Book II.
Title LVIII (LIX).

Concerning an oath to be taken on account of chicanery (calumnia).

2.58.1. Emperor Justinian to Demosthenes, Praetorian Prefect.

We ordain that in all cases in which there is a contention either concerning writings, or documents, or anything else necessary to be proved, the proofs thereof shall not be compelled to be produced otherwise than after he who demands them first takes an oath concerning vexations litigation (of good faith), that he does not make this demand to delay the case. For the contentious insistence of litigants (in pursuing their claims) is restrained by the fear of an oath. 1. Lest some persons, moreover, wrongly wanting slaves examined (under torture), give vent to the cruelty of their mind, it shall not be permitted those who demand the examination of slaves to have it, or be heard by the judges, till they first depose, while touching the holy scriptures, that they have not come for this on account of hatred for the slaves or enmity toward the coheirs, but because they cannot otherwise discover or show the truth concerning the property of an inheritance. Given at Constantinople September 20 (529).

Note.

The term "calumnia," vexatious litigation, referred in Roman procedural law particularly to a groundless action or accusation brought or instituted against better knowledge, or to a defense set up out of mere willfulness, and by which the rights of the opponent were sought to be frustrated. Glück, 6 Pandekton 386; Paul. Sent. 1.5.1; C. 5.37.6. An oath against chicanery was, therefore, stated otherwise, an oath of good faith. It was required to be taken in a number of cases, as where accounts were demanded from a banker (D. 2.13.6.2), where a decisory oath was tendered (C. 4.1.9, note); in connection with a trust (C. 6.42.32); where a man demanded to be permitted to go on another's land to find his lost treasure (D. 10.4.15); where a man asked to inspect and take a copy of a will (C. 6.32.3), and in some other cases. See note Cujas to Novel 49, c. 3 [2 Cujas 959]. It was to some extent in vogue in suits even in classical times (Gaius 4.172.174) and was extended by Justinian.

2.58.2. The same emperor to Julianus, Praetorian Prefect.

Inasmuch as we have not permitted judges to dispose of cases otherwise than with the holy gospels before them,[1] and have provided that advocates in these cases must, in every part of the earth subject to the Roman sway, first take an oath before undertaking their cases,[2] (so) we have deemed it necessary to enact the present law, by which we ordain that in all lawsuits commenced after the enactment of this law, neither the plaintiff nor the defendant shall engage in the contest, in the beginning of the dispute,[3] unless after the statement and the counter-statement[4] have been made, and before the advocates of each party take the legal oath, the principals submit to an oath. The plaintiff, forsooth, shall swear that he has not set the suit in motion for the purpose of chicanery, but in thinking that he had a good cause; the defendant shall not bring forth his claims till he has

[1] [Blume] C. 3.1.14.
[2] [Blume] Id.
[3] [Blume] Must refer to the contest after joinder of issues.
[4] [Blume] C. 3.9.1.

first sworn that he has resisted the demands against him believing that he had a good defense. After that the learned advocates of each of the parties, as has already been provided, shall take an oath with the holy gospels, forsooth, placed before the judge.

1. If, however, the rank or sex of a person forbids going before the judge, the oath shall be taken in the home of the litigant in the presence of the adversary or his procurator.

2. This shall also be observed if it is guardians or curators or other persons who carry on the administration of the property of others by legal authority. For it is proper that they, too, should submit to an oath, because they come into a case knowing its situation. For neither a minor, under or over the age of puberty, or other person of that kind, but they themselves who carry on the guardianship, curatorship or other legal administration, can know the case and swear to the best of their knowledge and belief. And though the true nature of the case, perchance, is different, still, to what he believes and thinks, that is to be sworn to. All other oaths provided by past laws or by us, shall remain in full force.

3. If, moreover, one of the parties is absent, and the cause is conducted by a procurator, the plaintiff, if he is the one that is absent, shall not entrust the lawsuit to a procurator, to be conducted by him, until he first submits to an oath of (against) chicanery, made a matter or record in the province where he lives.

3a. And in like manner, if the defendant is absent, and, perchance, has by a stipulation that the judgment would be satisfied, appointed a procurator,[5] or if a defender has interceded for him, he,[6] too, shall, in the presence of the plaintiff or his empowered procurator or, in his (their) absence, if that appears best to the judge, take the oath, made a matter of record, which has above been provided to be taken by the defendant.

4. But because we fear that some persons might, through the use of some collusion, see themselves released from such oath, and by the aforesaid dissimulation cheat our sanction, we ordain that all judges, though trying a case under an arbitration agreement, shall, through the exercise of their power—since we have not enacted the instant law for the advantage of private persons, but for the common good—in no way permit release from such oath, but must by all means demand it from plaintiff and defendant, lest this law may seem gradually to be defrauded, and the oath of the principals or their advocates be in any way cut short.

5. We ordain that this, too, should be added to this law, namely, that if any person wants to set a suit in motion for another, without producing a mandate authorizing him to do so, but he has made himself acceptable through suretyship, that the principal will ratify his acts, then in order that this law may not be cheated even by such scheme, we further ordain that if anything like that happens hereafter, whether anyone wants to institute an action for a person, guild, village, or other corporate body (universitas), he shall indeed give the customary surety that his acts will be ratified, but the suit shall not al all proceed further unless, within the time fixed by the judge, he causes the principals to submit to an oath, either in the presence of the adversary, if the latter so prefers, or another acting for him, or if the other party remains entirely away, then such oath, to be

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[5] [Blume] i.e., the bond given by given by the principal for payment of the judgment also contained the appointment of the agent. Inst. 4.11.4.

[6] [Blume] Ipse. It seems to refer to the defendant. But a defender, agent, usually or frequently interceded for an absent defendant, only when the latter could not be reached. How could he be reached in such case to take an oath?

made a mater of record, shall be taken before the defender of the place,[7] either by the person for whom the suit is prosecuted or by the greater or adequate part of the corporate body.

6. But if the plaintiff refuses to submit to the oath relating to vexatious litigation, and this is legally shown, he shall in no manner be permitted to carry on the suit, but his action, commenced, shall fail as that of dishonest litigant, and the sternness of the judges shall oppose him with a holy threat, and expel him as far as possible from the court.

7. If the defendant refuses to submit to the oath, he shall be considered as one who has confessed as to the points contained in the statement of facts submitted by the plaintiff, and the judge may pronounce his decision, according as the nature of the case suggests.

8. For thus not alone lawsuits, but also persons guilty of vexatious litigation, will be diminished, and persons will think that they stand before sacred shrines instead of the courts. For if the principals of the litigation carry on their suits under oath and the advocates of cases take it, and the judges themselves make an investigation of the whole case, as well as render judgment, with the holy scriptures placed before them, what else is to be thought than that God is the judge in all cases instead of men?

8a. Thus with the old time vexations removed, and its subterfuges, let our clear and concise constitution shine throughout the earth, and be the greatest remedy in the disposal of cases.

9. And we want the aforesaid oath, indeed, to be taken at the very beginning of all lawsuits which have not yet been commenced.

10. If, moreover, there are cases still pending, even with issues already joined, and the accustomed judicial securities already given, then, forsooth, if both parties are present, and living in the same city or territory, the oath shall be taken also in these suits, and they shall be compelled to take it, upon their first appearance in court, after (the enactment of) this law.

11. If one of the parties, however, is absent, (then), lest the litigation may seem to be delayed on account of the absence of such party, and something should turn up contrary to our purpose, and what we have introduced for the shortening of lawsuits[8] should be turned into an opposite result, we direct that the party present shall take the oath, but it shall be remitted as to the absent party, only, however, in cases pending.

12. But if both of the principals are absent, then, lest the suits be delayed, the pending cases shall run the usual course without the giving of the oath.[9]
Promulgated at Constantinople February 20 (531).

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[7] [Blume] C. 1.55.

[8] [Blume] C. 3.1.13.

[9] [Blume] By Novel 49, in 537, Justinian provided that only one oath of good faith—against chicanery—should be required of the litigants during the suit. By Novel 124, c. 1, in 544 A.D., Justinian required of the parties an oath that they had not given or promised anything to the judge who was to try the case. A similar oath is mentioned in Pliny, Ep. 5, c. 21.