Book VII.
Title LXIII.

Concerning the periods and reinstatements of appeals and consultations.
(De temporibus et reparationibus appellationum seu consultationum.)

Dig. 49.4; See C. Th. 11.30.31.

7.63.1. Emperor Constantine to Crispinus.

If anyone is, in his absence, nominated either to the duumvirate or other places of honor or duty in a city, and he appeals from such appointment, the period of two months given in which to take the appeal shall be computed from the day on which he shows he learned of his nomination. If he was present and knew of his nomination and wanted to appeal, the period of two months commences to run immediately.
Given July 8 (320).
C. Th. 11. 30. 10.

Note.

Appeals in cases relating to buildings could be heard at once, after the report of the proceedings had been made. C. 8.10.12.7a. See also C. 7.62.4, and note; C. 7.62.27; C. 10.32.20, and note.

7.63.2. Emperors Theodosius and Valentinian to Cyrus, Praetorian Prefect.

We believe that, for the happiness of our times, the periods for appeal (fatalium dierum) should be corrected so as to remove reasons for delay. And we order that the first period after the appeal is taken shall be six months, whether the appeal is taken from a rector of a province or from a judge of worshipful rank. 1. But if the appellant lets the last day (of the first period) lapse, then we want the thirty-first day thereafter to be the second trial day. If the appellant also permits that to pass, the third trial days shall be when the same number of days (31) have passed thereafter. But if the third period, too, has passed, the fourth trial day shall, likewise, fall on the thirty-first day thereafter. 2. If it happens that the appellant has permitted four trial days to pass, then we direct that he seek reinstatement of his right of appeal from Our Majesty within the period of three additional months. The opponent need not be notified when such reinstatement is sought. The end of such three months' period shall not be computed from the time when the petition for reinstatement is made, but the case (on the appeal) must be introduced within three months after the fourth trial day, although the reinstatements was obtained only a day before an although the same is not shown in the court of the illustrious prefects. 3. Nor will this be prejudicial to the adverse party, since the last (trial) day is not doubtful, but is known to all. These provisions apply in case of an appeal taken from the decisions of a rector of the province or judges of worshipful rank. 4. But if an appeal is taken from a referee who has tried a case in a province pursuant to a special imperial assignment, only three additional trial days, in a similar manner as above mentioned, are given after the expiration of the first period of six months, without right to demand a reinstatement of the appeal from Our Majesty, so that when ninety-three days have elapsed (after the six months' period), the judgment must be ordered to be properly executed. 5. But if the referee was appointed in this imperial city, by orders of the praetorian prefect or of the

master of offices or of any other person of illustrious rank, and an appeal is taken from the decision of such referee, the first period for appeal shall consist of two months (instead of six); the other three periods (of thirty-one days each) shall be counted in like manner as mentioned above. 6. And whoever appeals from a referee appointed by a judge of worshipful rank or by a president of a province, has first a period of two months, and three others (of thirty-one days each), the same as mentioned above. 7. We decree that this, too, must be complied with in connection with trial (fatal) days, that if the last trial (fatal) day fall on a holiday, the days immediately preceding shall be considered the trial days by the litigants. But if the last trial day passes otherwise than the laws direct, and this is set up against the appellant, in the first place by the adversary, if present, and he alone is litigating, or by the judge, and this is proven, the appellant shall be considered as having voluntarily in every, accepted the decision (in the court below).
Given May 21 (440).

Note.

The terms "fatalis dies" (last day), and "tempora fataikum dierum" (periods of last days) and "temporalis dies" are apt to be confusing and need explanation. See 12 Cujacius, Obser. c. 4. Fatalis dies literally means fatal day, and refers to the last day of a period of appeal, on which the hearing of an appeal was required to be commenced. It was a fatal day because it was the last day for the introduction of the hearing. In some of the phrases in this law, the term is used almost as the equivalent for the period of appeal itself. But strictly speaking it was the last day of the period of appeal. The hearing of the appeal was required to be commenced on that day, unless, as shown by later laws, there was some excuse for not commencing it on that day. And it could not be commenced before that day. C. 7.63.5.1c, introduced some modification. Note that. In other words it was analogous to a return day or an answer day. It was in fact the trial day for the appeal. Hence the appellate was required to take notice of that trial day and no special notice to him was necessary, so far as we know.[1] To have only one day for the commencement of a hearing on appeal might often be very inconvenient, and sometimes, where the appellant neglected that day, might result disastrously. Justinian recognized this fact, and so in law 5 of this title (1c) remedied this situation and provided for ten last days, that is to say, ten trial days during either of which the appellant might introduce his appeal. The further explanations herein will make this even clearer.

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[1] [Blume] According to the Theodosian Code, only one reinstatement was permitted, except in cases of sickness of the judge, or the absence of the appellant on business of the State. C. T. 11.31.2 and 3. It may be noted that in Justinian's time, according to C. 7.63.2, the appellant had four different periods as a matter of course, and he could have a further period, upon application to the emperor. According to the Theodosian Code, notice of a reinstatement was required to be given to the opponent. C. T. 11.31.3.4.8. The Justinian Code is silent on the point. 3 Bethmann-Hollweg 330, note 36, states that notice was not required, under the later law. If that is correct, and so far as the Justinian Code indicates, it is, then the appellee was required to be at court, if he wanted to be present at the hearing, at each of the trial days, and that might be in vain until the last trial day arrived. On the face of the situation, that seems to have been terribly burdensome on the appellee. It may be that custom and rules of the court of which we know nothing, perhaps, relieved the apparent harshness.

The first period of appeals generally was six months. This period included, of course, a last day during which the hearing might be introduced. But the appellant might entirely ignore this day, and as a matter of course might have three further periods of thirty-one days each, on the last day of which he might introduce his appeal in the appellate court. In other words, the present law practically provided that the time for appeal should be six months and ninety-three days, or a total of substantially nine months, with the privilege on the part of the appellant to introduce his appeal on three certain days prior to the expiration of the nine months, in addition to doing so on the last day of the nine months. If the appellant neglected this time, he was granted further time by the emperor for 3 further periods, as of course. No great excuse seems to have been required for the 4th period, further time being granted almost as a matter of course. C. 7.63.5.1b. The full time here mentioned did not apply in all cases, as shown by this law, and further modification was made by law 5, by which in appeals from nearby places, the period of six months was reduced to three, and appeals from referees in Constantinople were required to be taken in two months. Novel 82, c. 6.

The provisions in reference to trial days above mentioned, did not apply to appeals taken by the method of consultation, and it is readily perceivable that since such appeals were ordinarily heard upon the record alone, trial days would be superfluous. Yet it seems that in later practice, one or both parties had a right to be present at the hearing in such cases. This has been inferred from the rather unsatisfactory statements contained in C. 7.62.39.1; and C. 7.63.5.2. See Geib 692 note 76; 3 Bethmann-Hollweg 335, 336; see also C. 7.62.37.3. It was provided by the law last cited, and by C. 7.63.5.2 and C. 7.64.10, that such appeal might be introduced before the expiration of the time for the appeal. Whether that meant more than simply filing the record is not clear. In any event, the method and details of bringing the case to a hearing in such appeals, if, as appears, the parties had a right to be present, are not known. For further proceedings on appeal, see note to law 5 of this title.

7.63.3. Emperor Justinus to Apio, Praetorian Prefect.

No one need think that hereafter the time fixed for appealing cases by the method of consultation will be extended either by filing a petition therefor, or by imperial rescript, granting reinstatement of right to appeal, or upon any other pretext. But all must be careful to see that their appeals are introduced in the appellate court within the time fixed, and too, that the proceedings in the case from which an appeal is taken should not first be delivered to the imperial bureau of correspondence toward the end of the time fixed, which might cause the period of appeal to lapse through trickery, but should deliver them immediately after an appeal is taken, or not later than when half of the period has expired, so that a tardy appeal may not be dismissed to the appellant's damage by reason of the shortness of time.

Given at Constantinople December 1 (518).

Note.

We saw in the last law that in ordinary appeals the failure to introduce an appeal in the appellate court on the trial day fixed by law was not necessarily fatal, but that the time for the appeal might be extended - the right thereto renewed. But that was not true in appeals direct to the emperor, these appeals being by the method of consultation. Whether the law applied to appeals by consultation to the praetorian prefect and quaestor,

if any were taken to them by that method, as mentioned in headnote, subdivision 4 to C. 7.62, is doubtful. See note Otto, Schilling and Sentennis.

7.63.4. The same to Tatianus, Master of Offices.

We order by this imperial ordinance, that in appeals by the method of consultation, opportunity shall be given to appellants and appellees to set up new claims or defenses which do not introduce a new subject-matter, but arise out of or are akin to those made before the trial judge. 1. And even if such claim is shown to have been made, or a document is shown to have been offered in the court below, for which proof, however, was previously lacking and which may be furnished, without delay, to the appellate judges, it shall be admitted, so that fuller light may be shed on matters previously investigated.[2]

Given at Constantinople May 28 (520).

7.63.5. Emperor Justinian to Tribonianus, Quaestor of the Sacred Palace.

Since in previous laws a similar course was provided for appeals from all the provinces to the imperial court[3], it has seemed best to us to make suitable for the time thereof. 1. We therefore ordain that if a case is appealed from Egypt, or Lybia, or the Orient as far as Cilicia, or from Armenia or Illyria, the first period of six months shall remain as in a former law[4], and nothing shall be taken from or added thereto. 1a. But if an appeal to this imperial city is taken from other portions of our empire, that is to say, from the Asiatic, Pontiac, or Thracian dioces, the first period instead of six months shall consist of only three months; the other three periods (of thirty-one days each), that is to say, the ninety-three days, shall follow in similar order, namely the six and three months' periods (respectively), according to the places designated by us. 1b. The other period of three months, also, which is usually granted by the emperor for reinstatement of the right of appeal, shall continue as added to the prior ones, and so the period in which to perfect an appeal is a year in part of the cases and nine months in other cases.[5] 1c. Formerly

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[2] [Blume] See note C. 7.62.6 and C. 7.62.37. See 3 Bethmann-Hollweg 268; note C. 8.35.4.

[3] [Blume] To the imperial court - this included appeals to magistrates other than the emperor, and referred to all appeals taken to Constantinople.

[4] [Blume] C. 7.63.2

[5] [Blume] These provisions show that the reparation-renewal of the 4th period of the right of appeal, granted by the emperor, was granted almost as a matter of course. The nine months' and the year's period here mentioned included the three months' time granted by the emperor after the expiration of the usual time for appeal, so that without this time, the ordinary time for appeal was six months and nine months respectively, although in some cases mentioned in law 2 of this title the time granted was only five months. These periods related to ordinary appeals, and not to appeals taken by the method of consultation for which the time was fixed at one year, as stated further on in this law, instead of two years, as stated in C. 7.62.37. As heretofore stated, no right of extension of time existed in such cases. Appeals from referees in Constantinople to the regular magistrates were required to be taken in two months without the right to have any additional time. Nov. 82, c. 6.

there was a trial day fixed at the end of each period (as the trial day for introducing and laying the appeal before the appellate court) and it often happened - since appeals may fail in many ways - either by reason of sickness, length of time, or other causes, which are not easily mentioned or enumerated, that the last (trial) day was overlooked, the time for perfecting the appeal expired and property was endangered through such unfortunate circumstances. On account of this, to remove the snares of fortunes, we ordain that hereafter, appearance shall not depend on one day, but if the appellant appears during the four days preceding the trial days or on such trial day or within five days after the light of such trial day went out, and looks after introducing his appeal and brings it to a hearing before the proper court, the law shall be deemed to be satisfied, so he may not bewail the loss of this expired cause, but may rejoice in our beneficence, since we know that causes are even endangered by an error in calculating days on the part of an official staff; which, it is to be hoped, will not, through the remedy of this law, happen in the future. 1d. This remedy shall also be extended and applied by petty judges and others enumerated by the provisions of our law, in connection with last days (for bringing an appeal to a hearing) so that ten days shall be given for that purpose in all instances. 2. In cases in which a period of two years is now given for bringing an appeal by the method of consultation to a hearing before the imperial council, in the presence of the nobles of our palace, a period of only one year is hereafter given, so that there are completed, within that time, to obtain the proceedings in the court below and deliver them together with refutary statements, if desired, to the devoted clerk of the bureau of correspondence (epistulares) and introduce the case in the imperial consistory; but the winning party may, if he wishes, according to a previous enactment[6], bring the matter to a hearing without waiting a year. 3. If a hearing has been begun before the imperial council, but is not finished in a day, it may be proceeded with thereafter, since it would be unjust that suits should fail because the members of the imperial council are busily engaged in the service of Our Piety. 4. We think that the following should also be added to this law: If an appeal is laid before the appellate judge on a proper (fatal) day, and the hearing thereof is commenced in the presence of one or both of the parties, and the appellant abandons it, leaves, and remains inactive in connection therewith the balance of the time, and a year passes after the appeal is commenced, the appellee cannot enforce the decision of the lower court on account of the commencement of the appeal, and he cannot easily terminate the appeal because of the absence of the appellant. We abolish such injustice. And since the appellee may prosecute the appeal even in the absence of the appellant, because it is the special privilege[7] of the appellate judge to decide the appeal with only one of the parties present, we order that if the appellant absents himself from court and fails to carry the appeal to a final conclusion, and the proceedings on appeal are not finished through his fault, he shall lose his appeal and the decision against him in the court below shall remain in force and be carried to effect as if he had never appealed, unless he can clearly show that he wanted to use every effort to carry on the appeal but was unable to do so thru the fault of the judge or some other unavoidable cause. For in such case we grant him another year. But if that, too, passes and the litigation is not terminated, he shall have no relief on appeal, since he had the fullest opportunity to come before our majesty,

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[6] [Blume] C. 7.62.37.3.

[7] [Blume] Not generally possessed by a trial judge.

complain of the tardiness of the judge and receive relief from us. 5. It is proper that this rule should also be applied to the decisions of our high praetorian prefects, when reviewing cases by order of the emperor, both as to the absence of persons as well as to the time stated, after appearance of one or both of the parties. 6. If the parties deem it best, however, to make an agreement in writing, to the effect that neither party shall resort to the help extended in such appeal[8], or pay any attention to any trial (fatal) day, such agreement shall be valid. For we want the severity of the law to be mitigated in such case by the agreement of the litigants.
Given at Chalcedon November 17 (529).

Note.

Proceedings after appeal perfected.

We have already seen that an appellant must file an appeal taken by the method of consultation within the time provided by law. If the hearing was commenced on a certain day but not finished, it might be continued on another day. And it was further provided in Nov. 23, c. 2, that if the imperial council could not be convened on any day, the parties should not be prejudiced thereby. This would seem to imply that there were some rules governing the time when such appeals were to be heard, but we have no information what these rules were.

In ordinary appeals, the appellant was required to at least introduce the case in the appellate court on the last day of the appeal-period. Sometimes, however, the appellate judge or judges might not be able to take up the case on that day. So it was provided by Nov. 119, c. 4, that in such case the appeal should be taken up thereafter and decided in the regular way. If the appellant failed to even introduce the case, or the appellee failed to appear when the appeal was introduced, the last day on which the party was required to appear was awaited, and the case was then taken up and disposed or without reference to whether the one or the other party was then present or not. Nov. 126, c. 2. This applied only to the introduction of the appeal in the appellate court and the commencement of the hearing thereon. For when an appeal had once been introduced, and the hearing, though most informally, had once begun, the parties then neglected the appeal, a different rule applied, which will be mentioned directly.

It would seem that it frequently, or at least at times, happened that after an appeal had once been introduced in the appellate court, it was thereafter postponed and neglected for one reason or another, just as in trials in the court below. In C. 3.1.13, Justinian made provision for such contingency in the court below, and fixed the time during which a pending case should be finished. Justinian - and he apparently for the first time - also made provision by the present law (C. 7.63.5.4), for pending appeal that was neglected by the appellant, and provided that he should prosecute his appeal to effect within a year, or at most within two years, and if he failed to do so, the judgment in the court below should

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[8] [Blume] Ad provocationis auxilium pervenire - literally, to resort to the help of an appeal. This might refer to an agreement of the parties not to appeal a case, but it is hard to see how the severity of the law would be mitigated thereby. Inasmuch as the law refers to other matters in connection with the pending appeal, namely disregard of the day on which the appeal should be laid before the appellate court, the clause referred to should probably be construed to mean that the appeal should not be prosecuted by either party. The Basilicae (9.1.133), do not mention this clause.

stand affirmed. But appeals in the Roman Empire were not, at times, easily prosecuted, as is shown in Nov. 49. The distance and conditions of the weather and other causes frequently hindered the appellant from appearing in court. Hence while the time for finishing an appeal was left undisturbed, Justinian, by Nov. 49, c. 1, gave some relief, though small, by providing that the appellee could not have his appeal affirmed by decision of the appellate judge unless he showed the justice of his cause, although, if neither party appeared, the decision stood affirmed by mere lapse of time. The latter affirmance of the judgment below was not, however, considered as valuable as an affirmance by decision of the appellate court. See note to Nov. 49, c. 1.