Book III.
Title III.

Concerning court referees—petty judges.
(De pedaneis judicibus.)

Bas. 7.3.28.

3.3.1. Emperor Gordian to Vican.

It is clear that our procurator, not also acting as president, has no power to appoint court-referees for private persons; and, therefore, if, as you allege, the person whom you mention undertook to appoint referees for private persons, the decision given by them has no force.
Promulgated February 1 (242).

Note.

An imperial procurator had no jurisdiction in civil cases, but only in fiscal cases, and orders given by him, accordingly, in the former class of cases was absolutely void. But if the parties voluntarily submitted to his jurisdiction, the judgment given by him was valid. C. 3.13.1. See C. 7.48.

3.3.2. Emperors Diocletian and Maximian and the Caesars say:

It is our will that the presidents themselves take cognizance of cases which they heretofore were accustomed to refer to court-referees, because they could not themselves try and decide them; provided that they shall have power to appoint court-referees if they are unable to investigate al the suits on account of public business or the multitude of cases. This must not be construed to mean that they may appoint referees also in those cases which they were heretofore accustomed to try by virtue of their office. Such cases must be tried and decided by the presidents, so that their jurisdiction will not appear to be abridged. Actions as to free birth and liberty of which they themselves heretofore customarily took cognizance, must be decided by themselves.
Given July 18 (294).

Note.

Formulary procedure abolished—referees. The foregoing, issued by Diocletian in 294 A.D., directs the president of a province to try cases personally, except where pressure of business required them to be referred to a referee-pedaneus judex. The law was the first definite law looking toward abolishing the formulary procedure, in which a suit was divided into two parts: proceedings before the magistrate (praetor), and proceedings before a referee (judex). Note C. 2.57.2. A rescript issued in 342 A.D. shown in C. 2.57, formally and definitely abolished the use of the formula—instructions by the magistrate to the referee (trial judge—C. 2.1.1.)—which, doubtless, had still been in use to a more or less extent notwithstanding the enactment of Diocletian in 294 A.D.

The transition from the period of the formula to the period of the extraordinary—henceforward the ordinary—procedure, in which a suit might be begun, tried and ended before one judge, without a division of the suit into two parts, did not take place at once. The enactment of Diocletian was not a radical departure, as it would seem to indicate. A change as great as that does not ordinarily come about in law; changes are generally gradual and the process of evolution is slow. There were certain matters which even in Rome had long been tried and disposed of by the judge, the magistrate, without the

intervention of a referee, as cases relating to trusts, appointments of guardians and matters incidental thereto, enforcement of obligations to provide support for poor relatives or for a dowry for daughters, cases involving the status of persons, and some other matters. Buckland 658. And Wlassak, in his Zum Römischen Provincialprozess seems to have shown successfully that: this power of the praetor or judge in Rome was used in some of the Roman provinces almost from the beginning; that we have no evidence among the papyri found in Egypt that the formulary procedure was used in Egypt at all; and that the extraordinary procedure gradually displaced the formulary procedure, the last to give up the latter being in Rome. There is no trace, says Buckland, 660, as to Rome itself, that the old procedure was used after the middle of the third century. It may be mentioned here that it applied only to civil cases. Fiscal cases had long-since the time of Nero-been tried by fiscal officers, without the intervention of a referee, except, perhaps, during the time of Trajan. Wlassak supra 14, note 8; Steinwenter, Versaümnisverfahren 12. Criminal cases were tried in the city of Rome to a jury during part of the republic and for about two centuries during imperial times, when juries disappeared. Criminal jurisdiction in the provinces was vested from early times in the governor of the provinces. Mommson, Strafrecht 229 et seq.; Sherman, Roman Law 436, 437, 442; headnote C. 9. The jurisdiction of the various judges is more fully treated in book 1, title 26 et seq., and under title 13 of this book. Suffice it to say here that the ordinary judge, with plenary original jurisdiction in all but fiscal cases, was the governor of a province, variously called by the name of procounsul, president, rector, corrector, moderator, or by other names when civil and military power was combined. Diocletian divided the empire into small provinces, and part of the reason doubtless was to enable the governors thereof to try all important cases themselves, as directed in C. 3.3.2. But they had, in all cases, a counselor, assessor—a man who sits by—to assist them, as shown in C. 1.51. Unimportant matters in any event were, as mentioned in law 5 of this title, delegated to a referee. This was true, it seems, even in criminal cases. Mommson, Strafrecht, 249. Justinian indicated in Novel 60, c. 2, that he preferred the magistrate—judge—to try all cases, but this was impossible, particularly in the larger cities. Hence it was left to the magistrates' judgment as to whether to appoint a referee or not. D. 1.18.9. This referee was called judex, judex datus, judex pedaneus, or arbiter pedaneus (C. 2.7.25 pr.), or simply arbiter (C. 7.44.1), or other similar names. His functions were broader than those of the referee under the formulary system in that he sat in the case from beginning to end, his decision being appealable to the power that appointed him. Headnote C. 7.62; Mommson, Strafrecht 250; law 3 of this title. This referee must not be confused with the arbitrator, selected by the agreement of the parties without resorting to a court, considered in C. 2.55. The right of the defendant to reject a referee, and the subsequent choosing of another referee, called arbitrator in C. 3.1.16, has already been considered in C. 3.1.16 and 18 and note. He was probably ordinarily appointed before service of summons and named therein, but issue might be made up before the magistrate, and the case sent to a referee thereafter. Steinwenter, supra 63. 3 Bethmann-Hollweg 121 et seq., took the view that the selection was made mainly from among the advocates, and this is borne out by Novel 82, and by C. 2.7.25 pr., by which it appears that a certain salary was assigned to advocates who acted as referees. A referee had no power before issues were joined by the parties. If a party failed to appear and was contumacious, he was required to refer the matter to the magistrate who appointed him, who thereupon dealt with it as required by law. Novel 53, c. 4. The only thing that he could do in a case of the kind was to send an officer to warn the defendant to appear.

C. 3.1.15 and note. He had certain powers after the parties came before him. He could fine witnesses and officials attending the case; if heavier punishment was required, he asked for the help of the magistrate. C. 4.21.15; C. 3.2.3; Novel 90, c. 1; 3 Bethmann-Hollweg 120. His power ended after he had given his decision, and the execution thereof was left to the magistrate. D. 42.1.15 pr.; D. 42.1.55. By Novel 82, Justinian provided for the appointment of special referees in Constantinople.

By Novel 82, Justinian provided for the appointment of special referees in Constantinople, who received a certain salary, some fees, and who had clerks and attendants. As to the latter, see also C. 3.1.16 and 18; C. 2.12.27; C. 7.51.5.

It would seem that when a case was delegated to a referee, a time was fixed within which a decision in the case was required to be rendered. D. 5.1.2.2. It happened, too, that when the referee was doubtful how to decide the case, he could call on the magistrate who referred it to him, for advice. C. 2.12.27.2.

3. 3. 3. Copy of the imperial letter of the same emperors and Caesars to Serapio.

It is our will that you inform the court referees, if Your Gravity appoints any as triors of a case, that they must determine the cases assigned to them by a final decision. They have no right to refer back to the presidential court cases in which they should and have the power to give a decision, especially in view of the fact that if the adjudication[1] appears unjust to one of the litigants, he has the free right of appeal from the decision in every case.
Given at Antioch March 23 (294).

3.3.4. The same emperors and Caesars to Firminus.

It is our will that whenever court-referees, appointed after joinder of issue, are necessarily busy with another trial, or leave for other provinces on public business, or die, and the case commenced cannot on this account be finished, another referee shall be appointed in their place to try the case, so that no impediment to the progress of the cause may be interposed by the intervention of such accidents.
Given November 22 (303).

3.3.5. Emperor Julian to Secundus, Praetorian Prefect.

There are some transactions which are not necessary to be tried by the moderator of the province. Presidents are, therefore, empowered to appoint court-referees to try cases which are not important.
Given at Antioch July 28 (362).
C. Th. 1.16.8.

3.3.6. The emperor Zeno.

[Nothing under this preserved.]
(486-487).

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[1] "The adjudication" is penciled in above "their decision," which has not been line out. I question mark appears in the margin adjacent to this sentence. Scott uses "decision." See 6 [12] Scott 269.