

Book III.
Title XIII.

Concerning the jurisdiction of the judges, and the competent forum.
(De jurisdictione omnium iudicum et de foro competentit.)

Bas. 7.3.38.

Headnote.¹

Courts and venue. Appellate procedure and matters incidental thereto are fully considered in headnote C. 7.62 and the laws there mentioned, and need not be considered here. Courts were sometimes divided into the highest, presided over by men of illustrious rank, the intermediary, presided over by men of worshipful rank, and ordinary, presided over by men of honorable rank—the governors of the provinces. But that division was made mainly for appellate procedure. This note deals with courts of first instance and their jurisdiction. The powers and scope of authority of most of the judicial officers, who were administrative officers at the same time, appear more in detail in connection with the laws dealing with these officers directly, in C. 1.26 et seq., and only brief outline is necessary here. It must, of course, be borne in mind that from the time of the twelve tables to the time of Justinian a thousand years elapsed, and the judicial machinery changed at various times. The judicial officers of the republic of whom there were as many as eighteen at one time (Amos, Roman Civil Law at 46)² and who were located at Rome, consisting mainly of the praetors, lost their power during the empire. Others were substituted in their stead, and this must be borne in mind whenever the term “praetor” is mentioned. Diocletian and Constantine the Great reorganized the administrative and judicial machinery of the empire during the latter part of the third and the beginning of the fourth century, and separated military from civil power. And the present note deals only with the officers who functioned in the judicial department of the government during Justinian’s time.

I. Ordinary Courts.

(1) Emperor. The emperor was at the head of the government and was the supreme judicial authority, as well as the source of all laws enacted during this time. On account of pressure of business, he could not hear many cases, but he reserved the right to hear some of them relating to minors under the age of puberty, widows and sick people. C. 3.14.1. He also decided criminal cases, after being heard by a special commissioner, against men of illustrious rank. C. 3.24.3. Supplications might be addressed to him at any time. See C. 1.19. He might delegate any case to a special commissioner, or judge, ignoring the regularly constituted authorities. As to the praetorian prefect, see headnote C. 1.27.³

(2) Provincial governors. The ordinary judge, with original and plenary jurisdiction in criminal and civil cases in the provinces, that is to say, in all places other than Rome and Constantinople, was the governor of the province. He did not, ordinarily,

¹ Blume penciled in here: “add as to centumviri.”

² This is the spine title of Sheldon Amos, The History and Principles of the Civil Law of Rome (London, Kegan Paul, Trench, 1883).

³ Blume wrote in pencil here: “As to p.p. see headnote C. 1.27.”

have jurisdiction in matters delegated to military courts, but in some cases military and civil power was vested in one man. The jurisdiction in civil and criminal cases was complete, except where special privileges were granted, as was true in the case of some persons of illustrious rank, in the case of subordinates of the highest functionaries of the empire sent into the provinces on duty, in the case of some tenants on the imperial domain, to retired advocates (C. 2.7.22.6; C. 2.7.26.6), and in some other cases. The governor could delegate cases, especially those of minor importance, to referees.

(3). In Rome and Constantinople the chief judicial officer was the city prefect. We also find in Rome the master of the census, the prefect of food supply and the prefect of the watch, both of whom were under the city prefect. 3 Bethmann-Hollweg at 64, 65. Headnote C. 7.62 (2). In Constantinople we find besides the city prefect, the master of the census, under the former, and in later times, provided for by Novel 80, the so-called inquisitor. The city prefects could delegate cases to a referee. By Novel 82, special judges or referees were provided for that city. See headnote C. 7.62 (2).

(4). Municipal magistrates, including the defenders of the city. These were able to try cases of minor importance. The subject is treated at C. 1.55.

(5). Arbitrators, chosen by the parties, to arbitrate a case between them. Certain force was by later law given to their decisions. This subject is considered at C. 2.55.

II. Fiscal Courts.

Suits in which the fisc was interested were within the jurisdiction of the comptrollers (rationales) of the fisc. C. 3.26. Comptrollers of the Crown Domain had partial jurisdiction over civil cases in which tenants of the imperial domain were defendants. C. 3.26.6 and 7. The Grand Chamberlain and his chief subordinate had jurisdiction in all civil and criminal cases involving tenants on the imperial domain in Cappadocia. C. 3.26.11. For more details see C. 3.26.

III. Military Courts.

Jurisdiction was vested in the masters of the Forces and the dukes and counts under them. They had exclusive jurisdiction over cases, criminal or civil, in which soldiers were defendants. C. 3.13.6; C. 1.46.2 and note.

IV. Courts with special jurisdictions.

It seems to have been a principle of Roman law under Justinian that a superior officer, particularly one in control of a department of the government, should have exclusive jurisdiction in cases civil and criminal, in which the subordinates of that department were defendants, the rule being relaxed when these subordinates were not on duty, and in some other special cases. Note C. 3.13.7; C. 3.23.1 and note; Novel 69. Crimes and wrongs committed by these men while in the provinces, however, at least when not on duty, seem to have been triable in the place where they were committed. Novel 60; Nov. 8, c. 12. So matters relating to taxation, too, were triable in the places where they arose. Novel 8, c. 12. And it may be noted in this connection that the privilege granted to persons to have their cases tried in certain courts might be waived, and a contract waiving such privilege was binding. C. 2.3.29. This applied not only to the persons above mentioned, but also to soldiers and all other persons having privileges in connection with the venue of their case.

V. Venue.

The question of venue, that is to say, the question where cases were triable, has to some extent been necessarily involved in what has already been said. Except where special privileges existed, as already noted, civil cases were triable either at the domicile of the defendant, or where he had his citizenship, or where a contract was to be fulfilled; criminal cases were ordinarily triable where the defendant had his domicile, and possibly where he was seized. C. 3.15. The general rule, as stated in the law, was that the plaintiff, in a civil or criminal case, should follow the forum of the defendant.

3.13.1. Emperors Severus and Antoninus to Severus and others.

Our procurator was not, indeed, a competent judge in private litigation. But since you yourselves chose him as a judge, and he, with the consent of the adversaries, rendered a decision, you must abide by the judgment rendered with your consent, since the procurator has the power of judging between certain individuals, and you, knowing that he was incompetent to act as a judge for you, never the less chose him as such. That is true also in other similar trials, both as respects the person bringing the action and the one defending it.⁴

Given January 12 (214).

3.13.2. Emperors Diocletian and Maximian and the Caesars to Alexander.

You ask to reverse the rule of law (when you ask) that the plaintiff should not follow the forum of the defendant, but the defendant the forum of the plaintiff; for where the defendant has his domicile, or where he had it at the time of the making of the contract, although he afterwards changed it, is the only place where he can be summoned. Promulgated August 27 (293).

3.13.3. The same emperors and Caesars to Juda.

The consent of private persons does not make a judge a person who is not in charge of a court; nor has his decision the force of a former adjudication.

Written December 27 (293).

Note.

Bas. 7.3.39 adds: "But an incompetent judge becomes competent by the consent of the parties," which is inconsistent with what precedes in the law. The Basilica doubtless referred to what is said in law 1 of this title, which is omitted in the Basilica; but that law had reference only to the fiscal procurator, who had jurisdiction between parties under certain circumstances, and the rule applied in his case could not well be applied in other cases not at all analogous.

3.13.4. Emperor Constantine to all the provincials.

No one shall, after joinder of issue, decline trial (examen) before the ordinary judges, and he shall not before (such trial) implore the aid of the Praetorian Prefect, the Count of the Orient, or other worshipful authority, but he must come before the appellate court by an appeal taken according to law.⁵

⁴ [Blume] C. 3.3.1 as to judgments by procurator of the fisc—referred to in the foregoing law, between private litigants.

⁵ [Blume] The foregoing law states that no one could object to the jurisdiction of the ordinary judges after joinder of issue, forbidding an appeal to any higher judge until after trial. Planck, Mehrheit der Rechtsstreitigkeiten 18; Gothofredus on C. Th. 2.1.6, seems to

3.13.5. Emperors Arcadius and Honorius to Vicentius, Praetorian Prefect of Gaul.

In criminal cases, the accuser must follow the forum of the defendant. And a person who takes his action, civil or criminal, into a prohibited forum without the sanction of an imperial rescript, or who demands military enforcement, shall, if he is plaintiff, be punished by the loss of his action in the proposed suit, and if he is defendant shall be considered as condemned (by a judgment); and the tribunes or the vicars must know what they will be punished by capital punishment, if they furnish enforcement, either in person or through the soldiers.

Given at Milan December 18 (397).

Note.

Bas. 7.3.41 states this law as follows: “Also in criminal cases the accuser must follow the forum of the defendant. If a man drags his adversary before an incompetent tribunal in a criminal or civil case without an imperial rescript, or asks for a military execution against him, his suit, if he is plaintiff, shall fail; if he is defendant, he shall be condemned.”

The foregoing law (C. 3.13.5) is peculiar. It was doubtless aimed, as 10 Cujacius 878 remarks, to prevent a party to a suit from employing force, and particularly military force, in dragging him to an incompetent forum—more especially into a military court which ordinarily had no jurisdiction over private parties (3 Bethmann-Hollweg 84, note 30; C. 3.13.6)—and there force him, with the military force hanging over him, to proceed in a case. The penalty of employing such force was severe. Ordinarily a mistake as to a forum made no difference, and, according to D. 2.5.2 pr., whenever a man was cited into court, he was compelled to obey the citation, whether the court had jurisdiction over him or not. He was required to go there and set up the defense of want of jurisdiction.

“Military enforcement”—*militarem executionem*—as mentioned in the foregoing law, cannot very well refer to anything else than to the employment of military force in connection with something in a suit. In C. 1.37.1, it was provided that soldiers might be used to help in enforcing the collection of taxes. And soldiers were used even in later times to guard prisoners, and in other criminal matters. Novel 8, c. 12; C. 9.4.4, note. But the employment of soldiers in connection with civil cases was forbidden. C. 1.46.1 provides: “Military force shall never be employed in connection with private transactions of men, either as a guard or to enforce any order.”

The forum of a defendant in a criminal case was generally the place where the crime was committed, or where he had his domicile. See C. 3.15.

3.13.6. Emperors Honorius and Theodosius to Anthemius, Praetorian Prefect.

We give the Master of the Forces the power to hear civil cases between soldiers, or where the plaintiff is a person of private station and the defendant a soldier, especially since that seems to be to the advantage of litigants, and it is known that a defendant who is in the military service can only be produced before, and punished by, his own judge, if he is at fault in anything.

Given at Constantiople April 27 (413).

think that the law applied also where a party asked for a change of judge (*recusatio*) on account of prejudice, but that is not probable, and applied merely where a party objected to the jurisdiction of the magistrate over him. Bas. 7.3.40. That such objection was required to be made before joinder of issues appears also from C. 4.19.19, and C. 8.35.13.

Note.

Military judges had jurisdiction over cases in which soldiers were parties or in which a soldier was a defendant. They had no jurisdiction over civilians in other cases. On the other hand, civil courts had no jurisdiction over soldiers in cases in which they were defendants. This subject and that of the power of military judges—the masters of the forces, counts and dukes—is mentioned in more detail at note C. 1.46.2. See also C. 12.46. 4; C. 12.37.13.

3.13.7. Emperor Anastasius to Constantinus, Praetorian Prefect.

We think it exceedingly iniquitous and rash for persons who follow a profession or business to attempt to evade the jurisdiction and directions of judges under whose care such trade or business may be.

1. Hence we order that the privilege of any imperial service, official girdle or position of rank, shall be of no avail to such persons in this respect, but persons who are or shall be among the regularly constituted number of officials in any imperial office, or who have any position of rank, shall not be able to object to the jurisdiction of, but shall be compelled to obey, the judges in all causes, public or private, who have the care of the profession or business which (the former) carry on, as has been said, outside of their public service. Provided, nevertheless, that they must also answer before the judges who have jurisdiction over their office or rank (dignity).

2. Persons who attempt to violate the tenor of this law shall, for such attempt, be despoiled of the girdle of their service and the honor of their rank.

Given at Constantinople February 15 (502).

Note.

A magistrate with a staff under him had jurisdiction of the members of the staff, and the high ministers of state had jurisdiction over the officers and clerks under them. 3 Bethmann-Hollweg 187. Thus the Master of Offices had jurisdiction, generally, in civil and criminal cases in which their subordinates were involved, and, frequently, their wives, parents, children or even slaves, as shown by C. 11.10.6, treating of weapon makers; C. 12.16.4, dealing with orderlies (silentarii); C. 12.19.12, dealing with members of imperial bureaus; C. 12. 20. 4, dealing with certain members of the imperial messengers or secret-service men (agentes in rebus); C. 12.29.2, dealing with palace guards. The Master of Offices had the right to delegate his authority to some other officers, as, for instance to the president of a province. C. 12.29.3.3. So the counts of the Imperial Exchequer and the Count of the Crown Domain had jurisdiction of the officials and clerks under them. S. 12.23.12; C. 3 26.10. See also C. 12.52.3; C. 12.54.5. And this jurisdiction so possessed was generally exclusive, in both civil and criminal cases, and was a privilege in favor of such subordinates. The rule has its limitations, particularly under Justinian and as to subordinates in provinces.⁶ So it was evidently also the aim of the foregoing law to abridge this exclusive jurisdiction, and that if men, no matter whether they occupied a place in the imperial service or not, engaged in business, subject to the jurisdiction of the judge who had jurisdiction in such matters over other persons. The city prefect, for instances, had jurisdiction over all guilds. C. 1.28.4; C. 11.17.2. So this law was also doubtless intended to declare that the privilege of the ordinary jurisdiction was lost, if the persons enjoying the privilege went into the provinces. 3 Bethmann-Hollweg 187, note 14, and see C. 3.25.1; Bas. 7.3.43. So if the

⁶ This sentence is penciled in, and there is a question mark in the adjacent margin.

subordinates really belonged to another service to which they were bound, the foregoing rule did not apply. C. 2.23.1, note. The inquisitor appointed specially for Constantinople by Justinian by Novel 80, appended to C. 1.28, was not, within his sphere, governed by any special privilege.