Book IV.
Title XX.

Concerning Witnesses.
(De testibus.)

Bas. 21.1.25[1]; D. 22.5.

4.20.1. Oral testimony will not be permitted to contradict a writing.

Note.

The foregoing rescript probably meant to state the same general principle known to us that parol testimony shall not be received in order to contradict a document in writing, and it must be assumed that the genuiness of the document was not questioned. 9 Cujacius 152; see also C. 2.42.3; C. 8.37.14. So Paul, Sent. 5.15.4 says: "When the genuiness of a document is not questioned, witnesses cannot be interrogated in contradiction of the writing." As to payment, see law 18 of this title.[2]

4.20.2. Emperor Alexander to Carpus.

If it is disputed that you are free-born, defend your case by whatever documents and proofs you think (you can); but witnesses alone do not suffice for proof that you were free-born.
Promulgated April 22 (223).

Note.

That free birth was required to be shown by writing is clearly an interpolation, and was probably made by Justinian. 34 Z.S.S. 242. It is inconsistent with a rescript of the Emperor Probus (C. 5.4.9), with two of Diocletian in 286 A.D. (C. 4.21.6 and C. 7.16.15), and one of Gordian (28 Z.S.S. 385); see also notes to Bas. 21.1.26. Justinian also provided that manumissions should be in writing, to enable a former slave to be a witness. Nov. 90, c. 6. Marcus Aurelius had provided that certificates of birth should be filed, but these were only prima facie evidence. C. 4.19.14. In Egypt these professions were earlier. Steinwenter, Urkunden D. 3.3.29.1

4.20.3. Emperors Valerian and Gallienus to Rosa.

Also in the civil law, the trustworthiness of members of the same family is disapproved as credible.
Promulgated August 30 (255).

Note.

Competency of witnesses. Under many jurisdictions at the present time, practically all restrictions as to the competency of witnesses, except in certain cases of confidential relations, have been removed. That was not so formerly, and was not so under the Roman law, for there were many cases where witnesses were either incompetent or were privileged not to testify. Entirely incompetent were persons condemned in a public

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[1] In the manuscript the citation appears as: Bas. 21.1?. 25, with the question mark being penciled in. There is a subsection 25 to 21 which appears to be relevant, so I have cited it thus.

[2] Blume added in pencil: "See Paul, Sent. 5.15.4? See last part C. 4.30.13; See 34 Z.S.S. 241 note."

criminal suit and other infamous persons, including prostitutes, gladiators and other similar persons; Paul, 5.15.5; D. 22.5.3.5; D. 1.9.2; apostates, C. 1.7.11, and heretics in certain cases, C. 1.5.21. Slaves could testify in civil cases only to a limited extent. See headnote C. 9.41. A minor under the age of puberty could not testify. D. 22.5.3.5.

Limitations existed as to certain cases. Thus parents could not at all testify for or against children and vice versa. Law 6 of this title; D. 22.5.9. Domestic testimony, as stated in law 3 of this title, could not be used for a man, and that included generally all those living under the same roof with him. 9 Cujacus 252, 253; D. 22.5.24; D. 48.19.11 pr. In other words, witnesses whom a man could order to testify were excluded from testifying for him. D. 22.5.6. Among that class were included slaves and freedmen of a man. C. 9.41 headnote and C. 9.41.6 and 7. Nor could a man be a witness in his own affair. Law 10 of this title; D. 22.5.10. But that had not been the law formerly. That rule extended to associates and participants in a crime. Law 11 of this title. A lawyer could not testify as to transactions in which he was or had been engaged. D. 22.5.25. Some other limitations are referred to in the laws of this title.

Certain witnesses were privileged. Thus relatives by blood or marriage, within a limited number of degrees, were privileged not to testify against each other. D. 22.5.4; D. 48.10.10 pr. But they might testify for or against each other if they wished and did not come within some other prohibited class. 9 Cujacius 253. Minors under twenty years of age (Donellus says under twenty-five) could not be compelled to testify. Old men, sick persons, soldiers, bishops, and persons absent on state business could not be compelled to appear in court. D. 22.5-8, 20. 7 Donellus 1207-8; C. 1.3.7, and see C. 1.3.8 as to presbyters. Generally, however, all other witnesses could be forced to testify, which was true originally, however, only in criminal cases. C. 4.20.16.

We are not altogether certain how long these rules in reference to the competency of witnesses existed, and doubtless did not grow up in a day. Pomponius, who lived in the first half of the second century affirms the rule as to a man's testimony for himself. D. 25.5.10. Ulpian, who died in the earlier portion of the third century, states that a father could not testify for his son, or the son for his father. Geib in his work on criminal procedure, 336, seems to think that the rules in about Cicero's time were not much different than those in the later times, and on page 141, in fact, seems to thing that many of these rules existed from early times.

Of course, failure of justice must frequently have resulted, and in fact Hunter, in his Roman Law, 1056, says that "the ancient point of view was that the object of a trial was to put an end to a mere private dispute," and "the discovery of the truth was by no means an exclusive idea." And the rules seem somewhat inconsistent with the great sanctity that the Romans seem to have put on an oath, and further with the rules of evidence, or lack of rules of evidence, which existed in the middle period, the time of Cicero, for hearsay, outside statements not under oath, character testimony and nearly everything else was admitted. We can see some excuse for these rules after writing had become rather prevalent, but very little in the period preceding that. See a good discussion of what evidence was admitted in criminal trials in Strahan-Davidson, 1 Problems of the Roman Criminal Law, 112-128. That author says that the Romans had no system of evidence such as we have it today. See also for a short account on evidence, Mackenzie and Hunter on Roman Law.

4.20.4. The Emperors Carus and Numerian to Aurelius.

Proof of a cause consisting only of a statement, brought forth, of a witness, in the presence of others (testatio) without other legal support is of no force.
Promulgated November 25 (284).

Note.

According to the Basilica, the words "of one person" should be inserted, thus reading "A cause supported by the testimony of one witness only, etc." But the rule that a cause could not be proved by the testimony of only one witness originated with Constantine. Law 9 h.t. Riccobono, 34 Z.S.S. 243 reads the rescript to mean that a cause could not be proven by witnesses only; in other words that documentary evidence was required. That cannot be the meaning. That would generalize the rule at law 2 h.t., which would not have been practicable. We need but mention criminal cases. The meaning of the rescript seems simple and clear. A testatio could mean a statement made in the presence of witnesses and reduced to writing. Heumann-Seckel, Lexicon. That is the meaning here in all probability. That alone could not, of course, suffice as evidence in a case. It might be a document of great importance, but it did not prove itself. If it was not a public document, witnesses were required to prove its genuiness, such as mentioned in law 15 h.t.

4.20.5. Emperors Diocletian and Maximian to Candidus.

Those witnesses should be summoned, in order to show the truth, who are able to place their judicial oath above every favor and influence.
Promulgated April 2 (286).

Note.

As was stated in the note to the previous law, great importance was attached to credibility of witnesses, which included their relationship to the parties, whether they were enemy or friend. The foregoing law states in effect that those who place favor or power above their oath will not be credited.

4.20.6. The same Emperors and the Caesars to Tertulus.

Parents and children cannot testify against each other even voluntarily.[3]
Promulgated at Nicomedia December 3 (294).

4.20.7. The same Emperors and the Caesars to Diogenes and Ingenuus.

It is too much what you ask—that the opposite party should produce those through whom he may make trouble for himself. Hence, you must know that you must support your suit by your own proofs, and that they need not be adduced by the opponents against themselves.
Given April 26 (293).

Note.

A plaintiff in this case demanded, for example, that a defendant should produce his children or other domestics who say, perhaps, the making of a loan, in order that such loan might be proved by them. The foregoing law says that a defendant is not compelled to do so. This did not, however, prevent a plaintiff from causing otherwise competent witnesses to be summoned through judicial authority. 7 Donellus 1133-1136. For similar

[3] [Blume] Note to law 3 of this title.

provisions, see C. 2.1, laws 1, 4, and 8. As to production of accounts by plaintiff and proof by reason thereof, see C. 4.21.4.

4.20.8. The same Emperors and the Caesars to Derulon.

There is no doubt that slaves may not be interrogated (under torture) for the master, any more than against him, but they may be interrogated as to their own transaction.[4]
Given at Nicomedia November 1 (294).

4.20.9. Emperor Constantineto Julianus, President.

We have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath, and that more credence should be given to witnesses of honorable standing (than to others). We also ordained that no judge should in any cause readily accept the testimony of only one witness; and we now make it plain that the testimony of only one witness shall not be considered at all, although such witness glories in the splendor of a senatorship of a curia.
Given at Naissus August 25 (334).
C. Th. 11.39.3.

Note.

The foregoing law provides, first, that every witness must take an oath, which had been the general rule; second, that the testimony of men of honorable standing should be preferred to that of others; third, that the testimony of one witness should not suffice to prove a cause. D. 22.5.12 states that where no other number of witnesses is specified in the law, two shall suffice. Two witnesses seem to have sufficed in criminal cases and delictal actions. 7 Donellus, 1145. The rule does not seem to have been peremptory (Hunter, 1057) as may be noticed from law 9, supra. See Geib 141, 336. More witnesses were required in other cases. At least seven were required for a will, five for a codicil. At note to C. 4.2.17, it has already been stated what number was required in certain contracts. To prove nativity, five witnesses were necessary, if no documentary evidence existed; if such documentary evidence existed, three were sufficient, and if the document was a public document, no witnesses at all were necessary. Law 15 of this title; see also C. 8.53.31.

4.20.10. Emperors Valens, Gratian and Valentinian to Grachus, City Prefect.

The laws deprive everyone of the right to give testimony in his own cause.[5]
Read December 1 (376).
C. Th. 2.2.1.

4. 20. 11. Emperors Honorius and Theodosius to Caecilianus, Praetorian Prefect.

Since free persons are asked to become witnesses in the suits of others, if they are not associates and participants in crime, and faithful disclosure (only) of their knowledge is asked, the judge must take care, in the production of the necessary persons--that is witnesses, that he directs that the proper expenses are paid to hose who are about to come

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[4] [Blume] See headnote C. 9.41 and laws 1, 2, 13, and 18 of that title.
[5] [Blume] See note to law 3 of this title. [After this, Blume has penciled in "See case tried before Gellius—Noctes Att. 14.2. Also Cicero, Pro Caecina, & as to [illegible] Stein, pp. 71, 75.

to court at the instance of the accuser or other person by whom they were summoned. 1. The law is the same if witnesses are to be produced by either party in a civil suit.
Given at Ravenna January 21 (409).
C. Th. 11. 39. 13.

Note.

It will be noted that slaves and participants of a crime were not included in the list of persons entitled to witness fees.

4.20.12. The same Emperors.

We forbid, under pain of punishment, unlawful and wicked voices of freedmen to be raised against their patrons, and that they shall not dare to appear voluntarily, nor be compelled to come if summoned.[6]
Given at Ravenna August 6 (423).
C. Th. 9.6.4.

4.20.13. (In Greek)

Whoever gives false testimony, in the first place, perjures himself; next, he will be prosecuted as a falsifier, and if he appears to be a liar while giving his testimony, he is subjected to torture. 1. If the party who loses his suit because of such false testimony want to proceed civilly against the person who has given it, he shall recover his damage from him, the punishment fixed by law being visited upon the falsifier in addition. If his perjury appears in the principal suit, it is becoming the duty of the judge to condemn him in favor of the party against whom he testified, either in the whole amount (involved in the litigation), or in a less amount, and also subject him to punishment. All enactments made concerning false witnesses shall remain in force.

Note.

Action for damages was also given against clergymen who gave false testimony. C. 1.3.8. The person who knowingly produced false testimony, too, was punished severely; and a judgment procured by such testimony was void. Note C. 7.49.2; C. 7.58. It will be noticed that if the perjury was discovered during the trial at which it was given, the perjurer might be condemned in damages to the party injured thereby, the amount thereof being evidently in the discretion of the judge. Perjury in the strict sense, namely false testimony of a witness given at a trial to sustain the claim of one or other party, was severely punished. Headnote C. 9.22. That was not true, however, in case of the decisory note, considered at C. 4.1.2 and note. As to torture of witnesses, see headnote to C. 9.41.

4.20.14. Emperor Zeno to Arcadius, Praetorian Prefect.

We direct that no one who has once come into court, though not in one to whose jurisdiction he is subject, for the purpose of giving testimony, shall be able to plead that he belongs to the armed soldiery, or that he is not in his own forum, in order to escape the anger of the judge which the dishonesty of the words or the character of the matter involved; but all who give testimony in a civil cause may not doubt that whenever they enter the sanctuary of the judge, they divest themselves of and, as it were, deposit before the forum, their right of excepting to the jurisdiction of the court over him, and they must stand in fear of whatever offends his ears. All judges have, without the obstacle of any

[6] [Blume] C. 9.41.6 is to the same effect.

defense—as has often been said—the right to punish, in proportion to their crime, witnesses in whose voices they detect falsity or fraud.[7]
Given at Constantinople May 21 (486).

4.20.15. (Synopsis in Greek)

This constitution, consistently with the preceding one, permits the petty judges (referees to visit proper punishment upon those who give false testimony.

1. If witnesses are persons in private station, they may be tortured, or if the judges see that graver punishment is necessary, they may have them punished through the praetor of the people.[8]

2. If he (the witness) is decorated with a girdle of a public office and punishment cannot be visited upon him by the referee, he (the latter) shall refer the matter to the magistrate who assigned the cause to him, and shall advise him how the matter stands, and this report shall be laid before the magistrate without cost. When the magistrate has received the report as to the witnesses, and the matter is plain from the depositions of the witnesses, he shall, after examining the case as to the witnesses, give his final decision. But if he finds, after inquire as to the witnesses, that the matter needs further investigation, he shall send it back to the referee.[9]

3. The provisions in the preceding constitution shall apply when deciding as to the testimony, that is, no one shall, in order to escape punishment pending over him, set up any defense that he is not in the right forum, after he has once given his testimony voluntarily.

4. If a person denies that he is related to his opponent and compels the latte to prove such relationship,[10] and the former is shown to have lied in making such denial, he shall, as punishment, although he is in fact a relative, lose his right to inherit by intestacy from the person from whom he demanded roof of such relationship.

5. But inasmuch as such privilege might easily be considered of no importance, the person saying: "I might not be his heir in any event, even though I should fail in showing him to be a slave, for he perhaps will die leaving a will"—the constitution orders that a person who demands proof of origin, must, before everything else, swear that he contends in the utmost good faith that his opponent is not his blood relative. If he so swears, he is capable of inheriting, and the person from whom proof is required must, after having taken an oath, produce it.

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[7] [Blume] Probably reference is here made to the difference in punishment which might be meted out, depending on the gravity of the situation and the character of the case in which the testimony was given. The literal translation of the Latin after "judge" is: "Whom the dishonesty of the words of his testimony and the character of the matter involved demands"—referring, of course, to the fact that the judge was to punish him when he gave false testimony, according to the gravity of the case. See 7 Donellus 1172.

[8] [Blume] See Novel 13. Petty judges might put false witnesses under torture, unless such witnesses were men of rank, for such men were exempt therefrom. Headnote C. 9.41. These petty judges could not inflict punishment for perjury; that could only be done by judges of plenary jurisdiction in the matter. Cucajius, Obs. 13, c.38.

[9] [Blume] This reference to the superior judge refers to the matter of the falsity of the testimony of witnesses and not to the principal case. Cujacius, Obs. 13, c. 38.

[10] [Blume] For the purpose of establishing claim to an inheritance.

6. Five witnesses are required for the proof, if not sufficient documentary evidence exists; if documentary evidence exists, we are content with three witnesses. If the document is such as to be in itself sufficient proof, for it may be, perhaps, a public document, then we require no witnesses.

7. the constitution adds this chapter: If a person has acted as a witness to a record or a document, and an action arises concerning it, he must give his testimony, although he is subject to another jurisdiction.

4.20.16. (Synopsis in Greek)

The constitution directs, that all persons shall, not only in criminal but also in civil causes, testify under oath to what they know, or shall swear that they do not know, excepting persons who by law are forbidden to testify, and excepting persons of illustrious or higher rank, unless an imperial rescript is obtained. 1. If they live in the imperial city, they shall give oral testimony; if they are absent, the procurators of the parties shall be sent to them, so that they may depose what they know, or swear that they do not know. The same persons (above exempted) shall also be exempt from giving testimony connected with documents. All orders as to, and production of, witnesses shall be without expense to them.

Note.

Prior to the enactment of this law, witnesses could not be compelled to appear in court and testify in civil cases. This enactment provided for compulsory attendance in all cases, but at the expense of the parties summoning the witnesses. The foregoing law also provides for the taking of depositions of absent witnesses, which were taken in the presence of both parties or their agents. See C. 4.20.20 and Novel 90, c. 5 appended thereto, and C. 4.21.18. The law, however, exempts persons otherwise disqualified or privileged under the law from testifying, and it further exempts all persons of illustrious or higher rank, who could be compelled to testify only pursuant to imperial order, and who were exempt from appearing not only in trials in court but also from testifying to their signature to a document. 3 Bethmann-Hollweg, 276; Cujacius, Obs. 13, c. 38.

4.20.17. Emperor Justinian to Mena, Praetorian Prefect.

If anyone shall have used witnesses, and the same witnesses shall be produced against him in another action, he shall not be at liberty to object to them,[11] unless he shall show that enmity has afterwards arisen between him and them, by reason of which the laws direct witnesses to be rejected, without, however, depriving him of his right to prove their testimony false by their own statements. 1. And if he can show by clear roof that they have been corrupted by a gift, or the promise of a gift of money, he may also set up that fact.

Given at Constantinople June 1 (528).

4.20.18. Emperor Justinian to Mena, Praetorian Prefect.

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[11] [Blume] that, for instance, they are persons who are infamous or of low character. The law is an application of the principle that a person should not be permitted to discredit his own witness.

In order to diminish, as near as possible, the heedlessness of witnesses through whom many untrue facts are made to appear as true,[12] we give notice to all who have given due bills in writing, that they shall not be readily hears to claim that they have paid the debt in whole or in art without a written receipt. They cannot show the fact by low and perhaps corrupted witnesses, but must produce five witnesses of good standing and of the best and untarnished reputation, who were present when the payment was made and who will testify under oath that the debt was paid in their presence. All should know that under these provisions, they pay a debt in whole or in part without taking a written receipt at their peril, unless they prove such payment by witnesses in the manner aforesaid. Persons, however, who have heretofore paid the whole or part of a debt without a written receipt, shall be exempted from the operation hereof. 1. If, of course, a written receipt was in fact given, and it was lost by accident, fire, shipwreck or other misfortune, the persons who have suffered in this manner may, upon proving the cause of the loss, also prove by witnesses the fact of such payment, and thus escape the consequence of the loss of the document.[13]
Given at Constantinople June 1 (528).

4.20.19. The same Emperor to Julianus, Praetorian Prefect.

If a person, pursuant to our law, wants to have unwilling witnesses summoned, according to law, in a civil case, and they voluntarily offer to give surety for their appearance without expense,[14] this shall be accepted; but if they do not want to do that, they shall not be put into prison, but shall be put under oath.

1. For if those who summon them think that the oath of those witnesses may be relied on in connection with the principal subject matter of the litigation, much more should they rely on the oath given for their presence.

2. But since it is not at all proper that witnesses should be delayed in such cases, and encounter difficulties of their own for the benefit of others, we ordain that they are not compelled to attend at court longer than fifteen days after they have been summoned. The judges shall take up the investigation of the case in respect to the points on which the witnesses are considered necessary within that time, and if one of the partied is absent and, after notification by process-servers, refuses to attend, they may have the witnesses appear before them and take their testimony in the presence of the party who produces them.

3. When the above mentioned period of days has passed, the witnesses may leave court, and they cannot be compelled to come back, after they have left. If it is the judge's fault that the testimony was not taken, he shall personally indemnify the injured party for the loss caused thereby.
Given at Constantinople March 21 (530).

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[12] [Blume] Literally, "through whom many facts contrary to truth are perpetrated."
[13] [Blume] See C. 4.2.17. The foregoing law was reenacted and amplified by Novel 90, c. 2. If payment could be shown by the books of plaintiff, other proof was unnecessary. C. 4.21.4. The law shows the preference which Justinian gave to written evidence.
[14] [Blume] Sine damno—without expense to the party giving a surety. 7 Cujacius 257. It had been the law that if the witness who was summoned refused to either take the oath or give surety, he could be arrested and put into prison. If, after taking the oath, he then failed to appear, his appearance doubtless could then be compelled by the judge. 7 Donellus 1211.

Note.

A time limit was, as noted, placed, in civil cases, upon the presence of a witness at court. The judge examined the witnesses in Justinian's time, and if he did not proceed with the examination within the time required by law, he "made the cause his own' and was responsible in damages to the party suffering by reason thereof. That rule obtained in other cases. C. 7.49.2 note.

4.20.20. The same Emperor to Julianus, Praetorian Prefect.

It was doubted, when witnesses had testified before arbitrators, whether the litigant could use their deposition in court or not. We ordain that if any agreement is made in reference thereto, that shall be binding. If not agreement is made in such cases, and the witnesses are living, the party against whom the testimony is produced has the privilege to object to such testimony, but must permit the re-appearance of the witnesses without the right to object that they have already given their testimony. If he does not want to give such permission (for their re-appearance), the testimony of the witnesses formerly given shall be received, reserving to him every other legal objection against the witnesses which he has. If all the witnesses have departed the light of say, he must, after the genuiness of the document in which the testimony is contained has been shown, permit such deposition to be received. If the situation is mixed, and some witnesses are living and others are dead, the litigant against whom the testimony is produced has the same right of election already mentioned, as to those who are living, but the depositions of those who are dead are not to be rejected, reserving to said litigant every legal objection which he has against said depositions or against said witnesses, as has already been stated.

Given at Constantinople March 27 (530).

Note.

To understand this law it must be borne in mind that where an arbitrator was selected by agreement of the parties (compromissarius), the parties might, under certain conditions, and sometimes without any penalty, leave him and pay no further attention to him and proceed to go into the ordinary court. C. 2.55, where the subject if sully considered. It is testimony given before such arbitrator which is considered by the foregoing law. A witness, as indicated by the foregoing law, could not be produced twice, nor could his written deposition given before an arbitrator be used in the ordinary courts. But no party against whom testimony had been given before an arbitrator could avail himself of both objections, and he was, under the provision of the foregoing law, required either to let the depositions be used, or to let the witness who had already testified be used again. Further, if such a witness was dead, his deposition could be used in any event, subject to the rights of the party to object, if he had any legal grounds therefor. See 9 Cujacius, 258, 259.