Novel 90.

Concerning witnesses.
(De testibus.)

Emperor Justinian to John, etc.

Preface. Use of testimony of witnesses was first made so that transactions might not easily remain undisclosed. But since great dishonesty had taken possession of the minds of men, there is great danger that such use may bring about the contrary. For most of them testify not to disclose transactions but to cover them up. And persons who state something different from what they know, or state something as a fact which they do not know, show that they do not want the true facts known and have judgment rendered in accordance with such facts. On the contrary, they state facts which are not true and want them to be considered in the suit. Still, it is dangerous to dispense with testimony altogether, since many things cannot be known otherwise than through the disclosure by witnesses. However, preceding lawgivers have not permitted all, including the lowest, to give testimony; thus they make many exceptions, excluding many from becoming witnesses. But since the situation is not as it should be even after these prohibitions, we have thought it best to add more details and to diminish false testimony as much as possible. For we find such to have been given recently before the president of the province of Bithynia, where witnesses were shown to be guilty of astounding perjury. They afterward confessed that at the time a testament was being finished, the testatrix died, but that some of them, seizing her hand, when already dead, laid it on the paper and guided it to draw a straight and transverse line with it, and so make it appear that the deceased had made the sign of the venerable cross. Considering these things, we thought it advisable to make some definite provisions as to the manner of witnesses and as to their standing. We confirm all that ancient lawgivers said as to prohibiting persons from giving testimony.

c. 1. We ordain that, particularly in this great and fortunate city where there is, thank God, a multitude of good men, witnesses shall be men of good reputation, and who, by reason of their rank (dignity), position of state-service, wealth or honorable occupation, are above any accusation of perjury, or if they do not belong to these classes, then they must be men whose credibility may be shown by others, excluding men sitting on benches crawling along the earth,[a] so that if there is any doubt as to witnesses, their honorable and becoming manner of life may be easily shown. **1.** If they are unknown and obscure and appear to want to deviate from the truth in giving their testimony, they may be subjected to torture. Judges who are magistrates may do this themselves; judges who are not magistrates shall, in this city, summon an apparitor of the magnificent Praetor of the People,[b] in the province, the Defender of the Palace, and apply torture through them, so that such witnesses may not conceal any of the truth, or may be compelled to acknowledge that they testify for money or otherwise corrupt.

a. Men who make their living by menial services performed on benches or while crawling along the earth—in a word, men who perform menial services. As to torture of witnesses generally, see C. 9.41.

b. Novel 13.

c. 2. Although we provided long ago[a] that no witnesses should be received to prove payment of a written duebill, when no written receipt was taken, except upon the condition there stated—which shall remain in force—still, we want to renew such a provision. If a debt was evidenced in writing, and proof of payment, not reduced to writing, is offered by litigants to be made through witnesses, the judges shall receive such proof, provided that the witnesses were present for the specific purpose either of witnessing the payment itself, or to hear the acknowledgment of such payment made by the party who received such payment, and provided that such witnesses, worthy of credence, testify to that fact, and perchance show it by a certificate made at the time. But testimony of no weight shall be of no avail; where, for instance, it is upon information gathered only casually, or when a man makes up a story that he happened to be present on account of some other business, and heard someone say

that he had received money from some other party, or that he owed such other party. We suspect such testimony and do not consider it worthy of consideration. We had such a case in court, in which, though the payment of a large sum was said to have been acknowledged, only two notaries (tabulrii) claimed to have heard this, without anyone else being present, though the debt was evidenced in writing, and though the person making the acknowledgement (as claimed) knew how to write and could have made a record of the fact at the time. This left us with a bitter taste and gave us the occasion for this law. Again, an impersonator, similar in looks to the person for whom snares were laid, confessed in the presence of witnesses and notaries that he owed a debt, and then, having been hired for the purpose, left. Thereupon, a demand was made on the person impersonated for the payment of the debt, which was confessed by the impersonator as though confessed by the party impersonated. This did not remain a secret, since God does not permit such transaction to remain hidden forever.

a. C. 4.20.18.

c. 3. So we give no credence to such testimony or, as stated, to such statements of notaries when persons who are said to have made the acknowledgments were able to write, since it is easy to state it in writing or make the acknowledgment in court and thus add undoubted verity to the fact. We do not permit such testimony to do injury to the truth, and we are not pleased if anything of that kind takes place. But we do require that witnesses must be summoned by the party who (subsequently) produces them in court, for the specific purpose (of hearing the acknowledgment made). This must be proven. And these witnesses, so specially summoned, as in the case of wills, must be of good reputation. Thus the transaction may be proven by them, and certificates shall hereafter be valid without the presence, declaration and subscription of witnesses. If the witnesses are not such as we have stated above, they shall be subjected to torture. If they contradict themselves or others, the judges shall pay particular attention to this, and if the testimony is contradictory on the principle points involved, it shall be rejected, and the testimony given by the more worthy and the greater number shall be accepted. If they appear guilty of

intentional fraud, and fall into contradictions on that account, they shall not be left unpunished; that is to say, if it is shown that they did so purposely and not through error.

c. 4. Many, after having produced witnesses three different times, and after they have rested their case and have received (a copy of) the testimony, address a supplication to us and want to produce witnesses the fourth time. We ordain that judges must be careful with reference to this, and if witnesses have already been produced three different times, and the person who produced them has rested his case and has received a copy of the testimony, and again seeks to have witnesses appear, he shall not be permitted to do so, because there is ground for suspicion that when the former witnesses have left out something as appears from the testimony already given, he does not really want (a new) production of witnesses, but wants to have an addition made to what the witnesses did not previously testify, or a correction of previous testimony. But if a party who produced the witnesses did not receive the testimony and has no knowledge of it either personally or by procurator, and the opponent alone received it, and made his objections thereto, without giving a copy of them to the party who already produced witnesses three different times, so that the latter might not add to the testimony what was lacking after knowing of the objections, then the person asking it may be granted the production of witnesses the fourth time, first taking an oath that he did not receive the testimony and had no knowledge thereof either personally or by procurator or by any agent of his, and that he is not asking for the production of witnesses the fourth time through any fraud or trickery, but because he was not able to make use of the former testimony. If this is done, he will not even need an imperial order, as was formerly necessary, but the law itself will be sufficient for that purpose, and he shall be able to use the testimony of witnesses produced the fourth time, not, however, after the lapse of a long time, so that the litigation may not be thereby protracted, but it shall be done speedily, according as the judge may order. **1.** But is undoubted that if anyone, after the first or second production of witnesses, has rested his case, and has either received a copy of the testimony or has inspected it, or, if he received the objections

of the opponent after the latter has inspected it, so that the former knew of the testimony thereby, he shall have no right of further production of witnesses even pursuant to imperial order.

Note.

Trial of cases. The foregoing chapter is obscure; especially must that be so to an American lawyer who is accustomed to the fact that ordinarily, when a trial of a case is commenced all the witnesses on both sides are produced, one after the other, until the trial is finished; and during the trial the court may, in its discretion, permit a party to reopen his side of the case as often is deemed best to as to elucidate the case.

The trial of a case, in Justinian's time was, ordinarily, before a single judge. It was more or less under cover, only a limited number of people being admitted into the court room. C. 7.45.6 and note. When the case same on for hearing, and the parties appeared, the plaintiff was bound to state his demand in detail, and the defendant ordinarily stated his defenses, although failure to do so did not necessarily bar peremptory defenses. C. 8.35.4, note. The substance of these statements were taken down by clerks of the court, shorthand writers (C. 7.62.32.3), and as noted in the foregoing law, that was true also with the testimony given by the witnesses, a copy thereof being furnished to the parties. The statements of the parties above mentioned ended in the settlement of the issues to be tried, unless, as mentioned, peremptory defenses were raised subsequently. C. 3.9.1.

Thereupon the witnesses were produced to prove the issues. The examination was, contrary to former practice, conducted by the judge—unless the testimony was in the form of depositions. The trial was not necessarily continuous until it was fully settled. It would seem that the judge made interlocutory orders at various states of the trial, directing upon whom rested the burden of proof of certain point or issues, and this burden was required to be met. The plaintiff was required to prove his case, if it was disputed. Obscure as the sources are, it is probably that he produced his witnesses, followed by the witnesses of the defendant on this point, if any existed. If the point in issue was proved to the satisfaction of the judge, then, and not until then was the defendant compelled to produce witnesses to show his

affirmative defense or defenses, an interlocutory order, apparently, being issued requiring him to do so, and testimony disproving such affirmative defense being produced, if possible, by the plaintiff. Further proceedings were similar. 3 Bethmann-Hollweg 273-274.

That the trial was not necessarily continuous, but might be by stages, seems to be implied by the provisions of the foregoing chapter. See also C. 4.1.12. After a party had produced his witnesses to sustain his point, a copy of the testimony was furnished to him and to his opposite party—to the latter evidently so as to meet the point better. Witnesses might be produced, under certain conditions, at four different times: i.e., there might be four "productions" of witnesses. We have no definite information whether this was on different days or at different periods. See 3 Bethmann-Hollweg 367-371. It is not probably during that time the opposite party produced any witnesses. Only one "production" of witnesses was possible, if the party had knowledge of the testimony given on his behalf. This rule existed so as to prevent him from obtaining perjured testimony, which would be less likely if the trial were continuous. Just when the right to have several "productions" of witnesses could apply is somewhat obscure, inasmuch as the parties had a right to be present at the taking of the testimony, and probably usually were, and inasmuch as cases were probably ordinarily conducted by attorneys. See 7 Donellus 1079, 1084 & 1216. The periods mentioned above had nothing to do with continuance of cases for the purpose of producing documents and witnesses (C. 3.11) but were outside thereof. Donellus, supra.

Records of proceedings. In Cicero's time, records of proceedings were but imperfectly kept. But they were in vogue in the time of the classical jurists and in later times, in all the courts, and registration offices, including the imperial court and the municipal offices. 2 Bethmann-Hollweg 194. Aside from a journal, which contained a chronological and summary statement of the proceedings, fuller record was made of the separate proceedings, as the statement of the parties in court and the testimony given by the witnesses and of documentary evidence furnished, and a copy furnished to the parties. 3 Bethmann-Hollweg 198-199.

c. 5. Moreover, we have already enacted a law,[a] that if a party has a lawsuit here, but it becomes necessary to prove a part of the case by testimony in a province, witnesses may, upon the order of the judge and a sufficient time being fixed for the purpose, be examined in such province, the testimony being sent back here and the case decided by the judge here. Now we are besought by many requests wanting the law to be extended so that litigants in the provinces who have witnesses that live here, may, upon order of the provincial judge, examine witnesses and take proof here, sending the proceeding back to the provincial judge. In fact, they ask that this rule should apply between one province and another. We, accordingly, ordain that, for the purposes of furnishing opportunity to obtain proof, the rule shall so apply, and it shall be permitted for the judge to send for testimony here, to be taken, upon the order of the judge, before one of the worshipful judges designated by us, and when testimony to be used in one province is to be taken in another, it shall be so taken, pursuant to the judge's order, before a defender or magistrate. So, too, testimony may be taken in one province or in this city to be used in another province, and the facility to obtain testimony shall be equal for all. But the testimony shall not be made public, but the record thereof shall be given to the party producing the witnesses, or also to his adversary, after being duly sealed, and so sent by the judges to this city or to the provinces (as the case may require), so that, if the nature of the case demands other testimony, additional witnesses may not be excluded on account of the testimony being made public. **1.** These provisions must be understood to apply only to civil cases; for in criminal cases, in which the most important matters stand in danger, it is necessary for the witnesses to appear before the judges and tell before him what they know. For in such cases it may be necessary to use torments and observe other regulations.

Notes.

a. C. 4.20.16; see also C. 4.21.18.

In cases where depositions of witnesses were taken, as here provided, there was no cross-examination and such depositions were, accordingly, similar to those taken upon commission, in at least some of the United States. They were permitted to be certified in similar manner as other public documents. Mommsen, Strafrecht

411. The testimony given therein was not, however, considered of the same force as other testimony. D. 3.2.21; D. 22.5.3.3. It will further be noted that no depositions could be used in criminal cases.

c. 6. If it is claimed that a witness who wants to give his testimony is a slave, but the witness claims to be free, then if he claims to be free-born, the testimony shall be taken, reserving the objection as to his status, so that if he is shown to be a slave, his testimony shall be considered for naught; if he says that he was manumitted, he shall produce the document of manumission and give his testimony thereafter. If he says that he obtained his freedom in another province, or that his proof is not at hand, and swears to that fact, his testimony shall be taken down, but shall not be used if the person calling him does not produce the document of manumission.

c. 7. If a party claims that a witness about to give testimony is his enemy, and, perhaps, was accused by him, then if he shows that a criminal case is pending between them, the person who is the party's enemy to the extent of accusing the latter of a crime shall not be permitted to give his testimony. If such witness is said to be a party's enemy in any other manner, or has sued him in a civil case, the testimony shall be taken, reserving (the decision on) such question till the time of taking exceptions.[a]

a. See C. 4.20.3, note.

c. 8. We have passed a law that witnesses shall testify in civil cases even against their consent, exempting persons who had been mediators between the parties. Many, however, abuse this privilege, refusing to testify (when they should). So we ordain that if both parties consent that such mediator may give his testimony and will be satisfied therewith, he shall be compelled to testify, although unwilling, inasmuch as the impediment, on account of which our law provided that he should not testify against his wish, is removed by the consent given by the parties.

c. 9. We also know that parties often go before the defender of a place or the president of the province, or, as is proper, before the master of the census here, complaining that they have been wronged or injured or damaged by some, and wanting to show this by witnesses. In order that the objection may not thereafter be made that such proof was taken with only one party present, the defendant, if living in the same city where the testimony is taken, after notice from the president or defender, shall appear and hear the testimony. If he refuses to appear, so as to make the testimony useless because given with only one party present, we ordain that such testimony shall be of the same force as though taken, not in the presence of only one of the parties but of both. For if he refuses to come and hear the witnesses testify, although he appears in public and is not prevented from appearing by inevitable necessity, he will be treated as present. But he shall not suffer for his contumacy except that the testimony shall be considered as taken in the presence of both parties. He shall have all other rights of making objections, but not as to the fact that the proceedings took place with only one party present, because of his contumacy, since a man who scornfully absents himself should not be able to make such objection. All provisions made concerning witnesses by our predecessors or ourselves shall remain in force and be enforced by our judges, high or low, in this great city or in the provinces, so that by bettering these provisions concerning witnesses as far as possible, we may make lawsuits purer and clearer. For such purpose we have also ordained that trials before judges should take place in the presence of the holy gospels, and that plaintiffs and defendants and the advocates should take an oath, everywhere placing God before litigants, judges and witnesses so that the thought and presence of God might keep lawsuits clean and above suspicion for the litigants. We want this law to remain in force for all future time.

Epilogue. Your Sublimity will take care to put this our will, declared in this sacred law, into force and effect.

Given October 1, 539.

Note.

The foregoing chapter deals with testimony taken before the commencement of an action, in order to preserve it for a future case. Bas. 21.1.