

Book VIII.  
Title XL.

Concerning sureties and mandators.  
(De fidejussoribus et mandatoribus.)

Bas. 26.1.74, et seq; Dig. 46.1; Inst. 3.20.

Headnote.

A suretyship might be created in Roman law by three different methods: (1) by a stipulation - the formal contract under that law; (2) by giving an order to mandate directing the extension of credit to someone, in other words, by giving a sort of letter of credit; (3) by promising to pay an existing debt for someone else, called *constitutum*. The effect in all three cases was substantially the same, and the names indicate, in the main, only the method by which the suretyship was created.

8.40.1. Emperors Severus and Antoninus to Lysia.

If Lysia, upon confiscation of part of his property, has been ordered to go into exile, he is liable to his creditors only in the proportion in which he retains his property. But parties who become sureties for him may be sued according to former laws (i.e. continue liable as before).

Promulgated October 15 (200).

Note.

Law 20 of this title provides that surety is not released by the confiscation of all the property of the principal debtor.

A surety could not, ordinarily, be liable for more than the principal. A contract of suretyship might be made less burdensome than the contract of the principal - it might, for example, be for a smaller amount or conditional - but it might not be made more burdensome, and if it was made so, it was void. Inst. 3.20.5; D. 46.1.8.7 and 16.1. The contract with the surety must be based on the contract of the principal; the former could not be bound by a different contract, nor could he, ordinarily, be bound where the principal was not bound. D. 46.1.8.8 and 16 pr; D. 46.18.1.42. Thus if a principal was discharged because of impossible performance, the surety was also discharged.

D. 46.1.29. The same defenses, too, that were available to the principal, were ordinarily available to the surety. Thus if the latter was released by reason of limitation of actions, or by compromise, or by the debt being forgiven, the defense open to the principal in this respect was open to the surety. That was true also in case money on a loan had not been actually paid over by the pretended creditor to the debtor. D. 46.1.15 and 32; D. 46.1.37 and 49 pr; D. 46.1.56.160 [?]<sup>1</sup> and 68.2. The rule was similar to another rule, namely that if two persons become joint sureties, but one of them was incapable of entering into such contract - as, for instance, a minor - the remaining sureties, too, were released.

D. 45.2.12.1. Both of these rules,<sup>2</sup> however, had their limitations. Thus, if a man knew that his co-surety was incapable of entering into the contract, he was not himself released,

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<sup>1</sup> There is no such subdivision; Blume seems to have meant 46.1.56 and 60.

<sup>2</sup> Blume underlined "Both of these rules" and put a question mark in the margin.

but the contract was treated as though he only became a surety. The same rule obtained, if a surety knew that the principal debtor was incapable of entering into the contract. D. 4.4.13 pr; D. 46.1.48 pr and 1. So, too, if a principal debtor's release was purely personal to him, no release of the surety followed. D. 2.14.22. There were other cases (Buckland 448), and one of these was the case dealt with in law 1 and law 20 of this title, namely that confiscation of all or a portion of the debtor's property, upon which the release of the debtor followed pro tanto, did not released the surety, but the latter was liable as though no such confiscation had taken place. The rule did not, however, involve any particular hardship, for the reason that the fisc, for the benefit of which the confiscation was made, took the property subject to the debts against it, and was responsible to the surety for reimbursement to the same extent as though the principal debtor still retained the property. D. 48.20.4 and 10 pr; Dig. 49.14.1.1 and 6; D. 49.14.11 and 17; Buckland 400. In case the fisc succeeded to the property of both creditor and debtor, sureties were released. C. 8.42.2.

8.40.2. The same to Plotius.

A creditor who receives both pledges and a surety for the same debt may, if he prefers, sue the surety for the money for the payment of which the latter obligated himself. If he does so, he must transfer the pledges to the surety. 1. But if the creditor has the same pledges or mortgage also for another debt, he will not be compelled to transfer them till the whole indebtedness is paid.

Given January 28 (207).

Note.

At C. 8.26.1, it is provided that a creditor has the right of retention of pledged property till all of his debt due from the same debtor, whether secured or unsecured, has been paid, as against an action by the debtor for the recovery of the pledged property upon paying the debt that is secured. That law is later than the present one, and it is not unlikely that the present law was modified by the introduction of that principle, so that, perhaps, a creditor was not compelled to assign his rights to the surety, until all of his debts, secured or unsecured, were paid. As to the Greek custom of resorting to pledges before suing sureties, see note C. 8.13.8.

8.40.3. The same to Maximus.

If your allegation is true, our procurators wrongfully refused to hear you when you demanded your money out of a surety's property which had fallen to the fisc, but ordered you to sue the principal debtor, since a creditor has an election of remedies. 1. But since you state that you received two sureties, and that the other is solvent, you perceive that you should divide the amount, claim from the procurator the proper portion and sue the other surety (for the rest). 2. For though, as you state, the contract which evidences the obligation contains a provision that each should be liable for the whole, such provision does not change either the condition of your right or the constitution. For if no such provision were added, each surety would, nevertheless, be liable for the whole, provided that if all of several sureties are solvent, the obligation is divided into proportionate parts.

Promulgated August 16 (208).

Note.

This probably refers to the rule already stated in headnote to C. 39, and found in Inst. 3.20.4, and C. 4.18.3, that ordinarily sureties could demand to be sued only for an aliquot part of the debt resting on all the sureties. The portion of an insolvent surety was divided proportionately among the rest.

The rule announced in the first part of this law, too, was modified by Nov. 4, whereby a creditor might be compelled to sue a solvent and present principal debtor before suing the sureties. 1 Mel. Corneil 158.

8.40.4. Emperor Antoninus to Rufa.

If the obligation to pay a debt is transferred to another by novation of the debt, lawfully made, there is no doubt that the sureties and mandators of the first contract are released, if they did not enter into any obligation in connection with the second contract.<sup>3</sup> Promulgated September 17 (213).

8.40.5. The same to Potamon.

A creditor has the option under our law to leave the principal debtor alone and proceed against the sureties, unless some other agreement is shown to have been made between the contracting parties.<sup>4</sup> Promulgated May 2 (214).

8.40.6. The same to Polla.

If your father did not obligate himself in behalf of Cornelius when the latter received a loan, suit against you on the ground that he signed the document evidencing the debt as a witness, is useless. Promulgated June 21 (214).

8.40.7. The same to Erotis.

If the creditor failed to comply with the condition attached to the mandate, (to the effect) that he should take pledges when he made the loan (authorized by the mandate), he cannot effectually sue you on the mandate, since you cannot be considered as having obligated yourself except upon compliance with the condition to take pledges. Promulgated July 1 (215).

8.40.8. Emperor Alexander to Longus.

An unemancipated son who becomes a surety for his father, though in connection with the sale of a farm, is bound by his contract. Promulgated October 14 (223).

Note.

An unemancipated son (filiusfamilias) could ordinarily not be a creditor, since whatever he acquired, he ordinarily acquired for the benefit of his father (or other paternal ancestor under whose paternal power he was), although he had a right of action

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<sup>3</sup> [Blume] See note to law 28 of this title.

<sup>4</sup> [Blume] Modified by Nov. 4. The rescript arose out of Greek custom permitting beneficiaries [illegible]. See also laws 17 and 19; Brassloff 25.

in a few cases, as for intentional wrong, on a deposit, on a loan for use, and in a few other cases. D. 44.7.9 and 13. But he might become a debtor, and might be sued on his obligation the same as any other person, and if he had some special property (peculium), his father might be sued, to the extent of the peculium. D. 15.1.44; D. 44.7.39; Hunter 605, 606.

8.40.9. The same to Aristocratis.

A suit carried on concerning pledges does not release sureties.  
Promulgated November 27 (223).

Note.

While there were exceptions, the rule, generally speaking, was that where a man had two remedies, the election to pursue one, did not bar the other. Dig. 44.7.34; 9 Donellus 1327-1328.

8.40.10. The same to Vitalis.

A surety by stipulation or mandate, if obligated also to pay interest, had no just cause to refuse to pay it. But the requirement that one of two or more sureties should not be sued alone, but that the action should be divided between those who are solvent, is rightfully made, if made before condemnation.<sup>5</sup>

8.40.11. The same to Sallustius.

When one of two sureties satisfies the debt in full, he has no right of action over against his co-surety. You could, of course, have demanded, when you paid the fisc, that the pledge held by the fisc be transferred to you, and if that was done, you can enforce the rights of action transferred. This applies also in case of private debts.  
Promulgated October 26 (229).

Note.

To the same effect - D. 46.1.39. The rule seems harsh and has been the subject of considerable controversy. As relating to co-obligors who were all principals, it has been referred to in C. 8.39.1, and it was there stated that the right of contribution existed. But the parties in that case were, perhaps, partners or joint-owners. The general rule seems to have been that no such right existed among co-obligors, except pursuant to either a certain relation between the parties or pursuant to a stipulation among them. See C. 4.2.12. And, as stated by Buckland 451, the rule is not quite so harsh as it seems at first glance, for parties not standing in relation to each other, which would give them such right, would doubtless, generally, stipulate among each other as to the share of the burden which each should carry. There was a right of contribution among partners, and an agent might have an action on his mandate, and in several other cases the right of contribution arose by reason of the relationship in which the parties stood to each other. Buckland 451, 452. A demand might be made by the sureties for division. Inst. 3.20.4. And in case of sureties for guardians all might be brought into the case. Headnote C. 3.40.

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<sup>5</sup> [Blume] See note to C. 8.39.1 and C. 8.40.3.

8.40.12. The same to Theodotus.

The man who persuaded you that you entered into no obligation when you said in Greek "I bind myself," simply wanted to be agreeable, for it has long been considered that a stipulation may be entered into by such words.<sup>6</sup>

Promulgated August 27 (230).

8.40.13. Part of a letter of the Emperor Gordian.

If Lysanias, the decurion, promised by stipulation that he would find Barsagoras, the robber, he must either produce him or send him to the praetorian prefect or the president of the province.

Note.

Lysanias supposedly had it in his power to produce a robber, but let him go. Complaint was made against him on that account, and he thereupon gave a stipulation to find him. He was compelled to carry out his stipulation. 9 Donellus 1339-1340.

8.40.14. The same to Salvius.

An action on a mandate is in personam. If it lies in favor of a surety by stipulation (fidejussoris), wither against the debtor or his heirs, the president of the province will order the amount which he shall find to be due to be repaid. 1. Pledges given to a creditor pass to you (the surety) only when you pay the debt and take an assignment of the rights of action. 2. If that was done, you may pursue the pledges and the same president will lend his extraordinary jurisdiction as against the possessors thereof.

Promulgated July 5 (239).

Note.

See C. 4.39.5 n. It will be noticed that where a man entered into suretyship for another by stipulation, it was treated as though a mandate or order had been given by the principal debtor to the surety to do this. Ordinarily, of course, the surety would become such by reason of an order or at the request of the principal debtor, and in such case the surety had a right of action over against the principal debtor upon paying the debt. Inst. 3.20.6; C. 4.34.2 and 6; C. 4.34.10 and note. That action was one on mandate, or on volunteer agency - if the suretyship were entered into for an absent principal. Where the surety became such against the wishes of the principal debtor, or where the relationship was entered into in order to make a gift to the latter, no right of action over existed.

The action was one in personam. Pledges which the creditor had would be released upon payment, unless the creditor's rights were assigned to the person making the payment.

8.40.15. The same Emperor to Claudianus.

If you gave a duebill (cautio) for money not in fact owing, induced to give it by erroneously thinking that you owed the debt by reason of a guaranty on your part, you may set up the defense of fraud or bring a personal action (condicere) that the obligation be delivered to you as paid. 1. Moreover, it is not doubtful that a surety is released if,

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<sup>6</sup> [Blume] See note to 8.37.1.

after the property of the principal debtor fell to the fisc, and it, upon suit, paid the debt (for which the suretyship was entered into).  
Promulgated November 27 (239).

Note.

A suretyship entered into through error was not effectual. D. 46.1.37. That the fisc was liable to creditors in taking over the property of a condemned man, has already been stated in the note to law 1 of this title.

8.40.16. The same to Maximus.

The creditor had the right, before joinder of issue with the several sureties, to pursue any one of them, at his option, if he considered the others insolvent. But now, after joinder of issue, the law does not permit the divided claim to be restored to its former condition.

Promulgated June 12 (241).

Note.

As shown in headnote to C. 8.39, the law provided (Inst. 3.20.4; C. 4.18.3; Nov. 99) that a creditor might be compelled to sue solvent joint sureties for only a proportionate share, without, however, being compelled to sue those who were insolvent. If he did not comply with this law, the defendant might object, and in that event the judgment would be only for the proportionate amount. <sup>9</sup> Cujacius 1202. If he took the risk voluntarily, to choose his debtors, and brought an action against them all for the proportionate amount, he was bound by the election, and the division of his action thus made. He was not, however, under Nov. 99, barred as herein mentioned, unless he sued all, each for the proportionate amount. He could sue one, recover the proportionate amount against him, and still sue the others. Cujacius, supra. It is apparent, however, that he might be put to a great deal of trouble.

8.40.17. The same to Brasida.

The law is clear that creditors may sue their sureties without resorting to pledges, unless the surety was taken for the amount that could not be realized out of these pledges.<sup>7</sup>

Promulgated March 10 (242).

8.40.18. Emperor Philip and Caesar Philip to Smyrna.

If, as you state, you did not sell the farm mortgaged for your debt for a just price, you cannot rightfully ask the deficiency of the debt, which you could have paid out of such price, to be made good by the surety.<sup>8</sup>

Promulgated July 28 (244).

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<sup>7</sup> [Blume] See C. 4.10.14; C. 8.13.24. Under Nov. 4, a creditor might, however, in certain cases, be compelled to sue the principal debtor first. As to Greek custom of resorting to pledges before suing sureties, see note C. 8.13.8.

<sup>8</sup> [Blume] See note to C. 8.27.4.

8.40.19. Emperors Diocletian and Maximian and the Caesars to Sabianus.

If you assumed another's obligation, as principal, or became a debtor's surety, by stipulation, mandate, or in some other form, you ought to know that the creditor cannot be compelled to sue the party who received the loan rather than you, but he may elect whom to sue, unless the contrary was specifically agreed on when the contract was made.<sup>9</sup>

Subscribed April 30 (293).

8.40.20. The same to Aurelius.

A decision (of condemnation) which deprives a party of all his property does not take from a creditor the right to elect to proceed against the sureties of a man so condemned.<sup>10</sup>

(293).

8.40.21. The same to Julianus.

As a creditor has the option to sue a surety (instead of the principal)<sup>11</sup>, so it is proper that if such surety asks that property pledged or hypothecated (for the debt) be assigned to him, he should not be required to make a payment until the right of action thereon is set over to him.

Subscribed October 22 (293).

8.40.22. The same to Hermianus.

If the woman to whom, according to your statement, you gave a letter of credit, received more than the amount which you wrote you would pay, the president of the province will not permit you to be sued for an amount paid to her beyond that stated in your order.

Subscribed April 20 (294).

Note.

There has been much dispute on this law. See 9 Donellus 1349, 1350. According to the Basilica, this law reads: "If you are sued for more than the amount which the mandatary received, or for more than asked for by your mandate," etc. The law becomes plain, if we change the order of words somewhat as follows: "Si ultra hoc quod daturum te scripsisti ea, pro qua te mandatorio nomine intercessisse commemoras, accepit, etc.

8.40.23. The same to Antipater.

A creditor has the option to sue the principal debtor or an unconditional surety by mandate, or to sue each for a portion of the debt, and if the person first sued does not make satisfaction, to have recourse on the other, since neither of them are released by such an election.<sup>12</sup>

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<sup>9</sup> [Blume] Modified by Nov. 4.

<sup>10</sup> [Blume] See note to law 1 of this title.

<sup>11</sup> [Blume] Modified by Nov. 4.

<sup>12</sup> [Blume] See note to law 28 of this title. See also Nov. 4, modifying this law, the latter part, showing that suit against one did not liberate the others, was interpolated by the compilers. Levy, Konkurrenz 201-2.

Subscribed at Nicomedia December 5 (294).

8.40.24. The same to Pergamius.

The heir of a surety indeed is liable the same as (the heir) of the principal debtor. But if the same person becomes the heir of both, the suretyship ends, and he may be sued as though he were only the heir of the principal debtor.<sup>13</sup>

Subscribed December 22 (294).

8.40.25. The same to Philippus.

When the pledges given by the principal debtor are sold by him, the creditor is not forbidden to sue the surety for the amount left due even after the lapse of a long time (ten or twenty years' period of prescription).<sup>14</sup>

Subscribed December 27 (294).

8.40.26. Emperor Justinian to Julianus, Praetorian Prefect.

We ordain that if anyone promises by stipulation (i.e. is surety) to bring a party to court within a certain time, or pay a certain sum of money in lieu thereof, and he cannot produce him when the time fixed has expired, the money stipulated to be paid cannot be demanded immediately. The action for the penalty indeed accrues after the lapse of such time, but the payment of the sum for which the contract of suretyship was made cannot be enforced at once. 1. If the time fixed is six months, the surety has an additional six months, and if he can produce and deliver the person within that time, he will be released from the penalty. 2. If a period of more than six months was originally fixed, no matter what the period may be, the surety has, after the lapse thereof, only an additional six months within which he may produce the person instead of paying the penalty. 3. When the additional time has passed (and he fails to produce the person), he must pay the penalty fixed. 4. If he prefers, after the lapse of the time originally fixed, to defend the defendant on account of which he is sued, he will be permitted to do so, unless the tenor of the agreement forbids this, he having, perchance, become surety without the right to make such defense. But if he shall undertake the defense, he must carry it through to the end, and he will not be permitted during its progress to produce the defendant and thus escape the pecuniary penalty. 5. Nor will he be permitted to make such defense after the lapse of the second period, but he must then pay the penalty (if the defendant has not been produced) unless the defendant died during the period originally fixed; for in that case he should be entirely released from the payment of the penalty. 6. But if the defendant dies during the second period, the penalty already incurred may, notwithstanding that fact, be demanded from the surety. 7. The provisions as to sureties, subject to such a penalty, shall, because of the benefit thereof, apply to their heirs.

Given March 27 (530).

8.40.27. The same to Julianus.

Where a surety had given no written bond (*cautio*) showing that he became such, but had acknowledged that he became surety (for a party's appearance) it was questioned

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<sup>13</sup> [Blume] i.e. there was a merger.

<sup>14</sup> [Blume] As to the time of prescription, see C. 7.39.3 and 4, and note to C. 7.36.2.



by the guild of advocates of Palestine, whether he was released after two months - not having entered into the suretyship in writing, according to the general edicts of the sublime Praetorian court - or whether he should be bound as though he had given a written bond. And the further question arose as to whether that should be the law in public as well as private cases. 1. We, therefore, ordain that unless a written confession of suretyship has been made by sureties, for the production of person in court, although a statement was made in the presence of witnesses, it shall in private cases, be considered as a suretyship without writing, and the sureties shall be released from the tie of such obligation upon the expiration of six months, unless the suretyship is given for a certain time, for in such case the suretyship lasts for the length of time acknowledged by the surety. In public cases, however, a contract of suretyship, witnessed as aforesaid, shall be considered the same as a writing. For public necessity demands many exceptions in public matters, and it is not out of place to also give it the privilege of that kind. Given at Constantinople February 20 (531).

8.40.28. The same to Johannes, Praetorian Prefect.

We ordain generally, that the rule in force in case of surety by mandate, (namely) that when issue is joined with one, the other is not released shall apply to cases of sureties by stipulation. 1. We find this point generally provided for in contracts made by sureties by stipulation, and we, therefore, ordain by general law, that one surety shall not be released by reason of suit against another surety, or against the principal defendant, nor shall the principal defendant be released by suit against one or more sureties, unless the creditor is satisfied in full, but the right to (further suit) shall remain unaffected, until the creditor is paid in full or he is satisfied in some other manner. We decide the same in regard to joint debtors, not permitting action against one to prejudice action against the other, but the creditor's rights of action, personal and hypothecary, shall remain unaffected till he is paid in full. 3. For if it is permitted to make agreements to that effect - and we find daily use of them - why should not this be permitted by the authority of law itself, so that lack of knowledge of those who accept such contracts, may not in any way damage the right of a creditor.

Given at Constantinople October 18 (531).

Note.

There was, particularly before the enactment of the foregoing law, a difference between the various kinds of joint obligations, some of them being released by joinder of issue, while others were not. Of the latter kind - those that were not so released - were obligations arising out of tort; those of co-guardians and curators, joint depositaries, joint borrowers of a thing for use, joint agents to do a certain thing for a principal, sureties by mandate - persons who gave, as it were, a joint letter of credit - and persons jointly liable for damages caused by throwing an object on passers by in a street. Moyle, *Inst.* 473, 474. In this case it is said that there were as many debts as there were debtors, but that in other cases there was only one debt, which would be released by joinder of issue. Thus it is said in the preceding law that sureties by mandate were not thus released (see C. 8.40.23), (interpolated) but that sureties by stipulation were. This difference has given rise to the attempted distinction between a solidary and a correal debt, referred to in note to C. 8.39.1. It does not refer to joint creditors, but, as Buckland 451, says, this was probably by accident. In any event, the cases of joint debtors were probably much more

numerous than the cases of joint creditors. Some of the joint obligations, e.g. those where such obligation was expressly stipulated, were also released by novation and formal release and some other proceedings between any of the parties (Buckland 450), while others, as torts, were not extinguished except by full payment.

8.40.29. (In Greek).

If anyone guarantees the payment of interest, he is liable not only for (the interest of) two years, but for such a time as he contracted. He may, therefore, fix whatever time he wishes, but shall not be liable for the payment of more than twice the principal.<sup>15</sup>

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<sup>15</sup> [Blume] i.e. the interest shall not exceed the principal. See C. 8.13.22.