Book IV.
Title XLV.

What is permitted to rescind a purchase.
(Quand aliceat ab emptione discedere.)

Bas. 19.5.22-23.

4.45.1. Emperor Gordian to Licinius Rufinus.

Nothing having been done toward performance of a purchase and sale, it may be abandoned by the parties by mutual consent. For whatever is done by consent, may be undone by an agreement to the contrary. But the naked will does not dissolve the sale after delivery has been made, unless an act similar to the original one, to put an end to the sale, is done.

4.45.2. Emperors Diocletian and Maximian and the Caesars to Aurelius Felix.

It is plain that a purchase and sale already entered into, but nothing having been done toward performance, may be dissolved by mere agreement and consent.

1. Hence, if gold has been given as earnest money, you can recover it pursuant to the agreement (to abandon the sale contract).

2. But if you paid part of the purchase price, you have a right of action for what the seller was to do under the sale, rather than for the price which you say you have paid. Given at Byzantium April 4 (293).

Note.

See Siber in 42 Z.S.S. 98; Stoll, 44 Z.S.S. 71 for interpolation of this law, to bring it into conformity with the Byzantine rule of symmetry, to the effect that contract could be dissolved in the same manner as originally made.

Contracts of sale, lease, partnership, mandate were consensual contracts; that is to say, they were entered into and became binding through the mutual consent of the parties. Hence there was no reason why an agreement to the contrary should not have the effect of nullifying the original contract. However, a partnership and mandate could be dissolved by simple announcement by one party; D. 17.2.14-18; G. 3.159. Hence no further rule was necessary, nor has been applied in the texts. The dissolution of a lease by mutual consent is mentioned, but has not been applied by actual examples of the texts. D. 4.2.21.4; D. 46.3.80. The rule was, in classical law, applied only to sale. But the Byzantine jurists attempted to classify the rules of law and announced a rule of symmetry that contracts could be dissolved in the same manner as made. D. 46.3.80 (itp); D. 50.17.35 (itp). The rule could not apply to real contracts; e.g. a loan, since a release required payment-fulfillment.

An original agreement could be dissolved by one contrary thereto only when neither art had performed (res integra). Laws 1 and 2 h.t.; D. 18.5.3; D. 19.1.11.6. If the purchaser had paid the price, or the vendor had delivered, the contract could not be dissolved. D. 2.14.58. Such an agreement, plus an agreement that the price or property should be returned was void, for the simple reason that such agreement for the return was a naked pact, and thus not enforceable. D. 2.14.58; Stoll in 44 Z.S.S. 71. Hence the only right of action was on the original contract. Law 2 h.t. is deemed to express the same thought, but interpolated. Siber in 42 Z.S.S. 98. There is no reason, however, why it

might not also apply to a resale. The theory of voluntary return here mentioned is deemed to be post-classical. Stoll, 44 Z.S.S. 71.