Book IV
Title I.

Of credit given and as to taking an oath.
(De rebus credits et de jure jurando.)

Headnote.

On failure or scarcity of proof, the law frequently allowed facts to be settled by one or the other party to a transaction taking an oath, commonly called the decisory or reference oath. This was a peculiar institution of Rome, but has survived in Scotch, French, Italian, Spanish and Qubeque law. If at his creditor's challenge a debtor affirmed an oath that he was under no obligation to the creditor, the debtor was relieved, whether he swore falsely or otherwise. Inst. 4.13.1. The oath was one of the resources for the purpose of settling disputes, and was, when taken pursuant to the agreement of the parties, in the nature of a compromise. A voluntary oath did not suffice. It was required to be tendered by one of the parties. It might be tendered in an extra-judicial transaction, or in court, or the judge, in case of failure or scarcity of testimony, might require a party to suffer judgment to go against him or take an oath to the truth of his cause.

4.1.1. Emperor Antoninus to Herculianus.

A cause decided by an oath, taken pursuant to agreement of the parties, or when the opponent has tendered the oath and it is taken or waived, cannot be reopened even under the pretext of perjury, unless specifically excepted from this law.
Promulgated June 17 (212).

4.1.2. Emperor Alexander to Felix.

God is a sufficient avenger of the violation of the sanctity of an oath. Even if perjury is committed, impetuously in the name of the emperor, it is not deemed proper, according to the constitution of my divine parents that he should suffer bodily danger, or be accused of treason.
Promulgated March 27 (223).

Note.

God was considered a sufficient avenger of perjury, even though the oath was taken in the name of the emperor. The law is, however, apt to be misunderstood. It was not perjury, as we understand that term, to swear falsely when taking the decisory oath; that is to say, a false oath did not in such case carry a penalty. That was true also generally with a false oath taken in many private transactions, though that was not true throughout, and it seems not to have been true altogether when an oath was taken in the name of the emperor. But an oath taken by a witness in a proceeding in court, to support a contention in ordinary court proceedings, was considered sacred, and false testimony given in a case was considered a grave crime. A full discussion of this subject will be found in headnote to C. 9.22.

By C. 2.4.41, a heavy pecuniary penalty was imposed on those who violated an agreement of compromise which was confirmed by an oath in the name of the deity or the emperor.

4.1.3. Emperors Diocletian and Maximian to Severa.

In connection with contracts of good faith and in other instances where there is a lack of proof, the cause may, after investigation, be decided by the judge pursuant to an oath (submitted by the court to one of the parties).
Promulgated August 23 (286).

4.1.4. The same emperors to Maxima.

Though a minor, under the age of puberty, has tendered an oath to the guardian to avoid an action on the guardianship, he is not thereafter prohibited from bringing such action.
Promulgated July 1 (290).

4.1.5. The same Emperors to Julianus.

Since trusts, imposed on guardians of minors, are considered the same as though imposed on the minors themselves, the president of the province will investigate the matter, and if it appears that a trust was left to you, he will cause it to be turned over to you. He will also, if a denial is entered, put the guardian to his oath, if you wish it.
Promulgated December 3 (290).

Note.

A decedent appointed his son under the age of puberty as his heir, and also appointed a guardian for the minor (C. 5.28), directing such guardian to pay to someone else a legacy or trust; this legacy or trust was considered the same as though the minor had been directed to pay it, and the guardian was required to do so on his behalf. If he denied that any such legacy or trust was left, he might be tendered the decisory oath.

4.1.6. The same Emperors to Bessius.

Since you say that it was agreed between the parties that the question as to origin and free-birth should be decided under the sanctity of an oath, the president of the province will look after the interests of the sons of your paternal aunt, pursuant to the decree of the arbitrator, rendered in accordance with your agreement.
Promulgated February 9 (291).

Note.

The foregoing law shows that the decisory oath might be taken not only in pecuniary matters, but also in a controversy concerning the status of persons.

The sister of the father of Bessius died, leaving an inheritance and some children. Bessius was the nearest agnate relative of his aunt, and claimed that her children could not receive the inheritance because they were born while their mother was a slave and had never become free. It was agreed between them that the controversy should be decided by tendering the decisory oath to the children. They took it. Then Bessius refused to abide by the oath, claiming that it was not a matter where such oath was binding. The parties agreed on an arbitrator to decide this question, and his decision was in favor of the children. The emperor wrote that this decision was right and that the president would see to it that it was carried out. Bas. 22.5.48; 7 Donellus 519-520, where, however, the rescript is explained slightly differently.

4.1.7. The same Emperors and the Caesars to Eutychiana.

Neither a son nor anyone else can, by litigation or pact or by tender of an oath, without the consent of the owner of the property, prejudice the latter. Hence, if your son

transacted any business in connection with your property, without your authorization (mandate), and you have not ratified it, it will not prejudice you.
Subscribed November 13 (293).

4.1.8. The same Emperors and the Caesars to Alexander.

If an oath is tendered or referred back to the plaintiff, and he takes it or it is waived, an action on the facts (in factum), that is similar to one on a judgment, lies.
Subscribed April 20 (294).

Note.

An action on a judgment (action judicati) was necessary in order to enforce it, although in the later time the proceeding does not seem to have been at all complicated. It was simply a proceeding to get an execution. C. 7.52.1, note.

Now when an oath was tendered to, or referred back to, a plaintiff and he took it, the defendant lost his case. The oath itself took the place of a judgment, and was of the same force, and the right thereunder was enforced in the same manner as a judgment. It took a special proceeding, here called action on the facts. Savigny, System §312 says that when the amount of money involved was not determined, a special referee was appointed to do so. If that is correct, then two special proceedings were evidently necessary in such case in order to obtain an execution.

4.1.9. The same Emperors and the Caesars to Marcianus.

If an oath has been tendered to the defendant, he will be compelled by the judge to pay or to swear or to refer the oath back, unless the plaintiff has failed to take the oath that he did not tender the (decisory) oath vexatiously.
Subscribed at Sirmium April 21 (294).

Note.

If a party tendered a decisory oath to the other, but the latter demanded that the former should take an oath that he was tendering the decisory oath in good faith and not vexatiously, such oath of good faith was required to be taken, before the other party to whom the decisory oath was tendered was required to act. The oath of good faith could not be required of patrons or parents. D. 12.2.34.4. See also law 12 of this title.

4.1.10. The same Emperors and Caesars to Protogenis.

In an action on a deposit brought concerning things delivered without writing, an oath may be tendered the same as in other actions of good faith (bonae fidei).
Subscribed November 27 (294).

4.1.11. Emperor Justinian to Demosthenes, Praetorian Prefect.

We ordain that if anyone has tendered an oath, and before it is taken the tender is revoked with the thought that there is abundance of proof, he shall not, we ordain, thereafter again have recourse to an oath; for it is absurd for him to return to what he thought best to renounce, and afterwards, despairing of other proof, to again appeal to religion; and the judges shall in no manner listen to those who take such iniquitous course.

1. However, if anyone has tendered an oath, but wants to revoke the tender thereafter, he shall be permitted to do so and furnish other proof, if he wished, provided, however, that this privilege is given only till the end of the litigation.

2. For after final decision, which is not suspended by legal appeal, or which, after appeal, has been confirmed, we permit no one to revoke the tender of oath and have recourse to other proof, lest, be reopening the case, the end of one transaction may be the beginning of another.
Given at Chalcedon September 17 (529).

Note.

Under the first part of this law, a party who had tendered an oath might revoke the tender before the oath was taken, and resort to other proof instead, but he could not again tender the oath thereafter. If the oath, however, was taken before the revocation, it was binding. It might be submitted on single, individual points that might arise in the case or on a point that would dispose of the whole case. This is clearly shown in the next law.

The second part of the law provides that the tender might be withdrawn before a final decision or before final disposition on the appeal. It leaves somewhat in confusion as to whether that could be done notwithstanding the fact that the oath had been taken before revocation. In order to harmonize the first and second part of the law, it must be accepted that an oath once taken before revocation was binding and that a subsequent revocation, though made before final decision or final disposition on appeal had no effect. This view is confirmed by Bas. 22.5.53. The meaning of the second part of the law would, accordingly, seem to be as follows: If A, for instance, tendered an oath to B, with the approval of the court—for that approval was necessary at this period—and B took it, that ended that point, and if of sufficient importance, might be decisive of the case. If B refused to take the oath, the point was decided against him, and again might decide the whole case if of sufficient importance. Subdiv. 2 of law 12 hereof. But the imposition of the oath was in the hands of the court. It might impose it or not, though asked. Before it was actually imposed, A had the right to withdraw his tender and offer proof, if there was still time therefor; if no withdrawal was made, the court might, without imposing the oath, find against A because of want of proof. Again the court might impose the oath on B stating at the time that if the latter took the oath, he would find in his favor. C. 7.45.11. In either of the latter two events, it was too late to withdraw the tender.

Again, the law says that the tender might be withdrawn before final disposition on appeal, in case the case was appealed. But that again was true only if the oath had not been taken during the trial, before withdrawal. Hence, such withdrawal could be made only on an appeal of B and in a case where he had refused to take the oath, as mentioned in subdiv. 2 of the next law. For comments on this law, see 7 Donnelus 542-548; 9 Cujas 184; Perez on the Code, 219, subdiv. 27. Donellus seems to think, if rightly understood, that though the oath was taken, the tender therof might be withdrawn before final disposition of the appeal.

4.1.12. The same Emperor to Demosthenes, Praetorian Prefect.

The matter concerning oaths tendered in a suit, either by the judge or by the parties, should be settled by a general law. For since it has become the custom for judges to impose an oath of most definite scope, it happens that when a case is appealed and the decision is (thereby) suspended, persons upon whom the oath has been imposed are taken from the light of day, and the proof of matters accordingly fails, since there is a great difference between an oath taken by an heir and that taken by a principal in the

transaction. Forced, therefore, by necessity, to assist more fully in the matter of proof, we come to enact this law.

1. Every oath, accordingly, whether tendered by the judges or the parties, either in the beginning or the midst of the litigation or at the time of the final decision, shall be taken before the judge presiding in the case, without awaiting the final judgment or the fear of an appeal therefrom.

1a. So when an oath is tendered by the parties with the approval of the judge, or is imposed on one of the parties by the authority of the judge, and the party on whom the oath is imposed offers no objection, he must take it or refer it back; the [illegible][1] being imposed on, the person to whom the oath has been referred back to must take it, or if he refuses, the case or point in dispute shall be decided against him, without right of appeal, and just as if the oath tendered to the opposite party had been taken. For why should an appeal be given to a man in a matter which he himself brought about?

2. But if the party to whom the oath is tendered, either by a party or the judge, does not want to take it, he shall have the right to refuse it. If the judge, however, thinks it really necessary, he shall decide the cause as though the oath had been declined with his consent, and the remaining matters, either the point in dispute or the whole suit, shall run its course, and such refusal shall not be a cause to stop the case.

2a. The party declining the oath may cause this to be attested, or if he does not dare do this, he has in any event his remedy on the appeal from the final judgment.[2]

2b. And if the appellate judge decides that the oath was rightly imposed and wrongly refused, the judgment shall stand as rendered in the court below. If he decides, however, that it was wrongly imposed and rightly refused, then he may modify the judgment below, rendered on the basis that the oath was declined, and no prejudice shall result or unjust expenses shall be incurred (by the appellant by reason of the former judgment) from beginning to the new end without hindrance, and shall be decided according to justice.

3. But whether a tendered oath was taken or refused, the party who tendered it shall have no remedy by appeal, since it would not be right that he should have the right of appeal in a matter in which the judge allowed him to take the course he wanted.[3]

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[1] May be "necessity." Scott has it: "…he to whom it is tendered shall be compelled to take it." See 6 [13] Scott 5.

[2] [Blume] The attestation here referred to was doubtless a written record made of the fact, together with the reasons for declining to take the oath. The failure to make the record, however, made apparently no difference so far as an appeal was concerned, except that the trial judge might refuse to verify the reasons ultimately alleged by the appellant for refusing to take it.

[3] [Blume] If the oath was taken as asked, this was binding; if it was not taken, the case on which the oath was requested went in favor of the party who tendered it, and there would then be no reason for him to appeal. But it would seem clear, that this provision did not apply except in a case where the decision of the whole case was based on the oath. An oath might be tendered, as shown by this law, on numerous individual points arising at various stages in the case; but these points might be wholly immaterial. There would be no reason to deny an appeal on grounds independent of the points on which the oath was taken. The same reasoning should apply where an oath was tendered, referred back, and refused to be taken, mentioned in subdiv. 1a.

4. While we make these provisions as to person who are present, we do not forget absent persons, but also subject them to this law.

4a. And if a person to whom an oath is tendered is absent and conducts his case by a procurator, the principal must, time being given for that purpose, come before the judge to comply with these provisions concerning oaths, or he may, with the permission of the judge, take, refer back, or decline the oath, in the province in which he lives, by having a record thereof made,[4] so that the result already mentioned my be arrived at in each case.

4b. Permission is given to the opposite party, either personally or by a procurator appointed for the purpose, to be present at the proceedings in connection with the oath, or if he prefers not to be present in either of the modes, the oath shall in any event be taken, referred back or declined ex parte, with a proper record made thereof.

4c. The judge must equitably determine whether the costs incurred on this account shall be paid by both or one of the parties.

4d. The case shall not, however, be stopped by reason of these proceedings, but the judge shall, in the meantime, examine other points of dispute or parts of the litigation, and upon receiving the record as to the oath, return to the point which that involves, and when that is finished, return to the remainder (of the points).

4e. All other provisions made as to persons who are present shall apply to parties who are absent.

5. Moreover, in all cases in which oaths are taken, we direct that judicial custom shall be observed according to the standing of the persons, whether the oath should be taken before the judge, or in homes, or by touching the scriptures, or in sacred chapels.[5]

6. In similar manner, all regulations which have been made concerning the oath against vexatious conduct and concerning referring an oath back, shall remain in force, whether made by ourselves or by our predecessors. For these regulations are not enacted to take anything away from the ancient laws, but to supply what is lacking therein. Recited seven times in the new consistory of the Justinian palace on October 30 (529).

4.1.13. The same Emperor to Johannes, Praetorian Prefect.

When a person demanded a legacy or trust as though left him, but the testament is not at hand, and an oath was tendered him on account thereof by the heir, and he took it, affirming that such legacy or trust was left him, and he obtained what he claimed (as though) pursuant to such testament, but it becomes manifest thereafter that in fact nothing was left him, it was doubted among the ancients whether the oath should be binding in such case, or whether such claimant should restore what he had received; or, if in fact a legacy or trust were left him, whether the heir would have the right to receive the

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[4] [Blume] This record was to be made before the judge of the place where the principal lived, the record was then certified and sent to the judge trying the case. 7 Donellus 559-560.

[5] [Blume] Ordinarily the oath was taken before the trial judge, but at times it was taken in other place in the presence of officials, by touching the holy gospels. C. 2.58.2; Novel 12, c.1 appended to C. 9.27. It might be here added that the provision herein that interlocutory orders could not be appealed from, and that such appeal could only be taken from a final judgment, was in accordance with the general rule. C. 7.62.36. Appellate judges had large discretion in revising a judgment. It was not sent back for a new trial. C. 7.62.6 and note.

Falcidian fourth out of it—if he were (in fact) entitled to it. 1. It has seemed to us better that the legacy or trust may be reclaimed from the recipient, and he shall receive no benefit from such perjury, so that no one may be permitted by our law to make an impious gain out of this wrong.[6] If the claim should be found to be true, the Falcidian fourth—if it in fact applies—may be claimed.
Given at Constantinople October 18 (531).

Note.

The foregoing law makes an exception to the rule that an oath tendered and taken in connection with a transaction or lawsuit was binding upon the parties. Where a claimant for a legacy or trust took an oath that he was left such legacy or trust by a testament which was not then in hand, or that it was left without the right of the heir to deduct the Falcidian fourth—that is to say, a fourth of the amount claimed to have been left—and the testament was afterwards found, and it was then discovered that either no such legacy or trust was left at all, or if left that it did not prevent the deduction of the Falcidian fourth, then the amount wrongly paid might be recovered, notwithstanding that it was paid pursuant to an oath. For the Falcidian fourth see C. 6.55 and headnote.

[6] [Blume] This sentence is the last in the text, but would seem to belong in the place as shown in the translation.