

Book IV.
Title XXXV.¹

Mandates.
(Mandati.)

Headnote.

A mandate, in private law, was a direction or authorization of one man, the principal, given to another, the agent, to do, gratuitously (law 1 h.t.) a certain thing or a number of things for him. When the agent agreed to act, there was a contract. It was consensual, was enforceable in an equitable action (C. 4.10.4 note) on the contract (mandate) and required of the parties the exercise of the utmost good faith. The authorization might be to bring a suit (law 3 h.t.), to become surety (law 2 h.t.), to sell property (law 12 h.t.), or to transact any other lawful business, except formal transactions under the civil law, such as mancipation and entering into a stipulation. The contract usually created the relation of principal and agent, giving rise to the usual duties and responsibilities toward each other. But that was not always true, or not strictly true. For instance, the principal might direct the agent to advance money to a third person, and if complied with, the real relation created was substantially that of suretyship, making the principal liable for the repayment of the money. Laws 7, 8, and 18 h.t. See note law 7 h.t. Again the principal might authorize the agent to sue on an obligation for his, the agent's own benefit, without accounting to the former. In that case, there was, in effect, an assignment of the obligation. In fact, that was the only way by which an obligation could be sued on by a person not a party thereto, until, in the second century, the law began to permit grantees of obligations to sue thereon in an independent action in their own name. C. 4.39.5 note; C. 4.27.1 note.

4.35.1. Emperors Severus and Antoninus to Leonida.

You can bring an action on mandate against the person whose business was transacted by you, to recover the money, together with interest, which you paid out (for him) from your own resources or which you received from others as a loan. The matter of honorarium which he promised you will be investigated by the president of the province.

Note.

The contract of mandate was supposedly gratuitous. Inst. 3.26.13. Still, an honorarium might be promised, just as in the case of professional men, and was recoverable by extraordinary procedure before the magistrate. It could not exceed 100 gold pieces, but the promise could not be sued on, unless definite. Law 17 h.t. See D. 17.1.7; D. 50.13.1.

4.35.2. Emperor Antoninus to Staius Marcellinus.

Since you say that your father paid the money due by reason of his suretyship, you have an action on mandate, in which you can recover not only the money, but also the pledges given for that obligation.

Note.

¹ [Blume] Rev. 4/3/32.

A request or even permission (law 6 h.t.) to become surety was treated as a mandate. C. 8.40.14. When the surety paid, he had the right of regress against the principal debtor by an action on the contract—the mandate. In this case, the surety—the father—was evidently dead, and his son succeeded to his rights, as heir.

4.35.3. The same Emperor to Germanus.

If your father authorized you, by mandate, while you were your own master, to bring an action against his debtors, he could nevertheless, while nothing had yet been done, sue personally. And anything thus done by him before the judge cannot in any manner be rescinded.

Promulgated October 27 (216).

Note.

Revocation and renunciation of authority. Authority to sue on an obligation was revocable, and incomplete, till the authority was exercised and issue had been joined with the debtor, which novated the debt. C. 4.10.1 note. If an assignment was intended (for the assignee's benefit), the assignee could protect himself by giving notice to the debtor. C. 4.39.5 note. And if, in such case, the assignor collected any money, after making the assignment, he was responsible to the assignee. C. 4.39.6.

In case of simple agency, the authority could be revoked at any time, and was revoked by death (law 15 h.t.), subject to the adjustment for liabilities incurred by the agent before notice. D. 17.1.15; G. 3.159.160. And third persons were protected till notice of revocation. D. 46.3.12. So the agent could renounce the agency at any time when he could do so without damage to his principal, or if he became sick or the principal insolvent. Inst. 3.26.11; D. 17.1.22-25.

4.35.4. Emperor Alexander to Aurelius Vulneratus.

Although an adverse judgment was rendered against those who appointed you as procurator in the appeal of (certain) cases, still, if that happened without your fault, you can recover the expenses reasonably incurred by you in the suit, by a contrary action on the mandate.

Subscribed January 6 ().

Note.

The agent's action on the mandate was technically known as a counteraction. The agent, properly performing his duties, was entitled to reimbursement for necessary and useful expenditures, but no other. D. 17.1.10.9 and 10. So he was entitled to have the principal assume the obligations incurred in the due performance of the agency. D. 17.1.45 pr.

4.35.5. The same Emperor to Julianus.

If the husband of your sister, acted as procurator for you, and refused to claim possession of an inheritance, you may bring an action against him, and you will be successful therein if you prove that you authorized him by mandate to claim the possession of the property, and he neglected to do so.²

4.35.6. Emperor Gordian to Aelius Sosibius, a soldier.

² [Blume] Law 11 h.t. note.

If a man became surety with the permission of the defendant, he can bring an action (against the defendant) on the mandate after paying the money or after judgment against him.³

Promulgated September 3 (238).

4.35.7. The same Emperor to Aurelianus, a soldier.

If in complying with the letter of the author thereof, you loaned money to the bearer of the letter, you have a right of action both against the person who received the loan as well as against the person whose mandate you carried out.

Note.

Here an authorization—mandate—was given to loan money to the bearer of this letter. Hence not only the debtor, but the person giving the mandate, were both liable to the lender. The latter differed somewhat from the ordinary surety, inasmuch as he was responsible for the principal transaction. Hence Boroluci thinks that in classical law he was not considered as only accessorially liable, and that he was so considered only in post-classical law, as in C. 8.40.4;10;19; Nov. 4, and that C. 4.18.3 which gave the mandator the benefit of division of liability the same as to the ordinary surety was a post-classical interpolation. See review of Bortoluci's work in 47 *Z.Z.S.* 534. That C. 4.18.3 is not interpolated, see Levy, *Sponsio*, 153; Levy, 1 *Konkurenz* 200-201.

4.35.8. Emperors Valerian and Gallienus and Caesar Valerian, to Aurelius Lucius.

If the father of the minors under the age of puberty instructed you to loan money to his slaves for his benefit, and pledges too are given in this transaction by his direction, you may, after the father's death, sue the minors (heirs of the father), and enforce your right under the pledges, if payment is not made.

Given December 29 (259).

4.35.9. Emperors Diocletian and Maximian to Marcellus.

Since you say that damage was done to your cause by your general agent (procurator), you have an action on the mandate against him.

4.35.10. The same Emperors and the Caesars to Aurelius Papius.

If you interceded for the female against whom your petition is directed, either as surety by stipulation, or by giving a mandate, still, if judgment has not been rendered against you and you cannot prove that she afterward commenced to dissipate her property, so as to furnish you cause for apprehension, or that you became obligated in the first place upon condition that you could sue her before any payment was made by you, it is certain that you cannot, under any rule of law, compel her to pay you before you have paid the creditor for her. Further, it is clear that a surety by stipulation, or author of a mandate, who has a defense, and is wrongly condemned by a judge, but fails, contrary to good faith, to exercise the right of appeal, cannot sue on the mandate.

(293).

Note.

The rule as to appeal here stated is simply based on the general proposition that an agent (in whose position the sureties were—law 2 h.t. note), had to do everything in the

³ [Blume] See law 2 h.t.

utmost good faith. Ignorance and poverty were an excuse for not appealing; that was true also if they called on the principal debtor to appeal, if he desired. D. 17.1.8.1.

4.35.11. The same Emperors and the Caesars to Aurelius Gaius.

It is necessary that a procurator should be held responsible not only for what he has done, but also for what he undertook to do, for money collected pursuant to the mandate as well as for money not collected, and for fraud as well as for neglect, provided, however, that expenses incurred in good faith must be allowed. Given at Sirmium June 1 (293).

Note.

See also law 13 and law 22 h.t. Up to about the middle of the third century, an agent was responsible only for intentional, deliberate conduct (*dolus*) resulting in damage. Coll. 10.2.3. That is also indicated by C. 2.12.10. But liability for negligence gradually came to apply in most cases. See C. 4.34.1 note. See also as to agent's duty to do what he understood to do. C. 2.12.17. In this case he undertook to collect.

4.35.12. The same Emperors and the Caesars to Firmus Marcellinus.

Since you state that the contract of mandate was made upon definite conditions, such conditions must be complied with in accordance with good faith. Hence if your procurator sold a farm belonging to you contrary to the tenor of the mandate, and you did not thereafter ratify such sale, he could not deprive you of your ownership. Promulgated at Sirmium May 16 (293).

Note.

An agent's act beyond the scope of his authority could not bind his principal. A general agent, as, probably, the procurator here mentioned was (C. 2.12 headnote) had certain implied powers, but that did not include the sale of ordinary property. C. 2.12.16 note. Hence when the agent in this case exceeded the special authority given him, namely to sell on certain terms, his contract was not binding.

4.35.13. The same Emperors and the Caesars to Zosimus.

The law clearly states that a procurator is responsible for intentional damage (*dolus*) and neglect, but not for unforeseen casualty.⁴

4.35.14. The same Emperors and the Caesars to Hermianus.

If you bought horses pursuant to a mandate of Tryphon and Felix with your money, or such horses were turned over to you and you delivered these horses to one of the persons who gave the mandate, with the consent of both, good faith compels them, when sued in an action on the mandate, to comply with their agreement. Given at Sirmium March 27 (294),

4.35.5. The same Emperors and the Caesars to Aurelius Precarius Athenaeus.

A mandate not commenced to be executed (*res integra*) is invalidated by the death of the giver thereof.⁵ Given April 15 (294).

⁴ [Blume] But the agent might, by agreement, assume the risk thereof. Bas. 14.1.75 note.

⁵ [Blume] So the death of the agent ended the contract. Inst. 3.26.10.

4.35.16. The same Emperors and the Caesars to Uzandus.

If a person who undertook to execute a mandate for the purchase of goods and who received money for that purpose is faithless to his trust, he is liable for the amount of damage resulting to his principal.

Given September 29 (294).

4.35.17 The same Emperors and the Caesars to Aurelius Gorgonius.

Suit cannot be brought for an honorarium proffered in uncertain terms.⁶
(294).

4.35.18. The same Emperors and the Caesars to Tuscianus.

After he who gave a mandate for the making of a loan to another personally pays the lender, he may rightly demand payment thereof, together with interest after default, from the person who received the loan, or from his heirs.⁷

Given at Sirmium September 25 (294).

4.35.19. The same Emperors and the Caesars to Aurelius Eugenius.

You cannot be compelled to pay interest beyond the legal amount, either pursuant to a stipulation or by reason of delay, on the price received for the property which you took for sale pursuant to a previous mandate, even though it is shown that pledges were given.⁸

Subscribed at Sirmium October 19 (294).

4.35.20. The same Emperors and the Caesars to Aurelius Epagathus.

If you, contrary to law, bought the uncertain profit of a lawsuit, you fruitlessly ask fulfillment of a contract which you were forbidden to make. But if you gratuitously undertook a mandate, you justly demand repayment of the money laid out by you in good faith.

Note.

No lawyer or other person was permitted to buy into a lawsuit, or to undertake a suit for a portion of the fruits thereof. That was what we call champerty and which was considered against good morals. C. 2.12.15; C. 2.6.5; C. 4.35.22. If an agent violated this rule, he was not entitled to recover his expenses. The contract of mandate was, as already stated, supposed to be gratuitous, although the agent could lawfully receive an honorarium. But an interest in the suit was not considered such. In fact, it was forbidden to transfer a matter in litigation. C. 8.36.2. And contracts could not be assigned to dignitaries. C. 2.13.

4.35.21. Emperors Constantine to Volusianus, Praetorian Prefect.

In mandates there is a risk (for the agent) not only as to money, in connection with which the action on a mandate provides a definite remedy, but also as to good reputation. Each man is governor and arbiter of his own affairs, and he carries on, not all, but most of his business as he lists. But the affairs of others are managed under a more

⁶ [Blume] The amount promised had to be definite. Bas. 14.279.

⁷ [Blume] See laws 2 and 7 h.t.

⁸ [Blume] As to the legal interest chargeable, see C. 4.32.26.

exacting duty, and responsibility exists for everything that is neglected or left undone in the management thereof.

(313-315?)

Note.

A judgment against an agent, as was true of other fiduciaries, made him infamous, for violating good faith. C. 2.12. But judgment against the principal did not have that result. D. 3.2.6.7.

4.35.22. Emperor Anastasius to Eustathius, Praetorian Prefect.

Through various supplications addressed to us we have learned that there are persons who, eager to grasp the property and fortunes of others, cause rights of action in favor of others to be transferred to them, and in this manner afflict various persons with vexations of litigation, while there is no doubt that where obligations are unquestioned, the parties to whom they previously belonged would prefer to enforce them personally rather than to transfer them to others.

1. Hence, we order by this law that such acts must be restrained, for there is no doubt that persons who desire such transfers to be made to them, are purchasers of lawsuits of others, and so if anyone receives such transfer in consideration of the payment of money, he shall be permitted to sue only for the money paid and the interest thereon, although the instrument of transfer states that the obligation was sold.

2. Excepted herefrom are assignments made among heirs for inherited causes of action, and assignments which a creditor or a person in possession of another's property received for his debt or to serve as protection and safeguard, and assignments necessary to be made to legatees or beneficiaries of a trust to whom debts, rights of actions, or other things are bequeathed. But if no such reason exists, a person who, for money, takes transfers of rights of actions against others shall, as discussed above, be considered a champertor.

3. If an assignment is, however, made as a gift, all may know that this law shall not apply, but the ancient laws shall remain in force, so that assignments made or to be made in the excepted and specially enumerated cases and other cases, shall be valid according to the tenor of the rights of action assigned or to be assigned, without diminution.

Given July 23 (506).

Note.

The Roman law did not favor purchases of contracts. C. 4.39.5 note. There were four specific exceptions in which the foregoing law did not apply: (1) Where a cause of action was assigned among heirs. Heirs inherited obligations due to the decedent in proportion in which they became heirs. It was, of course, beneficial that they should be permitted to assign debts due the estate to one of the heirs, so as to avoid multiplicity of suits. (2) In case of legatees under a will. Various legatees could assign their right of action to one of them. (3) If a creditor took an obligation in payment of a debt due him. (4) If a person in possession of property bought a right of action to serve as a muniment of title. For example: The true owner of property mortgaged it. It was in possession of another, and he, fearing that he would have to give it up to the true owner, purchased the debt due the creditor of the true owner. (5) In case of gifts.

The penalty of the foregoing law further did not apply in cases similar to those specifically enumerated; for instance, where a creditor assigned his right of action against the principal debtor to a surety who paid him, or where a pledgee of property assigned his

right of action against his debtor to the possessor of the pledge (who had bought it from the debtor).

The foregoing law was strengthened by the next law, and by C. 4. 35. 24, the exceptions above mentioned, aside from the case of gift, were repealed, so that no one could recover more on an assigned cause of action than the amount paid therefor, unless it was given to him. Contracts were entirely forbidden to be assigned to dignitaries. C. 2.13.

4.35.23. Emperor Justinian to Johannes, Praetorian Prefect.

Anastasius, emperor of blessed memory, enacted a most just constitution, full of the spirit of humanity and benevolence, that no person should acquire debts against another by assignment, and should not be able to recover from the debtor thereof more than he himself paid to the assignor, except in certain cases which are specially mentioned in that constitution. But as persons who del in litigations would not let that pious enactment retain its force, cunningly having the creditors transfer part of the debt to another by way of sale, and assigning the remaining part as a sham gift, we, upholding the Anastasian constitution, ordain generally that no one shall be permitted to assign part of a debt for money by way of a sale, and transfer the other part by way of a colorable gift; but he may, if he wishes, make an unconditional gift of the whole debt, and of his rights of action, but he shall not publicly make a pretended gift: We do not object to transfers of that kind.

1. But if anyone attempt to do anything secretly, receiving money for a sale of a part of a right of action, pretending to make a gift of another part, either to the person who purchased part or to someone else, perhaps some supposititious person—which we have learned is often done—such trickery shall be of no avail whatever, and the assignee shall receive no more than he in fact paid under the true contract, and everything, over and above that, and transferred by a pretend gift, shall be void as to both parties, so that neither the assignor nor the assignee shall receive or retain any gain therefrom, and neither of them shall have any right of action thereon against the debtor or his property.

2. And if anyone pretends to make a gift of the whole right of action, so that the whole shall appear as a gift, but shall receive anything secretly, in such case, too, only the amount shown to be paid shall be collected, and if that amount is paid by the debtor, the pretend gift shall make him or his property no further trouble.

3. It would indeed be just, to extend to debtors the relief of this law commencing from the time of Anastasius, when the law which men cunningly wanted to tear to pieces was passed. But lest we be thought to act harshly amid such great benevolence of our times, the present law shall apply to cases arising in the future, so that everything done to circumvent the Anastasian law may hereafter be met by our remedy.

(531-532).

4.35.24. The same Emperor. (Synopsis in Greek.)

This constitution calls attention to the law of Anastasius made concerning assignments, which forbids the person to whom actions were assigned for a consideration to demand more than he shall have given for them; and since certain persons are excepted therein, this constitution orders that the same law shall apply to them, and that any exception made in that law shall no longer be valid; but the person who shall have given

any money may collect what he gave, with interest, and nothing more. An actual gift, however, of causes of action shall be valid unless, perchance, made in fraud of the law.⁹ (531-534).

⁹ Blume penciled in above this sentence an alternate reading, without striking the typewritten original. It is difficult to interpret, as it apparently makes use of part of the original sentence as well: “But if an unconditional gift is, however, made of causes of action, it (the constitution) [to the effect] that an assignment made as gift, shall be valid unless, perchance, made in fraud of law.”