

Book IV.
Title XIX.

Concerning Proofs.
(De probationibus.)

Bas. 22.1.35; D. 22.3.

Headnote.

Proof-Evidence. We have already seen at C. 2.1 and C. 2.2 how an action was commenced, namely by petition and summons and we also have already noted the various steps necessary to effectually bring a defendant into court. The three following titles deal with the proof of a case. One of these methods, namely the decisory oath, has already been dealt with at C. 4.1.

Title 19 deals with the subject of proof generally, and mainly with the burden of proof; title 20 deals with witnesses, and proof by them, and title 21 deals with documentary evidence.

Burden of Proof The rules as to burden of proof show an advanced state of civilization and were much the same as with us, except only as different conditions required modified rules. That will be noticed in the illustrations given in the present title. A few others, from the Digest, may be here added. There was a presumption of regularity of conduct; thus one who asserted that an emancipation was not legally made had the burden of proof. D. 22.3.5.1. A change of wish once expressed was not presumed, but was required to be proven. D. 22.3.22. Fraud was not presumed but was required to be shown. D. 22.18.1. A defendant was required to prove his defense. D. 22.3.19 pr. If a man asserted a right arising out of sickness or absence on state business, he was required to show that fact. D. 22.3.19.1. And, in general, whoever made an allegation of fact was required to prove it. D. 22.3.1;2;4;6;12;17.

4.19.1. Emperor Severus and Antoninus to Faustinus.

As a creditor, who claims money, must show that it was given, so, on the other hand, a person who affirms that it has been repaid must furnish proof thereof. Promulgated June 30 (196).

Note.

The plaintiff who asserted the making of a loan was required to prove it. Even a due bill was not prima facie proof of a debt, unless it stated the consideration (C. 4.30.13) or unless it was not attached in some manner as shown in note to C. 4.2.5., D. 22.3.25.4. On the other hand, the burden to prove payment was on the defendant. D. 22.3.12. If a due bill was cancelled, the presumption of payment arose and prevailed unless the creditor showed that the indebtedness still existed. D. 22.3.24.

4.19.2. Emperor Antoninus to Auluzanus.

Seek the possessions, which you claim to own, by the usual procedure in courts. For it is not incumbent on the possessor to prove ownership, since, if your proof fails, ownership remains with him. Promulgated November 17 (215).

Note.

Possession, as with us, was ordinarily prima facie evidence of ownership, and such possessor was ordinarily not required to prove or give the source of his title. C. 3.31.11; C. 3.32.28. Where property was stolen, however, the possessor was required to show from whom and under what circumstances he bought it. C. 6.2.5. So where a prima facie title as heir was made out, and the possessor claimed the property as a gift, he was required to show the gift. Law 16 of this title. If a petition for an inheritance was brought, the possessor was required to state, though not prove, whether he was in possession as heir or as mere possessor. As mere possessor he had no right whatever. If he claimed as heir, his claim could be litigated in this action. But if he claimed under some other title, then, under the old system of pleading, another action was required to be brought. C. 3.31.11 note.

In Greek law, the possessor was always required to give the source of his title, or he lost. The case was decided according to who seemed to have the better right. Mitteis, R.R.u.V.R., 501. That principle appears to have been adopted by Constantine. C. Th. 11.39.1. But that provision was left out of the Justinian Code.

4.19.3. Emperor Alexander to Leaena and Lupus.

You should not be sued on account of the colleague of your father, if you can prove that when that colleague quit his office, he was solvent.
Promulgated December 28 (231).

Note.

Municipal magistrates, who are in question in this law, if administering the same office, were responsible for each other's defaults, provided, however, that if the magistrate was solvent at the time of surrendering his office, his colleague was not responsible for him. D. 50.1.11. This was true also as to guardians. C. 5.32.1; D. 26.7.53; see C. 6.62. But the burden to prove the solvency of the magistrate at the time of quitting office was upon the colleague. The same principle is stated in D. 22.3.11, as to the solvency of the sureties of guardians.

4.19.4. The same Emperor to Avitus.

Ownership of property is not only shown by the documents of purchase, but by any other legal proof.
Promulgated November 1 (222).

Note.

Documents were not the only mode of proving ownership. In fact documents alone, unless made by the emperor, could not alone prove it, since a document of sale did not show that the maker was owner so as to be able to transfer title. 7 Donellus 1021-1022.¹ No statute of frauds prevented verbal proof of the sale of property, real or personal, or of a gift thereof, as is also stated in law 12 of this title and D. 4.21.12.

4.19.5. Emperor Philip and Caesar Philop to Sertorius.

Private documents, certificates or notations, if not supported by other testimony do not alone suffice for proof.
Promulgated April 7 (245).

¹ Blume has penciled into the margin here: "C. 3.32—several places."

Note.

The private documents, certificates and notations here referred to were private memoranda made by a person himself, showing certain transactions. But the principle that self-serving declarations were not admissible in favor of a claimant was as fixed in the Roman law as with us. See also laws 6 and 7 of this title. They were, however, admissible against the party making them. C. 4.21.4; Bas. 22.1.39 and notes.

4.19.6. The same Emperor and Caesar to Romulus.

Rescripts have often been issued that statements of accounts of the deceased, found among his goods, cannot alone suffice for proof of anything owing him. 1. The law is the same, even when the deceased has stated in his last will that certain money or certain things are owing him.²

Promulgated May 15 (245).

4.19.7. Emperor Gallienus to Sabinus.

It would be a pernicious precedent that a writing should be credited whereby a person makes another his debtor by his own notation. Hence, neither the fisc nor anyone else should be able to prove a debt by such notations.

Promulgated September 4 (262).

4.19.8. Emperors Diocletian and Maximian to Publicius and Optatus.

You fear in vain that the burden of proof should be demanded from the party who is sued.

Promulgated November 19 (289).

4.19.9. The same Emperors and the Caesars to Marciana.

Since you say that you are below the age of twenty-five years, you should go before the president of the province and prove that fact.

Given April 13 (293).

Note.

In this case the party claimed that he had a defense to a claim against him by reason of his minority. That being his defense, he was required, under the general rule, to prove that defense.

Where that status had once been shown, and that the contract was entered into during minority, and restitution to rights was sought by him, the adversary was required to prove that the period allowed for restitution after minority had already passed. In other words, after a certain status had once been shown, it was presumed to continue until the contrary was shown. The shifting of producing evidence is clearly shown by this illustration. C. 2.21.4.

4.19.10. The same Emperors and the Caesars to Isidorus.

Neither your birth, although you can prove yourself to be free, nor the positions of honor which you say you have held, are sufficient proof of the liberty of your daughter, since nothing prohibits you to be free, while she is a slave.

² [Blume] to the same effect C. 10.2.5.

Given April 17 (293).³

Note.

Several of the following laws deal with the question of proof of liberty, a subject also treated at C. 7.16. Even though liberty was favored, particularly under Justinian, the Roman law did not, as it logically should have done, presume that where the father's status was shown, the status of his children was the same. See also C. 7.16.28. Slavery was so extensive, embracing at one time, it is estimated, perhaps more than half of the population, as to cause the Roman jurists to adopt another course. If the mother of a child, however, was shown to be free, and that she had a child, the child was resumed to be free, for the child followed the status of its mother. Law 17 of this title. The burden of proof in causes involving liberty was as follows: If a man, finding himself in slavery, claimed freedom, he had the burden of proof; if he lived in freedom and someone claimed him as a slave, the latter had the burden of proof. C. 7.16.5 note; law 15 of this title; D. 22.3.14 and 20.

4.19.11. The same Emperors and the Caesars to Antonia.

If you are confident that you can prove that the heir designated by your maternal aunt cannot receive the inheritance by reason of the invalidity of the will, or for any other reason, you can sue for the inheritance before the rector of the province.

Subscribed April 27 (293) at Heraclia.

Note.

Here it was presumed that the status or condition of the person appointed as heir under a will was such that he could take under it. The validity of the testament also was resumed; but that was true, probably, only where the will was in apparently perfect condition and without the mutilation or erasures mentioned in C. 6.33.3.

4.19.12. The same Emperors and the Caesars to Chronia.

Since transactions do not consist of documents, but these are (only) proof of things done,⁴ you should show, by producing such legal proof as you can, that the purchase was made, that your father was let into unhindered possession and that the price was paid.⁵

Given October 3 (293).

4.19.13. The same Emperors and the Caesars to Justinus.

The tie of relationship is not shown⁶ by letters, but by birth or the solemnity of adoption, and just as little can an action instituted for a female slave, for dividing an inheritance, brought against you as her absent brother, destroy the truth of facts. 1. And

³ Below this law and above the following note, Blume penciled in "irrelevant." It's not clear whether that comment relates to the fact that the petitioner's status is irrelevant with respect to that of his daughter, or whether he later thought the note was irrelevant. The former seems more likely.

⁴ Without lining out any of the typewritten text, Blume penciled in this alternate reading, accompanied by a question mark: "Since transactions are not carried on by documents, but the matters done are (only) embodied therein, you should show..."

⁵ [Blume] See note to law 4 of this title.

⁶ Blume underlined "shown," wrote above it "created," and put a question mark in the margin.

whether, therefore, you wrote a letter to one whom you are confident you can prove to be a female slave, as though she were your sister, or whether it is shown that an arbitrator to partition the inheritance was asked (for her) as though for a coheir, the question of relationship between you could not be settled by those facts.

Given December 1 (293).

4.19.14. The same Emperors and the Caesars to Mucianus.

Person are not shown⁷ to be sons of fathers, under the civil law, by naked assertions or untrue certificates (professions), although both parties agree thereto, but by conception during legal marriage or by solemn adoption. If you are confident, therefore, that the person against whom you direct your supplication is a stranger, prove personally, or through your procurator that his affirmation is false.

Given December 1 (293).

Note.

Parents were required to file a certificate (professio) as to the birth of their children. Capitolinus in his life of Marcus Aurelius says of that emperor, in chapter 9: “In the meantime, he put such safeguards about suits for personal freedom—and he was the first to do so—as to order that every citizen should bestow names upon his free-born children within thirty days after birth and declare them to the prefects of the treasury of Saturn. In the provinces, too, he established the use of public records, in which entries concerning births were to be made in the same manner as at Rome in the office of the prefects of the treasury, the purpose being that if anyone born in the provinces should plead a case to prove freedom, he might submit evidence from these records. Indeed, he strengthened the entire law dealing with declarations of freedom.” The practice is recognized in the law books. D. 22.3.16; C. 4.20.21. These certificates were presumptive evidence. In some parts of the empire these certificates were in vogue long before the time of Marcus Aurelius. See Weiss, Greich P.R. 389, note 105; Taubenschlag, Studi Bonfante 389 and note 117.

4.19.15. The same Emperors and the Caesars to Antonius.

Force used by a person who contends that he is master, in no way serves to throw the burden of proof on the person whom he claims to be his slave. Since, therefore, you acknowledge that you fled from the house of Servus, but allege that you were detained by him, not by reason of any just claim, but by violence, the first inquiry will be whether you are in possession of liberty without fraud, and the outcome thereof will determine who has the burden of proof.⁸

Given December 27 (293).

4.19.16. The same Emperors and the Caesars to Philippus and Sebastiana.

If you are in possession of the land, which your emancipated brothers claim to have been given them by your common father, the necessity of proof of the fact lies on them; or if they are in possession of these lands, as having been given them by your father, but you have been appointed his heirs and demand them (back as such), they must prove, when the question arises, how they became owners, in order to show your claim not well founded.⁹

⁷ Blume again underlined “shown” and wrote above it: “created—appointed.”

⁸ [Blume] See note to law 10 of this title; C. 7.16.5 note.

⁹ [Blume] See note to law 2 of this title.

Given January 23 (294).

4.19.17. The same Emperors and the Caesars to Paulina.

In order to prove yourself free-born, you must show that your mother acquired her liberty and that you were born subsequently. That no such question is raised as to your brothers cannot aid you in your defense.¹⁰

Given February 9 (294).

4.19.18. The same Emperors and the Caesars to Violentilla.

Since you signify in your petition that the person whom you mention caused it to be noted in a document without your knowledge as though you had given him a farm, if the matters which you set forth are true, the farm did not become a gift even in name. 1. Hence you should prove before a competent judge, in order to receive a decision according to the tenor of our rescript, that your opponent caused the farm to be assigned to him in the document without your consent.

Given at Byzantium April 7 (294).

Note.

In this instance a document was executed, and in due form. It pretended to state that the grantor made a gift of a farm. That was not true, and the intention of the grantor was, perhaps, that the property therein described should be let to the grantee under a lease. Or, perhaps the document was not executed at all by the grantor, but only by an agent, unauthorized. The burden to prove the document invalid was on complainant, but should not have been. Bas. 22.1.52 note. A gift could be completed under Justinian by the delivery of a document to that effect. C. 8.53.1 note. That was not the classical law. At that time delivery of the property also was essential, and the instant rescript was changed by leaving out any mention thereof. Riccobono in 33 Z.S.S., 298-299; C. 8.53.1 note.

4.19.19. The same Emperors and the Caesars to Menandrus.

A dilatory defense must be set up in the beginning, but should be proven (only) after the plaintiff has made proof of his allegation.¹¹

Given at Nicomedia November 16 (294).

4.19.20. The same Emperors and the Caesars to Phronima.

If Eutychia, in your possession as a slave, claims liberty, when the documents of purchase have been lost, she cannot, since the burden of proof is on her the claimant, be aided thereby, if her proof is defective. But when she is claimed into servitude, no further proof of purchase is necessary than to show the theft of the documents of purchase.

Given at Nicomedia December 2 (294).

Note.

See law 10 h.t. as to burden of proof. Loss of documents would have no tendency to prove that the person purchased was free. Riccobono, 34 Z.S.S., 239 considers it certain that the last part of the rescript was the work of the compilers, because, as he says, proof of freedom or servitude at that time rested entirely upon documents. Nov. 90, c. 6

¹⁰ [Blume] Note to law 10 of this title. [Blume adds here: "relevancy."]

¹¹ [Blume] See note to C. 8.35.4.

provided that a person claiming to be manumitted was required to show the document of manumission before he would be permitted to testify. C. 4.20.2 shows that free birth was required to be shown by document.

4.19.21. The same Emperors and the Caesars to Crispus.

Persons who steal documents of others cannot use them to show ownership, since the reading of them does not aid the reader but avails only the person who is designated (therein as owner) by the tenor thereof. Since, therefore, other modes of proof are not rejected, prove that the ownership of the farms which are in question belongs to you legally. But it is not becoming that a person who brings an action to recover property (vindicatio) should trouble to prove his claim by evidence that it was his money which the purchaser paid, since this fact, although shown, furnishes him no aid.

Note.

The fact that the property may have been bought with the money of Crispus did not give him title to the property, as he believed. C. 4.50.1 note.

4.19.22. The same Emperors to Agathlocea.

To prove that Glyco is a slave, the fact that his mother and brother have performed services as slaves does not suffice, since neither connivance of free-born persons can prejudice those related to them, nor is it forbidden that when slaves are born of the same mother, one of them should receive liberty.

Given December 14 (294).

4.19.23. The same Emperors and the Caesars to Menalaus.

When the plaintiff acknowledges that he cannot prove his allegations he does not thereby impose upon the defendant the necessity of proving the contrary, since in the nature of things the burden of proof does not rest upon the person who denies a fact.¹²

Given December 25 (294).

4.19.24. Emperors Valens, Gratian and Valentinian to Antonius, Praetorian Prefect.

We order that all persons who henceforth fabricate suspected writings and produce them in court shall, if they do not prove them genuine, be detained as person guilty of executing a nefarious writing and as forgers.

Given at Treveris January 12 (378).

C. Th. 11.39.7.

Note.

As ordinarily interpreted, this law provided that persons who produced a document, the genuineness of which was questioned, were required to prove that it was genuine. C. Th. 11.39.7 has the word "nefarious" instead of "suspected," and Gothofredus thinks that the law was aimed at persons who feigned that they had letters or other documents showing some crime, like magic.

The meaning of the last sentence is disputed, that is to say, whether it means that persons who failed to prove the genuineness of the document might be convicted as forgers if duly accused and proven guilty (as held by Basilica 22.1.58 note, and 9 Cujacius 251), or that such persons should stand convicted of the crime of forgery. The latter opinion is held by 7 Donellus 1104, and Gothofredus in his commentary on C. 11.39.7. Persons

¹² [Blume] See C. 2.1.4.

might at times be held guilty of a crime shown in a case before court though no accusation had been brought. C. 4.20.12; D. 48.5.1.5 and 6; note C. 9.2.9.

4.19.25. Emperors Gratian, Valentinian and Theodosius to Florus, Praetorian Prefect.

All accusers should know that they must make public accusations only in matters which can be shown by suitable and sufficient witnesses, or by absolutely credible proofs, or other tokens (circumstances) suitable for proof as clear as the light of day. Given at Constantinople May 18 (382).

C. Th. 9.37.3.

Note.

The principle announced in this rescript reminds one of the rules in most English-speaking jurisdictions, that a defendant in a criminal case must be proven guilty beyond a reasonable doubt. A reading, however, of the law on Roman criminal procedure generally is not convincing that the rule was rigidly enforced. See book 9 of the Code.