Book VIII.
Title XXXIX.

Concerning joint creditors and joint debtors.
(De duobus reis stipulandi et duobus reis promittendi.)

Dig. 45.2; Inst. 3.16; Bas. 26.3.

Headnote.

Joint right or liability.

The simplest relation of debtor and creditor is where there is only one creditor and only one debtor. But in many cases there may be more than one of each. In considering this subject under the Roman law, we shall not here enter into a discussion of the much-debated difference between solidarity and correality. It is treated at length by Moyle, Inst. 474-477; Buckland 448, 454; Hunter 561-562; and a reference to it is made in note to C. 8. 40. 28. Modern civil law makes no distinction between them. 40 C.J. 1314. It is well, perhaps, to divide the subject to some extent, and consider separately, for the purpose of clarity, though the division may be arbitrary, joint obligation in cases which arise (1) out of tort, (2) out of contracts, (3) out of miscellaneous relations. We shall consider these divisions in their order.

I. Cases arising out of torts.

In cases arising out of torts, generally, there was only one debt, though two or more might be obligated to pay it. Full payment or satisfaction by one was payment and full satisfaction of the whole debt. All tortfeasors, however, were each severally and jointly, responsible for the whole debt, and none were released till full satisfaction was made. C. 4.8.1; D. 2.10.1.4; D. 4.2.14.15; Hunter 552. See Buckland 685. There was, generally, no right of contribution. We find an exception to that rule in the case of damage caused by throwing something out of a building onto a street, and in case the damage was inflicted by a slave or an animal. D. 9.3.4; D. 9.4.5 pr; D. 10.3.8.4. In modern civil law, the right of contribution seems to exist in all cases. 40 C.J. 1316.

What has been said did not fully apply to some cases arising under the early - the so-called civil-law. Thus the penalty recoverable in actions for the penalty of theft and robbery, and the damages to property (and sometimes) penalty recoverable under the Aquilian law (C. 3.35), and for intentional wrong to a person (injuria - C. 9.35), were recoverable from each and every wrongdoer, without reference to the fact that it had already been recovered from another, and it seems remarkable that in some cases under the Aquilian law, namely those relating to mere negligence, this rule was retained in force. C. 4.8.1; D. 9.2.11.2; D. 47.10.34; Hunter 551.

II. Cases arising out of contract.

(a) In certain cases arising out of contracts, such as deposit, loan for use, mandate to do certain business for a principal, the, the persons, if more than one, who received the deposit or loan or agreed to do business for a principal, were each severally and jointly responsible to the principal for the whole of whatever indebtedness or damage might arise out of that relationship. D. 17.1.60.2; D. 11.6.3.1; D. 3 6.5.15; see D. 45.2.9.1. The law made them thus responsible, though nothing was said in the contract. Whether they had the right of contribution, is not entirely clear. It would seem that if the parties liable

were guilty of fraud, then, as in cases of tort, no such right existed, but if not guilty of any fraud, the right of contribution arose. This is expressly affirmed in the case of depositees (D. 16.3.1.43), and the same rule probably applied to all of the cases mentioned. Moyle, Inst. 474. So joint shipowners and partners in slave-dealing were each severally and jointly liable on the whole contract. D. 14.1.1.25; D. 21.1.44.1. And there are some other cases. Buckland 449, 450; C. 4.65.13. Generally speaking, however, partners were not considered the agents of each other, and they were as to third persons, so many men; a man who had contracted with one of them had no right against the others, unless the latter had entered into the contract with him as joint debtors. Buckland 507.

(b) Inst. 316 gives the usual form of creating joint obligations and rights. Joint promissors were created by the promissee asking each of the promissors whether he would pay the amount of the whole obligation and each answering in the affirmative, thus: "Maevius, do you promise to give five gold pieces? Seius, do promise to give the same five gold pieces?," and in answer they replied separately "I promise."

Joint promissees were created by each of the promissees first asking the question whether the promissor would pay the whole amount of the obligation, and the promissor thereupon answering, "I promise to give so and so (the whole amount involved) to each of you."

It will be noticed that the promises were in fact several, but such contracts are commonly spoken of as joint by reason of the connecting circumstances. Such contracts were ordinarily by stipulation, or what amounted to that (note C. 8.37.1), but a stipulation was not essential in all cases. In the so-called good faith contracts, as purchase and sale and lease, deposit, a simple promise was sufficient. D. 45.2.9 pr.; Moyle, Inst. 477. So a simple promise was sufficient where in the so-called real contracts, as a loan, the contract had been fully fulfilled on one side;[1] e.g., the money loaned was paid over. In such case, the validity of the simple promise arose out of the nature of the contracts. Bas. 23.1.53 and see C. 4.2.9 and note. In fact, a promise was implied in such case. 9 Cujacius 190, on C. 2.4.5.[2]

Except, however, as already mentioned, there was no joint liability and no joint right, unless that was the intention of the parties, and that intent affirmatively appeared; that is to say, the contract must in some form expressly state, or it must appear from the mode of contracting, that the joint liability or joint right existed; in other words, the contract must show that the parties are bound jointly or have a joint right (ita ut duo promittendi - Stipulandi - essent). Sohm 381; D. 45.2.11.1 and 2. A contract whereby A and B promised to pay 100 gold pieces, was a simple and not a joint promise, and A and B were each liable for only one-half of the amount promised. D. 45.2.11.1. Unless it appeared in some form that the liability or the right was joint, the liability or right was pro rata. If it, however, appeared that the liability or right was joint, each of the promissors were - until at least the enactment of Nov. 99, hereinafter mentioned - liable also severally; that is to say, each was liable for the whole. Joint promissees were each entitled to recover the whole.[3]

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[1] Blume wrote in the margin here: "Why just in such cases?"

[2] Blume penciled in here: "Law in this consistent with what is said in [illegible] of II?

[3] [Blume] Inst. 3.16 gives the usual form of creating joint obligations and rights. Joint promissors were created by the promisee asking each of the promissors whether he would

The object of creating a contractual, joint liability is easily perceived. But there was also some value in a joint right (sometimes called an active correal obligation in contradistinction of a passive correal obligation, in which there was a joint liability). The object was to make it easier for the creditor to recover his debt by legal proceedings, a single action by a single creditor being sufficient. Each of the joint creditors might sue for the whole amount of the debt without having to show that his co-creditor had given him the right to do so. Sohm 382.

Each of the several joint debtors might, as already stated, be compelled to pay the whole or any part of the obligation. The creditor might sue any one of them for the whole or any part of the debt. C. 8.39.1 and 2; D. 45.2.3.1. Under our common law rule, too, all joint debtors are equally liable, but it is different from the Roman law, in that all joint debtors must be sued, as against a defense of non-joinder of parties.

Hence contracts are generally made, making the joint debtors liable also severally, in which the identical rule obtains as did under the Roman law of joint contracts. In other words, the joint contract under the Roman law is identical with the joint and several contract of our common law. Jaucian v. Querol, 38 Phillipine 707, 718; Anderson v. Stayton Bank, 82 Or. 357, 159 Pac. 1033, 1038. Under Nov. 99, appended to title 40 of this book, Justinian practically made the same requirement for the purpose of creating a joint and several obligation, as is made under the common law.

Special mention should here be made of sureties, though the subject generally is treated at length in the next title. They had, in certain cases, what was called the benefit of division, that is to say, the right to be sued only for an aliquot part of the debt. Inst. 3.20.4; C. 4.18.3. This is confirmed by Nov. 99, appended to title 40 of this book. And the further right was granted them by Justinian, by Nov. 4, appended to title 40 of this book, to have the principal debtors, in certain cases, sued first.

The right of contribution arising in cases under this subtopic (b) will be treated at C. 8.40.11, and note, and C. 8.39.1 and note, and the difference in the extinguishment of the obligations herein mentioned will be treated at C. 8.40.28.

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III. Miscellaneous cases.[4]

(a) Co-guardians or curators were jointly and severally liable for any delinquencies. D. 26.7.18.1; D. 27.3.1.13. They were entitled to the right of contribution, or at least the right to have the suit divided and brought against all the solvent debtors, or to have the right of the ward assigned to them. D. 27.3.1.13. No right of contribution appears to have existed in case of fraud. D. 27.3.15. As to liability under a judgment, see C. 7.55.

(b) Under the law of the twelve tables (5, 9) which continued in force, debtors due to or by a deceased person were divided among these co-successors, by mere operation of law, in proportion to their shares in the inheritance. This rule, might, however, be changed by direction in a testament. D. 45.2.9 pr; D. 30.8.1; D. 32.25; Hunter 553.

8.39.1. Emperors Diocletian and Maximian to Diogenes.

A creditor cannot be prevented, when there are two or more joint debtors of the same debt, to demand its payment from whichever of them he wishes. 1. And, if you prove, accordingly, that, upon demand, you satisfied the whole debt, the rector of the province will not hesitate to lend you his assistance against the party who received the loan jointly with you.

Promulgated February 25 (287).

Note.

This law provides that a co-debtor who has paid the debt has the right of contribution from his co-debtor. That was, undoubtedly, the rule in many cases. The subject will be more fully dealt with at C. 8.40.11. See Binder 283-288.

8.39.2.(3). The same and the Caesars to Fabricius.

You should have stated in your petition whether you made yourselves liable for only a part of the debt, or were joint obligors liable for the whole, since, if each was originally obligated for only a part, the terms of the agreement cannot be overstepped, but if for the whole, the right of election (to sue either of them) cannot be taken away by rescript.

8.39.3.(4). The same to Andronious.

When a loan was delivered over to one and others, became joint obligors, the laws would be violated, if the obligation (of the latter), pursuant to their request, were released on the ground that no money was delivered to them.

Subscribed at Sirmium February 9 (294).

8.39.4.(5). Emperor Justinian to John, Praetorian Prefect.

When several joint-creditors had certain joint-debtors, or one creditor perchance had two or more debtors, or, on the contrary, several creditors had one debtor, and some of the joint-debtors acknowledged the debt to certain of the creditors, either by payment (of part), or in some other manner by which under former laws, the scope of which was enlarged by us[5], the period of prescription was interrupted, or when perchance some of

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[4] Blume penciled in here: "Add note as to [illegible] C. 8.40.28."

[5] [Blume] C. 7.40.2 and 3.

the debtors have shown their willingness to perform toward one of the creditors (as by paying interest), or - in case of several creditors - the sole debtor acknowledged the debt to one or more of them, it was asked whether he or they might rightfully neglect to perform his or their duty to others, and refuse to pay by reason of the period of prescription, or whether, when some of the debtors acknowledge the debt or were defeated in a trial, the others, too, should be held to be without any defense. 1. Equity suggests that when there is any interruption (of the prescription period), or any acknowledgment in connection with any contract, it is just that whether there are several joint-debtors or only one, and several creditors or only one, all the debtors should be equally liable to pay the debt. 2. We ordain, that in all the cases mentioned by us, (part) performance or acknowledgment by, or suit against, some of the debtors shall operate with equal prejudice against all the debtors and be of benefit to all the creditors. 3. The duty to perform accordingly shall be uniform, and no one shall be able to rely on another's non-performance, when a contract (for the benefit of several) springs from one and the same root and source, and the reasons for a debt (owing to several) appear in one and the same action.

Given at Constantinople September 1 (531).

Note.

The substance of this law is that if one of two or more joint-debtors does any act whereby the prescriptive period is interrupted as to him, even in relation to only one of the joint-creditors - of more than one - this interruption of the prescriptive period, is good as against all the debtors, and benefits all the creditors. Buckland 451. The prescriptive period might be interrupted by acknowledgment, by payment of interest or part of the principal, by execution of a new duebill, or suit against one of the debtors. See C. 7.39.7.5a; C. 4.30.4; 9 Cujacius 1100. A similar rule seems to prevail in the civil law of today. 40 C.J. 1316, 1317; Bloom v. Kern, 30 La. Ann. 1263; Morgan v. Metayer, 14 La. Ann. 612. In common-law jurisdictions, however, the rule is generally otherwise. 37 C.J. 1131, 1132.