

Novel 99.

Concerning co-obligors.
(De reis promittendi.)

The same Augustus (Justinian) to Johannes, Praetorian Prefect the second time, ex-consul ordinary and patrician.

Preface. We know that we formerly enacted a law, containing many useful enactments for our subjects, concerning sureties by stipulation, by mandate and by promising to pay a settled past obligation (*constitutae pecuniae reorum*). It has appeared to us at present that the law needs some amendment and addition which will not be unimportant and will be useful to our republic.

c. 1. If some are mutually (*mutua fidejussione*)^a obligated to another, and it is not added that they are severally liable for the whole, each must be sued (only) for an equal portion. If that provision is added, the agreement shall be in force, but the whole shall not, in the beginning, be demanded from either of them, but each shall be sued for his portion, all of them being sued if they are able to pay and are present (in the province). If that is the situation and they are able to pay and are present, each shall be obligated to pay his proportion of the amount loaned pursuant to the mutual suretyship, by reason of which the obligation exists, and the common debt shall not become the special burden of any one of them. But if some or all of the other co-sureties are unable to pay, either in whole or in part, they (the remainder who are able to pay) shall also be liable for the amount which cannot be [had]¹ out of the others. In this way the agreement will be upheld and the plaintiff (creditor) will not be prejudiced. And though the sureties, without the creditor's knowledge, have some agreement among each other, each of them shall be liable according to his contract in the beginning, and shall not be able to avoid the contract by artifice, fraud or agreements. **1.** If two of them or all of them live in the same place, the judge trying the case shall summon them at the same time, examine the case as to all

¹ Justice Blume seems to have omitted part of the verb here. In Shoell and Kroll the phrase is *accipere not potuit*—not able to be taken (or acquired, gotten, etc.)

of them and give a decision affecting all of them. For in this way all (of such) defendants will be condemned, the amount of their property will be investigated and the debt will be settled according to justice and law. **2.** If the person before whom the case is pending is not a magistrate (such as has complete jurisdiction), but is some other person, we give authority to the proper judge, when called upon—either the president or other competent judge in the province when called upon—to compel them (the other sureties), through his official staff, to appear in the cause and take part therein, so that no impediment will be laid in the way of this imperial law. These provisions shall apply to all future contracts made after the enactment of this law; we leave the past to be governed by the law heretofore enacted on the subject.

a. The expression “mutua fidejussione,” mentioned in the beginning of c. 1, has given rise to much discussion and disagreement among authors. See Girard, 785; Collinet, 1 Etudes Historique 124, 144. Some authors have thought that the provision related only to contracts where the debtors have entered into a contract becoming sureties for each other. The phrase is used in D. 26.7.39.9-10, as representing a joint and severable liability, but that liability must, under the Novel, be expressed in a different manner, as noted, and cannot, therefore, be accepted as itself denoting such liability. Girard says that the effect of the Novel is to give to all co-debtors the right of division, if the other co-debtors are present in the province and solvent. See also Mackeldy, sec. 361, note.