Book IV.
Title XXX.

Concerning money not actually paid.
De non numerata pecunia.)

Bas. 23.1.63.

Headnote.[1]

Gaius 4.116 says that when a suit was brought upon a stipulation to pay a loan, but the loan had not actually been made, that is to say, the money to be loaned was not actually paid to the borrower, this fact might be set up under a defense of fraud. Later, when a suit was brought on a due bill, it was permitted to set up the defense of money not paid. This was not a true affirmative defense, for the burden of proving that the loan had actually been made was then cast upon the plaintiff to prove it; so the setting up of the defense had the same effect as a denial with us. At first the defense was available only for a year; this period was later extended to five years, but was reduced by Justinian to two years. C. 4.30.14; Buckland 439. The creditor might wait and not sue during this period, and in order not to deprive the defendant of this defense in such a case, it was further provided that an action might be brought (condictio) to recover the due bill. C. 4.30.4. If the supposed debtor preferred not to do this, he could, under Justinian, instead of that, give notice of his claim to the supposed creditor, or enter a formal protest, claiming that the money was not delivered, on the records of the court, the court officers in such event notifying the supposed creditor. Complete provisions were made in other respects so as to protect the debtor. C. 4.30.14.4. A creditor was not compelled to prove, in order to recover on a due bill that he had actually paid money on it, but it was sufficient, if he proved that there was actually a debt. C. 4.30.5. And if the due bill was given for something else than a loan, and recited the consideration or the legal basis of liability, such recital was prima facie evidence of the liability. C. 4.30.13; C. 4.19.1.

As shown by law 14 of this title, the defense applied to other things than due bills, but in some cases the defense was taken away entirely and in others it was generally limited to thirty days, unless steps were taken for protection. By Nov. 136, c. 5, Justinian took away the defense herein mentioned when a due bill was given to a banker. It would hardly seem reasonable, though the Novel seems to so state, that all defense was taken away from the maker of the due bill, and the defense of fraud was doubtless left him, but casting the burden of proof upon him. Buckland 439. This has been thought to be true throughout. Thus, Poste, Gaius 581, says that a due bill, if not contested within two years, was prima facie evidence of the fact that the loan had actually been made. Some of the laws, however, indicate that it was more than a prima facie evidence, and that if the due bill, which was but an acknowledgment and extra-judicial confession of the existence of a debt, was not contested within two years, that such acknowledgment and confession became of binding force without being able to be contradicted.

On he contrary, it is clear that if a due bill, given for something else than a loan, stated the consideration or legal basis of liability, enabling the defendant to prove the

[1] At the top of this title, Blume has penciled in: "See Kniep, Praes., 136-137; Kniep, 58 Z.S.S. 1.

contrary if he could. Law 15 hereof.[2] In this connection it must be borne in mind that a due bill, in order to be able to be admitted in evidence, was required to be executed as provided by law—in, at least, the presence of three witnesses, and sometimes more. See note C. 4.2.17; note Nov. 73, c. 2, appended to C. 4.21. But though admitted in evidence, a loan was not shown by that fact alone, unless the defense mentioned in this title was not raised in some way within the time prescribed by law.

Special provisions were made when dowry was claimed not to have been paid. C. 5.15, and Novel 100.

4.30.1. Emperors Severus and Antoninus to Hilarus.

If you allege (asseris) that the money agreed to be loaned was not delivered to you, and that a due bill (cautio) given was accordingly void, and you can prove that a pledge was given, you have an action in rem (to recover the pledge). For a claim that a pledge was given for money loaned, without any money being delivered can be made only when there is no doubt that a loan was actually made. For the same reason, the truth will be upheld if your adversary commences an action against you while you are in possession of the pledge.
Promulgated September 1 (197).

Note.

This law has given rise to considerable controversy. Almost the duplicate thereof is found in C. 8.32.1, except that "asseris," allege, is not found, and for numeratae (paid) is found redditae (returned). The point is whether in 197 A.D. the creditor or the debtor had the burden of proof as to the payment of the money in connection with the execution of a due bill. Gneist, Form Vertr., 268-272 holds that both laws were interpolated, the instant law by insertion of "asseris" and C. 8.32.1 by wrongly inserting "redditae" for "numeratae," and that the law, aside from the last sentence, originally read as follows: "If you prove that the money agreed to be loaned was not paid over to you, that the due bill given was, accordingly void, and that a pledge was given, you have an action in rem. But your claim that you gave the pledge and that no money was paid to you (by the creditor) will have no force unless the truth or falsity of the debt is shown." As so interpreted the law would show that at that time the burden of proof that no money was in fact paid over was on the person who executed a due bill, and would be inconformity with D. 22.3.25.4.

4.30.2. Emperor Antoninus to Maturius.

If it appears before the judge who tries the case that you received less money than the due bill given shows, he will not order you to restore more than what you received plus the interest agreed on by stipulation.
Given April 13 (213).

4.30.3. The same Emperor to Demetria.

If you are sued on your due bill and a defense is interposed either of fraud or money not actually delivered (by the lender), the claimant, even though a mortgage was given, will be compelled to prove that the money was delivered to you, and in default of doing so, you will be absolve.
Given June 29 (215).

---

[2] Blume penciled in question marks next to these two sentences.

4.30.4. The same Emperor to Bassus.

If you acknowledge the genuiness of the due bill, and paid a portion of the principal debt or the interest, you know that your complaint that the money was not actually delivered by the lender is too late.[3]

4.30.5. Emperor Alexander to Augustianus.

If you have any remedy against the claims of your opponent, you may use it. You ought not to be unaware, however, that the defense that money was not actually delivered by the lender applies only when the suit is for a loan claimed to have been made; but when a previous indebtedness is reduced to a due bill, it is not a question whether any money was delivered when it was given, but whether a legal indebtedness existed previously.[4]

4.30.6. The same Emperor to Justinus.

You err in thinking that you are protected by the defense of money not actually delivered by the lender, when you, as you acknowledge, substituted yourself as debtor in place of another person who was then liable as such.

4.30.7. The same Emperor to Julianus and Ammonianus.

If you gave a due bill to your adversary as though about to receive a loan, but the money was not in fact delivered to you, then you may bring a personal action (condictio) to recover the due bill, although the claimant should not sue, or you may interpose the defense that the money was not in fact delivered, when he sues thereon.[5]
Promulgated November 5 (223).

4.30.8. The same Emperor to Maternus.

If the person who gave a due bill dies without having made complaint within the time fixed by law,[6] his heirs will have the unexpired time both against the creditor, as well as against the latter's heirs.

1. But if the decedent made a complaint, the defense that the money was not actually delivered avails the heir (against the creditor), and against his heir perpetually.

2. But if the legal time has expired, and no complaint has been made against the creditor, the heir of the decedent, even if a minor, will be compelled to pay the debt.
Promulgated March 21 (228).

4.30.9. Emperors Diocletian and Maximian and the Caesars to Zoilus.

Since it is clear that no one can be obligated on a loan for more than he received, and since a creditor, when a stipulation was entered into, did not in fact deliver what he agreed to loan, it is proper that a defense on these facts should be given. And if the time, within which a complaint in reference thereto may be made, has not year passed, or the law has within that time been satisfied by protest,[7] the president of the province will not permit any more of the principal to be collected than you received.

---

[3] [Blume] The same principle applied when intimidation was claimed. C. 2.19.2.
[4] [Blume] See law 18 h.t., note.
[5] [Blume] To the same effect is C. 4.5.3.
[6] [Blume] I.e. that no money was actually loaned. See law 4.14 of this title.
[7] [Blume] Law 14.4 of this title.

Given November 29 (293).

4.30.10. The same Emperors and the Caesars to Mucazanus.

The claim of one contending that a debt is paid is not lost by lapse of time. And the rule that a defense of money not paid fails unless a complaint has been made within a certain time, does not stand in the way. For there is a great difference between a person who, alleging a fact, takes on the burden of proof, and a person who denies that money was paid, of which in the nature of things there is no proof, transferring the necessity thereof to the claimant (opponent).

4.30.11. The same Emperors and the Caesars to Eutychianus.

If you stipulated to give money to Palladius by way of compromise, you cannot set up the defense of money not delivered.
Given April 10 ( ).

4.30.12. The same Emperors and the Caesars to Severianus.

The defense that money was not actually delivered is available to the surety by mandate and by stipulation in pattern of the defense granted to the principal debtor.

4.30.13. Emperor Justin to Theodotus, City Prefect.

We ordain, generally, that, if any written promise to pay is given on account of any money owing by reason of any antecedent consideration (causa), and the promisor specially mentions this consideration, he shall no longer be entitled to demand proof of such consideration from the promisee of the stipulation, since he should properly abide by his own proofs, unless, of course, he, on the contrary, can satisfy the conscience of the judge by the plainest proofs in writing, that the transaction took place in a manner different from that mentioned in the due bill; for we do not deem it proper that what a person plainly affirmed out of his own mouth, he should in the same matter deny and contradict his own testimony.

Note.

If no loan was made, but a due bill was given for an antecedent debt arising, for example, out of a purchase, previous loan, compromise, or other contract, the statement of the consideration of legal basis of liability in the due bill was proof of the fact stated, and could not be contradicted except by writing. The statement that the special complaint of want of consideration should “no longer” apply in such cases indicates that it had previously been applied, although law 15 h.t. is in line with this rescript.

4.30.14. The Emperor Justinian to Mena, Praetorian Prefect.

When money or other things are, in written contracts, stated to have been delivered or received, the person who acknowledged the receipt of such money or property, or his heir, shall not have the period of five years, as was formerly prescribed, in which he may set up the defense of “non delivery of money,” but only an uninterrupted period of two years, so that, when such time has passed, no claim of money not paid may be set up; provided, however, that persons who were entitled to relief in the past, for reasons specially stated in the laws, even after the expiration of five years, shall also be entitled to the same relief in the future, although the two years’ period has been substituted for the five years’ period.

1. And since litigants attempt to interpose such defense to vouchers and instruments evidencing deposits of certain property or money, we seem it proper to entirely take away the right to do so in certain cases, and to limit such right in other cases to a short time. We therefore ordain that no defense of money not delivered can be set up against a document evidencing a deposit of definite things or of definite amounts of money, or against vouchers for public dues, whether they acknowledge delivery in full or in part, or against vouchers which, after the execution of dowry documents, acknowledge the delivery of the dowry in whole or in part.

2. As to other vouchers, written by a creditor concerning private debts, which acknowledge payment of part of the debt, either principal or interest, or which acknowledge the payment of the whole debt, while the writing evidencing the loan still remains in the hands of the creditor, or which promise the future return of the writing which evidences the debt; or if an account of any other contract in which the delivery of money or giving of certain property, is stated, a voucher, similarly has been given, stating that money or other property, or part thereof has been repaid, the defense of money not delivered[8] can be interposed (only) within thirty days from the time of the issuance of the voucher, so that, if these days shall have passed, the voucher shall in every respect be accepted by the judges, nor shall the person who issued it be permitted to say, after the above mentioned number of days have passed, that the money or other things were not repaid.

3. And be it observed that in cases in which it is not permitted to set up the defense of money not delivered, either from the beginning or after the time fixed has elapsed, no (decisory) oath may be proffered (to the opposing party).[9]

4. The party, however, who has such right of defense, has the whole time given to make known his complaint of money not delivered, by notice in writing, to the person who has the instrument in writing which has stated that the money was delivered or the things were given, or if he (the party to whom the instrument was given) happens to be absent from the place in which the contract was made, he (who gave the instrument) may make the complaint before any ordinary judge in this fair city or before the rectors of the provinces or the defenders of the city, and thus preserve the right of defense in perpetuity.

5. If the person who has the writing showing the money delivered or things given, is present, but has some administrative post in this fair city or in the provinces, so that it seems to be difficult to send the protest to him, we give permission to the person who wants to use the defense mentioned to go before other judges, either in this fair city or in the provinces, and through them make it known to the party to whom the defense is opposed, that there is a complaint of money not paid (or things not delivered).

6. But if there is no other administrator, civil or military, in the provinces, or it is difficult, through any cause, for the person who makes the said complaint, to go before him, to do what has been stated, we give him permission to make the defense known to

---

[8] [Blume] It will be noticed herein that the claim of "money not actually delivered" was applicable to other property as well. See also C. 1.4.21. See headnote to this title.

[9] [Blume] To supply proof, if possible, in that manner. The subject of decisory oath is treated in full at C. 4.1. Novel 136, c. 6 also forbade the decisory oath being proffered after two years in connection with the banker's loans. The question on "non-delivery of money" could not be raised at all in these cases, not even by proffering an oath.

the creditor through the most reverent bishop, and thus interrupt the stated time. And it is certain that these provisions also apply to the defense of non-delivered dowry.[10]
Given at Constantinople July 1 (528).

4.30.15. The same Emperor to Mena, Praetorian Prefect.

If anyone has the right of defense of non-delivered, but neglects to use it, whether he is present or absent, his creditors, whether they themselves are sued as persons who detain the debtor's property, by persons who demand payment of debts of the debtor who has such right of such defense, either on account of dowry or any other cause, or whether such first named creditors bring some action against others in possession, may, in the trial of the matter, oppose the same defense of money not actually delivered, and they are not prevented from doing so by reason of the fact that the principal has failed to use it; provided, however, that the principal or his surety shall not be prejudiced if the person who opposes the defense is defeated, but they may afterwards, if sued, use the same defense, if they set it up within the time fixed.
(528-529 A.D.)

4.30.16. The same Emperors to Johannes, Praetorian Prefect.

It is undoubted law that the defense of money not actually delivered applies to due bills or other writings, which mention the taking of an oath. For what is the difference whether such due bills or other documents, which permit the interposition of such defense, mention the taking of an oath or not.
(531-532 A.D.)

[10] [Blume] Special provisions for the defense of "non-delivery of dowry" are found in C. 5.15.13 and in Nov. 100.