

Book IV.
Title XLIV.¹

Concerning rescission of a sale.
(De rescindenda venditione.)

4.44.1. Emperor Alexander to Aurelius Marones, a soldier.

If your father sold his house, compelled thereto by force, that was not done in good faith will not be considered valid. A purchase becomes void through bad faith. Hence, if you go before the president of the province, he will interpose his authority, especially since you say that you are ready to refund to the purchaser the price he paid. Given February 19 (222).

Note.

The action in this case was that for duress, for four-fold penalty (C. 2.19 headnote), or the direct action for the recovery of the property. C. 2.19.3.

In case of fraud, a different action was applicable. Law 5 h.t. And sometimes the extraordinary remedy of restitution to former condition was applied. Law 2 h.t. C. 2.27 (minority). According to the view of some authors, that was the remedy applicable in laws 2, 5, 8 and 10 h.t.

4.44.2. Emperors Diocletian and Maximian to Aurelius Lupus.

If you or your father sold property for less than its value, it is just that you should receive it back, though the authority of the judge upon restoring the price, or that the purchaser, at his election, should pay you what is lacking of the just price (and keep the property). A price is considered too little if one half of the true value is not paid. Promulgated October 28 (285).

Note.

This singular law (*laesio enormis*), despite its date, is thought the product of Justinian, and law 8 h.t. where it is also mentioned is thought interpolated. It is inconsistent with C. Th. 3.1.4 and 7 of 383 and 396 A.D.

The remedy under this law was, when the property was delivered, the extraordinary remedy of restitution to former condition, which according to C. 2.52.7, was limited to four years. Note Stephen to Bas. 13.2.2 (2 Heimbach 40); 4 S.Z. 57.

4.44.3. The same Emperor and the Caesars to Marciana.

When a contract of purchase and sale has once been legally completed, good faith does not permit one of the parties to repudiate it against the wish of the other, even pursuant to an imperial rescript. It has often been decided that our fisc is governed by this law.

Given February 6 (293).

4.44.4. The same Emperors and the Caesars to Sempronius Eudoxius.

To rescind a sale and prove bad faith, it is not sufficient merely to show that you sold the land at a smaller price than you paid for it.

Given at Byzantium April 5 (293).

¹ [Blume] Revised 1/27/32.

4.44.5. The same Emperors and the Caesars to Claudius Rufus.

If you go before the president of the province and he, learning that you made a sale of the land through the fraud of your opponent, and knowing that fraud is contrary to the good faith which is especially demanded in such contracts, will order such sale to be rescinded. 1. But if a sale is completed by one over twenty-five years of age, lawfully and by mutual consent, you should know that it cannot be annulled.

Given at Sirmium October 18 (293).

Note.

See C. 4.58 headnote as to frauds in sales. The character of the action for rescission is not specified. It was probably the contract action (*ex empto*), which, though primarily designed to enforce, came to be used also to dissolve, a contract. C. 4.58 headnote. Inst. 3.23; but see note laws 1 and 10 h.t. In earlier law, however, the remedy for misrepresentation and other positive fraud of vendor or vendee was ordinarily redressed by the direct action for fraud (*doli*--C. 2.20). C. 4.58 headnote. D. 19.1.32 (itp); See 4.39.4. See 2 *Labeo*, 1, 176.

4.44.6. The same Emperors and Caesars to Novisius Gaianus, veteran.

The reason for which you want the sale which was made by consent, to be rescinded, is not convincing, and though you offer the purchaser double the price, he is not compelled to rescind the sale against his will.

293.

4.44.7. The same Emperors and the Caesars to Mucatraulus, a soldier.

It is to your own interest that sales lawfully completed should continue to be valid. For if sales, when the price is paid, were permitted to be easily rescinded, it might happen that if you made a purchase, through your efforts, from our fisc or from a private person, the same rule which you ask to be permitted to use could be used against you.

293.

4.44.8. The same Emperors and Caesars to Aurelia Euodia.

If your son sold your land with your consent, fraud of the purchaser through cunning and trickery should be shown, or fear of death or imminent bodily harm, in order to avoid the sale. The fact that you state that the land was sold for a little less than its value, is not alone sufficient to invalidate the sale. For if you consider the nature of purchase and sale, that when the parties are intending to enter into such contract, the purchaser wants to purchase for less, the seller wants to sell for more, and that it is with difficulty and after many contentions, the seller gradually receding from what he asked, the purchaser adding to what he offered, that they finally consent to a definite price, you surely must see that neither good faith, which protects the contract of purchase and sale, nor any other reason, permits that the contract, completed by consent, either immediately or after discussion of the price, should be rescinded on that account, unless less than half of the value of the property at the time of the sale was given, and in such case the purchaser has the right of election already extended to him (to pay the remainder of the just price.)

Given December 1 (293).

Note.

It was not strictly true that fraud or duress alone warranted rescission of a sale. Secret defects in property sold in the open market, and in late post-classical law great defects in other property, might give rise to rescission. C. 4.58 headnote. So also might minority. C. 2.27. See also law 2 h.t.

4.44.9. The same Emperors and Caesars to Domitius civalenses.

A contract is not void because the price is not paid in money but in cattle, with the consent of the seller.²

Given at Sirmium December 18 (293).

4.44.10. The same Emperors and the Caesars to Aemilius Severus.

Fraud of the purchaser depends upon the nature of his acts, not on the quantity of the price. If such fraud is shown to have been committed, the vendor has no action against the person to whom the purchaser transferred ownership to recover the property (vindicatio), but an action of restitution to his former condition against the person with whom he had made his contract.

Note.

Fraud ordinarily operated in personam and not in rem. C. 2.20. An innocent third party was generally protected. In cases, however, where a sale was made by a defrauded minor, and the purchaser knew of the facts, and even if he did not, and the first purchaser was insolvent, the court could protect the minor even against a second or third purchaser, though the remedy is not pointed out. D. 4.4.13.1. The reference to the knowledge of the subsequent purchaser and the insolvency of the first purchaser is thought to be interpolated (Bremer, 2 Jur. Anteh. 1, 103; Lenel, Ulp. 405), so that a defrauded minor was, in classical law, always protected.

The instant rescript speaks of "restitution to former rights." Pernice, 2 Labeo 1, 177 thinks that the proceeding referred to is the extraordinary remedy mentioned in C. 2.21 ff. See also D. 50.13.3. and Spaltenstein, Wiedereinsetzung in d.r.S. 161. But that point is and has been much disputed. Savigny, 7 System 177, thinks that the remedy was a contractual action in damages. Similar is the view of Donellus. 8 Donellus 890-892, 911-915. See also Windsheid, Lehrbuch §78, §118 n.b.

It would, however, seem that if that was meant it could have been easily so expressed instead of using the misleading term of integrum restituito. The latter remedy did not exist in Cicero's time (Cicero, De off. 3.15.61; Partsch, 42 Z.S.S. 250) (contra Klingmueller in 2 Pauly-Wissowa, 1, 679 (?)) and must have been developed later. See Paulus, Sent. 1.7.3; D. 4.1.1. From the time of Julian, the contract action assumed the function of rescinding a contract as well as enforcing it. D. 19.1.11.5 and 6; Pernice, 2 Labeo 181. And it ultimately, perhaps, and not later than Justinian's time, when the forms of action became comparatively unimportant, and all the judicial power, including the trial of cases, was vested in the judge, or one appointed by him, the extraordinary remedy of restitutio in integrum was, in cases such as mentioned, supplanted by the contract action. Note on Duquesne in 50 Z.S.S. 649. In the instant rescript the vendor could not be made entirely whole, since he had no remedy against a second transferee, at least when in good faith. It would seem that the only remedy which he had was to obtain adequate damages. It may, however, be that the restitution to former rights was, in

² [Blume] Note C. 4.38.3.

classical law, given in order that these damages might be more quickly and more effectually determined.

4.44.11. The same Emperors and the Caesars to Aurelia Magna.

The vendor can complain of fraud if he shows an act of the purchaser of which he had no knowledge at the time of the contract, not an act of which he had knowledge and to which he consented.

1. Since, therefore, you acknowledge that your father consented that a greater price than that for which the property had been sold should be mentioned in the instrument of sale, he fruitlessly complains of fraud on this account alone.

2. Of course, if the price agreed on is not shown to have been paid, it, and the amount which, through error of fact, was agreed to be set off on a debt, may be recovered.³

4.44.12. The same Emperors and the Caesars to Antiochus.

A sale of land is not any the less valid because you contend that the land was sold in order to meet the urgent and necessary expenses for municipal burdens (*munus*), and not because you sold for too small a price, or by reason of the fact that you were pressed by an (ordinary) debt. You had better, therefore, abstain from making invalid claims, and confine yourself to collecting the price, if it has not all been paid.

Note.

Men belonging to the curial order—that is to say, to the municipal senate—frequently had to take upon themselves considerable burdens. This subject is considered at length at C. 10.32 and subsequent titles; and it is to this subject that reference is doubtless made in the foregoing rescript.

4.44.13. The same Emperors and the Caesars to Nica Decaria.

If you sold you land while more than twenty-five years old, good faith does not permit the sale to be rescinded by you simply because your father-in-law warned the purchaser not to buy.

4.44.14. The same Emperors and the Caesars to Aurelius Basilia, a soldier.

If land is sold upon condition that the purchaser should pay the amount due to the city, the vendor may, if he pays such debt himself, sue for reimbursement. But the fact that the purchaser did not pay according to contract does not invalidate the sale.⁴ Subscribed at Nicomedia December 18 (294).

4.44.15. Emperors Gratian, Valentinian and Theodosius to Hypatius, Praetorian Prefect.

If a person over twenty-five years of age sold land, though situated at a distance, he cannot recover the property simply because it was sold for somewhat too small a price. And he ought not be permitted to raise foolish objections, for instance, that he did not

³ Above the last phrase, which Blume did not strike, he wrote the alternative reading--“is rightly demanded.” Scott uses the phrase “a demand can legally be made for its recovery.” See 6 [13] Scott 102.

⁴ [Blume] See C. 4.38.9 note.

know the fertility of the locality, when he should have known the producing capacity, merits, and income of his own property.
Given at Milan May 2 (383).

4.44.16. Emperors Valentinian, Theodosius and Arcadius to Magnillus, Vicar of Africa.

If the necessity to pay amounts due the fisc compels men overburdened by debt to sell their property, its quality and the quantity of its income shall be appraised, so that a public sale may give no opportunity for fraud, and for the property being sold for a small price, and for the collector to receive more as a bribe than the debtor as his price. 1. Purchasers can acquire perpetually legal ownership only if they shall pay to the fisc as much as private persons would, for their advantage, have demanded. For it would be very wicked to sell property of others at public auction, through partiality, and pay little into the public treasury, while the debtor loses it all.⁵

Given at Aquileia July 19 (392).

C. Th. 10.17.3.

4.44.17. Emperors Arcadius and Honorius to Messale, Praetorian Prefect.

Persons who flee⁶ from municipal burdens and think of secretly selling their property may know that such trickery will not benefit them, and the purchaser who knows of such flight shall be penalized in the amount which he shall have given.

Given August 21 (399).

Note.

Decurions, members of municipal senates, were subject to great public burdens, and because of them frequently fled, preferring to live among barbarians rather than in the land of their birth. They could not sell their lands without order from court. C. 10.34. Many, therefore, resorted to secret sales. See C. 10.32 et seq.

4.44.18. Emperors Arcadius, Honorius and Theodosius to Nestorius, Count of the Private Estate.

The palace officials must know that they have no right to buy clothing, silver, or slaves which happen to be sold by the Crown Domain. They will (in case of violation) be punished by the loss of the price.

Given December 30 (402 or 406).

Note.

The palace officials here referred to were those under the Count of the Crown Domain. They were, in other words, directly dealing with the property belonging to the Crown Domain—public property, and hence were forbidden, on grounds of public policy, from buying any of the property which they directly, or indirectly, managed. The rule was relaxed by the emperor Zeno, and he provided that the Count of the Crown Domain and the palace officials connected with his office (and that of the Count of the Imperial Exchequer) and the advocate of the fisc were permitted to buy confiscated property, when sold. C. 10.3.6.

⁵ [Blume] See also C. 4.46; C. 10.1.3; C. 10.10.

⁶ Blume penciled in above this “by evasion desert—Pharr.” In the margin Blume also wrote “evade—Pharr.” Scott renders it: “Those who, in order to avoid public charges to which they are liable, take to flight...” 6 [13] Scott 103.