Book III.
Title II.

Concerning the fees and expenses incurred in various courts and concerning the process-servers (exsecutoribus)[1] of lawsuits.

(De sprtulis et sumptibus in diversis judiciis facendis et de exsecutoribus litium.)

Headnote.

Fees of officers. The system of fees paid to the officials of a magistrate appears not to have been known until toward the middle of the fifth century of our era. 3 Bethmann-Hollweg 200 says that the Theodosian Code knows nothing of this system. The magistrate himself, like the governor, vicar, praetorian prefect and other magistrates did not share in the fees, but they were paid to the official staff and other officers and clerks connected with their office. Fees were paid to the process-servers, as stated in note to law 4 of this title. That was true also in order that either party might have his case taken up in court, the fees for certain privileged persons amounting to from one to three solidi. So the persons who took down the proceedings in shorthand and extended them and gave a copy thereof to the parties were paid fees, amounting to one-half to two solidi in case of certain privileged persons. The ordinary amounts paid are not definitely known, although probably in reasonable proportion to those above mentioned, and the fees varied in the different courts, being higher in the higher courts. Lydus, De Mag. 3. 25, reports that for a one-sided proceeding in the court of a praetorian prefect, 37 gold pieces were paid. 3 Bethmann-Hollweg 203 note. Certain officials enjoyed the right, when sued, to pay only a limited amount, less than the regular fees. C. 12.10.2; C. 12.19.12.1; C. 12.21.8.3-8; C. 12.25.4.2; C. 12.29.3.2; C. 12.35.18.2 (soldiers). Other persons, as advocates, bishops in their private affairs, poor persons, and the church and the fisc were wholly exempted from the payment of fees. C. 7.22.2; C. 2.7.26.6; Novel 123. 8; Novel 17, c. 3; Cass. Var. 9.14; Novel 82, c. 9.

Referees and arbitrators received fees. Thus referees appointed by Justinian in Constantinople received 4 solidi in cases involving 100 solidi and more, in addition to a salary of about144 solidi. Nov. 82, c. 9. Smaller fees for arbitrators were provided to be paid by certain privileged persons. C. 12.19.12.1; C. 12.21.8; C. 12.25.4. See generally on this subject, 3 Bethmann-Hollweg 200-204; Wenger 323-324.

The exsecutor litium—the process-server in the case—was in all probability an official attached to a magistrate or other person acting as the judge, or who, in any event, was a public official appointed for the purpose, so as to make his acts official. 3 Bethmann-Hollweg 249; Steinwenter, supra 129-134; Wenger, 266 and note 24, referring to contrary opinion of Partsch; Girard, Manual 1141, note 2, referring to Thomas, Etudes; 1 Girard, Manual 378-416, which indicates that such process-server might have been a person selected by the plaintiff.

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[1] In the typewritten manuscript, Blume translated this as "bailiff." In the course of editing, however, he struck bailiff in most instances and penciled in "process-server." Scott uses "executive officers of the court." See 6 [12] Scott 267.

3.2.1. Emperors Gratian, Valentinian and Theodosius to Potitus, vicar.

We order that if a person is arrested, he shall be guarded y the process-server (apparitor) to whom he is first assigned. If this order of our clemency is by any authority disobeyed, the primiscrinius (chief) who dared to violate our order shall be punished by a fine of 5 pounds of gold.

Given October 25 (379).

C. Th. 8.8.2.

Note.

Gothofredus maintains that the foregoing law related to arrests and custody of defendants in criminal cases. But this is an incorrect view. C. 9.4.6.[2]

3.2.2. The emperor Justinian to the duke of the Thebaid. (Synopsis in Greek.)

Those who act as messengers of edicts of those who are about to be civil or military magistrates, shall not receive more that 15 gold pieces from the provinces. If they accept more, they shall repay four times the amount thereof, and cannot use the excuse that the unlawful amount received by them was voluntarily paid. 1. So far the constitution is general. But it fixes a special punishment against the duke of the Thebaid, to whom it is addressed, and against those who, after him, fill that magistracy, if they do not collect the fixes fine from those who violate this law.

Note.

Cujacius, 12 Obs. 22 (and Otto, Schilling and Sentinnis, evidently following him), interpret the first sentence, of this law as follows: "Those who carry the imperial edicts, concerning those who are to conduct a civil or military magistracy, into a province" etc. But this interpretation does not seem warranted. The law seems to refer to the messenger of orders sent out by a magistrate about to enter his province which he is about to govern. C. 12.60.7 and C. 12.63.2, provide that a messenger sent to a province with announcement of a new law, appointment of consuls, etc. shall receive no more than six solidi, and these laws would seem to be inconsistent with C. 3.2.2, if interpreted as Cujacius does, since the messenger there mentioned was to receive not more than 15 solidi.

3.2.3. The same emperor to Julian, Praetorian Prefect.

We grant power to all our judges—those of illustrious, worshipful or honorable rank, and advocates of the forum of every prefecture and all cities to whom lawsuits are (specially) assigned by our imperial majesty, and persons to whom cases are to be assigned by our judges—when the apparitors[3] are negligent in laying the case fully

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[2] Following this statement, Blume made additional comments, some of which are struck through. Some of these strike-throughs appear to have been erased, making it very difficult to know what he intended. Referring to criminal cases, he notes that they are covered in C. 9, titles 3 and 4. Blume then goes on to write: "He [Gothofredus] maintains that the foregoing law would better have been placed in either of those titles. It may be, however, that it was intended to refer as well to arrests and custody in civil cases, which, as shown in note C. 2.2.4, and law 4 of this title, was possible."

[3] Blume changed "court bailiffs" to "process-servers" then, finally, to "apparitors" here and in the two other places in this law where the term appears. Scott uses "their subordinates." See 6 [12] Scott 268.

processed (made ready) before them[4] to remove them from their post, and supplant them by others who are more efficient, or to punish them also by a fine, which must be limited, if imposed by a person of illustrious rank to six solidi, if imposed by others to three solidi, and report it to the judges (magistrates) whom it concerns, so that the apparitors may be shorn of their office and visited with corporal punishment. 1. Our highest judges have power to impose greater fines and inflict severer bodily punishment upon the apparitors when the later conduct themselves badly in connection with lawsuits, so that they may know that suits are not to be make playthings by them, nor damaged by their greed.
Given March 28 (530).

3.2.4. The same emperor to Julianus, Praetorian Prefect. (In Greek.)
We ordain that a person who is entrusted by the emperor or by one of our glorious magistrates to prosecute[5] a public or private suit shall summon such defendant before he communicates the orders to him—for sometimes these should be (temporarily suppressed—but he shall not take any fee (sportulas0 from him, nor take him into custody, till he has given him a copy of the imperial or other high order pursuant to which he summons him.
1. If he has an order, relating to public or private affairs, of any other magistrate or of a person governing a place, he shall not take the defendant into custody, nor take any fees from him until he has first informed the president of the province (where the defendant is), so that he may be authorized to take the accused away from there, and until the petition or criminal complaint shall be delivered to the defendants.[6]
2. If the process-server [bailiff][7] summons the defendant or demands his fees without complying herewith, the latter may resist him.

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[4] Blume seemed unsure about this translation. His typed original read: "…are negligent in making service in cases given them in charge…", but he placed a question mark in the margin and did not line out that translation when he penciled in above it the language shown in the text. He also added the following note: "Si cessaverint causas eis instructas offerre. Bas. 7.6.19, has 'in litibus offerendis.' The meaning is probably that given in the translation. The term executor generally referred to officers whose particular duty it was to serve papers, although that was not the exclusive meaning and could refer generally to the duty of an apparitor to do or execute a certain thing. See C. 12.60." Then, in a penciled note dated 5/11/49, Blume writes: "I think executor here=apparitor who laid the cause before the judge." Scott renders the relevant thought as :"…if they neglect their duties…" 6 [12] Scott 268 (in C. 3.2.2).
[5] The typewritten original reads "to summon a defendant." Blume struck that and penciled in "prosecute," but also added a question mark and the comment: "exsequendum-omitted in German trans." He also added in the margin "restore." It is unclear whether he meant he favored his original translation or whether he thought the word "restore" should replace some other in the translation.
[6] [Blume] This evidently contemplates that the order to summon was issued in a province other than where the defendant lived, and that the order of the resident of the province where the defendant lived should be necessary to remove defendant therefrom. This law is not in Scott, where Book II, title 2 has only 2 laws.
[7] Blume did not substitute "process-server" for "bailiff" here, but it appears to have been an oversight because the same term--"executor"—is used as in the preceding and

3. Nor shall our subjects be burdened in giving a bond or appointing a procurator. If those summoned possess sufficient immovable property, they shall only be required to give a guaranty in writing under oath;[8] if not, they must give a surety for an amount long ago fixed by law, without imposition of any other burden.

4. If the process-servers have doubt as to the sureties or the guaranty on oath, the bishop and curator, and defender of the city shall meet and determine whether the surety appears sufficient, considering the amount in litigation; this done, the process-server must accept the surety (declared sufficient by them) and must not take any money either for the bond with surety or the guaranty on oath.

5. But if perchance he is ordered by our special order or the order of one of the highest functionaries to bring the person, then if he does not deem the surety sufficient, he is authorized to reject the surety, but in such case, too, he must inflict no (other) burden on the defendant.

6. If the reverend bishop of the place permits this law to be violated, or fails to report the violator, he well offend the deity and incur the anger of the emperor.

7. So, too, if the president of the province neglects this law, he shall be removed from his magistracy and be perpetually banished.

8. The process-servers, moreover, who deliver the petitions, complaints, accusations or documents, shall receive no emolument above that fixed in the following constitution,[9] and if they do, they shall be subjected to the punishment therein fixed. Given at Chalcedon June 24 (530).

Note.

When a defendant was summoned in a civil case he was required to pay the process-server a fee proportioned to the amount involved. The amount was fixed in a constitution, as mentioned in the foregoing law, which has been lost. In private cases, as shown by the next law, it was on-half of one per cent when the amount involved did not exceed 100 solidi. The fees in cases involving a greater amount were in proportion, but are not known. If fiscal cases before the count of the crown domain, the fee was four solidi (nummi). C. 10.11.8.4. A process-server could not serve any process in another province without special order. C.12.60.7.

A defendant in a civil case was, under this procedure, further required to give a bond, either by taking a simple oath to appear, or by giving surety. A defendant who was a real estate owner, as shown herein, was not required to give a surety, but could simply take his oath to appear. The same privilege was extended to persons of illustrious rank (C. 12.1.17) and to bishops (C. 1.3.32). Other persons were required to give a surety. If they could not or would not give a bond, they were arrested and kept in custody. C. 2.2, headnote. Among these were probably the largest number of debtors—the common, ordinary run of men, who, not merely being guarded (1aw 1. n. t.), but put in jail, were often brutally mistreated, forced to abandon whatever defense they might have, and compelled to give up whatever property they had to satisfy the plaintiff's claim, however unjust it might be. 43 Z.S.S. 512 ff. See C. 1.3.32. Justinian attempted to moderate the practice by limiting the time of confinement. C. 9.4.6. Women and some privileged men

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subsequent subdivisions where he changed "bailiff" to "process-server." Blume has also added at the top of the following page, unattached to any sentence the following: "See 46 Z.S.S. 385 'executor," 46 Z.S.S. 344-345, Festgabe Hanausek—Steinwenter 36 ff.

[8] [Blume] For their appearance.

[9] [Blume] This is lacking.

were exempt from such arrest in civil cases. C. 2.2, headnote. Bail could also be given in criminal, except capital, cases. C. 9.4.6.

3.2.5. The same emperor to Julianus, Praetorian Prefect.
    There is a constitution of our emperor which directs that a definite amount, in proportion to the sum demanded (by the plaintiff) in the summons, be paid as fees to the process-server assigned to the suit; it provides, for instance, that one-half of one solidi (shall be paid where to amount involved does not exceed 100 solidi; if the amount involved is greater, the fees are greater.
Given at Chalcedon June 24 (530).

3.2.6. The same emperor.
    [Nothing under this preserved.]
Given at Constantinople June 1 (533).