

Book VIII.
Title XLI.

Concerning novations and delegations.
(De novationibus et delegationibus.)

Bas. 28.4.35; Dig. 46.2.

Headnote.

Novation in Roman law was the merging and transfer of a prior debt into another obligation, so as to destroy the former debt. It might take place in four ways: (1) By creating a new obligation between the same creditor and the same debtor, destroying the old obligation between them. The new obligation, however, must contain something new, something different from the old obligation, in order to effect a novation; otherwise the old remained and was in no way affected; in fact the intention to make a novation had to be clear, (law 8 of this title); (2) by substitution of a different creditor; (3) by substitution of a different debtor; (4) by substitution of a different creditor as well as debtor. Joinder of issue in an action had an effect similar to that of novation, but we are here dealing only with voluntary novations. No novations could be effectuated except by stipulation - formal contract.

8.41.1. Emperor Alexander to Quintionus and Timotheus.

A delegation of a debt cannot be made effectually unless the (new) debtor enters into a stipulation with the creditor, agreeing to pay. A sale of an account, however, is usually made when an action is, by mandate, authorized to be brought (by the purchaser) against the debtor, though without the latter's knowledge or consent.

Promulgated February 9 (223).

4.39.3.¹

Note.

The present law deals with a "delegation," transfer of a debt, for the purpose of novation, and with a sale, or assignment of a debt. The term "delegation" of a debt is a technical term, and meant simply assigning the debtor to a new creditor by the old creditor, and directing such debtor to promise by stipulation to pay the new creditor. It was, in a sense, and assignment of a debt, the assignment not, however, being complete, or intended to be complete until the debtor had made such promise. The "delegation" took root in an order or mandate of the old creditor, directing the debtor to promise by stipulation to pay the debt to a new creditor, and was completed, effecting a novation of the debt, when the promise was given. This released the debtor from paying the old creditor; and he was henceforth responsible only to the new creditor. A sale of an account, however, was a delegation, or assignment, or a right of action, not of the debtor himself, and could be made without the consent of the debtor. See also C. 8.53.2. So in law 6 of this title, a "delegation" of a debtor is referred to, which means simply that he was directed to promise by stipulation to pay someone else, and the latter was authorized to receive or exact such promise; hence such "delegation" could not be made without the

¹ This appears to refer to C. 4.39.3 as there is no C. Th. 4.39.3.

consent of the debtor, and differed from an assignment only in that the consent of the debtor was necessary.

8.41.2. Emperor Gordian to Firminus.

An action of a loan fails if a delegation of the person (debtor) was legally made and the old contract became extinguished by novation.

Promulgated September 1 (238).

Note.

Here a loan had been made to a debtor; the debtor was "delegated," that is to say, directed to promise by stipulation to pay someone else. This was done. A novation took place, accordingly, releasing the old obligation entirely.

8.41.3. The same to Mucianus.

If no delegation of your debtor was made and the rights of actions (against him), therefore, remained in you, then, even though you gave a mandate to your creditor authorizing him to bring the actions for the purpose of recovering payment, you are not forbidden, till your creditor has joined issue in a suit or he receives any part of the debt or he has notified your debtor, to demand the amount due from your debtor and in that manner stop collection by your creditor from him. 1. But if a delegation was made, and you are released by novation, you needlessly fear that his failure to collect from his (new) debtor will result in danger to you, since, by the stipulation made with the intention of novation, you are released from your debt.

Promulgated June 9 (239).

Note.

See note C. 4.39.5; C. 4.10.1 n; C. 8.16.4. If A, the old creditor, did not, in this case, "delegate" his debtor B to C, that is to say, directed A to promise C by stipulation to pay the debt, but simply gave C a mandate or authority to collect the debt, the authority might be revoked till the commencement of the suit. If, however, the debtor was "delegated," and the debt was novated by B promising, by stipulation, to pay it to C, in that event A was released from his indebtedness to C, which the law presumes existed.

8.41.4. The same to Stratonicus.

Your procurator did not deprive you of your action, if, when you had given him a mandate authorizing him to collect the money which those against whom you complain owed you, he, after accepting part, released them from the rest, since he could not, against your consent, either make a novation or release them as to the part not paid.

Promulgated November 13 (239).

Note.

In this case the "delegation" of the debt was simply for the purpose of collection, and the agent had no authority to release part of the debt by making a novation; his authority did not imply that he had a right to novate the debt. No one had a right to go beyond the terms of the mandate. See C. 8.40.22.

8.41.5. Emperors Diocletian and Maximian and the Caesars to Septimia.

If your father, whose heir you say to be, obligating himself to the creditor for Alexander, promised by stipulation to pay a certain sum, payment of the promised sum cannot justly be refused though Alexander did not pay your father.

Subscribed at Sirmium April 12 (294).

8.41.6. The same to Ziparus.

No debtor may, without his consent, be delegated to the creditor of a creditor.
Subscribed at Dorostolum October 21 (294).

Note.

See note to law 1 of this title. This law is construed by Hunter 632, as meaning that the consent of the person to whom the delegation is made, presumably a creditor of the old creditor, is required in order that the "delegation" may be effectual. That is, of course, true, and, as observed by Hunter, otherwise an insolvent might be foisted upon him. C. 8.42.16. The law seems to contemplate, however, that the consent of the debtor, who owes the debt to the original creditor, is required. 9 Donellus 1383. In fact the consent of all the parties to the transaction was, of course, required.

8.41.7. The same to Zoilus.

If Eucarpus, delegated to you as debtor, agreed by stipulation to pay money to you, or promised to pay the subsisting obligation (constitution), he may be sued on his own account. Otherwise you uselessly try to sue him on the duebill of your original debtor.

Subscribed December 16 (294).

Note.

In this case, presumably, the duebill (chirographum) was not assigned, and no mandate had been given to bring an action on it. The debtor only had been "delegated," that is to say, had been directed to promise, by stipulation, to pay Eucarpus, but had not done so. No novation, accordingly, took place, and Eucarpus had no rights of action against this debtor, and all he could do was to fall back on his old debtor, who had made the delegation.

8.41.8. Emperor Justinian to the Senate.

Correcting the harmful writing on novations and settling the doubts under the ancient law, we ordain that if a creditor has received an additional debtor, or has made a change in that respect, or has received a pledge or has undertaken to increase or diminish the amount of the debt, or has added or subtracted a condition or a clause as to time, or has received some subsequent guaranty, or has done anything which the founders of the ancient law considered a novation, none of these things shall in any manner change the prior obligation, but the same shall remain intact, and all subsequent obligations shall be considered additional to it, unless the parties have specifically released the prior obligation and have stated that they choose the later obligation rather than the earlier. 1. And we provide, generally, that a novation will take place only by consent and not by operation of law, though not expressed by words that the transaction is made without

novation, which the Greeks call by the customary word "anobateutos."² For such reservation arises naturally, without needing any express words to that effect.³
Given at Constantinople July 22 (530).

Note.⁴

The law shows that formerly a subsequent promise of the same debt operated as a novation, and therefore a release, of the original obligation. This was changed hereby. Binder 10, who shows that D. 46.2.8.5, which permitted two separate promises for the same debt, was interpolated. The novation, to work as such, had to contain something new. 2 Dernburg 692, note 8. (See what this means) - See 2 Karlowa 740. Binder 11, top - on page 13 he says that stipulation debiti alieni was always novation. [The passage in Binder reads: "...die stipulatio debiti alieni immer eine Novation enthielt...] The same thing arises today. Supposing another gives a note for the amount in another's note. If giving in payment is as novation, first extinguished, if given simply as additional security, not.

² [Blume] A rather free translation has been made. The meaning is not at all in doubt.

³ [Blume] Inst. 3.29.3 gives a rather complete statement of this principle.

⁴ This entire note is handwritten and sometimes difficult to read.