Book III.
Title XL.

Concerning co-parties in the same litigation.
(De consortibus ejusdem litis.)

Bas. 12.3.12.

3.40.1. Emperor Julian to Secudus, Praetorian Prefect.

Disapproving and rejecting the objections, which litigants have been accustomed to set up under the pretense that there are co-parties, in order to protract the suit, we permit the litigants, whether living in the same jurisdiction or in different provinces, in the absence of a co-party or co-parties, to sue or defend so far as their own interests are concerned.

C. Th. 2.5.1.

Given at Antioch September 3 (362).

Note.

This is an abbreviation of C. Th. 2.5.2, from which it appears that according to a law of Constantine, co-owners (consortes) of property should all be brought in when another claimed the property. This was impossible when some of them lived in another province, and hence litigation was protracted or set at naught. So Julian restored the old law, whereby a litigation might be conducted though some of the owners were not in court. C. Th. 5.1 expresses this idea. But that law is taken from the Burgundian law, which expresses the idea of Julian. See Planck, Merheit der Rechtsstreitigkeiten 138-148.[1]

On one could, ordinarily, represent another's interest in a suite, unless he was duly authorized. For the subject of procurators in a suit see C. 2.12. But if another man's interest in a suit was separable from the interest which another had therein, there was nothing to prohibit him to carry on the suit so far as his interest was concerned. Others might be proper parties, but they were not necessary parties. One heir, for instance, could sue for his interest in a farm, or his proportion of a debt due to a decedent. And though a debt was due to several parties, each party might sue for what was severally due him. On the other hand, jointly interested parties might sue or be sued jointly. According to law 2 of this title, if several parties had a common interest in a matter, one of them could bring an action on behalf of all, provided that he gave bond that the absent parties would ratify his action; and so if a man was sued, but others were equally interested with him, he could defend for all, provided that he gave bond that the judgment would be satisfied. See for a full discussion as to jointly interested parties, 2 Bethmann-Hollweg 467 et seq.; Wenger, Institutionen 79. That the rule is in many respects radically different from the rule in the United States, relating to necessary parties in a case, is apparent.

3.40.2. Emperors Valentinian and Valens to Sallustius, Praetorian Prefect.

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[1] This paragraph above was pasted, as a flap, above the note to follow. The following note was not struck out; hence, it appears as if Blume did not repudiate it and intended only to add the previous paragraph.

A common matter may, after a case has been put in order in due form[2] when some of the interested parties are absent, be litigated for the benefit of all without special authorization, if those present are ready to give security that the absent parties will ratify this action; or if in case some claim is made against the latter, the parties who are present will give bond with sureties that they will satisfy the judgment.
C. Th. 2.12.2.
Promulgated December 8 (364).

[2] [Blume] Post litem ordinatam—whether this was before or after joinder of issue is not certain. Gothofredus on C. Th. 2.12.2, and Cujacius on this law at 10 Cujacius 898, maintain that the suit was duly constituted though no issue was joined, but contemplated the regular commencement of the action and the giving of bonds required by law in connection therewith, and the appointment of a referee, if one was appointed. Planck, Mehrheit der Rechtsstreitigkeiten 155, 408, takes the opposite view; so in Glück, 5 Pandekten 235-238.