

Book III.
Title XLII.¹

Action to produce and exhibit.
(Ad exhibendum).

Bas. 15.4.21; D. 10.4.

Headnote.

The action to produce and exhibit was one in the nature of a bill of discovery, to enable a claimant of personal property (including slaves) or other interested party, to whom the possessor of the property refused to show it, to definitely identify it and bring another action concerning it—e.g. to recover it, which was the usual case, (D. 10.4.1), or to sue for the penalty of theft, when the property was stolen, or to exercise the option of choice, given, for instance by a testator, in connection with the property sought to be exhibited (D. 10.4.12.2), or, where a slave was sought to be produced, to pursue him in a criminal action, or to sue for a tort committed by him. Law 2 h.t. D. 10.4.3.7. Thus this action lay chiefly only in aid of another. Where property was sought to be recovered, and the defendant did not lay any claim thereto, such second action was, of course, unnecessary after it was produced. If defendant refused to produce and exhibit, in a suit for that purpose, or if he fraudulently put, or had put, it out of his power to do so, he was condemned in damages. Law 14.5.7 h.t. In cases where production and exhibition was not desired in aid of another action, a different remedy was ordinarily required to be pursued by an interested party. Thus bankers were required to exhibit accounts kept by them, and refusal to do so laid them liable in an action on the facts (in factum). D. 2.13.6. 4; D. 2.13.9 pr. Procedure by interdict lay to compel a testament, or children, or a free person, to be produced and exhibited. (C. 8.7 and 8), but in Justinian's time such procedure was the same as an ordinary action. If a defendant had made a contract to deliver over a document or other property, the contract action was the proper remedy. D. 2.13.9 pr. Justinian by C. 4.21.22 required, with limitations, the exhibition of any document for the benefit of a party to an action when it was in possession of a person not a party thereto. For production of evidentiary documents and accounts by parties to an action, see C. 2.1.

3.42.1. Emperor Alexander to Crescens, a soldier.

If the female slave concerning whom you complain belonged to your mother and was not legally sold by your father, and you are ready to sue to recover her, the president of the province will order her to be produced, so that the truth may be investigated before a referee.

Promulgated May 1 (222).

Note.

The action for production in this case, as will be noticed, was simply preliminary to another action intended to be brought. If the slave had been present, an action in rem to recover the slave could have been brought immediately. C. 3.32.13 indicates that in a suit for a slave, his or her production was necessary.

¹ [Blume] Revised 11/20/31.

3.42.2. The same Emperor to Syrus.

If a slave is accused of some crime, he must be produced by the master in an action for production, and must not be concealed.

Promulgated November 23 (222).

Note.

As stated in headnote to C. 3.41, a slave was liable to be prosecuted in a criminal case the same as a free man. And it was the duty of the master to produce him in court in order that this might be done.

3.42.3. The same Emperor to Felicissima.

Neither an action for production nor one for the recovery of the property, if it now lies, was extinguished because an action for production was formerly decided against you, since a change in the suit makes the matter different.

Promulgated September 1 (223).

Note.

Bas. 15.4.23 states this rescript somewhat more plainly, as follows: "Although a man is sued in an action for production and is absolved, still, if he afterwards is in possession of the property and hides it and is then sued (again), he cannot set up a defense based on the previous absolution.

3.42.4. The same Emperor to Flacilla.

The referee will not be unaware that if you have proven that the documents belonging to you are in the possession of the adverse parties and are not exhibited by them, the opportunity for the assessment oath should be given you (i.e. you can prove your damage by the oath).

Promulgated April 29 (230).

Note.

The oath here mentioned is the so-called assessment oath considered at C. 5.53, in which the damages were fixed by the plaintiff's oath, controlled, however, within bounds, by the judge. See D. 10.4.3.2; D. 10.5.2. If a defendant failed to produce a testament, as ordered, the damages were determined by the value of the inheritance, or of the portion to which the plaintiff was entitled. D. 43.5.3.12.

3.42.5. Emperor Gordian to Sabinianus, a soldier.

That not only a person who is in possession of the property is subject to an action for production, but also a person who by fraud disabled himself to produce, was correctly told you by the jurisconsultant Modestinus, an authority not to be despised.

Promulgated February 12 (239).

Note.

A man could not avoid responsibility in this action by handing the property in dispute over to another, or by changing its character, as, for instance, melting down a gold ornament. D. 10.4.9. 3; D. 10.4.14.

3.42.6. Emperor Philip to Polemonides.

You aver that your opponent took the documents belonging to you by force. If you bring a criminal action, comply with the customary requirements as to accusations and prove your case; but if you sue for production, follow the customary civil procedure. Promulgated March 14 (244).

3.42.7. Emperors Diocletian and Maximian to Vitalianus.

A man is liable in an action to produce, who being able to produce is guilty of negligence or fraud in connection with the fulfillment of the order; provided that if a person produces the property in a deteriorated condition, the equity in connection with production demands that although an action to exhibit does not lie, an action on the facts (in factum) is given against him, for damages.

Promulgated May 17 (286).

3.42.8. The same Emperors and the Caesars to Photinus.

If the person whom you mention in your petition loaned or deposited (for accommodation) your property, you may bring an action to produce or for the recovery of the property (vindication) against the possessor. 1. If he had an agreement that the property should be turned over to you, then if you are, by inheritance, the successor in interest of the person who deposited it, you are not forbidden to bring an action on the contract of deposit. But if the inheritance from the deceased does not belong to you, either under the civil or praetorian law, you know that you have no action on the pact against the person, of whom you complain, under the civil law (stricto jure); but an action analogous to that on the contract of deposit lies in your favor because of the equity of the case.

Subscribed at Heraclia April 27 (293).

Note.

Ordinarily one man could not make any contract for the direct benefit of another. C. 4.27.1 note. Nor could a third party have any benefit from a contract, formal or informal, made between others, unless the contract, or rather right of action thereon, was assigned to him. Exceptions were made in special cases, as here. C. 4.39.5 note.

3.42.9. The same Emperors and Caesars to Faustinus.

If you prove before the president of the province that you have delivered to the proper party what was due him under a contract, he will order the writing and the documents pertaining to the contract, under which nothing further can be claimed, to be delivered to you, since you have been freed from your obligation by your acts (naturaliter).

Subscribed August 25 (294).