Novel 49.

Concerning defendants who appeal; concerning hand writings produced by a defendant; and concerning the oath about delay to be joined to the oath as to causeless litigation to be taken once for all as to the proof in the whole case. (De reis qui appellationem interponunt. Et de chirographis a reo prolatis. Et de jurejurando dilationis ut jungatur cum jurejurando calumniate qui semel tantum pro omni probatione juretur.)

Emperor Augustus to Johannes, the second time Praetoran Prefect, ex-consul and patrician.

Preface. The changes in human affairs which never remain the same but constantly shift, produce disturbance in the laws, and the variety of cases that arise often shakes what formerly seemed to be just and safe and approved by experience. We know that we recently corrected an evil condition in connection with appeals; for appellants, content with having introduced a course, and either one or both parties having appeared—for whether one or both is the same—abandoned the case, and the winner was not able to obtain the fruits of his victory, since he could not realize on his judgment after an appeal was taken nor cause the appeal to be heard on account of the absence of the appellant. **1.** We corrected this evil recently,[a] fixing a year in which [the] appellant, whether appearing alone or with [the] appellee, must prosecute and finish his appeal to effect. If a delay occurs through the fault of the judge or through some unavoidable cause, then, for equitable considerations, another year is added, and if the suit is not then finished, the judgment stands affirmed. This, our will, was embodied in a general law, which shall remain in force and effect. **2.** But many have appeared before us, stating that they had reported to the appellate-judges and wanted the appeal heard, but that opportunity to do so had been denied them by the judges themselves, through unavoidable contingencies. Others have complained that hurricanes and adverse winds prevented them from leaving the province by navigation, and that they were unable to travel by land on account of poverty, or because, living on an island, they could not come except by sea, and, therefore, could not finally terminate a suit even during a period of two years. Others give bad weather, others serious sickness as an excuse, all of which

has been proven to us by the facts themselves. Hence we have been justly moved, since we do not want the laws violated, and at the same time extend our help to those whose interests have been adversely affected by fortuitous circumstances. Nothing was left, therefore, to do except to provide a new law which would meet the situation.

c. 1. As to the rest, our former law, shall, as stated, remain in force and effect. But if in fact an avoidable condition arises, whereby an appellant, though he has taken an appeal and has introduced it in the appellate court on the trial day, fails in prosecuting it and in appearing (further), and there is danger that the two years' period will pass by, then the decision in favor of the winner shall indeed be affirmed, as provided by the former law, but with the following limitation, which we shall point out in the present law. For as we have benefitted the victor (in the court below) by limiting the time of the appellant who has taken an appeal and appears on the trial day (fatali die) but who fails to prosecute the appeal further or abandons it during the litigation, so, on the other hand, we think it proper to somewhat diminish the rights of the victors. For if the party in whose favor the case was decided wants an actual decision affirming the case (instead of having it simply stand affirmed by lapse of time), he must appear—not secretly, or after the lapse of time (of two years), but in reliance on the justice of his claim—even though the appellant is not present, make his complaint (that the appeal has been abandoned), seek the deserter, and whether he can find him or not, set forth his claims within the period of two years, but toward the end thereof, when about a month thereof still remains. If his cause appears to be just, the decision shall be affirmed; if unjust, the case shall be decided according to law, even though the appellant, who took the appeal within the proper time, failed to prosecute it, provided that the appellee, whether he wins or loses the appeal, shall be paid his expenses after the appeal was taken. For if he wins, it is proper that he should be paid his expenses on that account. If he loses, he should still be paid his expenses by the appellant because the latter was absent, though in spite of it won his appeal. And the appellant who (in such case) gained the decision, may thank God and the present law which guarded his right, and only

penalizes him in the amount of the expense, which he incurred rather through his own act than through the law. If neither the winning or the losing party appears in a case, the appeal is taken in proper time and the appellant fails to prosecute it, then the judgment shall stand affirmed (by mere lapse of time). All other provisions of law concerning appeals shall remain in force and effect, including the provisions as to time as well as other provisions. For we limit the present law to cases where the appeal has been taken in time, but the appellant failed to prosecute it, and we neither abrogate or change other laws or the times for appeal, but rather confirm them by the present law. **1.** Besides, it is proper to state that if the winning parties in the court below have already had their judgment affirmed, they shall enjoy the full benefit thereof, for we do not disturb cases that have already been determined; but appeals still pending, while the period of two years has not yet elapsed, and the judgment below has not yet been affirmed, shall be examined in the same manner as above, and the winner in the court below shall receive a favorable decision only if he shows the judgment to be right.

Note.

A distinction is drawn in the present law between affirmance of a case by mere lapse of time, and affirmance by actual decision of the appellate judge. An affirmance of the latter kind was considered more valuable than the former kind, because if the emperor were petitioned for reinstatement of the cause, he might grant relief more readily if the appeal was simply affirmed by lapse of time that if there was an actual adjudication. It must be borne in mind that the emperor was considered the fountain of justice, and relief from him might be obtained at any time. Cujacius, 18 Obs. c. 36.

c. 2. We have thought it best to add to this law the following: We have already enacted a law providing that comparison of handwriting should not be made with that in private documents, but only with that in public documents. Experience, however, has shown that the law should be amended. We have discovered this in connection with actual lawsuits, and the law shall, accordingly, be corrected as herein provided. It has often happened that a plaintiff produced a private

document, founding his action or the proof of his allegations thereon. When thereafter the adverse party produced a document in the same handwriting, and desired to prove its authenticity by the document produced by plaintiff, the latter took advantage of the law providing for comparisons to be made only with public and not with private documents. **1.** We, therefore, ordain that if anything of that sort arises again and a party wishes to make a comparison with documents produced by the adverse party, the latter shall not be permitted to question the right. For he cannot subsequently question the document on which he relies and which he produces to prove his rights, nor can he prevent a comparison of another document to be made with it, although it is private. He cannot engage in a fight with himself and at the same time affirm and deny. **2.** If a document from public archives is produced, a receipt, for instance, from the treasury of the praetorian prefect—for as to this, too, dispute has arisen—whether it belongs to the public records, or has merely been certified by public officials, comparisons may also be made with it. We detest the crime of forgery and have, accordingly, provided that those who make comparisons shall be put under oath, and shall make them only with public [a] documents, and that law shall, except as modified by the present law, remain in force, provided that those who make the comparison shall in every instance take an oath.

[a] Which included private documents signed by three witnesses.

c. 3.[1] For the purposes of increasing the scrupulousness of litigation, we have demanded of each of them an oath at the beginning of the litigation—from the plaintiff that he is bringing no vexatious suit, and is not made simply to be contentious. We enacted this law to apply to all and exempting no one therefrom. We also added[a] that if one of the litigants should demand proof of the other as to his statements or writings, he should first take an oath that he does not do so for the

[1] At the top of the manuscript page which begins with this chapter, Justine Blume penciled in "Out." It is not clear whether he meant that this chapter was to be appended to C. 2.58.1, which his tables indicate he deemed this Novel chapter to have affected, or whether he had replaced it with a different translation, which is now missing. (Note that Blume refers to C. 2.58.1 in note [a] in this chapter.)

purpose of delay. But many, as soon as proof of a writing or of some other fact is demanded of them, take recourse to this oath simply for insult, particularly in the case of women of refinement, and thus frequent oaths have often been taken in the same case. Desirous to put an end to such insult, and not wishing that repeated oaths should be taken in the same case, we ordain that when the plaintiff takes the oath that he is not bringing a vexatious suit, and the defendant the oath that his defense is just, each shall add that if he should demand proof from his adversary during the litigation, he will not do so for delay, but because he truly deems it necessary that such proof be made by the adversary. And if either takes such oath, no other shall be demanded from him by the other party, though proof may be asked many times, but the proof shall be furnished an no one shall be compelled to repeatedly take an oath which has once been taken to cover the whole case.

[a] C. 2.58.1, supra.

Epilogue. This, our will, declared by this sacred law, must be made known by Your Sublimity to all, by edicts issued by you, so that all may know what we have enacted. August 23, 537.