

Book IV.
Title XVIII.

(Action on) a promise to fulfill a subsisting obligation.
(De constituta pecunia.)

Bas. 26.3; D. 13.5.

Preface Note.

The term here dealt with—*pecunia constituta*, or *constitutum*—is apt to be confusing to those uninitiated in Roman legal lore and deserves some explanation. It was a pact (see C. 2.3), and gave rise not to a defense, as most of the pacts—simple contracts—but to as positive right of action as the most formal contracts. In fact, it seems to have been one of the most important contracts among the Romans. Its precursor was applicable only to bankers—under the name of *actio recepticia*. The latter was a remedy for an ancient contract, couched in certain formal terms and confined, as stated, to contracts with a banker, when he had made e.g. a promise to pay a sum of money, or deliver something else to a customer on a day named—e.g. had accepted a bill for a customer. But its extension by the praetor was felt necessary, and its origin is explained in this manner: Suppose A sued B for a sum of money and the parties joined issues. On the way to trial of the case B admits A's claim and promises if he will not press the suit to pay him on a day named. A dismisses his suit.¹ The joinder of issue among the Romans absolutely extinguished the former cause of action. If then thereafter B should refuse to pay, A would be absolutely remediless, except only in case a formal stipulation had been made. See C. 8.37 as to stipulation. A stronger case for stipulation could hardly be conceived, and the praetor, accordingly, introduced the foregoing action called *action de pecunia constituta*—at first relating only to money. See Hunter at 567. It was generally to be discharged on a day certain. Roby renders the term *pecuniae constitutae* as “money appointed to be paid.” The word “appointed” is not, it seems—at least to the American reader—a happy one. “Constituere” means to fix, settle definitely by mutual agreement, with the accessory notion of payment by the promisor. An agreement, therefore, as to *pecunia constituta*—*constitutum*—might very well be translated, generally, as an agreement to fulfill a money obligation, if dealing only with money, but as the contract could be made with reference to any other property, it is properly translated as a promise or agreement to fulfill an existing obligation. Equivalent terms will sometimes be used herein. It could be made only if based on an existing obligation, and only to that extent in value, though varied at times in manner and form from the original obligation, and hence that accessory notion has generally been embodied in the term as translated here. It could be made for an obligation of the promisor himself, or that of another, and hence might be one of the forms of suretyship—of equal dignity, as shown herein, as one based on a stipulation—that of *fide jussio*. In fact it was more binding than a suretyship by stipulation; for in the latter case, the surety was released by anything which extinguished the principal debt; but in the former case, the surety was released only by payment. Sohm, Institutes 431. The Digest gives several illustrations of such contracts. One is as follows: “A man wrote to his creditor: ‘The ten pieces which Lucius Titius received as a loan are at your disposition in my hands, irrespective of what may appear due for

¹ Blume has it “B dismisses his suit,” but clearly it is A's suit to dismiss.

interest.’” D. 13.5.26. This constituted a contract herein mentioned. Again, Titius wrote a letter as follows: “I have given a written assurance at the request of Seius that if he owes you anything I would, on the same being proved, give you an undertaking for payment thereof, and would discharge the debt without any dispute.” D. 13.5.5.3. This constituted a promise of Titius to fulfill the existing obligation.

Novel 135 and Edicts 7 and 9, and Novels 4 and 99, make certain provisions as to the order of payment between principals and sureties. These provisions are made applicable to parties who promised to pay an existing obligation of another. See also law 3 of this title.

4.18.1. Emperor Gordian to Felix.

If you have made a promise (*constitutum*) to fulfill a subsisting obligation of another, a perpetual² action lies on the promise (*constitutum*), not along against you but also against your heirs.

Given at Sirmium June 25 (294).

4.18.2. Emperor Justinian to Julianus, Praetorian Prefect.³

The action on a bankers’ undertaking (*recepticia*)⁴ being dormant, which law on agreements couched in by certain formal terms, and the traces of which—it not having been used—have become faint, it has appeared necessary to us rather to amplify the nature of an agreement (*constitutum*) to fulfill a subsisting obligation.

1. Since, therefore, the aforesaid action, that is the one on a promise to fulfill a subsisting obligation, was confined by the ancients to a case where the demand was for property which was weighed, numbered or measured, but did not apply to other things, and since such action did not, in all cases, have a long life, but was confined in certain matters to the period of a year, and since it was doubted whether a promise to fulfill a subsisting obligation could be made if such subsisting obligation was conditional or payable at a future time, and whether such new promise was valid if made unconditional (i.e. without fixing the day for fulfillment),⁵ we provide by this law in plain terms that every person shall be permitted to make a promise to fulfill a subsisting obligation, not only in regard to things weighed, numbered or measured, but also in regard to all other things, movable and immovable, or self-moving, or documents, or any other property, concerning which men may stipulate. Nor shall the action in any case last only a year, but whether a person makes a promise to fulfill his own or another’s obligation, it shall have the same life as other personal actions, namely thirty years, and the promise to fulfill may be made unconditionally for a future day or conditionally; it shall have a dignity not at all dissimilar to that of a stipulation, without depriving it of the characteristics peculiar to itself. An action thereon shall lie in favor of and against heirs, so that the people shall not be in need of the action *recepticia* or of any other help, but the action on a promise to fulfill shall, by our constitution, be sufficient in all things, provided, however, that it must be based on a subsisting obligation. In the ancient action *recepticia*, suit could be brought when nothing was owing, but it is absurd, and contrary

² [Blume] I.e., one lasting thirty years, instead of only a praetorian year. See next law.

³ Blume penciled in here: “See 29 *S.Z.* 404, 412-413; 2 *S.Z.* 70.

⁴ [Blume] *Actio recepticia* was, in short, an action against a money changer, who had accepted a bill against another and promised to pay it.

⁵ [Blume] 2 *Karlowa* 1376.

to the spirit of our times as well as to just laws, to permit, through an action recepticia, the recovery of property not owing, and then in turn provide various actions (condictios) whereby promises may be annulled and money not owing be returned.

1a. In order that the laws may not blush because of such a strife, a promise to fulfill an existing obligation shall be made only for an existing obligation, and everything said in the various books of law-making concerning recepticia is declared to be of no effect, and a promise to fulfill a subsisting obligation shall embrace all cases, which could be embraced in a stipulation.

1b. And no one needs to be surprised that every kind of thing may be demanded under the name of money, since it appears even from the books of the ancient juriconsults that although the promise to fulfill a subsisting obligation was named pecunia constituta (a promise to fulfill a money obligation) nevertheless, not only money could be claimed thereunder, but all things which are weighed, numbered or measured.

1c. And it is possible to convert all things into money. So if a certain house, field or slave is mentioned in making the agreement to pay a subsisting obligation, wherein does that differ from money itself.

1d. But also to meet the subtlety of those who play on empty words instead of relying on the real meaning, everything may be embraced in a promise to fulfill a subsisting obligation, as though it were made in regard to money, since even the ancients included every sort of property within the meaning of the term pecunia—money, as clearly shown in the books of juriconsults and in other legal lore.

2. Provided, however, that whatever unconditional promises to fulfill obligations have been made by money changers and other businessmen shall remain in full force and effect according to the custom heretofore obtaining.

Given at Constantinople February 20 (531).

4.18.3. The same Emperor to Johannes, Praetorian Prefect.

The letter of Hadrian of divine memory, which speaks of dividing the risk among sureties by mandate or stipulation (mandatores et fidejussores), necessarily has application also in regard to those who make a promise to pay existing debts of others. For the rule of equity should in no manner exclude any different (but apply in every) species of action.

Given at Constantinople November 1 (531).

Note.

See headnote (III) to C. 8.39. If a man gave a letter of credit (mandate) to another, and money was obtained thereon, the author of the letter of credit became a surety for the debt. See note C. 4.35.9.