the latter decided the appeal along with the master of soldiers.

7.62.34. Emperor Justinian to Demosthenes, Praetorian Prefect.

If a higher or inferior judge refers a case to Our Clemency which we assigned to him for trial, or which he tried pursuant to his inherent jurisdiction, and asks Our Majesty to decide the case which has been tried before him, (in such event) whether he adds his opinion of the case to the report or note - when he did not make his opinion known to the parties by reading his decision - but merely awaits the answer of Our Majesty, the reference to us shall not be decided until, through a pragmatic order of Our Majesty, we have joined two magnificent men, patricians, consulars or ex-prefects, whom we shall choose at the time, to the illustrious officiating quaestor of our palace, and together with him, examine the written report, either in the presence or absence of the parties, as they deem best, and determine the answer which should be made to the report of reference. The disposition of the case made by these judges shall be final, without right of appeal therefrom or to raise any question in regard thereto. 1. This shall be the rule not only if one judge refers a matter to us by reference and report, but also when two or more specially appointed judges cannot agree on a decision, and each has referred his own decision to us, or when all have asked us what the decision should be. 520-524.

Note.

It would seem that this law relates only to reference of a case before final decision. That subject is fully treated in C. 7.61 and notes. But see law 37 of this title.

7.62.35. (Synopsis in Greek, from Bas. 9.1.125).

The 32nd constitution already provides that appeals from illustrious magistrates from whom an appeal is permitted, will be heard by the emperor. The law is found to be

²⁰ Based on equivalencies Blume calculated elsewhere, these figures appear to correspond to 100 pounds of silver and 10 pounds of gold, respectively.

clear that an appeal is not permitted from the decision of the prefects; but (only) a reconsideration (*retractatio*).²¹ And since it is not unlikely that if one man should succeed another as prefect, he might overturn the decision of his predecessor; but that if the man who gave the original decision succeeds himself as prefect, it is likely that he will not disturb the decision against which a supplication is directed, this constitution, therefore, directs that the quaestor shall sit with the prefect who has been appointed as such a second or third time, to examine the decision of the latter during his former magistracy, but no reconsideration of such decisions is permitted.

7.62.36.

An appeal shall be taken (only) when the suit is finally finished, in order that the case may not be protracted by appealing from an interlocutory order, when frequent appeals are taken in the same case, and after that is examined, take up another point, and again appeal from that. For no one is damaged, if in the meantime, some legal right of a litigant, as the production of a witness or the reading of a document, by an interlocutory order, is denied him; for everything may be considered on appeal (from the final decision).²² 1. If it is an arbitrator who denies him any right by an interlocutory order, an exception must be taken in writing, so that an assignment of error based thereon may be preserved for him on appeal. If anything is done that is contrary hereto, the judge shall not allow the appeal and the appellant himself shall, for his violation, pay fifty pounds of silver.

(Enacted about 527 A.D.)

7.62.37. Emperor Justinian to Mena, Praetorian Prefect.

In connection with appeals, in which the transactions involved have been accustomed to be brought before the emperor by the method of reference for consultation and advice, we think the following additional provision should be made: If the amount involved in the litigation, to be determined by the decision of the judge, does not exceed ten pounds of gold, the appeal shall not be referred, as heretofore²³ to two magnificent judges; but to one only. 1. If, however, the amount involved exceeds that sum, but not exceeding twenty pounds of gold, the matter shall be referred to two magnificent judges, our devoted clerks of the bureau of correspondence (*epistolatibus*) taking down the proceedings on appeal. If the two judges cannot agree, they shall call in the illustrious quaestor, so that the doubt may be settled by him and the matter finished. 2. Suits, in which the amount involved exceeds twenty pounds of gold shall be heard in the imperial council. Provided that according to present statutes not only the defeated but also the prevailing party, may lay the consultation to be sent to one or two judges before him or them only within a period of two years. But that right is denied after that time has passed. 4. The decision rendered by any such judge or judges shall not be suspended by

²¹ [Blume] See C. 7.42.1 and note.

²² [Blume] See note to law 20 of this title, showing that only a final decision was appealable.

²³ [Blume] The law under which the case on appeal was sent to two judges of illustrious rank for review must be law 34 of this title, although that law apparently does not relate to appeals, but only to references before the final decision in a case.

any appeal. We also permit new allegations to be introduced by the parties before the judge or judges, in pattern of cases of consultation sent to the imperial palace.²⁴
Given at Constantinople April 7 (529).

Note.

We saw in note to C. 7.62.32, that appeals to the emperor could be taken only from decisions of judges of illustrious rank. The present law limits even that right, and provides that cases involving not more than twenty pounds of gold should be referred to one or two judges - the questor participating when the two judges could not agree. A very limited number of cases were triable to the emperor, in his council, after the enactment of this law. Theoretically, of course, practically all appeals were heard by the emperor, since the appellate judges heard the appeals "in the emperor's stead." But that was only a theory. The period of two years for appeal here mentioned was changed by C. 7.63.5.2.

7.62.38. The same Emperor to Demosthenes, Praetorian Prefect.

If an appeal is at any time taken from the decision of a duke, rendered pursuant to a special imperial assignment made to him, the appeal, whether the duke is of worshipful or illustrious or even higher rank - since even masters of the soldiers and ex-consuls must fulfill a duty of that kind when public necessity demands it, shall, without reference to his rank, but considering him only as a magistrate, in no case be heard, as heretofore provided, but shall in all cases be heard jointly in the emperor's stead before the sublime master of offices and the excellent questor of our palace, in the manner of appeals by consultation, and the clerks of the bureau of correspondence taking down the proceedings, and no former rule of law shall govern in such case, but the appeal shall be heard only by these judges.²⁵

7.62.39. The same to Julianus, Praetorian Prefect.

Looking after the interests of our subjects better, perhaps, than they, if vigilant, could do themselves, we correct an ancient rule under which only an appellant could have a judgment modified on appeal, while the party who did not appeal was compelled to abide by the decision, whatever it was. 1. We therefore ordain that when the appellant has once come into court and has stated his reasons for the appeal, the appellee, if he wishes to object to any part of the decision, may do so if present, and shall receive his legal relief, but if he is absent, the judge shall, nevertheless, on his own motion, give him the rights to which he is entitled. 1a. In connection with refutatory statements which are accustomed to be read in the imperial court of our prudent nobles sitting in cases on appeal, the litigants, as well as those who draft such statements, must be careful not to make use of verbose allegations, or repeat what has once been stated, but the reasons for the appeal, or new or additional statements of facts left out (of the report), should be stated succinctly. Parties who neglect this must know that the indignation of the high court against the composers of such documents, will not be lacking, because (in such case) the record only of the proceedings and the short abstract made by the worshipful masters of the bureaus should suffice to show everything clearly. 2. Further, since we

²⁴ [Blume] See C. 7.63.4.

²⁵ [Blume] See headnote to this title, subdivision 2c; also note (b) to law 32 of this title.

know that we promulgated a law by which we ordained that cases, appealed by the method of consultation which involve an amount up to ten pounds of gold, should be heard by one judge, and cases involving as high as twenty pounds, by two sublime judge. Now if on the face of the record the suit did not seem to exceed the respective amounts mentioned, but the judge or judges in reaching a final decision came to the conclusion that a judgment for a greater amount should be rendered, it was impossible for him or them to go outside of the rule by which they were bound. 2a. But we direct, and give them gull power, if this shall happen, to go outside of the amount of the judgment for the review of which they were appointed, and to give judgment, not within the limit stated in the law, but as the facts, in truth, require, so that these high judges shall not be fettered, as it were, by chains, but shall be able to satisfy the law and judicial power in all respects. Given at Constantinople March 27 (530).

Note.

The appellee, as shown by this law, was entitled to be heard when an appeal was taken, and was not merely entitled to have the judgment rendered in the court below affirmed, but was also entitled to affirmative relief, that is to say, relief in addition to that granted in the court below, if such additional relief was warranted by the facts. In other words, he was entitled to a relief which in the United States is generally granted only when the appellee has taken what is commonly called a cross-appeal. In cases where the appeal was by the method of consultation, such additional relief might, of course, be asked in the claims which the parties attached to the report of the case made by the trial judge. It would seem, however, as stated in note to C. 63.2, that the parties had the right, in later times, to be present at the hearing, and if that is so, the appellee had doubtless the right to ask for whatever relief he was entitled to at such hearing.

It also appears from this law that a brief summary of the record in cases of appeals taken by the method of consultation was made and laid before the court by the masters of the bureaus.