

Book IV.  
Title XXXVIII.

Concerning contracts of purchase.  
(De contrahenda emptione.)

4.38.1. Emperors Valerian and Gallienus to Aurelius Paulus.

Although sales are made in places other than where the real property is, they are not on that account considered void.

Given April 20 ( ).

4.38.2. Emperors Diocletian and Maximian to Aurlius Avitus.

That a purchase and a sale require consent, and that an insane person cannot give his consent is clear. But it is not doubted that such persons, more than twenty-five years of age, may make sales and enter into any other contracts at intervals when they are sane. Given May 8 (286).

Note.

Contract of sale. The contract of purchase and sale was consensual; that is to say, it was entered into by the mutual consent of the parties, and became binding when they had agreed (1) on the object sold, real or personal, and (2) on the price. Law 9 h.t. It became recognized as consensual probably not later than the second century B.C. It was effective as soon as orally entered into, unless, as provided by Justinian (C. 4.21.17), the parties agreed that it should be reduced to writing. Written documents were doubtless used in all important transactions after writing had in the later period of the republic become usual. Earnest money was, in classical law, merely evidential. G. 3.139. Under Justinian, the purchaser lost it, if he failed, and the vendor had to return double, if he failed, to carry out his agreement, in case the contract of sale was not to be complete until reduced to writing. C. 4.21.17; Inst. 3.23 pr. See 48 S.Z. 51 et seq. The contract of sale, it must be remembered was a contract only; it of itself did not transfer ownership. C. 4.39.6; C. 4.49.8; C. 2.3.20. Collateral agreements were often made. C. 4.54.

4.38.3. The same Emperors and the Caesars to Valeria Viacra.

If, to make a gift, you pretend to make a sale, the contract lacks substance. If, however, you put a person in possession of property, seemingly pursuant to a sale, but in fact for the purpose of making him a gift upon condition that he should support you, then since a completed gift is not easily rescinded, so it is agreed that the condition, which you fixed when you gave the property, must be complied with.<sup>1</sup>

4.38.4. The same Emperors and the Caesars to Aurelius Lucianus.

Since you state that things given (and delivered) to you were (also) sold (to you) by the heirs of the (female) giver, you must know that you could not have the property under two different titles, but you becoming owner by the gift and delivery, fruitlessly bought it, since there cannot be a purchase of one's own property, and such sale was of advantage only if it should be shown that you did not become the owner through the gift. Of course, since you say that all her property was given and delivered to you, [by] her son, by selling you his maternal property, would give you an additional protection,

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<sup>1</sup> [Blume] See C. 8.53.1; C. 8.54.1.

though the gift was complete, so that he could not reclaim it even by an action analogous to one to set a will aside as unjust.

Promulgated May 29 (293).

Note.

An agreement to purchase property already belonging to the purchaser was void. Law 10 h.t. And if such purchaser paid the purchase price without knowledge that he was buying his own property, he could recover it. D. 18.1.16 pr.

4.38.5. The same Emperors and the Caesars to Umbiga Gratia.

Since a guardian is not forbidden openly and in good faith to purchase property of the ward which can be sold, so much the more may his wife do so.

Given November 24 (293).

Note.

Guardians and curators could not ordinarily buy on their own account property of their wards, because one could not be vendor and purchaser at the same time. But such purchase was good if authorized by a co-guardian, or a creditor of the ward made the sale, or, as stated in the foregoing rescript, it was made at public auction. D. 18.1.34.7; D. 26.8.5.2.

4.38.6. The same Emperors and the Caesars to Aurelius Lucretius.

If Gaudentius transferred ownership of a slave to your mother pursuant to a sale without fraud, her title was not affected by reason of the fact that he and she were subsequently married and divorced. And if you prove that you became your mother's heir, you are not forbidden to bring an action to recover the slave (by vindictio).

4.38.7. The same Emperors and the Caesars to Aurelius Isio.

If your mother acquired a female slave by purchase, and subsequently pretended that she had received such slave as a gift from her second husband, the figment of a pretended title could neither strengthen nor take away her ownership.<sup>2</sup>

Subscribed at Sirmium March 7 (294).

4.38.8. The same Emperors and the Caesars to Heros and Diogenes.

If you did not make a gift of our vineyards, but sold them instead, and the purchase price has not been paid, you have an action for the price, but not for the return of what you delivered.

Note.

According to Inst. 2.1.41, no sale took place at the time of the twelve tables, unless the price was paid or the seller was otherwise made secure for it by a surety or a pledge. Originally, doubtless, no sales were valid unless made for cash or as a pure exchange. Gradually, the rules as to the payment of the price or the substitute therefor were modified. And Justinian added to the foregoing text that a sale was valid if the purchaser was given credit. In other words, he had arrived at the same standpoint as the moderns. And that principle, too, is contained in the foregoing rescript, and in law 9 and law 12 h.t.; also in C. 3.32.12; C. 4.49.1 and 6. Hence, in such case only a personal action for the price remained. Formerly, when the requirements of the law as to payment or satisfaction thereof had not been complied with, an action in rem to recover the

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<sup>2</sup> [Blume] See C. 4.22 as to simulations.

property existed. The subject is fully discussed by Schoenbauer in 52 Z.S.S. 195 ff, which also sets forth contrary views. Schoenbauer is undoubtedly right. See contra, Pringsheim 50 Z.S.S. 438.

4.38.9. The same Emperors and the Caesars to Severus, a soldier.

A purchase and sale has no force without a price. If a price, however, has been agreed on, though not paid, and possession only is delivered, such contract is not considered void, and the purchaser is no less a rightful possessor because payment of the sum which had been agreed on is denied. And a gift of a farm, made under the form of a sale, becomes valid if delivery follows, though no action for the price exists. Given at Sirmium March 25 (294).

Note.

It was necessary, to complete a contract of sale, to agree on, or arrange for fixing (law 15 h.t.), a definite price.

4.38.10. The same Emperors and the Caesars to Aurelia Gordiana.

If you mother bought her own farm as though the property of your father, then since a purchase of one's own property is void, and you say that the purchase was simulated, an agreement of that kind cannot change the truth or prejudice her.<sup>3</sup> Given April 8 (294).

4.38.11. The same Emperors and the Caesars to Aurelius Paternus.

A demand that someone should buy or sell against his will is not founded on any just reason. Promulgated December 3 (294).

Note.

No one, as a general rule, was compelled to sell his property. But there were exceptions. A joint owner of a slave might at times be compelled to sell his share in the slave. C. 7.7.1. So, too, in time of famine, people might be compelled to sell grain of which they had no personal need at a fair price. C. 10.27.2. Inhuman masters might be compelled to sell their slaves. Gaius 1.53; Inst. 1.8.2.

4.38.12. The same Emperors and the Caesars to Aurelius Pacianus.

A sale is not any the less complete because the purchaser did not take a surety (guarantying possession) or because an instrument of assurance (for undisputed possession was omitted. For if he goes into possession with the consent of the owner, he is in possession lawfully. The price, of course, if not shown to have been paid, can be recovered; but a protest of repentance, though made immediately, does not rescind a sale which is completed by the consent of the parties.

Note.

In some cases, and perhaps customarily, the vendor together with another guarantor, gave a guaranty that the purchaser would not be evicted from the property bought. D. 21.2.4; Bruns, Fontes 329, 331. But such additional guarantor was not essential. That was true also in Greece after the fourth century B.C., though the point is disputed. Partsch, Griech. Bürgschaftsrecht 347. The addressee of the instant rescript

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<sup>3</sup> [Blume] See laws 4 and 7 h.t.

evidently thought that one was necessary. See C. 8.44.8. Constantine, however, made one necessary if the purchaser ordered it, in case a father sold property of his children derived from the mother. C. 6.60.1.2.

4.38.13. The same Emperors and the Caesars to Aurelius Decius Lollianus.

When a sale is made dependent on the will of the seller or purchaser, no obligation is created, because the contracting parties are not bound to do anything. Hence, an owner or anyone else is not compelled to sell his property unwillingly by reason of such contract.

4.38.14. Emperors Gratian, Valentinian and Theodosius to Flavianus, Praetorian Prefect of Illyria.

Formerly relatives and consorts had the right to keep outsiders from purchasing property (belonging to a relative or consort), nor could men sell property<sup>4</sup> which they had for sale at their discretion. But since this has only the appearance of being proper, and it seems to be a grave wrong, that men should be compelled to handle their property in a manner contrary to their wish, the ancient law is abrogated and everyone may seek and approve of his own purchaser as he pleases, unless the law specially forbids certain persons to do this.<sup>5</sup>

Given May 27 (391) at Vincentia.

Note.

The law herein repealed was apparently incited by Constantine the Great, and perhaps in imitation of Jewish law to keep property within the family and not let it be sold to outsiders. Godefroy on C. Th. 1.6. A later enactment limited the transfer of land in so-called “mother-villages” (C. 11.56.1), and even prior to the date of this rescript, restrictions were enacted on the disposition of property of municipal senators. C. 4.44.17; C. 10.34.

4.38.15. Emperor Justinian to Julianus, Praetorian Prefect.

A great doubt arose among the ancient jurists as to a sale where a man brought property with the understanding that the price should be the valuation put upon the property by (say) Titus.

1. Settling this doubt, we order that if a sale is made at a valuation to be fixed by some other person, such sale shall be valid whether in writing or oral, upon condition that if the person named fixes the price, it must be paid as fixed by him, and the sale shall be carried into effect, provided that if such contract shall be reduced to writing, it must be duly completed and executed according to the provisions of our law.<sup>6</sup>

2. But if the person appointed will not or cannot fix the price, then the sale shall be held for naught, as one where no price is fixed, and there shall be no further speculation or conjecture in the future, whether the contracting parties had a definite person or (merely) a good man in view to fix the price, since we deem the latter entirely unlikely and by this sanction remove that consideration from such contract. We order that these provisions shall also apply in leases of the kind.

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<sup>4</sup> Blume’s original read: “...so that men could not sell property.” He struck that phrase but left a question mark in the adjacent margin.

<sup>5</sup> Blume wrote in the margin next to this sentence: “Sentence omitted?”

<sup>6</sup> [Blume] C. 4.21.17.

Given August 1 (530).

Note.

The dispute here mentioned is stated in Gaius 3.140. Labeo and Cassius did not believe that the contract of sale was valid if the price was fixed by a third party; Offilius and Proculus thought the contrary. In D. 19.2.2b pr. Gaius is made to say that it would be valid. That is doubtless an interpolation, taken from the instant law. Gradenwitz, Interpolationen, 5-8.