Book IV.
Title XXI.

Concerning the trustworthiness of documents, and the loss of them, and concerning the making of quittances, and concerning things which can be done without writings.

(De fide instrumentorum et amissione eorum et antapochis faciendis et de his qui sine scriptura fieri possunt.)

Bas. 22.1.60; D. 22.4.

4.21.1. Emperor Antoninus to Septima Marcia.

If you go before the president of the province, he will compel your debtors to pay you, if you can in any manner show that they lawfully owe you. Nor will the loss of documents prejudice you, if it appears by clear proof that the parties are (your) debtors.[1]
Promulgated September 9 (213).

4.21.2. Emperor Alexander to Manilianus.

If you use a document in connection with which another was accused and convicted as forger, and the party from whom you claim money therein should be ready, if that appeared best to him, to also accuse you of the same crime, running the risk of the penalty of the Cornelian law, the sentence, from which the person against whom it was given did not appeal and from which it was not necessary for you to appeal, not having been accused, will not prejudice you in any way.
Promulgated September 30 (223).

Note.

An adjudication made against a third party bound no one but him and his privies. C. 7.60.

4.21.3. The same Emperor to Aelianus.

If your adversary declared in open court (apud acta), when the trustworthiness of the document which was produced was put in question, that he would not use it, you need have no fear that such document, which appears not to be genuine even by the acknowledgment of your opponent, will be again the basis of a suit.
Promulgated May 5 (226).

4.21.4. Emperor Gordian to Marcianus.

If, on account of the misfortune of the loss of documents, you lack proof of a payment made to the treasurer (dispensator), an inspection of the accounts of the fisc will demonstrate the truth.
Given February 12 (239).

Note.

It was shown at C. 4.20.18 and Novel 90, c. 2 that if a man paid money which he owed without taking a receipt, he could not prove payment except by five witnesses, specially called to see the payment made or hear the acknowledgment thereof. But C. 4.21.4 makes an exception: payment might be proved by the account books of the

[1] [Blume] See law 5 of this title.

plaintiff, and that proof was sufficient. The fisc was compelled to produce its books in order that payment might be shown. C. 2.1.6. See also C. 10.30.2; C. 10.2.2. Plaintiffs in general were compelled to show their books in order to determine what a defendant owed them. C. 2.1.5. Defendants, whoever, were not, ordinarily, required to do so, except in the case of bankers and a few other persons. C. 2.1.8; D. 2.13.

4.21.5. The same Emperor to Aurelius, Priscus and Marcus, soldiers.

As it is unjust that debtors should refuse payment of their debts when documents are destroyed by fire, so no immediate credence should be given those who allege such misfortune. You must, therefore, know that when documents do not exist, you must show by other means of proof that your petition is true.[2]
Promulgated June 29 (240)

4.21.6. Emperors Diocletian and Maximian to Luscedes.

The law is certain that your status is not injured by the loss of the register of our birth.[3]
Given at Nicomedia January 20 (286).

4.21.7. The same Emperors to Zinima.

If you were honorably discharged after the customary military service, (then), although the document of discharge is lost, still you have the unquestioned right to enjoy the privileges, if the truth can be clearly shown in other ways.
Given May 18 (286).

4.21.8. The same Emperors to Alexandra.

If it is evident that you own the property in litigation, the judge will take care that the usufructuary cannot prejudice your ownership because of the loss of documents.[4]
Given February 15 (287).

4.21.9. The same Emperors and the Caesars to Arisaenetus.

Although no documents were executed showing the fact, a division, once legally made, will not be considered void.[5]
Promulgated June 26 (293).

4.21.10. The same Emperors and the Caesars to Victorinus.

Since a completed sale is valid, though no documents showing that fact were executed, it has been properly decided that the loss of documents actually made does not destroy the truth of the matter.
Given October 25 (294).

4.21.11. The same Emperors and the Caesars to Theogenes.

If the record of an emancipation actually made no longer exists, but the fact of it having been made can be shown by undoubted proof, either by persons or by documents

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[2] [Blume] See law 1 of this title.
[3] [Blume] See C. 4.20.2 and note.
[4] [Blume] C. 2.3.17; C. 3.32.15; C. 4.21.10.
[5] [Blume] C. 3.37.4.

of unquestioned trustworthiness, the destruction of the old record cannot affect the truth of the matter.[6]
Given November 11 (294).

4.21.12. The same Emperors and Caesars to Dionysia.

When you were given the unhindered possession of a property pursuant to a gift, you are not any the less able to hold it because, as alleged, the execution of a document relating thereto was omitted.
Given at Nicomedia December 13 (294).

4.21.13. The same Emperors and the Caesars to Leontius.

A declaration of the loss of documents before those who do not know the facts of the transaction is no avail in proving the truth.
Given at Nicomedia December 17 (214).

4.21.14. Emperor Constantine and the Caesars to Severus, Count of the Two Spains.

Different documents, which contradict each other, produced by one and the same party, can have no force.
Given at Constantinople May 4 (333).
C. Th. 11.39.2.

4.21.15. Emperor Constantine to the people.

In the prosecution of lawsuits, trustworthy documents and the testimony of witnesses have equal weight.
Given at Rome July 21 (317).

Note.

The law is obscure. See C. 4.20.1 that witnesses could not contradict a document. Sometimes testimony of witnesses did not suffice. That was not late law. C. 4.20.2. The rescript as applied to the law under Justinian probably simply expresses a general rule that in proper cases in which either documents or witnesses were admissible in evidence, and either the one or the other were produced, the proper effect should be given thereto and in such case a cause could be proved either by documents or witnesses.

4.21.16. (Synopsis in Greek)

If defendant denies his signature in a due bill, tablet or leaf, and he is shown to be wrong by comparison of handwriting, that is to say, by comparing other writing of his with the signature on the due bill, he shall pay the plaintiff twenty-four solidi as punishment for his lie.

1. And if the notary (tabellio) is produced before whom the certified document was executed, or others who attest the genuineness thereof, then in addition to the penalty of twenty-four solidi, he shall not be permitted to use the defense of money not actually delivered by saying that though the document is valid, yet the money specified therein

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[6] [Blume] The Syrian Law Book (law 58) mentions that a letter was furnished to the emancipated child showing the fact. Mitteis, R.R.u.V.R. 216. The addressee of this rescript perhaps thought that such letter was essential. See 34 Z.S.S. 239 for itp; also C. 4.19.20 note.

was not actually delivered to him; but he shall be condemned, though the money was not in fact delivered to him.

2. These provisions apply if a defendant is sued on his own contract. But if a guardian or curator of any person under guardianship or curatorship, whether such guardian or curator is a man or a woman—who has the guardianship of her own children according to our constitutions—denies his or her own signature affixed to a contract of such minors, he or she shall, if shown to be wrong by comparison of handwriting, pay twenty-four solidi, but if shown to be wrong by the production of the notary or by witnesses, the defense of money not actually delivered shall not be taken from those who are under guardianship or curatorship—for they committed no fault—but the guardian or curator shall personally pay another twenty-four solidi to the plaintiff as punishment, so as to leave to the wards the defense of "money not delivered" intact. For it is not just that they should suffer damage through the fault of others.

3. Having made these provisions concerning defendants, the constitution treats of plaintiffs, directing that if a plaintiff denies his signature to a writing produced against him—perchance a receipt—he likewise shall, if shown to be wrong solely by comparison of handwriting, pay twenty-four solidi, but if shown wrong by the production of the notary or by witnesses, he will be charged with the sum mentioned in the document, although not actually paid. This applies if he sues in his own name. But if he is guardian or curator, he shall be penalized by paying twice twenty-four solidi; but the ward can set up against the document the defense of "money not delivered."[7]

4.21.17. Emperor Justinian to Mena, Praetorian Prefect.

Contracts of sale, exchange or gift, which need not be registered, and contracts of earnest money, or of any other transaction, which are agreed to be put in writing, and contracts of compromises which, pursuant to agreement, are to be evidenced by a written document, shall have no effect until the final clean draft of the document has been drawn, and they have been confirmed by the parties by their signatures, and until, if such documents are written by a notary, they shall be completed (completa) by him and afterwards declared ready for delivery to the (respective) parties (absoluta), so that no one shall have permission to claim any right under such contract or compromise until these things are done, whether such claim is made under a contract still in rough draft, though signed by one or both of the parties, or under a contract of which the final draft has been made, but which has not yet been completed and declared ready for delivery to the (respective) parties. This is true to the extent that in purchases in this manner, even where the price is agreed on, it cannot be said that the vendor must complete his contract of sale or pay to the purchaser his damage.

1. This shall apply to instruments hereafter to be completed, as well as to those which have been already written but have not yet been executed, unless a compromise or legal adjudication, which cannot be reopened, has taken place; excepting herefrom only instruments of purchase already written in rough draft (in scheda), or in final draft (in mundo), to which the present law shall not extend, but we permit the former laws to govern them.

2. We also add that if any earnest money is hereafter paid in connection with the intended purchase of any property, whether accompanied by writing or not, then, although no special agreement is made of what shall become of such money if the

[7] [Blume] C. 9.22.2 and 24.

contract is not performed, the person promising to sell must, upon refusal to do so, restore double what he has received, and the person promising to buy must, upon refusal to do so, lose the amount paid, without right to reclaim it.
Given at Constantinople June 1 (528).

Note.

In general, all contracts were valid without the requirement of any writing; thus a sale was valid when the parties had agreed; an exchange was valid when the parties had agreed and one of them delivered his property upon the understanding to get something in return. Gifts of a large amount, however, were ordinarily required to be registered, and were, accordingly, necessarily reduced to writing. See C. 8.53. So contracts were not valid until reduced to writing as specified in the foregoing law, where the agreement was that they should be reduced to writing.

Execution of documents before notaries. The "tabellio," here translated notary, performed services akin to those of the modern notary. They were an advanced class of ancient scribes, acting for private parties in the drawing of documents and legal papers. They were versed in law, constituted a distinct and honored class, and, as noted in Novel 44, were assigned offices, stations, or places in the forum. They were formed into a guild and each of them had clerks, called cursors, logographi, or notarii, who were so named because they noted down in brief signs the substance of conferences and drew up a scheda, a schedule or rough draft of the facts agreed on, from which the convention was subsequently drawn in full form or final draft and certified by the notary or his deputy or witnesses or other person used in connection with the execution of the instrument, as noted in Novel 73. The instruments could be registered in a registration office, kept in the capital cities by the master of the census and in provinces by the defender of the city or other head magistrates. When so registered, they became public documents and needed no proof, other than the certificate that it was a public instrument. Documents drawn by notaries were required to be drawn on legal paper, furnished under the supervision of the Count of the Imperial Exchequer, containing the name of the officiating count, the time of making of the paper and other indications which would prevent forgery. By Novel 47, the name of the emperor was required to be added to the instrument, the year of his reign, the consulship, the tax year, and the date and month was required to appear on documents and records. See Pfaff, Tabellio u. Tabularius 40.

The time of the origin of the tabellio is not known, but he is mentioned in the time of the classical jurists in the beginning of the third century. While they could previously be employed by parties at will, Justinian gave them a special standing as authorized scriveners, and they were under the supervision of the master of the census in the capital and probably under the governors in the provinces. Pfaff, supra 44, 45. The witnessing of documents—in cases where witnesses were required—was not dispensed with by reason of the fact that the notary drew the document (Pfaff, supra, 32, 41, 42, 47), but the proof of the genuiness thereof was made somewhat easier than other privately executed documents in that the notary could, in certain cases, make sufficient proof thereof, where three witnesses were required in other cases. Chapters 4 and 7 of Novel 73.

The law here annotated speaks of a document being completa and absoluta (complere and absolvere). These terms were technical in their meaning, and until lately have not been thoroughly understood. When the notary used the word complere (complevi), he thereby certified that he had completed the document and was responsible for its contents and genuiness. The term absolvere had reference to the parties executing the document, and when they used the word in proper person and tense, they thereby

certified that it was completed by them and ready for delivery to the party who was to receive it. 1 Karlowa 1001; Woess, Untersuchungen 52, 317. Other authors, however, believe the term absolvere to refer to the act of the notary. See Pfaff, supra 43, 44. See further as to public and private documents note C. 1.56.2.

The tabellio—notary—must not be confused with the tabularius, a municipal clerk, who was the custodian of the archives of the municipality. They originally were slaves, but late only free men were employed. Their official intervention was necessary in connection with declarations of birth, emancipation of minors, inventories of the property of incapables and decedents, declaration of heirs as to acceptance of an inheritance, wills of blind men, and other matters connected with a registration office. W.W. Smithers, History of the French Notarial System, 60 Penn.L.Rev. 19; 3 Bethmann-Hollweg 170-175. See also Cujacius, note to C. 10.32.15; 1 Karlowa 1002-1003; headnote C. 10.72.

4.21.18. The same Emperor to Mena, Praetorian Prefect.

The enactment which we made[8]--that judges could, when they deemed it best, in case witnesses are living in other places, send litigants or their procurators to the witnesses so that depositions may be taken in the presence of both parties and the matter thereafter referred back to the judges—shall also be observed by the judges, whether in this famous city or in the provinces—in case of those witnesses, asked to testify to the trustworthiness of documents, want to be permitted to do this in other places, so that if the judge finds their demand just, an order shall be made, so that, after the trustworthiness of documents has been attested or has not been attested, in suitable places, the matter shall be referred back to the first judge.
Given April 6 (529).

4.21.19. The same Emperor to Demosthenes, Praetorian Prefect.

Many, after receiving a receipt for rent or interest, deny, in case a doubt arises concerning them at any time, that they have the receipt, thus making the right of a plaintiff litigant dubious. Serfs who are anxious for ownership and perhaps claim liberty for themselves, to which they are not entitled, and debtors, who wish to set up the defense of the statute of limitations against their creditors, have resorted to such denials. 1. Desirous to uproot this evil, we order that if in the foregoing or other similar private transactions, the person giving the receipt wants a copy, with the signature of the receiver attached, or a counter-receipt, he shall be entitled thereto, and the receiver of the receipt must give a counter-receipt. Provided, however, if the giver of the receipt fails or neglects to take such counter-receipt, he shall not be prejudiced thereby, since equity forbids that an enactment for the benefit of parties should become a detriment to them.
Given September 20 (529) at Chalcedon.

Note.

The foregoing law was enacted to aid owners of land and creditors. It seems that some tenants claimed to be owners of the land occupied by them. If they had admitted that they had paid rent, they would have acknowledged their landlord's title, and could not have claimed adverse possession. So they denied having paid any rent and having received receipts therefor. So, too, some debtors claimed that the statute of limitations had run against their obligation. If they had made payment thereon in the meantime, the

[8] [Blume] C. 4.20.16; see also Novel 90, c. 5.

statute would have been tolled; so they denied having made such payment and getting receipts therefor.

In order to meet such denials, the law provided that the owner of the land and the creditor could demand from the tenant and the debtor respectively counter-receipts—that is to say, a writing showing the payment of rent and part of the debt respectively.

4.21.20. The same Emperor to Julianus, Praetorian Prefect.

Comparison of handwriting with that in chirographic[9] and other documents which were not executed publicly have, it is clear, given frequent occasion for the accusation of forgery, both in court and in connection with contracts.

1. We, therefore, ordain that o comparison of handwriting with that in chirographic documents shall be permitted, unless these are subscribed by three attesting witnesses, and the trustworthiness of the subscriptions has been established either by the subscribers themselves—by all or at least two of them--or[10] by a comparison of the handwriting of the witnesses, and the comparison with the document, the genuineness of which has been thus established, may then be made.

2. Comparison shall be made in no other manner, although someone brings a document forward against himself,[11] but shall be made only with judicial or other public documents or with chirographic documents which we have mentioned.

3. We do not, moreover, permit any comparison to be made unless those who make it first have taken oath that they are not making it for gain or out of enmity or favor.

4. This shall hereafter be observed in all the imperial bureaus, as well as by the apparitors of every praetorian prefecture, of the Master of Offices and of all the other judges appointed in our dominion. But comparisons already heretofore made cannot be disturbed without danger.

Given at Constantinople March 19 (530).

Note.

Provisions in connection with comparison of handwriting, contained in the foregoing law, in c. 2, Nov.49, and in Nov. 73, contain three separate subjects: (a) relating to various oaths which the party asking for the comparison to be made was required to take; (b) with what documents the comparison might be made; (c) what documents, when questioned, admitted proof by comparison. The foregoing law provides that comparison might be made only with publicly executed documents, which included private documents executed before three witnesses. The genuineness of such document with which the comparison was made was required to be shown, of course, and, as already stated, former editions of the foregoing law required such genuineness to be shown by witnesses. Novel 49, c. 2, made certain exceptions, and permitted comparison to be made with a document produced by the adverse party and with documents from public archives.

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[9] [Blume] See C. 4.2.17 note.

[10] [Blume] "Sive"--former editions, accepted by Cujjacius, Donellus and Bethmann-Hollweg have "sine"--that is to say, that the genuineness of the document with which the comparison was to be made could be shown only by witnesses—at least two, and that it was not permitted to show the genuineness of such document by merely comparing it with other writing.

[11] [Blume] Modified by Novel 49, c .2.

Novel 73 deals more particularly with the subject as to what documents, if questioned, permitted comparison, and provides that no documents, unless publicly executed, or signed by three witnesses, would be permitted to be proved genuine by comparison of handwriting.

4.21.21. The same Emperor to Julianus, Praetorian Prefect.[12]

When someone shall have produced a document of other paper, and has shown it to be genuine, but afterwards the person against whom the paper or document is produced attempts to show that it was forged, in such event, in order that it may not be doubted whether the person who produced it must produce it again, or whether its previously established trustworthiness is sufficient, we ordain that if anything of the kind happens, he, who wants the paper produced again, must first take an oath that he makes the request thinking that he can prove the instrument or paper to be false; for he might be aware that the paper has perchance been lost, or burned, or defaced, and pretending that he wants it, makes his demand in view of the difficulty of production.

1. After the plaintiff or claimant has taken such oath, and a written criminal complaint ahs been laid before the proper judge, the person producing the document must also lay it before the judge of the criminal court, so that the question of its forgery may be aired before him.

2. But if he says that it is not possible for him to produce it, because he has been deprived of the ability to do so by fortuitous circumstances, he shall take an oath that he does not have the paper, has not given it to another, that it is not deposited with another by his wish, and that he has not committed any fraud so that it might not be produced, but that the paper has truly been lost without any fraud, and that its production is impossible for him. If he takes such oath, he shall be absolved from the necessity of producing it.

3. But if he will not take the foregoing oath, then the paper shall have no validity as to him against whom it was produced, but shall be considered forged and utterly void. No further punishment shall, however, be inflicted on those who do not wish to take the oath, since some persons stand, perchance, in such awe thereof, that they will not take it even if true.

4. This opportunity (of having the document reproduced) is given only while the matter is still pending before the judge. If final judgment has been rendered, and is not suspended by appeal, and there is no hope that the cause is still existent through the usual reconsideration (on appeal), then no complaint of that kind can justly be granted, lest causes be reinvestigated during infinite time, and transactions which are closed should, contrary to our intention, be re-opened in that manner.[13]

Given February 25 (530).

Note.

Documents introduced in evidence were evidently, at times at least, withdrawn by the parties. They were, however, copied into the record of the proceedings. A person who had once produced a document and had shown its genuineness, might be compelled to produce it again, if the adverse party would later, before the case was ended, declare himself ready to show the document forged, and would file a criminal complaint. Thus a man might be compelled to produce papers against himself in a criminal case. Institution

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[12] Blume penciled in above this "See 3 B-H 283.

[13] Blume has penciled in after the text and before the typed note: "inscriptionum pagina"—see C. 9.1.3.

of a criminal case was not forbidden, however, even after the civil case was ended. That the question of forgery might be litigated in a civil as well as in a criminal case is shown in C. 9.22.23 and 24.

4.21.22. (Synopsis from the Greek.) The same Emperor.[14]

When a person is asked to produce a document in court, to be used, not against him but against another, for the benefit of the petitioner, and he should refuse to do so, pretending that such production would damage him ,but the petitioner denies such damage, or shows that such person has taken money from those who would be adversely affected by the production of the instrument, or that he simulates some other pretext, and that he, the petitioner, would suffer great damage from its non-production, the constitution directs that the person who has the document must produce it, if he will not be damaged thereby; but if the document produced would truly damage him, then he is excused from producing what would be better for him to conceal.

1. If the petitioner to whom the document is necessary alleges that it production would not injure the person who has it, the later need only take an oath that he refuses to product it, because he thinks that to do so would injure his property rights.

2. But in order that he may not consider the loss of the amount promised him for non-production as a damage, he must take an oath in the precise terms, that he does not refuse to produce it because of having received money or something else for not producing the document, or because something has been promised him, or because of fear of the person against whom the document is required, or because of his friendship toward him, but only because his property would thereby directly suffer grave damage.

3. For as a person who is thought to know the truth of another's cause is compelled to give his testimony even against his will, and may not refuse because money has been promised him for not giving it, or because he would be testifying against friends, so a person who is asked to produce a document may not refuse to do so because he has received or hopes to receive something, or because of friendship for those whom the document injures.

4. If he swears, however, that he does not have the document in question, he is not compelled to produce what he does not have. If he is not willing to take such oath, he must produce the document in question. If he hides, in order to escape taking the oath or producing the document, he must pay the damage caused to the person to whom the document is necessary, out of his own means.

5. These provisions apply also to books of money-changers, or books kept by others which someone wants produced to be used not against those who kept the books, but against others.

6. This constitution, however, further provides that the foregoing provisions are applicable only when the persons who have them, and the person acting as judge in the case, live in the same city. For the person who has the documents is not to be compelled to send them to another place and endanger their safety for the benefit of another.

7. But if anyone wants the documents which are in another place to be produced before the defender of the city and registered, so that he may take a copy to be used in the court where the litigation is pending, no objection exists against so producing and registering the documents in the place where they are.

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[14] Blume penciled in above this "3 B-H 283.

8. Only persons who are compelled to give testimony against others may be compelled to produce account books and documents, and if a person is not compelled to given unwilling testimony against another, neither is he compelled to produce account books, documents or anything else of that kind against him.

9. The laws have made it known what persons are not compelled to give unwilling testimony against certain others, and who the persons are against whom certain others are not compelled to testify.

10. Except in the court where the litigation is pending, no one can ask another to produce documents, and the person who asks it must pay the expense thereof.

11. A production need (generally) be made only once. If, however, the person to whom the document is necessary wants it produced again, after it has already been produced, and it appears just to the judge that this should be done (then is shall be produced again), but if the person who has already produced it objects thereto, alleging that the paper has been lost, or that he is not able to produce it for some other reason, he needs to vouch for that fact only under oath, and will then not be compelled to produce it again. These provisions shall be in force not only in the imperial city, but also in the whole empire.