

Book I.
Title LVI.

Concerning municipal magistrates.
(De magistratibus municipalibus.)

1.56.1. Emperor Constantine to Florentius, Praetorian Prefect.

Decurions should be nominated to the magistracy or to the duty of collection of payments in kind three months or more ahead, so that if their excuse appears to be just, another may be substituted without trouble in filling the place.

Given at Constantinople April 13 (323).

C. Th. 12.1.8.

Note.

As stated in headnote, to C.1.55, magistrates of cities (other than the defender) were nominated from among the decurions, i.e. members of the municipal councils. The position was a burden rather than an honor. Some persons were exempt, but could make their claim of exemption effective only through the governor. This point is more fully stated at note to C. 10.32.1 and the sources there mentioned.

1.56.2. Emperors Valentinian and Valens to Germanianus.

(Municipal) magistrates shall have the power of making public records (conficiendorum actorum-potestaten).

Given December 20 (366).

Note.

Acts and the later gesta and monuments were the records—written statements—of the oral proceedings before senates, magistrates and judges and others who had the right to make such records. Acta conficere meant to make such records. Thus a record (acta, gesta) was kept of the proceedings of the Roman senate, and, of course, of the proceedings, of the municipal councils or senate in the various cities and towns in the empire. So, too, judicial records were kept in contentious and non-contentious business. Among the latter were records of manumissions, adoptions, the appointment of guardians, curators, and the like, all of which could be done when court was not in session—that is to say, in chambers or any other place. But those records do not seem to have been required until later times. Contentious judicial business resulted during the so-called formulary procedure (C. 2.57) in a written instruction to the referee. Some records must at all times have been kept by the magistrates, but seem not to have been compulsory before Cicero's time. In later times, they were required to be kept in complete form; all proceedings, including the talks of counsel and the testimony of witnesses were, in substance, taken down in shorthand; the notes were extended and the records as extended subscribed by the magistrate or judge. So, too, final decisions were required to be in writing. C. 7.44. The parties were entitled to a copy of the proceedings as fully made up, upon payment of a fee. C. 7.2.32.2. And see 3 Bethmann-Hollweg 198-199; Steinwenter, Beiträge 5, 6, 7, 14; Mommsen, Strafrecht 514; Wenger, Institutionen 290. Acta conficere might, accordingly, be the equivalent, as in C. 1.55.2, to holding court. Originally official records were the property of the magistrates and kept in their private possession. But this was changed, for imperial magistrates, at least in the beginning, when such records were required to be kept in public archives. Mommsen,

supra 519; Steinwenter, supra 15, 25. This requirement as to municipal magistrates appears to be of later date.

The term *acta* or *gesta conficere* meant, properly, to make a record of oral proceedings. We meet with the term *insuare* and *insinuatio*, which referred to the enrollment, recording, in the public record of a document already executed. Thus some gifts were required to be enrolled on the public records, and if the document evidencing it and executed, say, before a notary, was filed with a public official who had the right to make and keep public records, it was read and then recorded in full on the records. This was *insinuatio*. Steinwenter, supra 85; 1 Karlowa 1002; Girard 993-994, note. But the donor might go before this public official, tell him of his wishes to make a gift. The official would then dictate the terms of the gift to his shorthand writer, which when drawn up, would then be acknowledged as correct by the donor, certified and kept as part of his public records by the official, the parties interested being able to obtain a copy thereof. Steinwenter, supra 30. This was *acta conficere*. The result in both instances was the same—the gift was made of record, entitled to full faith and credit, as was a certified copy of such record. In fact any private document, if executed in the form required by law, might be taken to an official here contemplated, have it enrolled in the public records, thus making a public document out of it, to which, or to a certified copy of which, full faith and credit was given in all the courts. To give another illustration: A will might be made as a public will (*aud acta conditum*) by a testator, by the latter going before such official, telling him of its terms and having a public record made thereof in the same manner as stated above in the case of a gift. In such cases it needed no witnesses and no formality other than already mentioned. C. 6.23.19. In other cases, witnesses were frequently required. Making of such records of oral proceedings is frequently referred to in this case, and hence it is important to bear in mind what has been said. We find expressions, e.g. to the following effect: *Apud acta promittere, deponere, appellare*, and many others of similar character. They signify that an oral statement was made by a party and record thereof made by the proper official, this record having, as already stated, full faith and credit. By the *jus actorum conficiendorum*—the right to make records of oral proceedings—was probably understood the extension of the right already possessed by judicial authorities to make records of the proceedings which fell under their inherent jurisdiction. Steinwenter, supra 32. The right was possessed not only by the governors, but also by municipal magistrates; the *duoviri*, curator, and later the defender. In some cases where the proper authority refused to or could not act, as e.g. in the case mentioned in C. 1.55.8, the *tabularius*—city clerk or accountant—could and was required to act, making records of certain transactions. 1 Karlowa 1002. Bishops, too, and perhaps other ecclesiastical authorities obtained the right. In the capital it was possessed by the master of the census (C. 8.53.30.32), and in Alexandria by the *juridicus*. C. 1.57.1. See Steinwenter, supra 35. The right extended to make a record of matters required to be made of record in (a) matters, as of notices of births, declarations of faith (C. 1.55.11), protests by a father against his son becoming a *decurion* (D. 50.2.7.3); (b) in judicial matters, such as objections against a judge, oaths, declarations of wrongs (C. 1.55.9); (c) in matters relating to private rights, as remarriage of soldier's wife: C. 5.17.7; as to honesty of a sale of property by a creditor; (C. 7.72.10.2); notice in connection with certain leases, (C. 1.4.32.2); as to emancipations, adoptions and manumissions (C. 8.48.6; C. 8.47.11; C. 7.6.1 2.10); in some cases of guardianship (C. 5.35.3); in connection with gifts (C. 8.53). See for greater details, Steinwenter, supra 39-55. The right which these officials had of making records included also, as already

indicated, the right to enroll on the records privately executed documents. These records were kept in archives. The information as to these archives is not great. We hear of provincial, municipal and church archives. That those in municipalities were not always kept up, appears from Novel 15 pr. Notaries, doubtless, had archives or filing places of their own, as also had at least most of the higher officials of the government. Archives must have been indispensable in their case.

Documents as to private transactions. There was no general system of registration among the Romans as among us, and in fact registration of documents in public archives was practiced much more and was much more fully developed among the Greeks than among the Romans. The Greeks carried their custom to Egypt and many papyri have there been found in recent years which illustrate the execution and registration of documents. Many books have been written on the subject. But among the Romans only in a comparatively few cases were public records required. Contracts of sale, mortgage, pledge, and other private contracts were not required to appear on the public records, though transfers of real estate were at one time at least (note C. 4.47.30) required to be noted on the tax records. There must accordingly have been considerable uncertainty as to titles and liens. But the population probably did not—and during the latter empire—could not move about a great deal, and since the system of registration was known to the Romans, it is probable that it would have been adopted generally if that had been the requirement of business and commerce. See note C. 8.17.2. To what extent public officials who kept public records were employed to assist in drafting such documents (by reason of which these would become public) is not known. Governors, in any event, could, probably, not ordinarily be employed at all. Most of the work of drafting documents, particularly those relating to ordinary transactions, probably fell on the notaries (*tabelliones*) who were quasi-public officials and whose occupation was regulated. Pfaff, Tabellio und tabularius 32. But no full faith and credit was attached to the documents certified by them. Some, but only a little more credit was attached to them than to documents drafted by any private individual, and they had little more force than documents simply attested by the required number of witnesses and the requirement as to witnesses to certain documents was not at all dispensed with by reason of the drafting and certification of the documentary by a notary, and he was but considered one witness. Pfaff, *supra* 32, 41, 42, 47. See C. 4.21.19 note. Nor is it known to what extent privately executed documents were recorded—enrolled on the records. Steinwenter, *supra* 83-92, has examined the subject somewhat at length, particularly as to the municipal archives, and he has concluded—though there is a diversity of opinion on the subject—that except in the case of testaments and of gifts not a great number of private transactions appeared customarily on the public records or in the public archives. But he thinks it possible that the record keepers of the archives of the church also took private documents into their custody. Page 81. And it is clear from Novel 73 that Justinian encouraged their writing to be made public documents. Private documents and the form of transactions were, however, regulated by law to some extent. Some, though not many, transactions were required to be in writing, but it was customary to reduce them to writing. A formal will required witnesses. Five witnesses were required to be in writing, but it was customary to reduce them to writing. A formal will required witnesses. Five witnesses were required in the following cases: to codicils, and gifts *causa mortis* (C. 8.56.4); to documents required to be in writing, when a party thereto could not write (Novel 73, c. 8); to manumissions by letter and among friends (C. 7.6.1); to certain protests to toll the statute of limitation

(C. 7.40.2); to documents as to loans and payment thereof, where the amount involved [was] more than 50 pounds of gold (C. 4.2.17); to documents which were to be used as a basis of comparison of handwriting (C. 4.21.20); to certain declarations of parentage (Novel 117, c. 2); to declarations of a husband as to the infidelity of a wife (Novel 117, c. 5), and to a document of suretyship by a wife (C. 4.29.23). The requirement of three witnesses in these cases was, perhaps, only an extension of the class of cases in which three witnesses were already customarily used. 1 Karlowa 99. No witnesses were ordinarily, in later law at least, required to gifts in writing which were not required to be registered, the document evidencing the gift was not required to be witnessed as a prerequisite to registration. C. 8.53.31; see also Novel 52. c. 2, providing that gifts to the emperor need not be in writing, but requiring witnesses. Justinian made further requirements as to formality of executing documents as well as records. By Novel 47, they were required to contain the name of the emperor, the year of his reign, the consulship, the tax year, the month and day. Novel 44 made certain requirements as to what notarial documents should contain. By C. 4.21.17, notarial documents of purchase, sale and exchange were not valid if only in rough draft, provided the parties had agreed that it should be reduced to writing, but were valid only if the final draft was signed by the parties, certified by the notary by “complevi,” and then certified by the proper party to the instrument that it was completed and ready for delivery to the opposite party. See C. 4.21.17 and note, and Novels 44 and 47; and see further Pfaff, Tabellio und Tabularius 40 et seq.