

Book IV.¹
Title LI.

Concerning the property of others not to be alienated and concerning prohibited alienation or mortgaging of property.
(De rebus alienis non alienandis et de prohibita rerum alienatione vel hypotheca.)

4.51.1. Emperor Alexander to Cattianus, a soldier.

If it is shown to the president of the province that Julianus sold your slaves without any right, he will order the purchasers who bought with knowledge to restore your slaves to you. But if they have no knowledge of the want of such authority, and the slaves have become their property, the president will order Julianus to pay the price of them to you.

Given July 7 (224).

Note.

The rescript seems diametrically opposed to C. 7.26.1; C. 7.27.1 holding that after a transfer of a slave without authority, the property was not prescriptible, on the theory that the seller was a thief, and stolen property (not applicable to immovables) was not prescriptible. However, to make the seller a thief, knowledge that he had no right to sell was necessary (C. 7.26.7), and that knowledge was doubtless implied in the rescripts mentioned. And hence in the instant rescript, it was doubtless assumed that the seller thought he had a right to sell. Only in this way can the rescripts be harmonized.

4.51.2. Emperor Gordian to Grattia Aelia.

If your husband has sold property belonging to you without your consent, then even though you sealed the purchase-instrument with your seal, induced to do so through fraud, such trickery can not furnish protection to the purchaser if he is not rendered secure by usucaption or prescription of a long time (ten to twenty years).

Note.

For prescription and usucaption, see C. 7.26 headnote. It is apparent that a purchaser under Roman law was required to exercise caution.

4.51.3. Emperors Diocletian and Maximian and the Caesars to Aurelius Valerianus.

A person who succeeds to the rights of a (female) seller as heir cannot rescind a sale lawfully made and reassume ownership. And if he sues to recover it in his own right, you may, if you choose, set up the defense of fraud, or if you are evicted from the property and do not want to set up the indicated defense, you will be able to sue him for your damage.

Subscribed at Sirmium October 17 (293).

Note.

As, perhaps, in C. 3.32.14, the female vendor had sold property which did not belong to her. The actual owner became her heir and was on the point to sue for the recovery of it. It was fraud—against equity (C. 2.20 headnote)—for him to do so, since he stepped into the shoes of the deceased. So that defense was available. Or the purchaser could, if he chose, permit recovery, and sue the heir on an implied warranty against eviction (C. 8.44 headnote), for which the heir was responsible for the same

¹ Note at top of page reads “Rev. 2.22.32.”

reason. If the actual owner did not become heir, no such defense or action lay. Law 5 h.t. C. 3.32.14. See C. 8.44.31 and note.

4.51.4. The same Emperors and the Caesars to Aphobius.

Your mother could not deprive you of the slaves of your father, whose heir you are, and who leased a farm from Phillipus, by giving them to the owner of the land in payment of a debt. And, if, therefore, you are more than twenty-five years of age, and have not ratified what she did, you will be able to sue for the slaves upon offer of payment of the debt, if the lessor did not sell them by right of the pledge given him. Given February 11 (294).

Note.

The debt paid by the mother doubtless was the rent due the landlord and was, accordingly, the heir's debt. So, to recover the slaves, he had to offer to pay it.

4.51.5. The same Emperors and the Caesars to Aurelius Aegrus.

If your father sold your land, after your emancipation, without your consent, and you did not become his heir, and the possessor of the land is not protected by prescription of a long time (ten or twenty years), the rector of the province will, in a suit instituted by you, return it to you.²

Given at Sirmium March 8 (294).

4.51.6. The same Emperors and the Caesars to Aurelius Rufus.

No one can injure you by selling your property not pledged to him or over which he has no power of sale by reason of his office.

Given November 1.

4.51.7. Emperor Justinian to Johannes, Praetorian Prefect.

We ordain that where alienation is forbidden either by law or a provision of a testator or an agreement of contracting parties, not only is the disposal of the fee in the property of the manumission of slaves forbidden, but also the disposal of the usufruct of such property, or mortgaging or pledging it; likewise, no servitude shall be imposed, or emphyteutic contract (perpetual lease) made, except in cases where the law, the wish of the testator, or the tenor of the agreement—whereby alienation is forbidden—permits this to be done.

Given at Constantinople November 1 ().

Note.

An alienation forbidden by law was, of course, void. C. 1.14.5. C. 7.26.2 and D. 30.114.14 state that an alienation forbidden by a testator should be void. Both these places are thought to be interpolated by the compilers (Beseler, 2 *Beiträge* 77), so as to make it conform to C. 6.43.32.2 and 2a by which Justinian provided that if a legatee had no right to sell, the sale should be void—i.e. an action in rem to recover it could be brought.

But a sale forbidden by contract was not void. It only gave rise to a personal obligation, not to an action in rem. C. 4.6.3.

² [Blume] See law 3 h.t. note.