

Book IV.  
Title II.

If a definite amount (or thing) is claimed.  
(Si certum petatur.)

Bas. 23.1.45; D. 12.1.

Headnote.

Loans. The present title deals with the recovery of a definite amount, mainly on loans for consumption (*mutuum*). Such a loan was a cash loan or a loan of other fungible things which were weighed, counted, or measured in the ordinary trade, such as wine, oil, corn, bronze, silver, gold. The receiver was bound to restore the same kind of things as he received, equal in quantity and quality, but not the identical things, for the property loaned passed into the ownership of the borrower. If the property loaned was money, the borrower was bound to restore the same amount, but not the same coins. If corn, e.g., was given, the borrower was required to restore corn, not wine or something else. D. 12.1.2 pr; 3. This contract must be distinguished from a loan for use only (*commodatum*), considered at C. 4.23, in which case the property loaned did not pass into ownership of the borrower.

In a loan for consumption, physical possession of the property loaned to the borrower was necessary. The contract for a loan was a real contract—in re giving rise to an obligation only when the property loaned was delivered. A man might already have somebody else's money, and an agreement might be made between them that the holder should use it as a loan. D. 12.1.9.9. So a transfer by a man's debtor might be made to another, so as to make the latter a debtor on a loan due to the first. D. 12.15. An agreement for a loan might fix the condition, if any, on which the money paid should be a loan, the date and place for repayment and the person to whom it should be repaid; but it could not fix a larger sum to be repaid than the amount actually paid—the contract was without consideration as to the excess sum. The sum fixed to be returned might, however, be smaller than the amount loaned. D. 2.14.17; D. 12.1.11.1; D. 12.1.22; D. 12.1.40. Loans were originally considered to be gratuitous, and except in a few cases, no interest was payable thereon, except by express agreement, and that agreement was required to be by stipulation, the formal contract of the Romans. That subject will be considered in more detail in C. 4.32. Maritime loans were on a special footing, and will be considered at C. 4.33. For an agreement to pay a loan to be valid, it was essential that the money agreed to be lent was in fact paid to the borrower. That subject is fully treated at C. 4.30. The form of action on loans for consumption was *condictio*—an action at strict law. See note C. 2.57 and C. 4.5-9.

4.2.1. Emperors Severus and Antoninus to Modestinus.

You ask neither a just nor a customary thing, that you and your brother, your coheir, should not pay your father's debts in proportion to your share of the inheritance, but according to the value of prelegacies, since the law is clear that hereditary burdens fall on the designated heirs in proportion to their share of the inheritance and not according to the measure of their gain. You yourself appear not to be ignorant of this, since you gave promises to your creditors in proportion to your share of the inheritance, in accordance with the rule of law.

Given July 1 (204).

Note.

A prelegacy was property given to one of the heirs as property to which he was entitled before any of the inheritance was divided among the heirs. It was, in other words, a preferred claim, so far as the heirs were concerned. In the foregoing case, the prelegacies given to the brothers respectively were evidently unequal, and one of the brothers wanted to have the debts of the inheritance paid according to the amounts of such prelegacies. But the law states that the debts must be paid in proportion to the share of the inheritance given to each as heir. This was usually done by twelfths. In this case, the two brothers each, perhaps, received six twelfths, but the prelegacies given them made the actual amount received by them unequal. Legatees were not required to pay the debts. That devolved upon the heirs—legatees not being considered heirs under the Roman law. See note C. 4.16.3; C. 3.36.24.

#### 4.2.2. Emperor Antoninus to Hermogenes.

Although Asclepeades loaned out your money in his own name, he, by the stipulation in his favor, acquired the right to the obligation for himself. You may sue for the money if he authorizes you to bring the action.  
Promulgated April 25 (214).

Note.

The benefits under a contract was ordinarily personal to the direct contracting parties. That was particularly true in case of a stipulation. C. 4.27.1, note; C. 8.37.3, note. The origin of the money paid out for a loan did not make any difference. Law 7 h.t. However, a loan (not by stipulation) might be made in another's name, and then belonged to such other. C. 4.27.3. Another than the lender might, of course, be authorized to sue.

#### 4.2.3. Emperor Gordian to Sempronius.

Rescripts have often been issued that those administering an office cannot during such time loan money at interest in the province either in person or through supposititious persons.  
Promulgated August 25 (239).

Note.

By C. 1.53.1, presidents were even prohibited from receiving gifts or making purchases of property, except for sustenance. Such laws were intended to prevent extortion in any form on the part of governors of provinces. See headnote C. 9.27. Law 16 of this title prohibited loans to be made, in certain cases, to a judge.

D. 12.1.33 states that presidents and those with him could not loan any money in the province. But apparitors of the president, who were permanently stationed in the province, were not included in the prohibition. D. 12.1.34.

#### 4.2.4. Emperors Philip and Caesar Philip to Maximus.

If you have loaned the money of an absent person out at interest in his name, but the loan is not ratified, and you bring actions to recover it, pursuant to authority to bring them, the president of the province will exercise his jurisdiction. 1. And if he learns that the authorization (mandate) has not been given, he will not refuse to grant you an analogous action, against the debtor, on that account.  
Promulgated February 15 (246).

Note.

A loan made in another's name belonged to the latter. C. 4.27.3. If unauthorized, and made with his money, he might refuse to ratify it. The agent-lender would then have a right to recover the money lent, either pursuant to authorization of such other, or (probably where such authorization was impractical), without it.

4.2.5. Emperors Diocletian and Maximian and the Caesars to Aristodemus and Proculus.

If you did not severally obligate yourselves to pay the whole, by receiving a mutual loan, or if though the money was paid to only one, you did not voluntarily enter into a stipulation with the creditor, or you did not take the obligation upon yourselves on behalf of another as surety, you vainly fear that he (the creditor) can sue you for what he gave as a loan to another, if you have raised the question within the legal time. 1. Much less need you have fear if the document in reference thereto states that oil, instead of money, was received, since, if no stipulation for its return was added, and a protest is made concerning the matter in the usual manner, the facts will remain as they actually are, and it is manifest that nothing is due by reason of the document which states that oil was received.

Subscribed May 3 (293).

Note.

In the foregoing case, the loan was probably made to one person, a woman, but the men had joined with her in a written promise to pay the loan. The rescript states that the men were not liable unless (1) the loan was made to them and each promised to pay the whole, or unless, (2) they promised to pay the loan by stipulation (C. 8.39.4; Hushke 136), or, (3) unless they became surety for the woman. In as much as a suretyship in such case would be created by stipulation, the rescript may be reduced to the first two propositions above stated. If the loan was made to them all, each might promise to pay the whole, and such promise was binding, though not by stipulation. Savigny, Obligationsrecht, 157. A joint and several (correal) obligation could be created in that manner, even though the money was paid only to one of them (though for the benefit of all). C. 8.40.3. But if the loan was actually made only to the woman, a simple promise, though in writing, not accompanied by a stipulation, a formal promise, was not binding. Law 14 hereof. In other words, a promise for the benefit of somebody else only was required to be formal—that is to say by stipulation. As to stipulation, see C. 8.37; as to joint and several obligations, headnote II (b) C. 8.39. See on this law Girtanner, Stipulation 114 n.; 1 Donnellus 589-594.

4.2.6. The same Emperors and the Caesars to Nicandrus.

If you had a quantity of things coming to you, and, by making a novation by stipulation, you caused its price, together with lawful interest, to be promised to you by stipulation by the person against whom you directed your petition, then, since the nature of an obligation is not lacking, a false (preliminary) statement that the amount was for money loaned does not hurt the claim of interest being made in accordance with the contract. But if it is simply stated in writing, without entering into a stipulation, that the money was loaned and that interest should be paid, then the fictitious statement will be held for naught and nothing in the previous obligation will be changed.

Subscribed November 17 (293).

Note.

In this case a debtor owed an amount of money to a creditor on account of some transaction, e.g. on a sale and purchase. A new contract was made which stated the amount was owing because of a loan of money; and interest was agreed to be paid. When the amount of the principal became due under this new contract, the debtor claimed that he did not own any interest. The law on this situation was as follows: If there was a lawful novation made of the debt, there was no harm in stating in the new contract that the debt was owing by reason of a loan. A novation could only be made by a stipulation. Headnote C. 8.37. If there was no legal novation, no stipulation, the new contract, a mere pact (C. 2.3), was of no force or effect, and the old contract was left untouched. If the old contract drew interest, then interest could be collected, but not otherwise, and the law shows that a due bill in writing did not ordinarily draw interest, unless a stipulation was added. Some contracts drew interest pursuant to a simple pact. Others required a stipulation for the purpose of creating any obligation for the payment of interest. Headnote C. 4.32. As to fictitious transactions see headnote C. 4.22.

#### 4.2.7. The same Emperors and the Caesars to Pactumeia.

In such contracts of loan, the question is not as to the origin of the money loaned, but whether the party who made the contract paid it out as his own. Subscribed at Sirmium October 3 (293).

##### Note.

If property was purchased with another's money and delivered to the purchaser, it belonged to the latter. C. 4.50.1 note. So if a loan was made with another's money for the benefit of the lender, it belonged to him and not to the owner of the money. If the actual coins were, however, still in the hands of the borrower, which would be seldom, and the loan was unauthorized, such owner might recover them by an action in rem. C. 3.42.8; C. 4.34.8. And a loan might be made in another's name. C. 4.27.3.

#### 4.2.8. The same Emperors and the Caesars to Proculus.

If instead of a cash loan, which you asked of the creditor, you received chattels of silver, horses or other things in kind, which were definitely valued by the agreement of both parties, and you pledged chattels of gold, then, though you agreed by stipulation to pay more than one per cent interest per month, the principal, which was mutually fixed by the valuation of the parties, and interest—but only at the legal rate—can lawfully be claimed. Nor does the fact that the value of the pledge you gave is less, relieve you from paying that amount.

Subscribed December 16 (293).

##### Note.

The rate of interest was fixed much below one per cent per month by Justinian. C. 4.32.23.

If property pledged was not sufficient to pay a debt, the debtor was liable for the deficiency. C. 4.10.10; C. 8.27.3 and sources there cited.

The foregoing law shows that a loan of money might be made by turning property over to the borrower at a fixed valuation. See C. 4.32.25. This is stated to have been usual in the case of bankers. Nov. 136, c. 3. It shows the scarcity of money.

#### 4.3.9. The same Emperors and the Caesars to Alexander.

Since you allege in your petition that you, together with Syntrophus, gave a certain amount of gold, by weight, and money, as a loan, to be repaid at Rome, the proper

judge, before whom you go, will, when he ascertains that you were joint obliges, or that your right to sue alone arose out of the nature of the contract, or that you have been made procurator by the heirs of Syntrophus, order that the whole be paid to you, otherwise only that proportion which you gave yourself.

Subscribed December 18 (293).

Note.

Where a loan was made by two men, the presumption was that the right to the return of the money was only in proportion to the amount loaned, and each of the parties was entitled to sue for his share only, unless the co-creditor authorized one of them to sue for the whole. But were the rights of the creditors were joint pursuant to a stipulation, each might sue for the whole. Headnote II (b) C. 8.39.

4.2.10. The same Emperors and the Caesars to Crispinus.

The fact that the proof of an obligation, owing by many in several proportions, is contained in one document, does not hinder its collection. And if those to whom you loaned money promised by stipulation to deliver you wine, regret of the transaction does not render the contract invalid.

Subscribed February 4 (294) at Sirmium.

Note.

The foregoing law contains several distinct propositions. It shows that one document might contain the evidence of several loans. It further shows that it might be stipulated that property other than money was returnable for money-loan, and that when such agreement had once been lawfully made, the parties were bound by it.

4.2.11. The same Emperors and the Caesars to Maximianus.

A fire does not release a debtor from his debt.

Subscribed at Sirmium February 12 (294).

Note.

In ordinary loans for consumption, the property loaned passed into the ownership of the borrower, and he, therefore, held it at his risk. The rule was different in contracts where the ownership did not thus pass. That was true even in maritime loans in which the risk was, as a whole, with the lender. D. 22.2.3.

4.2.12. The same Emperors and the Caesars to Theophanius.

If you and Ion borrowed money for a common enterprise and you did not by the nature of the contract<sup>1</sup> (nec re) or by stipulation obligate yourself for the whole, and you

---

<sup>1</sup> [Blume] I.e., by simple promise. It was mentioned in note to law 9 hereof that if two persons received a joint loan, a promise to repay the whole might be made by simple promise without a stipulation, or a promise by stipulation.

thereafter paid it all, you can sue Ion for his part of the debt and try your claim before the judge.<sup>2</sup>

Subscribed August 18 (294).

4.2.13. The same Emperors and the Caesars to Fronto.

A person who borrows money, though in connection with the affairs of another, is, when the creditor does not make the loan with the thought of making it to the principal,<sup>3</sup> himself liable as principle.<sup>4</sup>

4.2.14. The same Emperors and the Caesars to Hadrianus.

A creditor cannot, without a stipulation, hold a party responsible who signed a document (promising to pay), when the loan was made to others.<sup>5</sup>

Without day (293).

4.2.15. The same Emperors and the Caesars to Charidemus.

Your demand that the creditors should not sue you, who received the loan, but the heirs of the person to whom in turn you loaned the money, is plainly contrary to the rule of law.

Subscribed November 27 (294) at Nicomedia.

4.2.16. Emperors Honorius and Theodosius to Theodorus, Praetorian Prefect.

Whoever loans money, at interest, to a judge (governor), who is in his province, is, as it were, a purchaser of laws and of the province, and a money changer who advances the price of a place of honor (as judge) to one who seeks it, will, together with the judge, be punished by exile.

Given October 16 (408).

Note.

Bas. 23.1.60 states the foregoing law to the effect that if anyone in the province lends money to the president thereof, whether at interest or not, he will be punished by exile. And that if anyone lends the price of a place of honor to a future magistrate, he and the magistrate both shall be punished by exile. 7 Donellus, 623-626, interprets the law somewhat differently. See law 3 hereof; C. 4.3.1; D. 12.1.34.

---

<sup>2</sup> [Blume] The law shows that joint promissors were not ordinarily entitled to contribution from their co-promissors. They might, however, stipulate to the contrary, or the duty to contribute might arise out of certain relations between them, as, for instance, that of partners. Note C. 8.40.11.

<sup>3</sup> [Blume] *Contemplatione domini*.

<sup>4</sup> [Blume] In classical law, only persons dealing directly with the creditor were liable. 4 Studi Bonfante, 290. In Byzantine law, however, there was an effort to introduce direct agency, and there are texts which provide that if a loan was made to an agent with the principal in mind, the principal and the agent should be liable. These texts are interpolated. See also Mitteis, R. Pr. R. 227.

<sup>5</sup> [Blume] Bas. 23.58 (2 Heimbach, 651) suggests that a subscriber was but a witness. A person not receiving a loan could not make himself liable for it unless he promised to do so by stipulation, or, in Justinian's law, unless he subscribed with the intention of making a gift. Bas., *supra*, note.

#### 4.2.17. Emperor Justinian to Mena, Praetorian Prefect.

We deem it best, for the benefit of all, to enact this law concerning written duebills (chirographic documents), so that if anyone makes a loan of money above fifty pounds of gold, or takes a receipt showing its payment, when it involves a larger amount than that stated, the chirographic documents should not be accepted by the debtor or creditor unless it is also subscribed by three witnesses or approved reputation. And if a chirographic document for money exceeding the above mentioned sum is produced, contrary to the foregoing provision, it must not be admitted by the judges. This applies to all future loans or receipts of payments thereof.

Given at Constantinople June 1 (528).

#### Note.

The foregoing law was modified to some extent by novel 73, cc. 8 and 9, appended to C. 4. 21 requiring five instead of three witnesses to such documents, if executed in cities by persons without knowledge of writing, and if involving more than one pound of gold.

Where the law did not specify the number of witnesses required on a document, two sufficed. D. 22.5.12. Frequently, however, more than two were required by Justinian in order that a court might accept it as proof of the contract. If the execution of the document was admitted, no proof was, of course, required. Codicils—informal wills—required five witnesses; testaments required seven. A written pledge or mortgage signed by three or more witnesses had a better standing than those witnessed by a less number. C. 8. 17.11, and note.

The chirographum was a duebill or promissory note, for which the term *cautio* was frequently used. Buckland, Roman Law 458, note 5. It as signed by the debtor. A *syngrapha* was a document signed by both parties to the contract. The terms originated from the Greek. Gaius 3.134. These documents were in use among non-citizens in Rome when the literal-book-entry-contract was in use among the Romans, and is generally considered to have constituted a contract, instead of merely evidence thereof. See for further particulars, headnote C. 4.30.<sup>6</sup>

---

<sup>6</sup> This last paragraph was added later, stuck on top of the prior, typed material with a straight pin and the direction “Add not to C. 4.2.17.”