

Book I.
Title LI.

Concerning assessors (counselors), private secretaries (domesticis), and chancellors (cancellariis) of the judges.
(De assessoribus et domesticis etcancellariis iudicum.)

Bas. 6.1.62.

Headnote.

Assessor or counselor. Roman magistrates, from provincial governors to praetorian prefects, did not necessarily possess legal knowledge, though in later times most of the civil judges doubtless did. Hence, these judges had an assessor, ordinarily a lawyer who gave advice on legal matters. The custom seems to have originated at least as early as in the time of the emperor Hadrian, (Hitzig, Die Assessoren 46) and perhaps even earlier, since mention of assessors is found in the middle of the first century. 1 Pauly-Wissowa 423. All magistrates exercising regular jurisdiction in civil and criminal cases, including civil and military and municipal magistrates, had such assessors. The petty judges, the referees, who were generally taken from among the ranks of the advocates (C. 3.3), and persons to whom special cases were assigned did not have any. Hitzig, supra 48-50; 1 Pauly-Wissowa 424. Only men could act as such, and they could not, except for a limited time, act in their native province. Law 10 of this title and note. Before being called to the counselorship here in question, they had some previous private practice at the bar. Hitzig, supra at 81. They were chose by the magistrate and held their position at his pleasure. Hitzig, supra at 83, et. seq. Each magistrate had but one assessor, except, it seems, the praetorian prefect or the Orient. Hitzig, supra at 94. They gave assistance and advice in connection with judicial inquiries, motions, petitions, edicts, decrees and epistles. D. 1.22.1; Hitzig, supra at 96-126. They received, as has already been noticed in C. 1.27, a salary from the public treasury. They had certain privileges (law 11 h.t.), could not act as advocate and assessor at the same time, nor occupy the position as assessor under more than one magistrate. Law 14 of this title. At the end of their term of office, they were required, as the governors themselves and chancellors and private guardsmen, to remain in the province for fifty days so that the provincials could accuse them of their delinquencies. Law 3 of this title.

Cancellarius—chancellor. This official has already been mentioned at C. 1.27.1.21. His duties seem to have been very modest at the beginning. The term, says Smith's Dictionary of Greek and Roman Antiquity, originally signified a porter who stood at the latticed or grated door of the emperor's palace. Later the term seems to have been applied to a bailiff who guarded the railings of the court chamber. 3 Bethman-Hollweg 167. 3 Lydus, De mag. 37, says: "There was aforetime in the court of justice a fence separating the magistrate from his subordinates, and this fence, being made of long splinters of wood placed diagonally, was called cancellus, from its likeness to network...At this latticed barrier, then, stood two cancellarii, by whom, since no one was allowed to approach the judgment seat, paper was brought to the members of the staff and needful messages were delivered." According to this author, they received one gold piece a day or about \$3. The instruction issued to the cancellarius of the praetorian prefect under the Gothic kings is in part as follows: "Guard then, the secrets of our

consistory. Through your intervention the petitioner for justice has to approach me. On your act depends in great measure the opinion which men shall form of me; for as a house is judged by its front towards the street and men by the trimness or shabbiness of their raiment, so are we high officials judged by the demeanor of our subordinates who represent us to the crowd....Remember your title, cancellarius. Enconced behind the lattice work of your compartment, keeping guard behind those windowed doors, however studiously you may conceal yourself, it is inevitable that you be the observed of all observers." 12 Cass., Var. 1, contains instructions to the various cancellarii of the several provinces. They are warned against misconduct and are urged to be zealous for the public good: "Let your person be a refuge for the oppressed, a defense for the weak, a stronghold for him who is stricken down by any calamity. Never do you more truly discharge the functions of the cancelli than when you open the prison doors to those who have been unjustly confined." This indicates that the chancellor was something more than a mere guard at the rails of the court. In fact, as shown at note C. 1.27.1.21, he seems in some instances in any event, to have taken the place of the chief of the official staff. This appears also from 11 Cass., Var. 6, which shows that he was the foremost of the official staff, to whom the others owed obedience. In some instances, they were given the supervision of the imperial post in a province, or the collection of tribute, or other duties. And those under the praetorian prefects bore the title of clarissimus (honorable). See 3 Pauly-Wissowa 1456-1459; Krueger, Kritik 163-165. They are not mentioned in the Justinian Novels; possibly their positions were dispensed with, in the Eastern Roman Empire, particularly, as was true also in a number of instances, with the so-called principes, chiefs of staffs, and others, in order to save money.

Domesticus. This officer was, in the beginning at least, the confidant of a higher official. He is apparently first mentioned as of the year 355 A.D., and later in the century appears to have become a confidential official of many higher officials. This officer is mentioned in connection with, and being an official of, the emperor, the king of the Goths, the praetorian prefect, the city prefect, the master of offices, counts, dukes, and presidents of provinces, and other officers. And his position was so important that he not infrequently married into the family of his superior officer. In some instances, the officer with this title seems to have been cancellarius as well, and appears to have occupied the chief position in an official staff at times, supplanting chiefs of the staff under other names. In 9 Cass., Var. 13, it is shown that he had received 200 solidi, and ten rations, and that his compensation was raised by 50 solidi. His salary was, accordingly, fairly high as compared with the salary of others.

It is shown by law 4 of this title that the officers misused their positions and became guilty of oppression, and it is clear that an attempt was made to check them and reduce their authority and power. They were required to remain in the province after the expiration of their office, to answer any charges against them. Law 3 of this title. In 404 A.D., an attempt was made to exclude them from participation in all affairs and to reduce them to the simple position of a companion of their superior. Law 4 of this title. How far that was successful remains a question.

1.51.1. Emperors Diocletian and Maximianus to Paulinus.

The labor of those zealous to learn deserves that those who desire to choose counselors as associates in public administrations, should call forth those whose learning

they deem necessary for themselves, through hope of reward and honor, not through intimidation or compulsion, inconsistent with a spirit of freedom.
Given July 14 (286).

Note.

The meaning appears to be that the office of counselor should be a voluntary one, and not compulsory. It appears clearly that such counselors were learned in the law, and often necessary to magistrates, some of whom—military judges, for instance—might be without any legal learning. The position of counselor often led to promotion and advancement. Hitzig, Die Assessoren 80.

1.51.2. Emperor Constantine to Bassus, Prefect of the City.

The presidents should sign dispatches (libellis) personally, not through counselors (assessors). If anyone, without our consent, permits a counselor to subscribe them, the latter, who so subscribes them, shall be punished by exile and the name of the president shall be reported to us, so that severer punishment may be visited upon him.
Given August 18 (320).

Note.

The dispatches here mentioned were evidently answers written on petitions (libelli) sent to the governor and prepared by the counselors. These answers were required to be signed by the governor himself. The reason is clear: he should have personal knowledge of the answers made. See Hitzig, Die Assessoren 106-109, where he comments on this law.

1.51.3. Emperors Arcadius and Honorius to Messala, Praetorian Prefect.

We desire that counselors (assessors) of the judges, and their chancellors and those who function as private secretaries (domesticis) shall remain within the province for fifty days after their administration is ended. An accused who removes such person shall be considered as having confessed his guilt and whatever is taken and wanting shall be restored fourfold, the person despoiled receiving half and our fisc the other half.
Given at Milan, December 27 (399).

Note.

We saw at C. 1.49 that the governor was required to remain fifty days in the territory which he had governed. A similar provision is here made as to the counselor and chancellor. The purpose evidently was that they should not only answer for their own delinquencies, but that they might also be used to disclose the delinquencies of the governor and of each other. See also laws 8 and 9 of this title. The “accused in this case was evidently one who with the assistance of these officers pilfered from some one. S. P. Scott, however, considers the accused to be the official.

1.51.4. The same emperors and Theodosius to Caecilianus, Vicar.

A secretary (domesticus) of a judge shall not mix in public transactions. If he shall be shown to have mixed in public business, he must immediately be taken before a higher authority for investigation, so that proper punishment may be visited on him.
Given April 8 (404).

1.51.5. Emperors Honorius and Theodosius to Selencus, Praetorian Prefect.

No one in the provinces who has once performed the duty of a governor's private secretary (domesticus), or chancellor, shall be permitted, through any corrupt solicitation, to occupy that position again.

Given at Ravenna, December 11 (415).

1.51.6. The same emperors to Vitalianus, Duke of Libya.

No private secretary (domesticus) of the dukes or military counts, serving under them, shall, after the completion of his term, aspire to that position again. A fine of 10 pounds of gold will be imposed if anyone violates this ordinance. The official staff, too, shall be punished by the same fine, if it, through corrupt solicitation or avarice, permits any violation hereof.

Given at Constantinople, October 24 (417).

C. Th. 8.1.16.

1.51.7. The same emperors to Eustathius, Praetorian Prefect.

Sons under paternal power also, who, as counselors, have aided administrators (governors) with their counsel, may retain as their own special property, after the death of their father, what by lawful and honorable means they have been able to acquire.

Given at Constantinople, March 23 (422).

Note.

The property of children ordinarily all belonged to the father, to be thrown into hotchpot after the latter's death. But soldiers obtained the privilege of acquiring property exempt from such claim. This privilege was subsequently extended to others in the imperial service. See note C. 8.46.2; headnote C. 6.60, where this subject is fully considered.

1.51.8. The same emperors to Asclepiodatus, Praetorian Prefect.

No judge (governor) to whom a province has been entrusted shall bring anyone with him to use as private secretary or as chancellor, nor accept as such anyone who (for that purpose) has come to him, lest he be punished by the mark of infamy and by confiscation of his property. For chancellors shall be appointed from among the staff officials, on the responsibility of the primates thereof, because of fitness for service shown.¹ After quitting their post, they shall not leave the service and shall remain present among the provincials, so that these, if they wish, may have an opportunity to accuse them. And if the case demands it, they must be put under torture (quaestioni) for the purpose of laying bare the crimes of the judge.

Given at Constantinople, May 31 (423).

C. Th. 1.34.3.

Note.

Examination of witnesses or defendants under torture was frequent in the Roman empire, particularly during the later time. The subject is considered at length in headnote to C. 9.41.

It is apparent from this law that both the guardsman and the chancellor were chose from among the official staff of the governor. See Cujacius on this title (10.822).

¹ This is the language of the typed original. Blume has penciled in above this, without striking the original, "shown (on the fruits) on the records."

1.51.9. Emperors Theodosius and Valentinian to Taurus, Praetorian Prefect.

If after a judge (governor) has quit his post of administration, the complaint of the provincials or curials of a city, or some public necessity, should make the presence and appearance of the private secretary (of the judge) necessary, they must be delivered by the same judges under whom they served, to the court and to the laws.

Given at Constantinople, July 3 (433).

1.51.10. The same emperors to Florentius, Praetorian Prefect.

We order that a counselor (assessor) who, in his province, sits with a moderator longer than four months, contrary to ancient law and the statutes of divine emperors, shall be subject to confiscation of his goods and an accusation of a public crime, unless he is protected by an imperial rescript or an order of our high office.

Given January 20 (439).

Note.

We saw at C. 1.41, that persons could not become governors of their own province. A similar rule obtained as to assessors. D. 4.6.37 says; “Persons who act as assessors in their own province beyond the time allowed by imperial enactments are regarded as absent on state service.” D. 4.6.36 says: “Where a man is allowed by the emperor to act as assessor in his own province by way of special indulgence, I should say that he is absent on state service; but if he acts in the same way without permission, we are bound to say that, as in so doing he commits an offense, he does not enjoy the privileges of those who are absent on state service.” It is apparent that, perhaps because of necessity, a man might act as counselor in his own province for the period of four months, but not beyond that time, except by special imperial indulgence. The rule originated early and was not always observed. Hitzig, Die Assessoren 64 et. seq.

1.51.11. The same emperors to Zoilus, Praetorian Prefect of the Orient.

Our benevolence should be extended no less to the counselors (assessors) of higher magistrates, than to these magistrates themselves. We therefore direct that the counselors of the illustrious praetorian prefects, the illustrious prefect of the city, the eminent master of the soldiers, and the illustrious master of offices, whether they have heretofore performed or shall hereafter perform the aforesaid duty, shall, after quitting their office, be entirely free from every indication of any civil or military judge, and they shall not be subjected to any burden even by the powerful office of Your Highness. The official staff of Your Highness will be punished by a fine of 50 pounds of gold if it permits anything to be done contrary to these directions of Our Clemency.

Given February 25 (444).

Note.

Everyone was required to pay the regular taxes, and the instant law refers to the imposition of the so-called liturgies—special burdens either of money, material, or work. These liturgies are considered in C. 10.32 and subsequent titles. A number of official persons were exempt from these burdens. See headnote C. 10.48.

1.51.12. Emperors Valentinian and Marcian to Polladius, Praetorian Prefect.

All judges of illustrious rank, may appoint the same counselors a second or third time or oftener, since the person already found to be efficient (recte) should not be rejected on the sole ground that he has already been found unimpeachable.

Given (450-455).

1.51.13. The emperor Zeno.

The assessors must not adjudicate a matter without the president, and they cannot simply add his name.

Given June 26 (487).

Note.

As already noted at law 2 of this title, counselors could not perform the duties of the judge-governor or other high official for whom he acted. All adjudications were required to be made by the judge himself. Fuller provisions will be found in Novel 60, c. 2.

1.51.14. Emperor Justinian to Demosthenes, Praetorian Prefect.

None of those who have been or shall be appointed as advocates of cases and who have been assigned to any court in this imperial city or in any province under our sway, shall undertake to fill at one and the same time the post of advocate and the position of counselor of any magistrate to whom any public administration has been entrusted; for it is more than sufficient either to act well as advocate or to perform the function of assessor (counselor), lest, if he should do both, he would not fill either position well; but if he prefers to act as advocate, he may be able to fill that position with the necessary skill, or if he has chosen to act as assessor, he shall, forsooth, continue as such provided that after quitting the position of counselor, he may again act as advocate.

1. Nor shall anyone be permitted to act as assessor to two magistrates, or take care of both courts. It is not easily believable that one man can fulfill two duties; for when he is present at one court, he is necessarily absent from the other, and he cannot, accordingly, be wholly suitable in either. Hence he must be content to act as assessor in one court, and is barred from acting in the other.

2. Nor let any think that this law may be evaded by fraud, and that he can fill the position mentioned by not placing the customary sign upon his papers but some other, deceiving letters, and hide under that kind of deception, for the law is violated by those who try to evade its spirit by cunning and trickery.

3. Nor let anyone flatter himself that he can evade the stings of the present law as he frequently evaded the former laws on this subject. For if anyone is discovered in the commission of such act, his name shall be stricken from the accredited roll of advocates; he must pay a fine of 10 pounds of gold to the treasury of our Crown Domain to be collected by the illustrious Count of the Crown Domain, and he may expect even greater imperial displeasure. The judge himself, who has permitted such act knowingly and advisedly will not remain free from imperial displeasure.

4. The same punishment will be visited upon those who dare to adjudicate any cause as assessor of a magistrate in which they have been engaged in and acted as advocates, lest, mindful of his wishes as advocate, he cannot sustain the name of an incorruptible judge.