Book II.
Title VI.

Concerning demands (pleading) made in court.

Headnote.

"Postulare" was a technical term and meant making motions or demands in court, or opposing them, and, in a larger sense, do[ing] whatever was necessary in a case. D. 3.1.1. A party could ordinarily (see C. 2.12.25) do so on his own behalf, or in a civil case, could, as a rule, do so by agent (procurator). C. 2.12. But at least after the early period of the law, parties to the case, or their agents, were ordinarily represented by a lawyer who would make all necessary motions, etc. And the laws of this title deals with them. Certain persons were excluded from acting as such—e.g., soldiers, women, infamous persons. D. 3.1.1. See also C. 2.7.

2.6.1. Emperor Antonius to Artemidorus.

Since you did not appeal when you were prohibited permanently, by the prefect of Egypt, from pleading causes, obey the order.
Promulgate August 1 (216).

Note.

The court, originally the praetor, had the power to bar anyone from appearing on behalf of another. If a man was prohibited from appearing before a particular magistrate, which was the extent of the penalty ordinarily inflicted upon an advocate for violation of duty, he had the right to appear and practice before the successor. At times, an advocate was forbidden to practice his profession for a limited period. D. 3.1.6 and 8; D. 48.19.9 pr.

2. 6.2. Emperor Alexander to Polydorus.

Neither the freedmen of others, nor those of mine, if they are so well educated that they can extend legal aid to those who desire it, are forbidden to do so.
Promulgated March 7 (224).

Note.

Freedmen could act as advocates according to this law, provided that they possessed the necessary qualifications otherwise provided by law. They could even act as assessor, that is to say, as legal counselor of a judge. D. 1.22.2. Advocates of courts of general jurisdiction, including the court of the governors and higher magistrates, were required to be possessed of certain qualifications. C. 2.7.11. And the advocates in those courts were limited in number.

2.6.3. Emperor Gordian to Flavianus.

If you promised (in a due bill) to give the sum mentioned in your petition, under pretense (sub specie) of an honorarium, which , up to a certain amount, could have been properly due to a lawyer, and you promised to repay the sum as though you had obtained a loan, and you did not through lapse of time consent to and ratify what had been done, you are protected by the allowable defense of money not paid, and you have, for the same reason, the right to recover-- by condiction--in the usual manner, the due bill given.[1]

[1] [Blume] 28 Z.S.S. 329.

Promulgated June 9 (240).

Notes.

It seems clear that the due bill here was held to be voidable on the ground of services not rendered. Bas. 8.1.12, however, which purports to give the substance of this rescript, apparently states that the due bill was void, unless not contested within the legal time as stated in C. 4.30 on the mere ground that it was given for future services, a note stating the reason to be that such due bill would be given not voluntarily but through constraint. In Pliny's time, indeed, no honorarium could be promised or paid before or pending a suit. Pliny Ep. 5.21. And in 368 A.D. a contract with a litigant-client was forbidden. C. 6.2 headnote. According to a note of Theodorus, however, to Bas. 8.1.11, a due bill given to a lawyer for promised services was voidable only if the services were not rendered. That view conforms to C. 4.6.4. And a note to Bas. 8.1.15, which gives law 6 h.t., states that the author does not believe a contract entered into in good faith to be void. In all probability, the law of 368 A.D. was ignored, just as the rule stated by Pliny had been.

In any event, a client could rightfully make actual payment of an honorarium, within the legal limit, before or pending a suit, and it could not be recovered, even though subsequent services were not rendered, if that was not due to any fault of the lawyer. C. 4. 6.11; see 5 Gluck 117. In fact Justinian provided by C. 3.1.13. 9, that the court could enforce payment of an honorarium pending a suit, so as not to delay an ultimate decision, if a litigant was able to pay, but a client might change lawyers to avoid such payment, since no absolute right to an honorarium existed.

There had been varying legislation as to charges made by lawyers. And while for a time the right to take compensation was entirely denied, lawyers were allowed, by a law of 49 A.D., which, with some interruptions, remained in force, to take and receive as an honorarium 100 gold pieces (Tac. Ann. 11, cc. 5 & 7; D. 50.13.1.13), the value of which at that time was about $460, but under the coinage after Constantine was worth about $300. Lawyers were, particularly in post-classical law, under the supervision of the courts, and the payment of an honorarium was enforceable under the extraordinary jurisdiction, the amount, in the absence of a contract, being fixed according to the circumstances and the standing of the lawyer. D. 50.13.1.9. If a client was poor, a lawyer could be compelled to act without pay. D. 1.16. 9.5. See 5 Gluck 116 ff.

2.6.4. Emperors Diocletian and Maximium and the caesars to Theodotianus.

It is in vain for anyone to attempt to reopen disputes that have been decided,[2] under the pretense of the absence of an advocate.[3]
Given at Nicomedia, December 29 (294).

2.6.5. Emperor Constantine to Helladius.

If any advocates are found to have preferred great and unlawful profit to their good name, demanding, as emolument, under the name of honoraria, a certain portion of the result of the very transactions which they undertook to protect, to the great damage

[2] Blume underlined in pen the words from "to attempt" to "decided" & placed a question mark above them. The gist of Scott's translation is the same. See 6 [12] Scott 185.
[3] [Blume] Similar in effect is C. 6.19.1.

and spoliation of the litigant, it is decreed that all who persist in such perverseness shall be entirely forbidden the profession of advocate.[4]
Given March 30 (325).

2.6.6. Emperors Valentinian and Valens to Olybrius, City Prefect.

Whoever wants to be an advocate shall not act as advocate and as judge in the same case, since a choice should be made of one or the other.

1. All advocates, above everything, should so furnish legal aid to the disputants that in their license to abuse, and in their heedlessness to slander, they should go no further than the requirements of the litigation demand. Let them do what the cause requires, but let them abstain from insults. And if anyone is so impudent as to think that a lawsuit should be conducted by reproaches, rather than by reason, he shall suffer loss of his good name. Nor is any indulgence to be extended to anyone who neglects the case in hand in order to openly or covertly abuse his adversary.

2. Further, no advocate must make a contract as pact with the person whom he has undertaken faithfully to protect.[5]

3. No one of those who are permitted and for whom it is proper to accept an honorarium must treat with disdain whatever a litigant has once freely offered him on account of his service.

4. No one shall purposely protract a case.

5. In the city of Rome, the nobles who choose to do so may plead caused as much as they wish, provided they do not, forsooth, use this opportunity to make dishonorable gain or disgraceful profits, but seek to increase their good reputation thereby; for if they are controlled by the thought of gain and money, they shall, as persons unprincipled and ignoble, be numbered among the lowest.

6. But if any one of those whom we thus permit to plead causes wants to act as advocate, he needs to play the role assumed by him only so long as he acts as such, and need not think that his honor is lowered, since he has voluntarily chosen the necessity of standing, and has spurned the right of sitting with the judge.
Promulgated August 23 (368).

Note.

Pr. taken from C. Jn. 2.10.5. [This should be C. Th. 2.10.5.] Counselors of the judges, called assessors, sat with the regular judges. C. 1.51. And the referees appointed by the regular judges were frequently taken from among the advocates. Headnote C. 3.3.2. If they acted in either of these capacities, they could not at the same time act as counselor.

2.6.7. The same emperors and Gratian to Olybrius, City Prefect.

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[4] [Blume] Taken from CJ 2.10.3. [This should be C. Th. 2.10.3.] As to champerty, see C. 2.12.15; C. 4.35.20 note.

[5] [Blume] Refers to honorarium or contract involving champerty. Bas. 8.1.15 note. But the author of the note thought that a contract—presumably as to the honorarium—was not invalid if entered into in good faith. Dignitaries in Rome could not at the same time play the role of advocate and that of a dignitary as well. Advocates stood, while certain dignitaries had the right to sit with the judge. C. 3.24.3. If men wanted to act as advocates, they could not at the same time claim the right to sit with the judge.

Care must be taken that those whom merit or age has made famous in court are not all engaged on one side of a lawsuit, making it necessary that the other side be defended by persons young and inexperienced.

If, therefore, there are in any court only two or more of those whose reputation is preeminent above that of others, it is the duty of the presiding judge to make a fair assignment of the lawyers, extend equal help of the several lawyers, to the litigants and make an equal division among them.

2. If any lawyer assigned by a judge, denies his legal aid to any party without just excuse, he shall be deprived of his right to appear in court, and he must know the opportunity to plead causes can never be restored to him.

3. If, moreover, any litigant is found to have dealt separately with several advocates, and by such fraud to have deprived his adversary of the opportunity of equal defense, he thereby clearly shows that he conducts an unjust lawsuit, and he shall be made to feel the authority of the judge of which he made sport.

Given at Treves, March 1 (370).

Note

As stated in note C. 2.6.3, the presiding judge appointed counsel for a party who had none. This was doubtless frequently necessary in criminal cases. A person accused of crime had a right to be represented by counsel. C. 9.3.2. Generally the parties would, of course, employ their own counsel, and the present law was probably enacted mainly for the cases in which the parties had not employed any. But the judge doubtless could direct some advocate to assist in a case even though a party already had engaged one.

Ordinarily, as stated in the instant law, an advocate could not refuse to be engaged in a case. Justinian enacted a law in 530 A.D. (C. 3.1.14.4) that if a lawyer found the cause of his client to be unjust, he should not continue to represent him. It may well be doubted that that law had any practical effect, except to give some advocate an excuse to desert a case when he wished.

2.6.8. Emperors Leo and Anthemius to Nocostratus, Praetorian Prefect.

No one shall be admitted to the guild of advocates in the court of Your Magnitude, or in any provincial court, or in the court of any other judge, unless he is initiated into the sacred mysteries of the holy Catholic Church. If, however, anything of the sort contrary hereto takes place or is attempted in any manner or by some deceit, the official staff of Your Sublimity shall be condemned to a fine of one hundred pounds of gold. So, too, whoever has dared to secretly obtain the position of advocate contrary to the prudent decree of Our Serenity, and extends forbidden legal aid, shall be removed from his position of advocate, be outlawed and specially sent into perpetual exile. The rectors of the provinces, too, must know that he under whose administration anything of the sort is attempted, shall have half of his property confiscated and shall be sent into exile for five years.

Given at Constantinople, March 31 (468).

Note.

C. 1.4.15 is a duplicate of this. By a law of 418 A.D. Jews were allowed to act as advocates. C. Th. 16.8.24. But that law is left out of the Justinian Code.