Novel 73.

How the genuineness of documents produced before the judges shall be shown.

Emperor Justinian to Johannes, Praetorian Prefect.

Preface. We know that our laws permit the genuineness of documents to be proven by comparison of handwritings, but that some of the emperors, as the fraud of those who forge documents became common, prohibited it, thinking that the zeal of forgers was directed to constant practice in imitating handwriting, since forgery is nothing else than an imitation of the genuine. And while in our time we have found innumerable forgeries in the many suits which we have heard, something unusual arose in Armenia. A document of exchange was produced and the writing declared dissimilar. But subsequently the witnesses to the document who had signed it were found; they acknowledged their signatures and the document was found valid. And thus the unexpected occurred, namely that when the letters, though examined carefully, were found destitute of credence, the testimony of the witnesses seemed to be doubtful. But we notice that the nature (of comparisons) often makes a critical examination of the matter necessary, for time often causes a dissimilitude in letters—for the youth, the man in vigor, the old man, often tremulous, do not write the same. Sickness has the same effect. However, why do we refer to this, when a change of pen or ink makes a perfect sameness impossible? Nor is it easy to say how many new things nature produces, and how much trouble she gives to us law-makers. **1.** Since God has sent government from heaven, in order that it may impart its benefits to difficult things and accommodate the laws to nature, we have thought it best to enact this law for the common benefit of our subjects whom God has formerly given us and whose number he has gradually increased. We find that a doubt and dispute has arisen concerning deposits, evidenced by documents, and we should properly provide for such cases. Hence, we shall begin with that subject.

c.1. If anyone, therefore, wants to deposit something safely, he shall not solely rely on the writing given by the receiver of the deposit. A case of that kind arose. The

person who was said to have given the writing did not acknowledge it, and much confusion arose. He was forced to write something else and while the handwriting appeared to be similar, it was not in all respects the same, so that, in so far as the handwriting was concerned, the case remained undetermined. But the person making the deposit shall summon witnesses as honorable and worthy of credence as he can find, not less than three, so that we need not depend solely on the document and on comparison of handwriting therewith, but that the judges may also have the aid of witnesses. We admit testimony of that kind, if the witnesses testify that the maker of the document subscribed it in their presence and that they recognize it; and if we find such witnesses, not less than three, who are worthy of credence, we shall not refuse them credibility. For we do not make this law in order to diminish methods of proof, but to provide that they shall exist and to make them certain.

c. 2. So if anyone executed a document relating to a loan or any other transaction, and does not want to make it a public document—which applies also in case of a deposit—the document relating to such loan shall not be deemed worthy of credence, unless suitable witnesses, not less than three, are present; and if these witnesses themselves appear and acknowledge their signatures or whether other witnesses testify that the document was executed in their presence,[a] in either case credence will be given to the transaction; not that a comparison of writing is to be rejected, but it in itself shall not be sufficient, but its authenticity must be confirmed by witnesses.[b]

Notes.

a. I.e., though they did not themselves subscribe the document as witnesses.

b. Proof of documents. Public documents, in the full sense of the word, including written documents that were registered in one of the public registration offices, and official records, needed no proof (other than certification of registered documents) in order to admit them in evidence. Instruments executed publicly, that is to say, before a notary (tabellio), did not prove themselves, as noted in c. 7 of this Novel, unless registered in a registration office, but they were nevertheless considered semi-public documents and as such ranked high. By cc. 1 and 2 of this

Novel, as also appears in C. 4.21.20 and C. 8.17.11, documents drawn up in the presence of three witnesses were nearly ranked with publicly executed documents before a notary. That had been previously done in connection with duebills over fifty pounds. C. 4.2.17. An exception to this rule, however, must be noted in cc. 8 and 9 of this Novel, where five, instead of three, witnesses were required in certain cases. It had long been the custom to sign documents in the presence of witnesses and have the witnesses subscribe the instrument. Suet., Nero, c. 17; 2 Bethmann-Hollweg 600; 3 Bethmann-Hollweg 282.

In order to prove a document, the original was required to be produced, and not merely a copy. D. 22.4.2. If a document was referred to in another document, the former was required to be produced. It was not sufficient to simply produce the document which mentioned the one relied on. Nov. 119, c. 3, appended to C. 4.21. [Not appended in this edition.] The contents of the document were inserted in the record of the proceedings. 3 Bethman-Hollweg 283. The manner of providing a publicly executed document is shown in c. 7 of this Novel, either by the notary or other persons or witnesses, or comparison of handwriting. A privately executed document, if executed in the presence of three witnesses, was on the level with the former and was proved by witnesses, not less than two, or by comparison of handwriting. If such privately executed document was not executed in the presence of three witnesses, it was not admitted in evidence at all, unless admitted to be genuine by the adverse party—c. 4 of this Novel; see also note to C. 4.21.21. At times the question of forgery arose. That point is mentioned in C. 4.21.21 and note.

c. 3. If anything happens as in Armenia, and comparison of handwriting leads to one result, and testimony to another, then we think that oral testimony given under oath is entitled to more credit than the writing itself, but that must be left to the prudence and conscience of the judge, and he should find according to the truth rather than anything else. We think that the genuineness of documents should be shown in this manner.

c. 4. If anyone makes a deposit or loan or enters into any other contract, and is content with the unsupported writing of the other party, he himself will be responsible when he finds that he is altogether dependent on the honest of the other party. According to our law then, a document is not sufficiently proven by the writing itself, but if its authenticity is supported by witnesses who were present at its execution, or, perchance, by that last refute—we speak of the (decisory) oath—then we do not declare as invalid whatever has been done. While we fear forgeries and imitations of handwritings, and do not credit unsupported documents, we do not require such formality in order to deprive parties of their faith which they put in their friends, but to overcome fraud and dishonesty in as many ways as possible.

c. 5. Even in public documents, though completed (certified) by notaries,[a] must, before completion, as has been said, be stated, in writing, the presence of the witnesses.

Note.

a. The documents made by notaries are frequently called public documents, though not in the real sense.

c. 6. If any marks or signs are found written in documents, the judges must inquire into them and attempt to read them—for we know that many things are discovered thereby—and must not hastily permit a comparison with other documents on grounds mentioned above.

c. 7. If all the witnesses are dead or perchance absent, or the authenticity of a document cannot be easily proven by the subscribing witnesses for any other cause, and the notary who certified the document—if it is a public one—is dead, so that he cannot become a witness to the document certified by himself, or if he is absent from the city, and it becomes absolutely necessary to resort to a comparison of the writing of those who completed (certified) it, or of the subscribing witnesses, then such comparison may be made—for we do not forbid it altogether. But the proceeding must be with care, and if it is thought that faith should be put in such

comparison, the person producing the document must take an oath that he is not conscious of any fraud in producing the document, is not guilty of any deception in connection with such comparison and that he makes use of a document which has not been mutilated and that it furnishes safety in the matter in every respect.

1. If a document is publicly executed, the notary shall appear and give his testimony; if he did not write it himself, but some one of his assistants, the latter, too, shall appear, if he is living and is able to appear and is not prevented from doing so by sickness or other mishaps which befall men. If a teller who paid out the money (numerator), is referred to in the document, he, too, shall appear, so that three, not only one, give testimony. If there was no teller, and the notary wrote and completed the whole document, or the person who wrote it is absent or for any cause cannot appear, the notary shall testify, under oath, to the genuineness of the document completed by him, and no resort to comparison of documents shall take place. The document shall then be entitled to credit; for the testimony of the person who completed the document, given orally and under oath, has no little effect. **2.** But if the notary is dead and the completion of the document (the certificate of the notary) is proven by comparison with others, then if the person who wrote the document and the teller are alive, they shall appear, so that the document may be proven both by comparison of the notary's certificate as well as by those witnesses. If neither of these are present, then comparison of the notary's certificate shall be made, but this alone shall not suffice, but the signatures also of those who signed, perchance, as witnesses or of the contracting parties shall be examined, so that the authenticity of the documents may be established by the several comparisons of the notary's certificate and of the subscribing witnesses or of the contracting parties. **3.** If nothing remains but a comparison of the document, then the provisions heretofore in force shall apply, namely the person producing the document for comparison, shall take the usual oath, so that the truth may therefrom appear more clearly. Such person, asking this to be done, shall, further, swear that he resorts to comparison of documents because he has no other method of proof and that he has neither done or devised anything to hide the truth. The contracting parties may, however, release themselves from these provisions, if they will, and agree to

produce the document and make it of record, whereby they will secure themselves against fraud, corruption, forgeries and all other evils, to abolish which the present law is made. Besides, the provisions of law, already made by us in reference to comparisons of duebills, shall remain in force; and, of course, the provisions already applicable in courts in connection with persons unable to write, shall remain in effect, since in such case a proper judicial examination will be made.

c. 8. If the contracting parties do not know how to write, notaries, if there are notaries in the place, and witnesses must be summoned, particularly witnesses not unknown to the contracting parties, so that the former, the notaries, may write for the person who does not know how to write or who writes very little, and so that the latter the witnesses, may certify that the transaction took place in their presence and that they know him, and thus such documents will be considered genuine. It is clear that in such transaction no less than five witnesses should be present, including the person who writes the whole for the contracting party or that part which follows a few letters written by the latter, so that no care will be omitted. **1.** And this we say as to documents composed in writing. If anyone wants to make any contract not in writing, it must be established either by witnesses or by an (decisory) oath, the plaintiff producing witnesses, the defendant taking an oath or referring it back to plaintiff, as the judge may order, so that in such case, too, nothing is omitted. **2.** It is proper that this, too, be added to this law, that if the contract involves a pound of gold, this provision shall not apply, but the case shall proceed according to the provisions heretofore in force, so that no great detriment may be sustained by men in small affairs.

c. 9. We want these provisions to apply in cities, but in the country, where rural simplicity exists and no writers and few witnesses are found, present laws shall govern. This too, has already been enacted concerning wills to which we extend our especial favor. The present law shall apply to all future documents and contracts, for who would make a law that would apply to past transactions?

Epilogue. This law has arisen out of the multitude of disputes in litigation and brought to our attention, so that we may make an end to the daily contentions among men by precise legislation. So it becomes Your Sublimity, when you receive knowledge of this, to make it known to our subjects here and in the provinces. We are also writing to the glorious prefects in the Orient in Libya and in the North—we mean Illyria, so that our whole republic may have knowledge of this law, which relieves the need of our subjects.

Given June 4, 538.