Book III.
Title I.

Concerning Trials
(De judiciis)

Bas. 7.6; D. 5.1.

3.1.1. Emperors Severus and Antoninus to Clemens.

The stipulation for interest is not destroyed by joinder of issues in an action. You may, therefore, sue a debtor for the interest of such time as was not included in the suit. Promulgated April 1 (205).

Note.

The first sentences doubtless, as held by Savigny, 6 System 160, refers to suit for the principal sum. A stipulation for interest was a separate stipulation from that for the principal. D. 45.1.75.9. So there might be separate stipulations for interest for different periods. D. 45.1.140.1. These rules were doubtless made to avoid the dangers of former adjudication. Each stipulation gave rise to different causes of action. In the early period of Roman law, it seems that no two or more separate causes of action could be joined. Ihering, 3 Geist d. R. R. 39. The later law is not clear. Provisions, however, were made for consolidations of actions—that is to say, two or more actions could be sent to the same trior of facts. See note to law 10 hereof.

3.1.2. The same emperors to Valerius.

Although you tried an action against your guardian, having accepted a trior of the facts (after issues joined), the action on guardianship was not destroyed by operation of law; and, therefore, if you again go before the same judge, you can effectually use the replication of fraud against the defense of res judicata if you allege that the matter concerning which you sue was not embraced in the former action.
Promulgated December 27 (210).

Note.

In this case an action had been brought by a former ward against his former guardians and he had made demand for certain items, or matters, but had not included other matters. He than brought a second suit, in which he demanded things not included in the former suit. The first action was held not to be an adjudication of all the matters embraced in the guardianship but only as to those embraced in the former suit. The rule was that any matter once adjudicated could not be reopened (C. 7.52; C. 2.26.1),[1] and that all matters directly involved and which might have been set up, were concluded thereby. He could not split his case into several parts.[2] C. 3.1.4 and 10. The doubt arose in the foregoing rescript out of the fact that both actions were, under the old procedure, called actions on the guardianship (tutelae), but the question was not whether the second action was one called by the same name as the first one, but whether the matters involved in the second action had actually been adjudicated. Suppose that a former ward sued his former guardian. Judgment was recovered, which was paid. Among the effects turned over by

[1] Blume penciled a question mark in the margin adjacent to this line.
[2] Blume also put a question mark next to this line.

the guardian to the ward were due bills. A maker of one of the due bills, when called on to pay, would prove that he had in fact paid all the interest on it, when apparently he had not. In such case, a second action against the former guardian would have been clearly just.

3.1.3. Emperor Alexander to Faustina.

Whenever a question as to personal status is involved with a dispute concerning property, nothing prevents a judge, who otherwise cannot try a cause involving the question of personal status, to decide the dispute.
Promulgated February 8 (224).

Note.

The question whether a man was free or slave was regularly triable only before judges of plenary jurisdiction. See C. 3.22.2 and 5. The procurator of the fisc, for instance, had no jurisdiction, ordinarily, to try that question. C. 3.22.2; C. 7.14.9; C. 7.16.11 and 15; Buckland, Roman Law of Slavery 657. Yet such procurator of the fisc had the right to try certain civil actions involving rights of the fisc, and if the question of a man's status came up in such actions, he had the right to decide the incidental question—for instance, a slave claiming to be an heir to property that apparently had fallen to the fisc for want of heirs. Other illustrations of the application of the law here translated might be given. The same general rule is stated in C. 3.8.1.

3.1.4. The same emperor to Popilius.

If, while the price of lands bought by your curators for you was charged up to you in an action, and the documents of purchase were delivered, you raised no question as to an omitted (warranty against) eviction, the action once finished should not be reopened.
Promulgated August 1 (238).

Note.

It was noted at C. 2.57, as will also be seen at C. 3.3.2, that the formulary procedure was abolished and the so-called extraordinary procedure was adopted under which the magistrate tried the case himself, except when necessary to refer it. It is probably that, on account of pressing business, the appointment of referees continued to a considerable extent, especially in large cities, and that the distinction in that respect between the formulary and the new procedure was, in some places, not very marked. Title 3 of this book deals specially with the appointment of referees. Whether the judge—referee—mentioned in the rescript here translated was a referee under the old or the new system of procedure does not appear. But the law that a referee cold not in turn appoint another in his stead, was doubtless true in either case. It frequently happened that the emperor made direct appointments of men to try certain cases. When that was true, the man appointed could in turn appoint some one else. An appeal could be taken to the person appointed by the emperor. C. 3.4.1; headnote C. 7.62.

3.1.6. The same emperor to Junia.

A slave cannot be a party to an action; nor if a judgment has been rendered against him can the decision stand.
Given August 18 (239).

Note.

Slaves could in no way be concerned in civil proceedings. If suit was brought on account of their contracts or delicts, it was required to be in the name of the master. They

could neither sue or be sued, and a judgment rendered against them was void. They were in that respect considered as property and not as persons. C. 3.1.7: C. 3.32.20; C. 3.41; Buckland, Roman Law of Slavery 83.

3.1.7. Emperors Diocletian and Maximian and the Caesars to Irena.

Since you say that the slave of your debtor who was pledged to you holds property of his former master, now taken away from human affairs, you unlawfully ask for a right of action against the slave, since no action between a slave and a freeman can be maintained. It behooves you, therefore, to ask possession of the pledge at the hands of the judge, rather than for something that is not lawful.
Subscribed April 18 (294) at Sirmium.

Note.

In this case a slave was pledged as security. In order to foreclose the lien which the creditor had, he had to have possession of the property pledged, and could, if necessary, bring an action for that purpose. C. 8.27.14 and note. The slave that was pledged could not himself be sued. See preceding rescript.

3.1.8. Emperors Constantine and Licinius to Dionysius.

It has been accepted as law that the foremost aim in all things should be justice and equity, rather than to follow the strict letter of the law.
Given May 15 (314).

3.1.9. Emperor Constintine to Maximus.

Since it is to the advantage of both parties, judges should first of all clear up the nature of the question in dispute by careful inquiry and frequently ask both parties if the want to add anything new, whether the cause is to be decided by the judge himself or whether it is to be referred to a higher authority.
Given at Sirmium, January 12 (321).
C. Th. 2.18.1.

Note.

It will be noted from this rescript that the presiding judge interrogated the parties. The proceedings were carried on by him (or his assessor), and the attorneys in the case had no such latitude as they have under the procedure in the United States. C. Th. 2.18.1, from which this law was taken, also provided that the presiding judge should permit the parties to ask questions. That portion was suppressed in the Justinian code, though doubtless the same right was still granted in the discretion of the presiding judge. The "reference to higher authority" was, in the Theodosian Code, reference to the emperor. A case was frequently referred to the emperor to get his opinion on what the decision should be. That custom was finally suppressed by Justinian. The subject is fully considered in C. 7.62 and notes. The frequent references to the emperor became, of course, burdensome, and hence references to other higher authorities was permitted by some of the emperors though not by all.

3.1.10. The same emperor to Severus, City Prefect.

No hearing whatever shall be given to anyone who splits up the contents of a cause, and in pursuance of an imperial authorization wants to air before different judges what can be decided in one trial. A penalty inflicted in the discretion of the judge hangs over the person who supplicates (the emperor) contrary to this sanction and demands one judge concerning possession and another concerning the main question (of ownership).

Given July 30 (325).
C. Th. 2. 18. 1.

Note.

This is one of the few laws which indirectly relate to splitting up a cause of action. It does that indirectly only, since the question of possession was required to be decided before the question of ownership was decided (C. 3.32.13; C. 3.39.3; C. 8.1.3), and it merely directs that both questions should be decided before the same judge, if competent to try both. Similar is C. 3.32.13. The question as to who had possession was in fact a preliminary question. It settled as to who should be plaintiff and who defendant in the suit for ownership. D. 41.2.35. Hence they were so closely linked together that they were, ordinarily, required to be tried before the same judge, though one after the other. See Planck, Mehrheit d. Rechtsstreitigkeiten 33-43 and C. 9.12.9.

3.1.11.

Magistrates must decide causes according to law and pursuant to what seems to them to be just; nor need they fear any imperial rescript which commands them to do anything contrary to laws, since it is invalid.

3.1.12. (In Greek)

All magistrates and judges appointed by the emperor shall decide cases quickly; and if a litigant often calls upon the proper judge, but suffers delay without just cause, he may appeal to the emperor and wait for relief from him.

1. If any party objects to a judge before joinder of issue, for just cause, he may appeal to the emperor, who will appoint another judge, or an additional one to sit with the former; but if the objection made is without just cause, his request will be denied. No other judge, or a colleague, may be asked for after joinder of issue.

2. A case shall, moreover, be tried before one judge; if he appears to be incompetent as to any portion, he shall, by his order, transfer the cause to a competent judge. A person who sues a second time, or oftener, shall pay double the damages arising in connection with the second summons and must litigate his case before the first judge, without sureties or bail on oath being given (by the defendant), pursuant to the second citation.

Note.

The parties could not object to a judge or referee after joinder of issues.

During the formulary period, a party could not commence a case, join issues, drop the case and commence another action, for the joinder of issues consumed the action. But the consuming effect of joinder of issues gradually disappeared. And unless thereafter there was a final adjudication, there was nothing to hinder the party, in the absence of other regulations, to drop the case and start over again. The instant law sought to prevent that evil, penalizing the party who sued a second time. According to other provisions, such party also lost his case. C. 2.2.4; C. 7.17.7. That perhaps referred to the loss of the second case, compelling the party to prosecute the first case to the end, before the judge before whom that case was pending. See D. 5.1.20.

Justinian also required the plaintiff to give a bond for his appearance and prosecution of the case. Nov. 53, c. 1; Nov. 96, c. 1; Nov. 112, c. 2. And he furthermore enabled the defendant to obtain a final adjudication in case, although the plaintiff was absent. Law 13.13.2 h.t. See generally Planck, Mehrheit 11-24; Buckland, Textbook 693.

As to a bond by the defendant (dispensed with in case of second suit, as mentioned in foregoing law), see C. 3.2.4.

3.1.13. Emperor Justinian to Julianus, Praetorian Prefect.

Lest lawsuits extend almost into infinite time and exceed the measure of life of man, and since one of our laws has already fixed the period of two years for criminal cases, but civil cases are more frequent and often are known to furnish the material for criminal causes, we have deemed it advisable to hasten to enact the present law which shall be in force everywhere and shall not be abridged in any place or at any time.

1. hence, we decree that all actions, concerning money of any amount or concerning the status of any persons, or concerning any right of cities or of private persons, or concerning possession, ownership, pledge, servitude, or any other matters in regard to which men litigate one against the other, shall not be protracted beyond the period of three years after joinder of issue, excepting herefrom only cases which involve fiscal rights or which relate to public duties. And no judges, whether they occupy high or low administrative positions in this imperial city or in the provinces; whether they are magistrates,[3] or are (specially) appointed by the emperor, or by our high magistrates, are permitted to protract lawsuits beyond the period of three years. For no one is so ignorant as not to know that this matter rests largely with the judges; for if they are not willing, no one would be so audacious as to protract a lawsuit against their wish.

2. And if the plaintiff procrastinates so that the defendant is wearied by long delay, and the limit of three years, after joinder of issue, is almost reached, that is, when only six months remain, the judge, upon defendant complaining of plaintiff's absence, may, through his process-servers, call on the latter to appear. Judges must always open their ears to complaints of this kind. If such call has been made three different times, a period of ten days being given between each call, and the plaintiff is not then found, and fails to appear either personally or by an authorized attorney with power to act, then the judge shall examine the record in the case as to what has been done before him.

2a. If not sufficient has been done from which to reach a correct conclusion for the termination of the action, the defendant shall not only be excused from appearing at court, but the plaintiff shall be condemned to pay all costs ordinarily incurred in lawsuits, the amount thereof to be determined by the oath of the defendant, and every bond, furnished by the defendant in the suit, shall be returned; but if it remains, it shall cease to have validity.

2b. If, from the transactions had before him, a way can be found in the absence of the plaintiff, by which it becomes clear to him as to what should be decided, and it appears to him, in the plaintiff's absence, that the latter has the better cause, he shall not hesitate to render his decision form him and against the defendant who is present, excepting from the condemnation only the expenses which the defendant shall under oath declare to have expended, because we impose this punishment (to pay such expenses) on the absent plaintiff who has the better cause, solely on account of his disobedience.

2c. The plaintiff shall have no opportunity to recommence the case thereafter. If the defendant is absolved, the plaintiff's right of action is at an end. If some judgment is rendered against the defendant in favor of the absent plaintiff, which the latter deems insufficient, still we grant him no right to reopen the case. The foregoing punishment is imposed on the plaintiff.

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[3] [Blume] Magistrates—such as governors, vicars and prefects.

3. If, on the other hand, the defendant shall be absent, he shall be cited in the same manner as we have prescribed for the plaintiff, and in case he makes default, the judge shall, as is provided by the ancient laws, carefully make an examination ex parte, and if he finds the defendant liable, he shall not hesitate to enter judgment against the absent person and carry it into effect by causing the victor to be satisfied out of the goods and property of the defendant, either by virtue of his own authority or by referring the matter to a higher court so as to find a legal way to reach the goods of the contumacious person. No permission shall be given him, or some one else representing him, to reopen the case for the purpose of making a defense, when the plaintiff, by reason of the foregoing, is placed in possession of defendant's property; nor shall such defendant be heard even if he returns and offers to give sureties in order to recover possession. For in the cases above mentioned, we deny him every opportunity to make a defense.

4. When the question of default is examined, whether on the part of the plaintiff or defendant, the inquiry shall be made without hindrance. For since this is done with the awe-inspiring scriptures present, the absence of the litigant is supplied by the presence of God; nor need the judge fear the obstacle of an appeal, which, as is known, is also clearly stated in the ancient laws.

5. A decision of this kind, however, shall be rendered (only) near the end of the three year period, in reference to which we have made the present law. For if either party is in default at an earlier date, when ample time is left and the absent person has hopes of returning, then a decision shall be rendered only concerning the payment of, or perhaps release[4] from expenses, and the suit shall not be declared extinguished nor absent litigant condemned, for that shall be done only in those cases when the end of the three year period is imminent.

6. Whether, moreover, a case is decided in the absence of either party or in the presence of both, all the judges in our empire must know that the losing party must be condemned to pay the usual costs in an amount sworn to by the winner, not forgetting that if they omit to do this, they must bear these costs themselves and will be compelled to pay them to the parties entitled thereto.[5]

7. It has seemed best to us to enact these provisions concerning the contumacious absence of either party, and to correct all things according to the standard of equity.

8. If, moreover, both parties are present and desire to try a case but the judge refuses to take it up, or defers it on account of friendship or hatred, or through bribery, or because of any other vicious inclination which may arise in the minds of such a judge, and the three year period expires on that account, the judge, if he occupies a magistrate's position, or a position of greater dignity up to that of a person of illustrious rank, shall be compelled by the palatine corps[6] to pay ten pounds of gold to the treasury of the Crown Domain; if he is an inferior judge, he shall be punished by a fine of three pounds of gold, to be collected by the same corps and turned into our treasury; and the judge must be removed and another substituted for him, under fear of a similar punishment. These provisions apply when one judge acts as such throughout the litigation from the beginning.

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[4] [Blume] Release—when a good excuse for absence is given. 9 Cujacius 117.

[5] [Blume] As to costs, see C. 7.51.5.

[6] [Blume] Palatine school [Blume changed "school" to "corps" in editing his translation but apparently neglected to make the change here]—i.e., apparitors of the counts of the Crown Domain and Imperial Exchequer.

8a. But if during the three year's period, either by reason of the death of the judge or other unavoidable casualty, the judge is changed, then, if one year or more remains of the three year's period during which a new judge has been substituted, the suit shall be terminated during the time remaining (of the three years); if, however, less than one year remains, then the time which is thus lacking shall be added, since the substituted judge cannot examine and terminate the litigation in less than the full year's time.

9. And it is to be observed, further, that if neither the litigants nor the judge were at fault in not finishing the suit, but the responsibility therefor rests on the lawyers, then the judge shall have power to impose upon the latter a fine of two pounds of gold, to be collected by the Palatine corps and paid into the public treasury. The judge shall, in such case, state in his decision that the delay was caused by the lawyers, either of the defendant or of the plaintiff, and by all or part of them. For the duty devolves upon lawyers, when they become engaged in a case, to prosecute it to the end, unless prevented by the law or other valid reason, so that no delay may occur through their refusal to act. The honorarium, however, due to the learned lawyers, must be paid by clients who are able to do so, and if this is not done, it shall be collected by the process-server engaged in the case, so that the case may not be delayed by such trickery, unless the litigant prefers to choose another advocate (who is willing to have payment deferred).[7]

10. All this has been provided by us in regard to those who are of full age and whose own judgment is such as to sufficiently guide them in cases.

11. In cases, however, in which minors under fourteen years of age or adults under twenty-five years of age, or others under guardianship, either male or female, are interested, which are carried on by their guardians, curators, agents or procurators, then if the three years period elapses and the cause is lost through the negligence of the latter, the judgment shall indeed remain in force, but the loss which arises therefrom shall fall on the guardians and curators and their sureties, heirs and property, and on all whom, according to law, it concerns. If their property is not sufficient to make the loss god, the minors and adults aforesaid (under twenty-five years of age), shall be restored to their rights to the extent of their loss.

Given March 27 (530) at Constantinople.

Note.

Termination of suit. The foregoing law, directing that a suit should be finished in three years, applied only to ordinary civil suits. Criminal cases were required to be finished in two years after joinder of issue (C. 9.44); fiscal cases in six months after joinder of issue (C. 10.1.11); cases involving the question as to whether certain municipal

[7] [Blume] An attorney or counselor for a party in a case was compelled to give his best services to his client, unless he found that the facts had been misrepresented and that his client's case was without merit. See the next constitution (C. 3.1.14.4). The lawyer was entitled to his honorarium, which might be collected by the officers of the court, and was apparently payable at once. The client might, however, refuse to pay him, and employ another lawyer who was willing to wait for payment. He might ordinarily, however, make such change only before joinder of issues. After that time he could make a change only upon cause shown. Desire not to pay the honorarium at once seems to have been sufficient cause. D. 3.3.16 and 1. In case a client was poor, a lawyer might be compelled to act without pay. D. 1.16.9.5; D. 3.1.4; 9 Cujacius 131. See note on this subject at C. 2.6.3.

duties should be performed, within three months. C. 10.32.54. See Keller, Litis Contestation 132, etc.

The foregoing constitution purported to shorten the period in which cases should be finished. In one respect, however, its provisions were contrary to the fulfillment of that purpose, for it did not permit final judgment to be taken until two and one-half years of the three years' period mentioned therein had passed, whereas previously a judgment had been possible immediately after the defendant had, after joinder of issues, deserted a case. C. 7.43.11; Steinwenter 144. The period of two and one-half years was subsequently changed to one year, as shown in note C. 2.2.4 (4). It will be noted that the law provided for default proceedings only for cases in which issues had been joined. But in the later law such proceedings before and after joinder of issues were very much alike. The steps and incidents therein have been fully discussed in note C. 2.2.4 (4), which should be read in this connection.

3.1.14. The same emperor to Julianus, Praetorian Prefect.

We come to treat of a matter which is not at all new or unusual, which was in fact provided for by ancient legislators, but the neglect thereof has injured lawsuits greatly. For who does not know that ancient judges never received the right[8] to pass upon a case, unless they had first taken an oath that they would give judgment according to justice and law?

1. While we, therefore, find a not unused path to be traveled, and while our former laws concerning oaths have been proven to be of no little value to litigants, and are, therefore, justly praised by all, we come to the resent, ever-enduring law, and ordain that all judges, high or low, magistrates in this imperial city or in any other place under our sway, judges specially appointed by us or by our higher judges to try cases, and judges who have inherent jurisdiction to try cases, persons who, pursuant to agreement or compromise, which is similar to a judicial trial, undertake to settle a cause, persons who function as arbitrators or are chosen as such pursuant to an order and agreement of the parties, and generally all judges whatever who decide cases under the Roman law, shall not begin to investigate a case until they have placed the holy gospels before the judicial seat, and which shall remain so throughout the trial from the beginning thereof to the end until the reading of the final decision.

2. For they may thus, looking at the holy scriptures and consecrated by the presence of God, decide cases by a higher help, knowing that they judge others no more than they are judged themselves, and that the trial is more dreadful for them than it is for the parties, if[9] the litigants bring their cases to be decided under men, but the judges try and decide them in the sight of God.

3. So let this judges' oath be made known to all, ordered by us as a splendid addition to the Roman laws, and let it be observed by all judges. Its omission will be danger to its scorners.

4. Moreover, the attorneys of the case who give help to the parties in any court, high or low, or before arbitrators under an arbitration agreement or otherwise appointed or chosen, shall, after joinder of issue, i.e. after the plaintiff has made his statement of

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[8] Blume penciled in "received the right" above "undertook," and placed a question mark in the margin but did not line out "undertook."

[9] Blume penciled in "if" above "since" but did not line out "if" and placed a question mark in the margin.

facts and the defendant has made his counter statement, take an oath while touching the holy scriptures, that they will, with all the power and ability at their command, bring forward on behalf of their clients what they shall deem just and true, leaving nothing undone which is possible for them to do; that they do not knowingly or advisedly, and with a bad conscience, assist in a cause entrusted to them, which is dishonest, in a desperate situation and made up of lying allegations, and that if they, during the course of the suit, become advised that such is the fact, they will withdraw from it and entirely sever their connection with it. And if this is done, such litigant cannot employ another advocate, so that a dishonest lawyer may not displace a better one.

5. If there are several lawyers in the case and all have taken the oath, but some of them, during the proceedings, think that their aid should be extended to the client, while others think the contrary, then those that are unwilling should withdraw and the others should remain, for the termination of the cause will prove as to which ones have either timidly abandoned or audaciously protracted the case. In such event the litigant shall have no right to substitute others for those who withdraw.
Given March 29 (530).

3.1.15. The same emperor to Julianus, Praetorian Prefect.

We ordain that if at any time a person formally cited to appear remains away at the time but appears later, the judges in this flourishing city or in the provinces, shall give him no hearing and exclude him from court till he has first paid to his adversary the damage occasioned by such default, whether arising from commencing the action, paying an honorarium to lawyers, or other causes which arise in connection with the case. The judge shall fix the amount thereof, after an oath has been taken by the person who incurred the expense 9as to the amount thereof0; and the process-server connected with the case shall execute the orders of the judge. All our judges and process-servers may know that if they omit to do this, they will be compelled to indemnify the person injured for the amount of damage sustained out of their own property. These provisions shall also apply to court referees (pedanei judices), even though the litigants who were absent because of a troubled conscience were not formally but informally[10] cited to appear.
Given at Constantinople, April 22 (531).

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[10] [Blume] Requisiti—The term for citation issued by an inferior judge was requisition, which, says Steinwenter, Studien zum Römischen. Versäumnissverfahren 145, probably consisted in a bailiff (process-server) going to the home of the defendant demanding that the latter appear. A special penalty was attached to preventing a man cited to appear before the ordinary judge from appearing. This did not apply to citation before a referee, an inferior judge. D. 2.7.3.1. See Mommson, Strafrecht 248, note 7. As to referees, see C. 3.3.

Costs—We have seen that where a party was summoned and failed to appear, judgment was not immediately rendered against him, but a special proceeding on default was then instituted against him by edicts or citations, and final judgment could not be rendered until the expiration of a year. Note (f) to C. 3.1.13. In the meantime, if it was the defendant who was absent, the plaintiff might be put into possession of defendant's property or so much thereof as was necessary. Note C. 2.4.4. During that time, the defaulting party might appear and be permitted to defend, but as stated in the foregoing law, before he was permitted to do so, he was required to pay the adverse party his expenses. See Novel 53, c. 4.

3.1.16. The same emperor to Julianus, Praetorian Prefect.

The law is plain that litigants are permitted to object to referees before joinder of issue, since even the general orders of Your Sublimity direct that when objections are interposed to a referee (judex), the parties must chose a referee[11] and submit the case to him. For even though a special judge has been assigned by our imperial majesty, still, since we are anxious that all lawsuits shall be conducted without any suspicion, a party who suspects a referee is permitted, before issues are joined, to object to him, so that another may be chosen, after presenting a written objection to the former. We have already ordered that no one can object to a judge, when issues have once been joined, nor appeal till a final decision has been rendered,[12] so that lawsuits may not be drawn out to infinite time. The process-server (executor connected with the suit) shall require the parties, by calling to his aid the ordinary judge (president), and by using the available civil processes to compel the parties to choose a referee, appear and prosecute the suit before him as though he had been appointed by our imperial highness. These provisions shall also apply when the referee has been chosen, not by our imperial majesty, but by one of the higher judges.
Given at Constantinople February 20 (531).

3.1.17. The same emperor to Johannes, Praetorian Prefect.

It is unquestioned law that soldiers may be referees. For what could be the objection to a persons acting as a referee in a matter with which he is thoroughly conversant, since we know that military magistrates and men of that kind have already, by daily usage, been shown to be competent for hearing and deciding cases and ending such disputes, according to their information and legal knowledge.
Given at Constantinople November 1 (531).

3.1.18. The same emperor to Johannes, Praetorian Prefect.

When a special judge has been assigned either by the imperial majesty or by a magistrate of the province where the defendant lives, and one of the parties objects to the judge who perchance is absent and lives in another city of the same province, in such case, lest the defendant be compelled to hand the written objection to the judge after a long journey, we ordain that if the president of the province is present in the city where this matter arises, the party who objects to the judge shall have the right to go before the president and make his objection known to the defender of the place or the municipal duumvirs, making it a matter of record before them; but he must immediately, that is within the next three days, choose a referee or referees and litigate his cause before them, so that the judge assigned may not be removed without another being chosen. If the parties cannot agree, the referee shall, in like manner, be chosen by the president of the province, if he is present, otherwise by the defender of the place or the municipal magistrates, and process-server to whom the enforcement of such cause is entrusted, shall take care that the decisions of the referees are carried to effect, unless an appeal is taken.

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[11] Blume lined out “an arbitrator” and inserted “a referee” but left a question mark in the margin.

[12] [Blume] C. 3.1.12.1; C. 7.62.36. A note as to rejection of referees and judges is found at law 18 of this title.

In such case the authority that appointed the judge who was suspected shall carefully examine the appeal and render a decision according to law.
Given November 13 (531).

Note.

Change of judge. During the formulary period, a list of triors of facts was made and there was a range of selection which could be freely used. During the following period, the magistrate before whom the case was brought had it in his power to appoint a referee (judex) to try the case. In D. 5.1.47, it is said: "Care must be taken not to appoint as judge anyone whom one side asks for expressly by name—such an appointment, according to a rescript of Hadrian, would be a thing of bad example—unless special permission for this being done should be given by the emperor out of respect for the person asked for as judge." And in law 16 of this title, Justinian expressed a solicitude to have cases tried before impartial judges.

Law 16 of this title deals mainly with referees appointed by magistrates; law 18 of this title with special judges appointed by the emperor. Either the former or the latter might be rejected. Law 12 of this title, probably enacted prior to the enactment of either law 16 or 18 of this title, provided that a judge or referee could be rejected, or objected to, only for cause shown. It is clear, however, that Justinian meant to change this, and enabled the parties to obtain a change of referee, or special judge by simply stating that they considered him as suspected. But the objecting party was immediately compelled to choose a referee himself by concurrence of the opposite party. They were compelled to agree, or someone else was chosen instead of the one who was rejected, according to the rule laid down in law 18 of this title, and this rule was probably applied in all cases. The person so selected could not be rejected. Novel 53, c. 4. An appointed referee was required to be rejected before joinder of issues. Novel 53, c. 3; C. 7.45.16. After that, it was too late to do so, except for special cause shown. The arbitrator here mentioned had the same power as a regular referee, and an appeal could be taken from his decision and, therefore, is not to be confused with the arbitrators mentioned in C. 2.55. See D. 49.1.23.

The case was commenced before a magistrate with plenary jurisdiction, and not before a referee. 3 Bethmann-Hollweg 125, 128; Steinwenter, Studien zum Versäumnisverfahren 62, 63. This is also clearly indicated by C. 7.70.1, which provided that if a referee was appointed, the magistrate himself might be asked, before joinder of issues, to try the case, and by Novel 53, c. 3, which provided that the defendant should have twenty days in which to object to the referee or ask that some one sit with him. On the other hand, instead of appointing the referee at the time of the issuance of the summons, the magistrate might summon the defendant to appear before him, and the issues might be made up before him and the case then referred. Steinwenter, supra 63.

The information we have as to change of judge, when the case was not referred, is not satisfactory. Novel 96, c. 2, appended hereto, seems to indicate that a change might be taken from anyone. Cujacious on Nov. 53. Novel 86, on the other hand, seems to indicate that no change from a magistrate (president) was permissible, but that a defendant might ask the bishop to sit with him. According to C. 1.16.2, associate judges might be appointed. It may be said in this connection, that if special reasons existed why a president should not try a case, the emperor might be asked to delegate a special judge, or the praetorian prefect might be requested to try the case. 3 Bethmann-Hollweg 56; Steinwenter supra, 177. See generally Cujacius, Obs. 9, c. 23; 9, 135-138; 1003; 4 Donellus 1383-1395; 3 Bethmann-Hollweg 125-127.