Book VII.
Title XLV.

Concerning decisions and interlocutory decrees of all judges.
(De sententiis et interlocutionibus omnium judicum.)

7.45.1. Emperors Severus and Antoninus to Quintilianus.

The decision of your predecessor in office, rendering judgment while trying a case between a claimant and a procurator (of a female claimant), not against the procurator but the female claimant who was not in court, is without reason. You can, therefore, retry the case anew.
Given May 30 (208).

Note.

Many suits under the Roman law were prosecuted or defended by a procurator, agent, a system entirely unknown to us in the sense in which that system existed at Rome; for representation by an attorney is not the equivalent. The procurator became, after joinder of issues in the case, the principal. C. 2.12.22. And, as shown by the instant law, the judgment was against the procurator if he joined in making up the issues, and not against the principal. Title 12 of c. 2, deals with this subject, and reference for more particulars is made thereto. Nearly everyone might be represented by a procurator, and certain titled persons were at one time compelled to act in a civil case through a procurator (C. 2.12.25), but this requirement was in 538 A.D. relaxed, except as to persons of illustrious rank, as shown by Nov. 71, appended to C. 9.35.11.

The judgment being against the procurator, one would naturally expect that the action or proceeding on the judgment (actio judicati), were also directed against him. But this was not ordinarily true, unless he acted really for himself. D. 42.1.4. Headnote C. 2.12.7. The rule was otherwise, however, where a person acted as procurator for an absent person. Vat. Fr. 232; 2 Bethmann-Hollweg 444. It may be noted here that a void judgment was not res judiciata.

7.45.2. Emperor Antoninus to Sextilius.

If an arbitrator appointed by a magistrate was living as a free man when he rendered his decision, it has the force of a judgment, though he was thereafter forced into servitude.
(No day or consul given).

7.45.3. Emperor Alexander to Veltius.

The president of the province is not unaware that a final decision which does not contain a condemnation or absolution is not considered legal.
Promulgated October 1 (223).

Note.

9 Cujacius 996 defines a final decision to be a "decree of the judge made in the usual mode of judicial procedure, concerning the whole or a definite topic of the suit, which absolves or condemns the plaintiff or defendant." See for more details headnote C. 7.42.

7.45.4. The same to Severa.

It is certain that a decision rendered by the president in violation of the usual rules in administering justice does not have the force of a judgment.
Promulgated December 18 (229).

7.45.5. Emperors Phillip and Caesar Philip to Montanus.

The order of the (imperial) procurator that the property of those who were liable to the fisc as principals should be delivered to the sureties upon condition that they should pay the fisc, and no appeal having been taken from his decision, it must be obeyed.

Note.

The doubt in the mind of the petitioner for the present rescript was, according to 9 Cujacius 1001 and 1104, as to whether the decision was valid because for an apparently uncertain amount, and the rescript says that it was. See also law 2 of the next title. The fisc sued the principal debtor, and the sureties were to step in and pay the fisc, receiving in turn the property of the principal debtor, on which the fisc always had an implied lien.

7.45.6. Emperors Carus, Carinus and Numerian to Loilus.

Since you state that the decision of the president is void because he gave it not publicly, but in a secret place without the presence of his official staff, it is clear that it cannot be the basis of prejudice to you.
Promulgated November 27 (283).

Note.

The hall in which the judge gave a hearing to the parties was called auditorium or secretarium, because it was closed by a railing and curtain (velum), and free entrance thereto was granted only to the apparitors and certain persons of rank. Only the judge, the persons mentioned and the parties and their attorneys were permitted into this room during a trial, although the curtain might be removed and the public be permitted to witness the proceedings, which, however, seems to have been done in the later time only occasionally. In some cased the hearing was espressly directed to be had with the curtains raised. C. 11.6.5; Mommson, Strafrecht 362; Bethmann-Hollweg, 3 C.P. 189, 190.

7.45.7. Emperors Diocletian and Maximian and the Caesars to Isidora.

If a right of action was acquired by a stipulation, the president of the province by persuading persons related to each other to compromise, could not extinguish such obligation, which is destroyed only in a definite, legal manner; nor does every pronouncement of a judge have the force of a judgment since it has often been held that the power to render a decision is limited within definite (legal) bounds. 1. Hence, if no pronouncement is made, after the trial of a cause according to law, the voice of the president persuading a compromise could in no manner destroy your cause of action, if you had any.

Note.

See law 3 of this title and note. In this case the compromise which the president urged should be made, was evidently never made, for otherwise the original cause of action would not have been good as against a defense that the compromise was made.

The present law evidently only means to indicate that the president's action did not amount to an adjudication.

7.45.8. The same to Licinius.

If Theodota, whom you state to have been delivered to you, pursuant to a purchase or in payment of a debt, was judicially pronounced to be a free woman, the decision cannot be vacated without appealing. 1. But if judgment was rendered after suit was started, and notice thereof was given to the vendor of the woman, you are not forbidden, in an action on the purchase, to recover your damage from him if you bought her, or sue to recover your debt, if she was delivered to you in payment of such debt.

Note.

The instant law deals mainly with the subject of eviction, and the right of the grantee of property, the title to which was found defective, to sue the grantor, rather that with the validity of judgments. The subject of eviction is dealt with in C. 8.44. Every grantor of property impliedly guaranteed title to the property.

7.45.9. The same to Domnus.

After a final decision, which is limited by definite (legal) bounds, has been given, a subsequent decision of the same question, made either by the judge who gave the first or by his successor, does not have the force of an adjudication. But a judgment as to possession does not prejudice the question of ownership, nor interlocutory decrees, generally, destroy a cause of action.
Subscribed April 3 (294).

Note.

A final decision rendered in the case exhausted the power of the judge. As soon as he had rendered his decision, he ceased to be judge in the case. C. 7.44.3, note. Possession and ownership, however, were two different things. A judgment might be rendered for plaintiff for possession, under the interdictal procedure mentioned in C. 8.1, etc., but that did not determine the title to the property, and hence, though a judge had rendered a judgment for possession, that did not debar him from rendering another judgment in regard to the title of the property. See C. 7.48.3.

7.45.10. The same to Menodorus.

No one who lacks the power of rendering judgment can compel anyone to leave his native country.

7.45.11. The same to Titianus.

It is clear that when a judge merely directs in his final decision that an oath shall be taken, but fails to provide[1] for the consequences following the refusal to take it or the taking of it would by such decision have no validity (as a final judgment).

Note.

It has been shown that a judgment must absolve or condemn. At C. 4.1.11 and 12, it is shown that under certain circumstances an oath might be tendered by the judge to a party, to swear whether the claim made against him was correct or not. The present law

[1] Blume penciled in “add what” above “provide,” without striking the latter.

states that an order is not a final decision if the judge merely tenders the oath, without also stating what the consequences would be of the taking of the oath or the refusal to take it. See 9 Cujacius 996.

7.45.12. Emperors Arcadius and Honorius to Julianus, Proconsul of Africa.

Judges may give decisions in Latin as well as in the Greek language.

Given at Milan January 9 (397).

7.45.13. Emperor Justinian to Demosthenes, Praetorian Prefect.

No judge or referee needs to follow the answer to an inquiry directed by him to the emperor (consultatio[2]), which he does not believe to be correct, much less the opinions (in answer to inquiries) of the eminent prefects or other high officials, or even the judicial decisions of the high prefecture or of any other of the highest magistrates. For if a wrong decision has been given, the vice of that should not be given by following examples, but should be given in accordance with law. We ordain that all our judges must follow in the footsteps of truth, of law and of justice.

Given October 30 (529).

Note.

Every judgment must be according to law. While this law warns against following precedent, it did not and could not take away the force thereof. Quintilian, De Or. 5.2.[3] In fact, D. 1.3.38, says: "The reigning Emperor Severus laid down the rule that where doubts arise under laws, custom and the authority of interpretation in the same way, should have the force of law." See 33 Z.S.S. 226ff; C. 8.52.1.

7.45.14. The same to Demosthenes, Praetorian Prefect.

Since Papinian, a man of great genius, rightly held in his "Questions" that a judge may not only decide in favor of a defendant, but may also condemn the plaintiff, if he should be found to be liable (to the defendant in a counter-action), we ordain that opinion should not only be confirmed, but we also extend its application and ordain that a judge may give judgment against the plaintiff and order him to give or do something, and no objection that the judge was not competent to give judgment against the plaintiff shall be valid. For a man whose decision he respects when acting as plaintiff, should not deem the same judge unworthy to render a judgment against him in the same suit.

Note.

The gist of this law is that even though the judge hearing the case would not have been competent to act, on account of residence of the plaintiff or otherwise, if the defendant had sued the plaintiff for the claim he might have against the plaintiff, still where the plaintiff sued the defendant, the claim which the latter might have against the former should be able to be adjudicated in the same suit. Papinian evidently had held that to be true only in case the judge sitting in the case had jurisdiction of the person of the plaintiff, if the defendant had originally sued the plaintiff. In other words the principle here laid down is that where a plaintiff submitted to the jurisdiction of the court by suing,

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[2] [Blume] See C. 7.61.

[3] This penciled insertion appears to read as given. It seems likely to refer to Psuedo-Quintilian's Declmationes Miores.

he submitted to the jurisdiction of the court also for the purpose of having the claims of the defendant against him adjudicated in the same suit, a principle also recognized in our law, provided, of course, that the cross-claim is one properly set up in the case. See also C. 7.51.5.1, and Nov. 96, c. 2.

Savigny System § 290, in discussing this law, says that Papinian had held that the plaintiff in this suit could be condemned though no affirmative counterclaim was set up, and that this opinion was confirmed by Justinian. He bases this upon the theory that prior to the time of Papinian, as held by Gaius, an offset might be allowed in good-faith actions without pleading it - setting it forth in the formula - but that a claim larger than that of the plaintiff, a counterclaim, was required to be set up, and embodied in the formula, and that Papinian must have intended to have enlarged this principle so as to allow a counterclaim even though not set up. This conclusion does not appear to be necessary to be drawn.

As to offsets and counterclaims, see C. 4.31. See also Plank, Mehrheit etc., 85, 86.

7.45.15. The same Emperors to Julianus, Praetorian Prefect.

The constitution orders that if many points are involved in a suit, the judge may give a final decision as to some of them, and thereafter proceed to investigate others and again give a decision on them, and he shall not be compelled to pronounce his decision on all the points at once.

Note.

This law shows that it was not necessary to decide all points of a case at one time by a final decision, but that definite points, disposing of a definite issue in a case might be decided at different times. This somewhat obscures the distinction between an interlocutory and a final decision. Appeals under Justinian could be taken only from final decisions, and it is somewhat doubtful whether the decisions mentioned in the present law were classed as such or not. 3 Bethmann-Hollweg 327. See note to C. 7.62.20.

Plank, Mehrheit der Rechtsstreitigkeiten 90, cites this law to the effect that the various claims (gegenstände) could be decided separately and that, perhaps, is nearer correct, the decisions thereon being final so far as these particular claims were concerned.

7.45.16. The same to Julianus, Praetorian Prefect.

As it been customary to frame interlocutory orders to the effect that the parties should not be permitted to appeal from or object to the judge before final decision, some have thought that parties could not, before joinder or issue, object to the judge (recusare), any more than to appeal from him. For as both expressions, "appeal" and "objection to the judge," are used together, and as no appeal can be taken before joinder of issue, they thought that the judge could not be objected to before joinder of issue. But that is not forbidden. Judges, therefore, must be careful not to use these expressions at the same time and without definite distinction.

Given November 17 (530).

Note.

Judges could be rejected before but not after joinder of issues which was in analogy to the change of judge permitted in many jurisdictions under Anglo-Saxon jurisprudence. The subject is more fully treated at C. 3.1.16 and 18. The instant law states that it was customary for judges to make an order that no appeal could be taken in

the case, and that the judge should not be objected to before the final decision. But that only meant that no appeal could be taken or objection to the judge made after joinder of issue and before the final decision. The rejection of the judge in such case would have been substantially the same as taking an appeal. Justinian did not object to such orders being made, but made it clear that this would not prevent objection to a judge before joinder of issues. Appeals could not be taken until after final decision. See not to preceding law. See also 9 Cujacius 1003; and Bas. 9.1.82, and note to C. 7.62.20.