

Book VII.
Title LI.

Concerning fruits and expenses of litigation.
(De fructibus et litis expensis.)

7.51.1. Emperors Diocletian and Maximian and the Caesars to Acta.

By the term "fruits" (profits) is meant what remains after proper expenses have been deducted.¹

April 3 (294).

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

A litigant who is defeated and who after summons of a suit remains in possession of another's property, is not only bound to restore the property and the fruits which he received, but he must also restore the fruits which he could have received - not only those which he actually received - from the time when he received notice through joinder of issue that his title is bad. An heir who succeeds to a bad title is subject to the same fate. Given at Trier February 23 (369).

Note.

See full discussion as to fruits received by persons in good and in bad faith, C. 3.31.1 note.

Fruits, as shown by law 1 hereof, meant the net fruits after the deduction of the expenses in connection therewith. The phrase "re in iudicium deducta" refers to joinder of issues (litis contestatio). Gothofredus ad C. Th. 4.18.2. The instant law introduced the new principle that the property and the fruits could be recovered in one and the same action. Girard 36 note 1. See C. 7.53.7, which also deals with the question at whose risk the property was held.

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

When a suit has been terminated and finished, no action shall thereafter lie, even pursuant to an imperial rescript, to recover the expenses thereof, unless the judge who rendered the decision in the main suit has, by judicial pronouncement, declared, in the presence of the parties, that the expenses should be paid to the victor of the cause or when a complaint to recover them is available under the law. For it is wrong that after a suit is terminated and finished, another action should arise out of the matters involved in the first one.

Given at Constantinople March 30 (423).

C. Th. 4.18.2.

Note.

The judge sitting in the case was required to take the costs into consideration as shown hereafter in this title; but if he did not, no separate action for these costs existed; the party entitled to the costs might, however, have recourse against the judge, if no adjudication whatever as to them had been made.

¹ [Blume] Note C. 7.51.1. Fruits were either natural, consisting of crops, offspring, wool, hair, milk, etc. or civil, such as rent. Inst. 2.1.37.

7.51.4. Emperors Valentinian and Marcian, an Edict to the People.

Let the man at whose instigation a defendant is, pursuant to law, dragged to a distant court, not forget that if the case is protracted through his fault, or if he fails to be present or fails to prove his allegations, he must suffer the penalty fixed by law for vexatious litigation, and he will, in a civil cause, aside from the defendant's costs and expenses, taking into consideration the amount demanded by plaintiff, or the distance of the journey, be condemned to pay an amount in the discretion of the judge.

Given at Constantinople October 11 (450).

Nov. Marc. 1.1.7.

Note.

As shown by this law, the actual costs of defendant, to the reimbursement of which he was entitled in case he was successful, included not only the ordinary court costs but the expenses of his journey as well. Bas. 9.3.68. Inst. 4.16 deals at length with the subject and penalty of vexatious litigation both on the part of the plaintiff and defendant. See also Gaius 4.171-181. Such litigation was sought to be curbed by requiring the parties, as well as the attorneys in the case, to take an oath that the cause or defense was just. C. 2.59; C. 3.1.14.1; Nov. 49, c. 3. In certain cases, as for unlawful damages, the defendant was liable for double or triple of the original claim, if he denied liability. In various cases, as in an action for the penalty of theft, the damages were multiplied in the very beginning of the action. Originally a defendant had a right to set up a claim for dishonest litigation, and the plaintiff was condemned, if he was shown to have acted dishonestly, in an amount equal to a tenth part of his claim, and in some cases for more; but, says Justinian, this penalty was never inflicted. Notwithstanding that fact, however, he enacted Nov. 112, c. 2, appended to C. 2.2.4, claiming to have found a new remedy, and providing that no summons should be served in a case "unless the plaintiff * * furnishes a bond * * promising that * * if he is subsequently shown to have commenced the suit unjustly, he will pay the defendant, on account of costs and expenses, the tenth part of the amount mentioned in his complaint."² Where such penalty was assessed, which would be only in exceptional cases, it doubtless covered all costs and expenses of defendant. See Bethmann-Hollweg, 3 C.P. 232.

7.51.5. The Emperor Zeno. (Synopsis in Greek).

The constitution ordains that every judge shall, in his decision, order the defeated party to pay all expenses of litigation, giving permission to the judge to order the payment of one-tenth more than the amount paid out, whenever the insolence of the defeated party gives him cause to do so, provided that the amount over and above the expense shall go to the fisc, unless the judge gives a part of it to the victor in order to repair the damages which he has sustained.³ 1. And not only may the plaintiff and defendant be so condemned when the judge has authority to give judgment against either

² Asterisks in Blume's original.

³ [Blume] The penalty of a tenth here mentioned is altogether different from that mentioned in the note to the preceding law. It has reference merely to ten per cent being added to the actual costs and expenses. If they amounted, for instance, to 100 gold pieces, the condemnation might be for 110 gold pieces.

party, but also when he (ordinarily) as no such power over the plaintiff, but the latter is defeated by a counter-claim, since he cannot (in such case) object to the judge⁴, whether he is the president or a judge appointed by the emperor - for apparitors and executive officers are also attached to the latter. 2. If the judge fails to do so, he must himself make the damage good to the victor. 3. In case, however, a defendant (against whom judgment is rendered) shows his good faith by paying, or if the plaintiff abandons the suit, or the judge believes that he is not a malicious suitor, but that the case, in which he was condemned, was doubtful, he will escape condemnation to pay the costs. 4. It is proper, moreover, for the official staff of the magistrate (president) to assign an apparitor to the petty judges to carry out these provisions.
Given March 26 (487).

Note.

The present law (C. 7.51.5), giving the judge power to release a party from payment of costs, was passed in 487 A.D. Subsequently in 530 A.D., Justinian enacted C. 3.1.13.6, which provides that the losing party must in all cases be condemned to pay the costs. That provision, perhaps, threw some doubt on the power above mentioned, but the question was set at rest by Nov. 82, c. 10, which confirms such power.

7.51.6. Emperor Anastasius to Stephanus, Master of the Soldiery.

Since some persons claim the privilege either under laws, imperial constitutions, or special grants of having to pay only a certain amount as fees for summoning the defendant, and less than the usual amount of expenses of suit or none at all, we order by this law, that whoever has now, or hereafter in any manner receives such privilege, may know that if he himself sues anyone, as though liable to his, in a criminal or civil cause, the defendant shall have the same privileges, since it is not to be tolerated that those who, as stated before, claim the aforesaid prerogatives, should be permitted to seek from their opponents anything more than they would pay if sued by others. And this rule shall be followed in every respect in connection with all privileges, given or hereafter given by grants of bounty or generally to any officials, departments, persons of rank, or to individuals by special grant, whether this is expressly stated in imperial orders or rescripts or not.

Note.

To the same effect as the present law is C. 12.19.12.4. Certain persons enjoyed a privilege either exempting them wholly or partially from the payment of costs. Those enjoying partial exemption were: the counts of the imperial consistory; members of the imperial bureaus; the imperial couriers (*agentes in rebus*) and their chiefs, soldiers on duty, clergymen, except bishops, and others. Complete exemption therefrom was enjoyed by advocates, bishops in their private affairs, the church, the fisc and poor litigants. Bethmann-Hollweg, 204; C. 12.10.2; C. 12.21.8; C. 12.35.18; C. 1.3.25 and 33;

⁴ [Blume] The judgment against the plaintiff here mentioned probably referred only to the judgment for costs, and not a judgment on a counterclaim against the plaintiff, since Justinian in C. 7.45.14, introduced, seemingly, the new principle that a plaintiff could be condemned on a counterclaim and could not raise any objection to the jurisdiction of the court. Plank, Mehrheit d. Rechtsstreitigkeiten 83.

Nov. 123, c. 28; C. 2.7.26.6; Nov. 17, c. 3. The present law, accordingly, provided that the adversary should enjoy the same privilege in any case as they themselves.