Book II.
Title III.

Concerning informal agreements.

Headnote.

Pacts. Development of contracts.

Pacts were agreements not made in the form recognized by law, and therefore, not enforceable by action. Originally, form and ceremonial were all important. Certain agreements could be effectually concluded, if made in the presence of five witnesses, a scale and weight, held by a balance holder, and the pronouncement of certain ceremonial words. That was true of the ancient loan called nexum, and of sales (and transfer)—mancipation (C. 7.31 note)—of Italic land, slaves and certain household animals. G. 1.120. The stipulation, too, was a formal agreement, and was entered into by question and answer—e.g. "Do you, Gaius, promise me fifty gold pieces? Ans. I do." (C. 8.37 headnote.) It dated from an early period in Roman law. Any agreement whatever, not contrary to law, if made in the form of a stipulation, or, as generally expressed, accompanied by a stipulation, could be made enforceable. But the expansion of Rome, and commerce and industry attendant thereon, made relaxation of form and ceremonial necessary, not only in the sphere of conveyances of property, but also in that of contractual obligations. Before the end of the Republic, we find a number of pacts, or informal agreements, raised to the rank of 'contracts,' and enforceable as such. These were the four consensual contracts of sale, (and purchase) lease, (and hire) partnership and mandate (C. 4.2; C. 4.23; C 4.34; C. 8.13), so called because they became binding, subsequent to the agreement made, only when the subject matter (res) was delivered. The contracts which we now call innominate (without a name) were agreements outside of the contracts already enumerated, but were in some respects similar to the real contracts. (See C. 4.64 headnote.) They arose when one party gave or did something under agreement that the other should do or give something else; and when one party had performed, but then only, the other was compelled to do so also. D. 19.5.5 pr. That was true, however, in classical law, only in certain cases, but ultimately became true in all. In addition, certain other informal agreements, called praetorian or statutory (created by the praetor or emperor) were made enforceable. Thus the offer by one party to the other to have the latter take an oath to settle a dispute (C. 4.1) was considered, when accepted, in the nature of an agreement, and enforceable under certain circumstances. An informal agreement to pay an existing obligation, too, was made biding. C. 4.18. So, if parties had agreed to submit a dispute to arbitration, the decision was, under certain conditions, made enforceable. C. 2.55. In 428 A.D. Theodosius gave actionable validity to a pact to give a dowry. C. 5.11.6. And Justinian made an informal agreement to make a gift enforceable. C. 8.53.35.5.

And a development took place along collateral lines. Agreements accompanying a transfer of ownership by the ancient form of mancipation above mentioned were to some extent, at least, enforceable as provided for by the twelve tables. (6.1). Pacts were not, however, originally enforceable, if jointed to, or part of, a transfer by mere delivery, although, if the pact was not fulfilled, the unjust enrichment action (condiction, C. 4.5. headnote) could ordinarily be brought for the return of the property. The Justinian compilers made the enforceability of such pacts one of the fundamental rules of law. D. 2.14.45; D. 2.14.48; law 10 h.t.; C. 4.38.4; C. 4.64.6; C. 4.64.8; C. 8.54.2). So, too,

agreements collateral to equitable contracts, such as sale, lease, a seller and purchaser might agree that the former had the right to repurchase the property sold, or that he should give a bond against eviction, or should put the property in good condition. See C. 4.54.57. If any such collateral agreements were made as part of the main contracts, they were, in time, made actionable; if not so made, they were unenforceable. Law 3 h.t. The same rule was applied, ordinarily, to a loan of money, a contract at strict law. D. 2.14.29. And collateral agreements to a stipulation, another contract at strict law, were in Justinian law, construed as embodied in the main contract. D. 12.1.40. Agreements as to interest, however, could ordinarily be made only by stipulation, but exceptions came to be made in that regard, especially in connection with equitable contracts. C. 4.32.1 note.)

Any pact, however, though not enforceable by an action, gave rise to a natural obligation, and could be set up in defense. This was particularly true with pacts by which a creditor or other party agreed not to sue, or not to sue for a limited time. Furthermore, a great change took place in the formality required in the stipulation itself, so that the form of entering into it became exceedingly simple. See C. 8.37 headnote. See generally, Seuffert, Geschichte der Obligatorischen Verträge; Pernice, 1 Labeo c. 3; Mayr, Romische Rechtsgeschichte; Kubler, Geschichte der Romische Rechts 166-183; Girard, Manuel 453 ff; Cuq. Inst. (1928) 411 ff.

2.3.1. Emperor Severus to Philinus.

The uncertainty of the condition was not inequitably settled by an agreement between the bothers. When you therefore acknowledge that your father was asked, by words which create a trust, that, if he should die childless, he should turn over the inheritance (left him) to Licinius Fronto, a pact made when Pilinus had no children, to the effect that Licinius Fronto should receive a sixth, can not appear unjust simply because after the division was made as was agreed, your father died leaving you surviving him.
Promulgated November 25 (200).

Note.

The elder Philinus, father of the man to whom this rescript was addressed, and brother of Licinius Fronto, received an inheritance from someone, upon trust—that if he should die childless, Licinius Fronto should become owner of the inheritance. He did not have any children at that time, and he made a pact with Licinius Fronto to the effect that the provisions of the trust should no longer be binding, but that instead thereof Licinius Fronto should have one sixth of the inheritance in absolute ownership. Thereafter the elder Philinus had a child, the petitioner, and then died, and the child then wanted to break the agreement. But it was upheld, the uncertainty existing constituting a sufficient reason for the pact, used as a defense, were good. The pact had been carried out by division of the property. If it had not been, it would have been a naked pact, and could not have been sued on by Licinius Fronto. See C. 16 headnote.

2.3.2. Emperors Severus and Antonius to Claudius.

If you are able to prove that after the sale of the inheritance made by you, the creditors (of the inheritance) brought their actions against the purchasers, and that the later voluntarily submitted to them, you are not ineffectually defended (in actions brought against you for the same debt) by a plea of an implied pact.
Promulgated February 12 (202).

Note.

An heir was liable for the debts of an estate inherited by him in proportion to the inheritance perceived. L. 26 headnote; C. 6.30 headnote. And even though an heir sold his inheritance, he remained liable for his portion of the debt until the same was paid. The purchaser was not required to submit to an action for such debt. C. 4.39.2. But if he did, the vendor was released. See D. 46.3.23.

2.3.3. The same Emperors to Restitutus.

A slave of a creditor can better the cause of his master; but he cannot by a new (unauthorized) pact alter for the worse a well founded obligation (due on the master).
Promulgated March 25 (203).

Note.

The rule also applied to a son under paternal power and other agents. C. 23 headnote; D. 23.3.7; D. 3.3.49.

2.3.4. The same Emperors to Valeria.

After you renounced a suit commenced concerning a landed estate, no rule permits a cause once finished to be revived.
Promulgated February 10 (206).

Note.

The renouncement here contemplated was made after joinder of issues. Bas. 11.1.65.

2.3.5. Emperor Antoninus to Demagoras.

If you have paid your creditor part of the money, but it was agreed between you and him that a part should not be claimed on account of your support and faithful defense in his suits and transactions, (then) you are released from this obligation, partly be the civil law and partly by the praetorian law. For the perpetual defense that a pact was made, or of fraud,[1] defeats the claim for the remainder, since it could even have been recovered if paid by mistake.
Promulgated at Rome, July 25 (213).

2.3.6. The same Emperor to Julia Basilia.

It is undoubted law that pacts made contrary to the laws and constitutions, or contrary to good morals, have no force.[2]
Promulgated July 28 (213).

2.3.7. The same Emperor to Julius Maximus.

If you have become heir to your debtor, the right of action which you had against him is, after you have entered on the inheritance, merged (with it). But if you transferred this inheritance, after you also received it in the trial, to the person whom you defeated by the decision (of the court), upon condition and under a pact that he should pay the other creditors (of the estate) as well as yourself, to the extent of the amount which would have been due you, if you had not entered on the inheritance, such pact and agreement must be

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[1] [Blume] "or of fraud" thought to be interpolated. Beseler, 1 Biet. 109.
[2] [Blume] Consult. 1.7 inserts "by unwilling persons" after "made" and omits "contrary to good morals."

performed. If that is not done, an action will lie on the stipulation, if that was only added to the pact.
Promulgated July 30 (213).

Note.

Under Justinian, the debt due an heir who entered on an inheritance was not merged, if he made an inventory as provided by that emperor. C. 6.30.22.9.

It may be noted that here the pact of compromise, though carried out by one party, was not enforceable unless a stipulation was added. In the absence thereof only an action for the return of what was given, as unjust enrichment (C. 4.5) could be brought. Law 10 h.t. Buckland, 519. In later law, however, the agreement was enforceable by an action in special terms (C. 4.64 headnote) though there was not stipulation. See note C. 2.4.6 and note Bas. 11.1.68. Some editions erroneously add to the end of the rescript: "or by an action in special terms (praescriptis verbis), if a stipulation was not added."

2.3.8 (9). Emperor Alexander to Aurelius Dionysius.

Since, after your mother's adversary was defeated, he circumvented her, so that she agree (caveret) that she would raise no question as to the slaves involved in the litigation, the pact entered into in bad faith is void, and when action on that agreement is commenced against your mother, the judge will release her (therefrom).[3]
Promulgated September 12 (222).

2.3.9 (8). The same Emperor to Mucatraulos.

If it is shown that Apollinaris took over herds to portion shares, that is that the increase thereof should be divided between the owner and the herder in certain proportions agreed on, he will be compelled by the judge to observe the pact faithfully.[4]
Promulgated September 12 (222).

2.3.10. The same Emperor to Nica.

The condition which you prescribed when you gave a dowry to your foster daughter, must be obeyed. Nor can the objection be raised against you, that as is customarily said, no action arises from a pact; for we apply that law when there is a naked pact; but when money is given and some agreement is made as to its return, an action analogous to (utilis) an unjust enrichment action (condiction) lies.[5]

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[3] [Blume] Duplicated at Consult. 9.11, with "by stipulation" omitted and adding at end: "because no one can make a pact concerning an adjudicated matter." See C. 2.4.32. Agreements tinged with fraud were not upheld. D. 2. 14. 7. 7.

[4] [Blume] See D. 17.2.52.2-3; 3 Z.S.S. 58-60; Trumpler, Gesellschaftsreformen 13-14; Bas. 11.1.69.

[5] [Blume] Duplicated at C. 5.14.1. A naked pact was an agreement without "causa"—a term somewhat broader than the term consideration of the common law, denoting any sufficient ground, reason or basis. Thus the causa of a stipulation was its form; that of real and innominate contracts, part performance; that of the consensual contracts and praetorian and statutory pacts, the mere agreement of the parties. Kotze, Causa, 1 ff. It may be noted that the only action here given was the unjust enrichment of the agreement, but simply for the return of what was given. An enforcement action (in special terms, C. 4.64 headnote) was given in later law. Law 1.7 h.t.; C. 2.4. headnote. Part of this rescript seems to intimate that the pact could be directly enforced. It is though to be

2.3.11. The same Emperor to Capito.

You are entitled to no action in which, as you say, it was agreed between your stepmother and your father, when she gave a farm as dowry, to the effect that she should herself pay the [taxes and the] interest due to creditors to whom the estates were pledged, even if the pact is proven to have been accompanied by a stipulation. But if the farm given as dowry was appraised as is indicated by part of the document, you have an action (as) upon a sale (ex vendito) to force compliance with the agreement.
Given December 5 (229).

Note.

Dowry was sometimes put in at a certain valuation, sometimes without one. If none was put on it in this case, then, when the husband of the stepmother, the son's father died, the farm went back to the stepmother, and in that event, of course, it did not matter to the son whether the interest on the lien on the farm was paid or not. On the other hand, if the farm was put in at a certain valuation, the husband became the owner, and the value of it became returnable to the stepmother when he died. In that event, the son, as heir of the father was interested in having the pact made enforced, and that was permitted. See C. 5.12 headnote.

An agreement such as is mentioned here was in later law declared void, insofar as payment of taxes were concerned. C. 4.47.1 which is nearly a duplication hereof. The words in bracket, relating thereto, were doubtless left in by mistake.

2.3.12. The same Emperor to Flacilla.

That the last pact made should be obeyed is demanded both by law as well as the equity of the matter. Hence, if your opponent agreed not to rely on a former agreement, and especially if, as you say, he also so stated upon the records of the president, you are not prevented to bring the action which lay upon the first agreement.
Promulgated February 27 (230).

Note.

The first agreement, or contract, in this case was the creation of a debt; the second agreement, that the creditor would waive the right to sue on the debt; the last agreement that the debtor would not rely on the creditor's agreement not to sue. Now this last agreement prevailed, but thereby enabled the creditor to sue on the original agreement.

At times, however, a second agreement totally destroyed the whole cause of action arising from the first, as in case an agreement was made not to sue for insult or theft. In such case the original obligation could not be revived. D. 2.14.17; D. 2.14.27.2. If an agreement of sale was dissolved by mutual consent, that ended the matter, so far as the original contract was concerned. C. 4.45.2.

2.3.13. Emperor Maximinus to Marinus.

In the case of equitable (bonae fidei) contracts an action arises on a pact mad in connection therewith only if the pact is made as part of the same transaction; for whatever is agreed on thereafter, gives rise not to a claim but to a defense only.
Promulgated January 9 (236).

Note.

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largely interpolated in that respect. Riccobono in 43 Z. S. S. 361 note 1; Ehrhardt, Justa Causa Trad. 82.

This rescript refers to the collateral agreements mentioned in the headnote. If they were made at the same time (in continenti) that the main contract was made, they were actionable, otherwise not. See Kniep, Praesc. und Pactum note 69.

2.3.14. Emperor Gordian to Caecilianus, a soldier.

If a stipulation was added to the pact in which, as you allege, your opponent promised to pay a penalty, if he should not abide by the agreement, you, when suing upon the stipulation, will succeed in having that which was embraced within the agreement performed, or you may, in accordance with judicial custom, demand the penalty in the stipulation. But you ask in vain that the property of your adversary should be delivered to you, contrary to what is usual.
Promulgated April 1 (241).

Note.

Here the soldier asked the right to take possession of the adversary's property without a proceeding in court. He probably had an agreement that he might do so, such agreements being common in Hellenic countries. But they were not effective in Roman law. C. 8.13.3 note.

2.3.15. Emperors Valerian and Gallienus and Valerian, the most noble Caesar, to Pactumeius.

A pact contained in a dowry contract, to the effect that when the father should die his daughter who was getting married should be equal heir of her father with her brother, could neither create an obligation, nor deprive the father of the woman of liberty of making his last will and testament.
Promulgated February 20 (259).

Note.

In the dowry contract, to which the father was a party on account of dowry given by him, he attempted to appoint his heirs. By such act he could not renounce his right, which he had under the law, of making his last will and testament, and appoint such heirs as he wished, leaving his property in any manner that he desired, subject only to certain limitations contained in the law. A pact, such as is here mentioned, was contrary to public policy. See note to C. 2.3.30.

2.3.16. Emperors Diocletian and Maximian to Diaphantus.

Since you state that the sons, named as heirs in the will, were therein asked that he who should leave his portion of the inheritance to the other, but since you further state that the precatory substitution was cancelled by the agreement of the brothers, an action on the trust fails.
Promulgated February 10 (286).

Note.

If, when the first died, the second should attempt to enforce the provisions of the will, the pact would be set up as a defense, and a pact, used as a defense, was always good. See also C.2.4.11 and C. 1 headnote.

By the term precatory substitution is meant that the testator by words used in connection with the creation of a trust, asked (prayed) that one be substituted for another.

2.3.17. The same Emperors to Deximachus.

The president of the province will, according to law, cause to be carried into effect a pact, shown to have been entered into in good faith, if, even though there is no writing thereof in existence, the truth of the transaction can be shown by other proofs. Promulgated June 23 (286).

Note.

Written instruments were not, ordinarily, necessary to the validity of transactions under the Roman law. This is attested by a number of rescripts in the Code. 3.32.10.15 and 19; 3.36.12; 4.19.4; 4.21.8-12; 4.38.12; 4.52.5; 4.65.9 and 24; 7.16.25; 7.32.2; 7.32.7; 8.13.12; 10.3.3. Most of these were addressed to Greeks. Mitteis, R.R. u. V.R. 517. Writing had been customary in the Greek world from about 700 B.C. (Weiss, Greich. P.R. 428), and the idea became, and as noticed by these rescripts, persisted to be, pre valent that writing was essential to make transactions valid. Mitteis, 514-515. But the emperors invariably answered that this was not the case under the Roman law. Written instruments were common, however, and were probably generally used in connection with important transactions from the time of the late republic. Huschke, Dahrlehn 94. But certain witnesses interested in a cause came to be excluded from giving testimony therein (C. 4.20.3, note; C. 4.20.10), and Constantine directed that the testimony of only one witness should not suffice. C. 4.20.9. These provisions must have been powerful influences in causing transactions to be committed to writing. See also C. 4.20.1. Gradually writing was required in some cases. Thus Justinian prescribed that a due bill or receipt for more than 50 pounds should be witnessed by three witnesses. In 316 it was provided that gifts should be in writing. C. 8.53.25. That remained the law as to large gifts, but was repealed as to small ones. C. 8.53.29 and 34-45. So certain marriages were, under Justinian, required to be evidence by writing. C. 5.4.9 note. That was true also to show free birth. C. 4.20.2. Pleadings, too, under the extraordinary procedure, were ordinarily required to be in writing. C. 2.1 headnote.

2.3.18. The same Emperors to Julius and Aemilius.

If you prove that your creditors permitted any one of you to pay (in full satisfaction) on his own behalf his (proportionate) part of the debt, the rector of the province applied to will, in accordance with his dignity, take care that one will not be called upon to pay for the other.
Promulgated January 7 (287).

Note.

The parties were liable jointly and severally, but the creditors agreed to proportionate payment. Such pact was binding, if set up as a defense. 9 Cujas 91; 7 Donellus 199.

2.3.19. The same Emperors to Victorianus, a soldier.

Although among civilians a writing, which provides that he who survives shall have the property of the other, does not even appear as an effective gift in contemplation of death; still as the wishes of a soldier, in respect to the last breath of life, and concerning the disposal (decreto) of his property, in any manner, in contemplation of death, reduced to writing, has the force of a last will and testament, and since you state that you and your brother, as you went into the danger of battle, made a mutual pact with each other, on account of the common danger from death, to the effect that the property of the person whose life should be ended by fate should belong to the survivor, if that condition has arisen, it is perceived that you receive the benefit of your brother's

property, pursuant to his wish, confirmed as it is by the ready indulgence expressed in the imperial enactments.[6]

Note.

Agreements like those mentioned in the foregoing law were generally considered as legacy-hunting agreements, and void as against good morals. Note C. 6.21.11; headnote C. 6.25; C. 8.34.4 and note. Such agreements were permitted to be made by soldiers through special favor for them.

2.3.20. The same Emperors and the two Caesars to Martial.

The ownership of property is transferred by delivery and usucaption (prescription), but not by naked pacts.
Promulgated January 7 (290).

Note.

A pact, or for that matter, a mere contract of sale, did not, anymore than with us, transfer ownership. C. 3.36.15; C. 4.39.6; C. 4.49.8. With us, a written conveyance is the usual mode of such transfer. Not so with the Romans. The instant rescript, however, does not fully express the Roman law as of the time of its date, and was changed by the compilers. Originally, the main property of importance, namely real property, slaves, rustic servitudes, and some animals could be legally conveyed only by mancipation, a formal mode of conveyance with scale and weight in the presence of witnesses (C. 7.31.1 note) or by fictitious suit (in jure cessio). Other property could be conveyed by mere delivery. Mancipation and transfer by fictitious suit became obsolete in post-classical time (C. 7.31.1), and transfer by delivery became the exclusive mode of conveyance. It had to be based on a transaction, such as sale, gift, agreement, etc. C. 7.32 headnote. The rigid requirements of corporal delivery, or complete control, were, in the course of time, materially modified. Thus in some cases the delivery of the key to the property was held sufficient. If the property was already in the hands of the vendee, or if it was agreed that the vendor should for a time retain possession—as lessee, for instance—no delivery at all was necessary. The agreement sufficed. Inst. 2.1.44-45; C. 4.48.2; see also C. 8.53.7; C. 8.53.8; C. 8.53.28. Justinian went so far as to prescribe in the case of a gift, that the delivery of a written agreement to sell should be equivalent to delivery. He was doubtless influenced in making this provision by the practice in Hellenic provinces, including Egypt, where a written conveyance, duly registered in a public registration office, transferred ownership. This provision seems to have been exceptional, and

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[6] This passage seems to have given Blume great difficulties. A type written reworking was pasted over the original, then another correction was handwritten of another piece of paper pinned on top of the prior reworking. Scott's version is as follows: "Although a document drawn up between private persons, which provides that the survivor shall obtain the property of the other, does not present the appearance of a donation mortis causa, still, as the testament of a soldier, disposing of his estate, and reduced to writing during his last moments, in anticipation of death, has all the force of a last will; and you state that your brother and yourself, being about to go into battle, made a reciprocal agreement in view of the common fortune of death, in such a manner that the property of him who died first should belong to the survivor; and the condition having been complies eith, it is understood that, by the will of your brother (which rule is confirmed by the Imperial Constitutions), his entire property is transferred to you." 6 [12] Scott 171.

generally speaking, Justinian, except as above mentioned, held fast to the idea that delivery was necessary. Lange, Das Causale Element 182 (1930). Mitteis, P.R. 509.

2.3.21. The same Emperors and Caesars to Eusebius.

Since you state that it was agreed among you, without writing, to divide the inheritance of your brothers equally among you, and that it can be shown that the agreement was made for the purpose of compromise, you can, if you are in possession, protect yourself by that defense; but if your adversary is in possession, then you should know that no cause of action arises out of such agreement, unless you have protected yourself by a stipulation; nor may your adversary take advantage of this compromise unless he is ready to fulfill the terms of the agreement.
Promulgated May 1 (293), at Thirallus.

Note.

A compromise of an action or dispute, if nor carried out, was not, unless accompanied by a stipulation, enforceable by an action, but in such case the original action that was available to the parties could then be brought, or renewed, giving thus an indirect method to enforce the compromise. C. 2.3.28 and 36. If the original action was extinct, however, the compromise could be enforced. C. 2.4-6; 33.

2.3.22. The same Emperors and Caesars to Archelaus.

The favor shown minors over fourteen years of age will have the effect that a pact of a curator agreeing to accept a less amount than is owing to the ward shall not cause injury to the ward. For guardians and curators are able to give a valid release of an obligation when they collect the debts which are due to minors under and over the age of puberty, not if they remit them.
Promulgated at Sirmium, November 16 (293).

Note.

The legal age was twenty-five. A minor under the age of puberty, (fourteen for boys, twelve for girls) was called pupillus (pupilla), and the guardian of such a minor was called tutor, generally translated as guardian; the guardian of a minor over the age of puberty was called curator. For administration of affairs of a minor, see C. 5.37.

2.3.23. The same Emperors and Caesars to Honoratus.

A son, by making a pact or accepting payment for a debt, does not thereby diminish an obligation due to his father.[7]
Promulgated at Sirmium, November 16 (293).

2.3.24. The same Emperors and Caesars to Domna.

If it is proven that out of affection for the heirs you released to others (strangers-aliis) a right of action which you had on a legacy or a trust against the heirs of your former husband, the defense that such pact was made will not prejudice you in your action against others who are still debtors of the estate.[8]

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[7] [Blume] See L. 3 h.t.

[8] This reflects handwritten changes by Blume. The original reads: "If it is shown that out of affection for the heirs you remitted a right of action which you had for a legacy or a trust against the heirs of your former husband, to certain parties (aliis) (who were not the

Promulgated at Sirmium, December 16 (293).

Note.

The widow released, remitted the debt as to, say A and B, whom she supposed to be the heirs. It turned out that C and D were the real heirs. The latter could not, when sued, set up the release. 9 Cujas 101. See C. 2.4.1. The law, has, however, been interpreted as meaning that, though some of the heirs were released, that was no defense to the others. German translation, note.

2.3.25. The same Emperors to Euhemerus.

The claim of creditors can neither be destroyed nor changed by pact among the debtors.

Given at Sirmium, May 1 (294).

2.3.26. The same Emperors and Caesars to Cornelia.

By the law of the twelve tables, the debt of the estate of a decedent is, by operation of law, divided among the heirs in proportion to the amount of the estate received by each, and a pact among the heirs of the debtor cannot place the obligation due to a creditor upon one heir only. The same rule applies also to heirs under the praetorian law. Hence, you may sue your co-heir for the production of due bills of the estate, owned in common, or if an agreement made in dividing the property has not been carried out, you can sue him for your damages.[9]

Promulgated at Varianum, October 13 (294).

Note.

"Debts due to or by a decedent are divided among his successors by operation of law, in proportion to their shares in the inheritance." Twelve Tables V. 9. See C. 3.36.6. The heirs could not, of course, make an agreement among themselves to the prejudice of creditors. In this case the heirs divided the property, and one of them agreed that he would pay all the estate's debts, and to that end got the due bills due to the estate. He failed to pay. The other heirs thereupon had the right to bring an action for the return of their portion of the due bills, or an action for damages. See 9 Cujas 103. Bas. 11.1.89. 1 H. 662.[10]

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real heirs), the defense that such pact was made will not prejudice you in your action against the real debtors." Where BLume has the right of action being released to "others," or "certain parties" (aliis), Scott makes this "in favor of others of the heirs…" See 6 [12] Scott 172. The German version reads: "Wenn bewiesen wird, dass du die Vermächtniss—oder Fideicommissklage…aus Zuneigung zu den Erben Anderen erlassen hat…" 5 Otto, Schilling & Sintenis 283.

[9] This passage also troubled Blume. This text reflects penciled corrections made to a revised translation pasted over the original. Scott's translation varies significantly: "Under the Law of the Twelve Tables, an agreement entered into by the heirs of a debtor by which the indebtedness of the estate was divided in proportion to the shares cannot bind one of the debtors to the creditor for the entire amount, and this also takes place where the heirs succeed under the praetorian law; hence, you can, so far as your interest is involved, bring an action against one of the co-heirs for the production of their common acknowledgment of the indebtedness in writing, or establish the fact that no agreement for such an appointment was made." 6 [12] Scott 172-173.

[10] This last citation was added in pencil. It is not clear what source "H" is.

2.3.27. The same emperors and Caesars to Aurelius Chresimus.

Complainant suing on a stipulation, which was added for the purpose of making a pact enforceable, whether such pact was made before or immediately after the stipulation, rightly demands that the decision be in his favor.

Subscribed November 8 (294), at Heraclea.

2.3.28. The same emperors and casers to Leonntius.

If what had been agreed to be paid pursuant to a naked pact was (in fact) paid during certain years, this could not obligate him who made the pact to continue in the future to make payments not owing, unless a stipulation was added to the pact.

Given at Burtudizum, December 3 (294).

2.3.29. Emperor Justinian to Johannes, Praetorian Prefect.

If a person in signing an instrument, agreed thereby that he will not claim any privilege as to venue because of his official position or rank or because of any sacerdotal prerogative—though it was formerly doubted whether such writing should be binding, and that he who made the pact should not violate his agreement, or whether he should have the right to set up his privilege, to disregard his writing—we ordain that no one shall be permitted to violate his pact and deceive the co-contracting parties.

1. For if pacts, not contrary to law and entered into without fraud, must be performed according to the praetor's edict itself, why should pacts not be valid in this matter, since under another ancient rule of law, privileges introduced on behalf of persons may be waived by them?

2. All our judges, therefore, shall follow this rule in lawsuits, and that shall apply to petty judges and arbitrators under a compromise, and referees appointed by judges, and they must know that if they fail to do so, they will be understood as making the suit their own.

Given at Constantinople, September 1 (531).

Note.

As to the various judges, referees and arbitrators under the judicial system of Rome, see note C. 3.3.2 and headnote C. 3.13. A judge made a cause his own where he acted corruptly or in gross ignorance. C. 7.49.2 note. As to the venue of cases—the place or the court where cases were triable—see headnote C. 3.13. Certain persons—priests, soldiers, and persons in the imperial civil service—had certain privileges in regard to the trial of cases in which they were interested, but these privileges, as stated in the foregoing law, could be waived, and an agreement waiving them was binding.

2.3.30. The same emperor to Johannes, Praetorian Prefect.

We have been asked by the lawyers in Caesarea in regard to this question: Two ore more persons, in hopes that an inheritance would perhaps come to them by reason of blood relationship, entered into pacts as to such hoped-for inheritance, in which it was specifically declared that if their relative should die leaving them the inheritance, certain specified things should obtain as to the inherited estate; or if perchance the benefit of the inheritance should come to only some of them, then certain pacts should be in force. It was doubted whether these pacts should be held valid.

1. The question arose with them, because this agreement was made during the life of the person whose property they hoped to inherit, and because the contracting parties

did not make the pact as though the property would come to them in any event, but under two conditions, namely if the relative should die and if they, the contracting parties, should become the heirs of the estate.

2. But all such agreements appear to us odious, and pregnant with unhappy and perilous results. For why should persons enter into a pact concerning the property of a living person without his knowledge:

3. According to ancient regulations, therefore, we ordain that such pacts which have been entered into are contrary to good morals, shall be invalid and shall not be carried out, unless, perchance, the person with reference to whose inheritance the pact was made consented thereto, and persevered in such consent to the time of his death; for then, when cruel hope is absent, and the pact is made with his knowledge and consent, the contracting parties are permitted to carry out the agreement made.

4. This rule of law was not unknown to the ancient laws and constitutions, although it has been made clearer by us. We order, accordingly, that neither a donation of any such property nor mortgage thereof, nor any contract in relation thereto shall have any validity whatever, since the ethics of the present time do not tolerate that anything shall be done, or any pact be made concerning the property of another against the owner's consent..

Given at Constantinople, November 1 (531).

Note.

Agreements as to a future inheritance were not favored under the Roman law, as we already saw at law 19 of this title, where it was stated that legacy-hunting agreements were invalid. C. 8.38.4 states that stipulations as to future inheritance were invalid. See also D. 18.4.1. At law 15 of this title it is shown that an agreement in a marriage contract as to future heirship was not binding. See also note C. 4.39.1. All such agreements were considered against good morals, and tended toward disrespect of the person whose estate was in question and toward insidious attacks upon him.