Book VIII.
Title XXXV.

Concerning exceptions or defenses.
(De exceptionibus sive praescriptionibus.)

Bas. 51.4.1, et seq; Dig. 44.1; Inst. 4.13.

8.35.1. Emperor Antoninus to Claudius.

Debtors of an inheritance are, by ancient law, liable to each one of the heirs in proportion of the property inherited by the latter. But if you have paid all the money to those of the heirs to whom the testator bequeathed the account due from your father, you can protect yourself against a suit of the others by the defense of fraud.
Promulgated July 18 (212).

Note.

It was one of the peculiarities of the Roman law that debts due to an estate were divided among the heirs in proportion to the inheritance, and the debtor paid one of them at his peril. C. 3. 36. 6, and references there. If the testator, however, bequeathed the debts to certain persons, the latter were entitled to collect the whole of it, and payment to them was valid. Such provision could be set up by the debtor as a defense, for it was considered fraud for an heir to make a claim contrary to the wishes to the testator.
D. 44.4.4.10.

8.35.2. The same Emperor to Julius.

You may bring an action for the protection of the house, which, as you say, belongs to you, if the matter has not yet been adjudicated, for a defense of former adjudication is good against a man and his heirs only when a case has been tried and a decision has been rendered.
Promulgated February 15 (213).

Note.

This law deals with the defense of res judicata, and declares the general principle that a third party is not bound by a judgment in a suit between third parties. On that subject generally see C. 7.56 and headnote.

8.35.3. The same Emperor to Vitalis.

If you have not previously brought an action on the guardianship against your brother, your former statutory guardian, persist in the pending action. You need not fear the defense of a compromise (pacti) if you can prove that it was made through fraud and deceit, for a replication of fraud makes the action an equitable action and defeats whatever fraud has devised.

Note.

This law deals with the defense of a pact not to sue, and the replication of fraud. Such pact was valid, and could be set up as a defense. Inst. 4.13.3. If obtained by fraud, however, it could be set up by replication, and so defeat the defense.

The last sentence reads: "nam replicatio doli opposita bonae fidei judicium facit et commentum fraudis repellit." Now such suit by a former ward against his guardian

was a suit in which equity was considered without reference to such replication. But Cujacius, 9, 1168, says that such replication will, as it were, emphasize the equity. Donnellus wants to correct the sentence to read: "nam replicatio doli opposita bonae fidei judicium facit, ut commentum fraudis repellat;" that is to say, that when such replication is set up, the equitable suit is effective so that it will repel the fraud. 9 Donnellus 1240-1241.

8.35.4. Emperor Alexander to Junius and others.

Since you allege that your case is not ended by judgment, but has been postponed, there is no doubt that you right to set up your defenses is unimpaired.
Promulgated October 6 (223).

Note.

A defense might consist of a general denial of plaintiff's claim. This need not be further considered here. Other defenses would admit the claim of the adverse party, but set up matters in avoidance, either in bar or in abatement, at times called peremptory and dilatory defenses respectively. The latter are merely temporary obstructions, such as an agreement that a debt shall not be sued for within five years, for in five years the defense ceases to be pleadable; such, too, are the objections to the jurisdiction of the court or the right or power of the judge to try a case, or that the opposite party is not properly represented, for example, by a guardian, or that the form of the action is not legal. Peremptory defenses, on the other hand, go to the gist of the action, and are an absolute bar thereto. Gaius 4121-123.

During the formulary period, which ceased toward the end of the third century, the issues were made up before the praetor - the judge. He issued his formula, his instructions to a trior of fact, commonly called judex or arbitrator, who tried the issues of fact in the case and rendered his decision. That decision either granted the plaintiff the relief which he sought or denied it, and the result of a final adjudication was just the same, whether the decision, if in favor of a defendant, was reached because of a dilatory or a peremptory defense. Hence it was very important for the plaintiff to definitely determine beforehand that a dilatory defense was not good; for if it was good in fact, the plaintiff was forever barred from bringing another action. This situation was entirely changed when the formulary system was abolished, and the whole case was tried before one man, and inroads were made by imperial legislation. Thus Zeno provided in 485 that if a man brought his action prematurely, he should be penalized by paying the expense of the opposite party, postponing another action for a certain length of time, and compelling the plaintiff to lose his interest during that time. C. 3.10.1; Inst. 4.13.10.

Some dilatory defenses were necessary to be set up at once, and must be decided before joinder of issues between the parties. This was true where the defendant objected to the jurisdiction of the court over him, or where objections existed against the judge. C. 8.35.13; C. 3.13.4; C. 3.5; Nov. 53, cc. 3, 4; and Nov. 96, attached to C. 2.2. 3 Bethmann-Hollweg 264. That was true also where the objection was to the capacity of the party to sue, as where a minor, for instance, sued without the consent of his guardian, or where an agent had not given a bond that his principal would ratify his acts. Bethmann-Hollweg, supra; C. 3.6; C. 2.12.13. That was true, also, as to a defense that

another question should be decided before the decision on the question raised by the petition of the plaintiff. 3 Bethmann-Hollweg 264, 265.[1]

Dilatory defenses, the effect of which, if good, was merely to postpone the right of action of the plaintiff, were necessary to be set up at the time of the joinder of issues, and could not be set up thereafter, unless permission was granted by the court. Proof thereof, however, was not necessary to be made until after the plaintiff had rested his case. C. 4.19.19; C. 8.35.9 and 12.

But the rule was altogether different after the formula – in [illegible] in regard to peremptory defenses, which absolutely barred all rights. While it was, of course, usual to set up all defenses at the time of the joinder of issues,[2] that was not essential, and any peremptory defense that was then omitted might be set up later, before final judgment. This right was in a measure the equivalent of the right of amendment granted under our laws. C. 2.1.3; 2 Bethmann-Hollweg 268-269. This rule is well attested not only by the present law, but also by law 8 of this title, and by C. 4.31.14.1; C. 7.50.2; C. 8.41.10.1. This might be done even on appeal. C. 7.62.6.1; C. 7.63.4. After that time, however, relief could be had only upon a petition for restitution of rights. C. 7.50.2. But see note to that law and see D. 5.1.52.; 47 Sav .Z.S. 105.

Within the term "defense" - exception - as here mentioned, is included not alone the answer of the defendant, but also the replication which might be made by plaintiff. Further pleadings beyond the replication were permitted, namely a rejoinder (triplicatio), and then a surrejoinder, and as many others as might be necessary. Bethmann-Hollweg 271; Inst. 4.14. Under the modern Codes in the United States, the last pleading is generally a replication , or reply, the affirmative allegations of which are ordinarily considered denied by operation of law.

Various matters, constituting a defense, are treated of specially in other portions of the Code. Thus pacts and compromises are treated in C. 2.2 and C. 2.3; contracts entered into under fear in C. 2.19; fraud in C. 2.20; res judicata and other matters under other titles.

8.35.5. Emperors Diocletian, Maximian and the Caesars to Basilius.

Although an action under the interdict against force (unde vi) can (only) be brought within a year, still the law is plain that a man, who was expelled by force but afterwards regains possession, has a defense which is permanently good.[3]
Subscribed at Trallis May 1 (293).

8.35.6. The same to Helena.

If a pact was entered into[4], a replication of fraud may be interposed, without limitation of time, against a defense (based on the agreement).

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[1] At the top of the page on which this paragraph is located, Blume penciled in several illegible words and phrases, mostly in Latin. The references accompanying them are legible and are as follows: Inst. 4.6.30; Gaius 4.61.63; 42 Z.S.S. 328; Buckland 673; D. 18.5.3; D. 24.3.24; D. 22.1.5; D. 30.1.108.12; D. 12.5.8.

[2] At this point, Blume wrote in the margin "See Bekker, 2 Act. 222-224."

[3] [Blume] See note to C. 8.4.2 and 7.

[4] [Blume] e.g. not to reclaim the property. See law 3 of this title.

Subscribed at Viminacium September 1 (293).

8.35.7. The same to Menandra.

If less than the whole of a debt was paid you, and you did not give a release to the debtor, you are not forbidden to sue for the amount not shown to have been paid, and if a defense of a compromise is set up, you may meet it by a replication (of fraud).
Subscribed February 28 (294).

Note.

There were some defenses which were personal to a particular person, and which, accordingly, could not be set up by defendant other than him. But most of the defenses were available to all the defendants. This included the defenses of fraud, res judicata, that an oath had been tendered and taken, that a contract had been entered into through fear; that defendants were sureties for a woman who had no right to enter into the obligation, and other defenses. D. 44.1.7; Mackeldy § 217, 3; Buckland 652. It does not follow, however, that such defenses were equally available against all the plaintiffs. For instance, the defense of fraud could not be set up against a man by reason of the fraud of one from who he obtained his title, at any rate unless he held by gift, but the defense that something had been done under fear was available against those deriving title from the wrong-doer. Buckland 652, 653; D. 44.4.4.31 and 33.

8.35.8. The same to Aurelius.

An absolute defense which suffices to be set up in the first place, but was omitted, may be set up at any time before judgment.[5]
Subscribed October 18 (294).

8.35.9. The same to Mucianus.

If you are confident that the claim of plaintiff will lack proof, you have no need to set up a defense. But if you acknowledge the claim, and allege that you are protected by a defense, it is necessary only to try this defense. If you have doubt as to the claim (of plaintiff), and have set up a defense, it is not necessary to prove the latter, till the plaintiff has proven his claim according to his allegation.[6]
Subscribed at Burtudizis November 3 (294).

8.35.10. The same to Aquilina.

Plaintiffs do not protect their claim by "defenses," (exceptiones) which in certain cases are available to defendants, but by replications, if they have any.
Subscribed at Nicomedia December 1 (294).

8.35.11. The same to Neonis.

It is clear that defenses or exceptions by which a principal defendant is protected, are available, while the matter is in statu quo, also to his sureties.
Under date December 18.

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[5] [Blume] See note to law 4 of this title.
[6] [Blume] See note to law 4 of this title.

8.35.12. Emperor Julian to Julianus, Count of the Orient.

If an advocate omits to set up a dilatory plea in the beginning of the suit, and he wants to do so afterwards, but is refused permission to do so, nevertheless still perseveres in insisting on the defense, which came too late, he shall be punished by a fine of one pound of gold.

Given at Antioch March 9 (363).

8.35.13. Emperors Honorius and Theodosius to Symmachus, Proconsul of Africa.

The law has decreed that defenses of lack of jurisdiction of the court over the person of defendant, must be set up by the litigants in the beginning of the suit.[7]

Given at Ravenna August 28 (415).

C. Th. 11.30.65.

[7] [Blume] C. 3.13.4 and note.