

Book IV.
Title X.

Concerning obligations and actions.
(De obligationibus et actionibus.)

D. 44.7; Inst. 3.13-4.6; Bas. 24.3.

Headnote.

While incidentally treating of other matters in connection with obligations and contracts, title 10 to 17 inclusively deal mainly with the question upon whom obligations and contracts are binding; that is to say who may and who may not be sued thereon, including the subject as to whether heirs of a person who was under an obligation could be sued in the decedent's place. Special subjects, such as sureties, are not covered. For the subject of sureties, see C. 8.40; for the subject of joint debtors and creditors, see C. 8.39.

4.10.1. Emperor Gordian to Valeria.

You say that you gave a certain amount of money to a party whom you mention, and that he, in turn, authorized you to sue on a right of action against the debtor, on whose behalf you paid, and that before you could, on that account, come to a joinder of issue with the latter, your assignor died without heirs. If that is so, you have an (independent) analogous action.

Promulgated April 27 (242).

Note.

Valeria in this case bought, or virtually bought, a debt. But under the law, a transfer could only be made by appointing the purchaser as agent to sue thereon, for the purchaser's benefit. Till joinder of issues with the debtor, the transfer was not complete. C. 8.53.33; C. 8.41.3. The principal might revoke the authority of the agent or, as in this case, the authority might be revoked by the death of the principal. In such case an independent action was given. C. 4.39.5. At the time of this rescript, the rule as to such independent action had evidently not been fully developed.

4.10.2. Emperors Valerian and Gallienus to Celsus.

Rescripts have often been issued that when accounts (nomina) have been given as a dowry, then, although no novation has taken place, nor issues have been joined in a suit, the husband is given an analogous action in pattern of that which a purchaser of a debt has.

Promulgated January 19 (260).

Note.

Novation: strictly "delegation"—that is to say assigning the debtor to the new creditor, the novation not being complete till the debtor had given his promise by stipulation to pay the new creditor. C. 8.41.1 note. Such "delegation" was made, in other words, so that a novation of the debt might take place.

4.10.3. Emperors Diocletian and Maximian to Rusticianus.

It would be intolerable that serfs (tenants) who pay their rent according to agreement could be sued for a personal debt of the lessor.¹
Promulgated at Tiberias May 31 (286).

4.10.4. The same Emperors to Licinia.

It is just that good faith should be considered in connection with contracts.
Promulgated October 7 (290).

Note.

Some actions were at strict law, some in equity, just as with us. The latter were called actions bonae fidei. In such action the trier of facts was instructed that “whatever you find should be given or rendered to the plaintiff in equity (ex bona fide) you will award him.” Formless contracts (C. 2.3.), such as the later purchase and sale, leasing, deposit, etc. were not originally actionable, but became so when the rules of world law (jus gentium) became recognized by custom, and were, accordingly, made actionable by the praetor. The phrase in the instruction above mentioned was originally probably inserted in order to emphasize that the award should be made according to the rule of the world law, and not according to the rules of the ancient civil law, for no award might be possible under the latter. No law, but a praetorian rule, introduced such actions. 3 Cic., De Off. 15. The expression that what should be done in “equity” or good faith was originally the same as what should be done under the world law. D. 50.17.84.1. And this world law came to be recognized about the middle of the third century B.C. Later the phrase above mentioned became more extensive, and denoted that the award should be made in an amount which, according to the conduct of an honest, trustworthy man, the defendant should pay. 3 Cic., De Off. 17.70. The phrase bona fide means literally “in good faith.” But it had different meanings, as with us, according to the facts. When used, for instance, in connection with prescription, the literal translation corresponds to our conception of the term good faith possession. 1 Vangerow 196; 42 Z.S.S. 643.

4.10.5. The same Emperors and the Caesars to Camerinus and Marcianus.

Just as each one is, in the first place, at liberty to make or not make a contract, so no obligation once entered into can be renounced without the consent of the other party. Hence, you may know that when you are once bound by a voluntary contract, you cannot repudiate it without the consent of the other party of whom you make mention in your petition.²

Given at Byzantium April 5 (293).

4.10.6. The same Emperors and the Caesars to Mauricus.

If your debtor paid you by a debt due him from his own debtor and made you procurator for our won benefit in connection therewith, you may pursue the special or general pledge which you have. If these, however, were sold by prior creditors to whom they were pledged, you can see that they cannot be demanded back from the purchasers thereof.

Given at Sirmium July 24 (293).

Note.

¹ [Blume] See law 11 of this title.

² [Blume] C. 4.45.1 and 2 similarly. See also C. 3.32.12.

An assignment of a debt carried the security given for it along with it. Law 7 h.t. C. 39.8 note.

4.10.7. The same Emperors and the Caesars to Euelpistus.

If you bought an account, sue (vindica) in the court of the president of the province to recover those pledges which your vendor could have recovered. For if those who are in possession of the pledges [obligated on account of] the debtor,³ do not pay the debt, you are not forbidden to sell them pursuant to customary law. 1. Of course, if the persons in possession acquired them under a sale made by creditors who had a prior right, or if they are protected by the prescriptive period of a long time (ten or twenty years), you can see that you have no right to sell the pledges.

Subscribed at Sirmium December 30 (293).

Note.

See. C. 4.39.5. On the subject of pledges, see C. 4.24 and C. 8.13 et seq. On prescription as to such property see C. 7.36.2.

4.10.8. The same Emperors and the Caesars to Cresceution.

If you allowed anyone whom you say you loved with a fatherly affection to take some of your money, for the purpose of a gift, and he, to repay your liberality, directed you to take other money from his procurator, and he died before you received the same, you cannot recover what you gave, since the gift was complete, nor can you claim from his procurator what he ordered to be given to you, but which had not been delivered. But if you only made a loan, and you did not exact a stipulation from your substituted (delegated) debtor for the purpose of novation, his heirs will be compelled to pay you.

Subscribed at Sirmium January 20 (204).

Note.

Death, of course, put an end to any direction which the decedent had made, and which had not yet been carried out.

A novation of a debt by giving—assigning—a new debtor to the creditor, was not complete till the new debtor had promised to pay the debt by stipulation. C. 8.41.1.

4.10.9. The same Emperors and the Caesars to Glycon.

Debtors who deny their debts should not be terrified by armed force. If a claimant fails to prove his claim or is defeated by a defense, they must be absolved; otherwise they must be condemned and compelled to pay by methods provided by law.

Given February 13 (294).

Note.

The rescript is addressed to a Greek. It was customary in old Greece to take contracts authorizing a creditor to seize the property of the debtor without official authority. That was contrary to Roman law. C. 8.13.3 note.

4.10.10. The same Emperors and the Caesars to Rufinus.

³ Blume penciled in above this line “obligated on a/c of the” and added a question mark in the margin. Scott has this as: “For if you hold the property which was pledged for the debt of the said person and it is not paid, you are not forbidden by the Common Law to sell the pledges.” 6 [13] Scott 21.

If a creditor first resorts to his pledges, a personal action is not thereby extinguished, but remains in force as to the balance due after the amount which is able to be realized from⁴ the sale is applied on the debt.⁵

Given April 3 (294).

4.10.11. The same Emperors and the Caesars to Paula.

You let your credulity get the best of your judgment when you believed that you could recover from the owner of the land the amounts which you loaned to his serfs on their account. Not even the presence of his managers would create an obligation against him.⁶

Given July 25 (294).

4.10.12. The same Emperors and the Caesars to Jovinus.

The laws do not permit that free persons should become slaves of their creditors on account of debts.

Given October 20 (294).

Note.

It is possible that the words “free persons” means “children” (liberi) instead. See lengthy note at C. 4.43.2. The subject of imprisonment for debt is considered at length in headnote (1) C. 7.53.

4.10.13. The same Emperors and the Caesars to Barsimius.

You must enforce repayment of the money loaned to anyone by suing him in a proper action. For you have no right of action against the traders who, as you say, (unlawfully) took money from your debtor in trading with him.

Given March 22 (294).

Note.

Even though the traders were debtors of the debtor, still action could be brought only against the latter by one owing him.

4.10.14. The same Emperors and the Caesars to Hermodtus and Nichomachus.

You have the option to sue the heirs of your debtor in a personal action or sue the party who has your pledges, sold and delivered to him by them in a Servian action, if he is not protected by prescription or a long time, or you may sue both.

Given at Nicomedia November 27 (294).

Note.

See also C. 4.10.10. The Servian action here mentioned is generally called quasi Serviana or hypothecaria—the hypothecary action used by a creditor to gain or recover possession of a pledge. See headnote C. 8.13.

C. 8.13.24 provides that a creditor could not be compelled to refrain from claiming his pledge and sue the debtors in a personal action. See also C. 8.40.17. Novel

⁴ Blume wrote in the margin next to these lines: “Too liberal.” Scott renders this as: “The right of personal action against a debtor is not extinguished by the sale of the pledges, but what can be obtained by it shall be credited on the debt, and suit can be brought for the remainder.” 6 [13] Scott 21.

⁵ [Blume] To the same effect is C. 8.13.1 and 14; C. 8.27.3; C. 8.27.9.

⁶ [Blume] See law 3 of this title.

4, c. 2, attached to C. 8.39 provides that if property is in the hands of a third person, the sureties etc shall be first sued, next the property pledged by the debtor and in the hands of third parties, and next the property pledged by the sureties and in the hands of third parties. As to Greek custom see note C. 8.13.8.