

Novel 82.

Concerning judges and that they shall not be chosen under oath.
(De iudicibus, et ne cum iurejurando eligantur.)¹

Emperor Justinian to John, Praetorian Prefect of the Orient the second time, ex-
consul, ordinary and patrician.

Preface. A constitution was issued by Zeno, of blessed memory, concerning the institution of lawsuits, which in subsequent times suffered so many changes as to become nearly void. For the referees mentioned therein have all passed out of life; many of its provisions have remained ineffective, have not been definitely recollected and have been applied in a manner different from that intended. And since we perceive the situation of the judges to have fallen into disorder, we thought it best to put it into order by a definite legal provision. We have not thought it becoming that some persons, particularly those devoid of legal knowledge or inexperienced in legal affairs, should bear the name of “judge” (iudex). All our judges have assessors who interpret the laws and take the place of the former, when occupied, since it is proper inasmuch as the judges are occupied by so many duties imposed on them by us, they should perform their judicial functions by the aid of their assessors. But if there are persons who are not magistrates and are not in our service, and who do not voluntarily acquire knowledge of the law but are dependent on others to tell them what is proper to be done in trial of cases, what amount of damage would not be done in our republic, if, instead of referring causes to persons who know what should be done, refer them to persons of the former class, permitting them to ask others from whom they can learn what they should do in administering the law? These considerations have justly moved us to enact the present law, since we look after the interests of our subjects and want lawsuits decided quickly, easily and without delay.

¹ A note in Blume’s manuscript following the Latin title states: “The latter part of this Novel, that judges shall not be chosen under oath, refers to c. 9 of this Novel, appended to C. 2.55, relating to arbitrators chosen by the parties without suit.” But, as has been noted previously, Justice Blume retrieved from the Code all the sections of the Novels he had appended there, so c. 9 is integrated into the present Novel.

c. 1. Hence we annul the rule of the constitution of Zeno, of blessed memory, whereby definitely mentioned referees were assigned to each judicial tribunal. We think it is best that referees should be chosen, who have good testimonials in every respect, who may act as referees for all, as though chosen by all. This has been done and the following are chosen by us as referees: Analalius, a man of worshipful rank, who recently quit the practice of law and was appointed as one of the worshipful advocates of the fisc; Flavianus, a man of honorable rank, now advocate of the fisc; also Alexander and Stehpanus and Menas, eloquent advocates and referees of your tribunal; also another Alexander, who, as we learn, also is referee in the forum of the glorious Master of the Offices; also two other advocates of your tribunal, Victor and Theodorus of Cyzicus. These referees have been chosen from among the advocates.

1. But since it is proper that also persons of higher station should be referees, who are first in rank, and who, by reason of experience in many things, or by long occupancy of the highest magistracies, or by reason of occupying many of such positions, have become men of knowledge, and who are diligent in our service, therefore, we have been pleased to appoint as referees from among the patricians the glorious Plato, who for a long time was prefect of the city and twice occupied that office; also the glorious Victor, who was magistrate of Greater Greece, as well as in the famous city of Alexandria, who, further was city prefect and is a man learned in the law; also the magnificent Marcellus, who constantly assists us, who, on account of his practice of justice, is worthy of praise and for that reason is sought for by all who come before us, and who, further, employs an assessor who can praiseworthy explain the law—we refer to Appio, a man of worshipful rank, who was advocate of the fisc and who has been considered a man of worth by the testimonial of others as well as that of ourselves.

c. 2. We want these men to be judges, next after our magistrates, and we ourselves shall refer cases to them as we deem advisable. If any magistrate wants to delegate cases, he must refer them to these referees whom we have named and to nobody

else, except where he delegates a portion only of a case to his assistant, reserving to himself the ultimate decision.

Note.

Novel 60, c. 2, appended to C. 1.51 [not so appended in this edition], provided that magistrates should not refer the whole case to their assessors, but they could so refer, at best, only a portion thereof, reserving the final decision for themselves.

c. 3. These referees shall always be present in the imperial portico, in the rooms where now also cases are heard, from morning till night. They shall hear not only the cases which are brought before them after the passage of this law, but also those which have been brought before others in the manner formerly in vogue,^a and have been now ordered to be transferred to the former.

a. This seems to be the meaning, although the texts left to us vary, and some of them preface the last clause by “not.” This chapter had been interpreted as meaning that cases could be commenced directly before these referees (3 Bethmann-Holweg 125), that the chapter bears no such interpretation, and that cases tried by them were delegated to them by magistrates. As to appeals the third time, see C. 7.70.

c. 4. Let it be observed that if an appeal is taken from the referees or from the men (referees) of glorious rank, then if the case is one which has been referred to them by ourselves, it shall, depending on the amount involved, be decided in council by our glorious magistrates, or referred to others, in pattern of the custom of imperial consultations. But if the cases have been referred to them by one of our glorious magistrates, the appeal shall be taken to the magistrates who referred the case, and he shall again decide it in the manner aforesaid.^a

a. Set forth also in headnote to C. 7.62, which deals with appeals generally.

c. 5. They (the special judges) shall hear all cases involving amounts up to 300 solidi, by making only short notes. In this way the cases will be more quickly disposed of and the litigants will be spared the prolixity of suits as well as delays.

Nevertheless, although the cases are to be thus heard, the final decision must be made in writing which indicates their opinion. And appeals in such cases are not forbidden, unless the appellant endeavors to appeal, perchance, for the third time or was purposely absent; for appeals are denied such persons.

Note.

This chapter has been interpreted to mean that the referees mentioned in this Novel had jurisdiction only in cases involving up to 300 solidi. But, as justly pointed out by 3 Bethmann-Holweg 125, the chapter does not so state, and simply provides that cases not involving more than that shall be heard summarily, without taking the proceedings down in full.

Decisions, however, were required to be in writing as in ordinary cases. That this was a general requirement is shown in C. 7.44. As to appeals the third time, see C. 7.70; that the one who was in default in a case could not appeal, see C. 3.1.13.

c. 6. No more than two months are given for appeals taken from the referees to the judges (magistrates), after which the last (fatal) days will run their course and no renewal of right (reparatio), as it is called in legal terminology, will be granted.²

c. 7. No one shall dare to violate the laws made by us concerning fees and costs; everyone must obey these laws and be in fear of the punishment provided by our imperial constitution. Those who prepare cases are to be appointed as heretofore ordered by the rule governing such service. Each referee shall have two shorthand writers and two clerks who prepare and expedite the cases for trial; and these assistants shall not be in the employ of more than two referees. They shall be persons faithful and honest, make no mistake, be guilty of no betrayal and commit

² The earlier version of this chapter, when it was appended to C. 7.63, had attached to it the following note: "This provision is simply confirmatory of C. 7.63.2.5. The course of the last days mentioned here refers to the three periods of one month each, on the last day of which the appellant might introduce his appeal in the appellate court. In other words, the total period of appeal was five months, without right to have the time extended."

no fraud. Their appointment as well as service shall be at the peril of those who have appointed them, and they must indemnify those who are damaged. The proper magistrates must, when the matter is brought to their attention, take care that such indemnification is so made. And if a referee discovers that a wrong has been committed by any of his officers, who have acted dishonestly, he must expel them from his court, and have others appointed in their place by those whose duty it is to do so, and at whose peril, as stated before, such appointments are made.^a

a. See C. 3.2.3.

c. 8. If one of our glorious and eloquent referees ceases for any reason to act as such, no other person shall assume his jurisdiction unless the examination of a case is transferred to another by our order.

c. 9. In order that the labor of our referees may not be without reward, we ordain that in each case, though it may have been assigned by the emperor, they shall receive two gold pieces from each side at the time of joinder of issue, and two gold pieces from each side at the end of the litigation, but nothing outside of that—which, too, was determined by our predecessors—and they shall be content with the fees mentioned; provided that the privilege, granted to some persons, to have a reduction in fees, shall be preserved to them according to their rank. The foregoing applies to lawsuits which involve amounts over 100 gold pieces. If the amount involved is less, the referees shall ask no fees; for whoever takes anything when a small amount is involved, deprives the person in distress of a large part of his victory. We do not stop with that, but ourselves provide a bounty for the special judges. Each of them shall annually receive two pounds of gold from the treasury of Your Sublimity. They shall be satisfied with that, be uncorrupt and uncorruptible. For we prefer to diminish our treasury, so that each of them, content with a gift from us and four pieces of gold (from each party), may keep his hands clean before God and us and the law, and take to heart what has been said in regard thereto by former lawgivers.

c. 10. The judges must also inquire into the expenses of the parties—since the decision of Zeno, of blessed memory, determined this correctly, and we do not disdain to make that a part of our constitutions—and the former rule in regard thereto shall remain in effect. We only add that if the judge tenders an oath to the prevailing party—he at the same time fixing the amount which appears to him just—called *taxatio* under the law—and such prevailing party takes the oath, the judge shall tax the costs in no less amount than shown by the oath, so that he may not appear more humane than this law. If he thinks, however, that neither party should be subjected to costs, on account of the doubtful character of the suit, he shall so state by an order. All other provisions of law concerning appeals, as mentioned above, and concerning objections to judges, and concerning parties not joining issues hastily or through force, but having a period of twenty days ^a therefor, and any other provision relating to courts, shall remain in force and effect.

a. See note C. 2.2.4, and Nov. 53, c. 3.

c. 11. Many persons choose arbitrators who are unacquainted with the laws and usages of courts, readily swear that they will acquiesce in (the decisions of such) arbitrator to whom no one would readily entrust any affair, and perhaps even persuade such arbitrators—men ignorant of what is just or how justice should be maintained—to administer such oath to them, and afterwards, when they are damaged (by a decision) not without desert, they forget the oath which they have taken and want the matter reexamined. Hence we are besought with many supplications, and the matter has seemed to us worthy of attention. **1.** And since we, by experience, have learned it to be dangerous, we ordain that no one shall hereafter become arbitrator or decide a matter pursuant to a sworn promise, so that men may not commit unwilling perjury and may not be forced to perjure themselves as a result of the ignorance of arbitrators; but those who choose an arbitrator or arbitrators shall do so under a stipulation with a penalty attached in an amount (or to the extent) as may be agreed upon by the parties. They must either abide by the decision, or if they want it reviewed, they must first pay the penalty, after which they have the right to disobey, and go before another judge. If our magistrates are

appealed to, they must demand this penalty and take care that it is paid to those entitled thereto. Persons choosing arbitrators must know that if they fail to carry out these provisions and fail to stipulate for a penalty, satisfied with a promise under oath, and they are damaged by the arbitrators so chosen, that if that is done purposely, the latter will pay the penalty of perjury to God; if it is done ignorantly, nothing is left them but the oath.^a We do not want perjury to be committed by anyone, and, on the other hand, we do not want litigants to sustain, aside from the scruples as to an oath, any great detriment on account of the ignorance of those who make decisions. All laws which have formerly been enacted, either by previous lawgivers or by us, concerning arbitrators, shall—except as to the force of an oath—remain in effect and are not in any manner affected by this law.

a. I.e., they have no remedy whatever, since they fail to stipulate for a penalty.

c. 12. All our magistrates must accept appeals, and none of them are permitted to reject them excepting Your Sublimity to whom former emperors granted the right to do so, for in place thereof the right to supplicate the emperor has been introduced.^a

a. See C. 7.62.19 and note; C. 7.42.

c. 13. Every judge, whether he is a magistrate or not, must maintain the law and give his decision accordingly. If it happens that during the course of the litigation the emperor issues an order, even though by way of pragmatic sanction, that the suit should be decided this way or that way, still the judge must follow the law.^a For we want the rules of law to be in force. If an appeal is taken in a case, the judge must accept it without evasion, provided it is a case wherein an appeal is allowed. The benefit of an appeal is granted to all, so that the injured party, who has a right to complain, may thereby have the error corrected, either by the appellate judges or by us, if the decision is referred to us.

a. See C. 1.22 and Nov. 113, appended thereto [not so appended in this version]; also Nov. 115, preface and c. 1.

c. 14. If the judges, who are called upon to decide anything, are in doubt, they may refer the matter to us, for information, so that they may thereupon decide the case according to justice and reason.^a

a. See headnote to C. 7.61.

Epilogue. Your Sublimity will cause these our orders, given for the benefit of our subjects, to be published in the imperial porticoes and in other portions of this magnificent city, so that they may become known to all, and so that all may recognize that we exercise perpetual care for their protection and tranquility.

Given April 8, 539.