

Book IV.
Title XXV.¹

Concerning actions on contracts with ship captains and commercial agents.
(De exercitoria et institoria actione.)

Headnote.

Liability of principal under agent's contract with third persons. In early law, contracts were personal to the parties thereto. This was still the general rule under Justinian, in so far as benefiting another thereunder. C. 4.37.1 note. But it was early relaxed, and finally nearly abolished in so far as liability thereunder was concerned, if a third party, the principal, authorized it. If an owner or hirer of a ship (exercitor), appointed a captain, or if a man appointed a managing agent (institor) to conduct a shop or other business, and the agent made a contract within the scope of his authority, the principal became liable thereon. That was probably originally true only where a child or slave was the agent, but the rule was early applied also if the agent was an outsider and free man. G. 4.71. If the authority ordinarily within the scope of such agent was to be limited, notice thereof had to be given; e.g. by posting it up in the shop. D. 14.3.11.2-3. The action against the owner or hirer of a ship was called exercitoria, that against a shop-owner institoria. The rule was further enlarged in late classical time, when a principal was made liable in an analogous action on any (informal) commercial contract authorized by him. Law 5 h.t. Inst. 4.7.2a; D. 14.3.19 pr; D. 19.1.25. If no authority had been given, and a free man undertook to act as agent, as frequently was true (C. 2.18), the principal was not liable. In late law, however, he was liable, with some limitation, to the extent of the benefit received, just as though his slave had made the contract. C. 4.26 headnote; C. 4.36.7.3. These rules did not go as far as the modern rules of agency, for the right to sue on such contracts (aside from those made by persons under the power of the principal), was only in the agent, if free, and not in the principal, except in cases where, as by reason of the insolvency of the agent, the principal could not be protected except by giving him a direct right of action. D. 14.1.1.18; D. 14.3.2. Furthermore, (except in cases of guardians and similar persons—C. 5.39.1), the agent too, if free, remained liable on the contract (D. 14.1.1.17. D. 14.1 5. !1; D. 14.3.7.1), unless he acted as a mere messenger (cf. C. 4.26.4).

In Byzantine law, an effort was made toward direct representation, so that if a loan was made to an agent, with the idea in mind that it was to the agent's principal, only the principal was liable. D. 3. 5. 5. 3 (itp); D. 5.3.30 pr. (itp); C. 4.2.13 and note; Mitteis, R.P.R. 327; 4 Studi Bonfante 289-290.

4.25.1. Emperor Antoninus to Hermetus.

Your slave by receiving a loan made you liable to an institorian action for it only if it is shown that when you put him in charge of some transaction or business for you, you also authorized him to receive the loan.² If such right or action does not lie, but it is proven that any of the money was used for your benefit, you will to that extent be compelled to pay in a proper action given in such case.

¹ [Blume] Rev. 4/2/32.

² [Blume] The making of the loan had to be within the scope of the slave's authority—which ordinarily would not be true.

Promulgated August 25 (212).

4.25.2. Emperor Alexander to Callistus.

Although masters are (generally) liable on contracts of their slaves, only to the extent of the special property (peculium) of the latter, there is no doubt that they are responsible for the whole of the amount which inured to their benefit and for the liability which arises out of a contract, in connection with his business, made with the slave in charge thereof.

Promulgated April 29 (222).

4.25.3. The same Emperors to Marcia.

You have an institorian action (action institoria) against the person who, as you say, appointed his slave as superintendent of a bank, if it can be shown that in connection with the business transacted by the latter, money was deposited and not returned.

Promulgated May 7 (230).

4.25.4. Emperors Diocletian and Maximian and the Caesars to Antigona.

If a man has been appointed shipmaster, though by a woman, she is liable on his contract in an action (exercitoria), in pattern of an action on a contract with a commercial agent (institoria).

4.25.5. The same Emperors and the Caesars to Gaius.

If Domitianus authorized Demetrianus to receive a loan, and you are confident that you can prove this, you can sue Domitianus before a competent judge, in an action in pattern of the institorian action (arising on a contract with a commercial agent).

Given Oct. 29 (294).

4.25.6. The same Emperors and the Caesars to Onesima.

Whoever, pursuant to the master's wish, contracted with the latter's slave, may rightly sue the master for the whole, in an action in pattern of the institorian action (arising on a contract with a commercial agent).

Given November 18 (294).