Book VIII.
Title XXXVI.

Concerning matter in litigation.
(De litigiosis.)

Dig. 44.6.

8.36.1. Emperors Severus and Antoninus to Paulina.

When a creditor sells a pledge, it cannot be considered that the purchaser buys property in litigation, although the debtor forbids the sale.[1]
Promulgated May 1 (207).

8.36.2. Emperor Constantine to the provincials.

During the pendency of a suit, rights of actions in which issue has been joined, or property, for the detention of which the plaintiff sues the defendant, cannot be transferred by a plaintiff to his relative or to a stranger, either by gift, purchaser or any other contract, and the suit shall be prosecuted to conclusion as if nothing of the kind had been done.
Given August 1 (331).
C. Th. 4.5.1.

Note.

Sale of property during litigation is not prevented by our laws, but the purchaser is bound by the result of the litigation. The Roman law was different. Even as early as the 12 tables (12.4), it was forbidden to consecrate property in litigation for religious purposes. C. 3.37.1 forbade, after joinder of issue in an action for partition, the sale of property held in common. D. 20.3.1.2 shows that such property could not be given in pledge. According to Vangerow and Winscheid, the rule in the early law applied in the ordinary case only when there was a sale of property in litigation by a plaintiff not in possession. Gaius and law 2 and 3 of this title seem to confirm that view. C. 4.35.20 which shows that the purchase of the uncertainty of the lawsuit - apparently applying to a pending suit - was unlawful in the time of Diocletian, is not in terms limited to purchases from one not in possession, but it is not conclusive one way or the other. According to the same authors, Justinian, by law 5 of this title, enlarged the rule, and forbade a plaintiff to assign his cause of action, and a defendant in possession to transfer the property, during litigation, and this rule was confirmed by Novel 112, c. 1, a defendant in a real action was forbidden to sell the property after service of summons. See Vangerow § 160; Winscheid § 125.

The rule here mentioned was made so as not to make the situation of the parties worse. During the empire, rights of action were frequently transferred to powerful person, and hence protection against transfers became necessary. By C. 2.13, transfers of rights of action to powerful persons were forbidden. In fact any transfer made for the purpose of changing the parties to a course and making the situation of a claimant worse was forbidden, and suit might be brought against the tranferror or transferee. C. 2.54;

[1] [Blume] To the same effect is C. 8.27.2; and Nov. 112, c. 1.

Wenger 172, 173. The law did not favor assignments of obligations. C. 4.35.22 and note.

8.36.3. Emperors Gratian, Valentinian and Theodosius to Tatianus, Praetorian Prefect.

If a man by testament or codicil bequeaths or leaves as a trust or by way of inheritance any duebill or any movable or immovable property whatever in litigation to the fisc, or to some noble or other persons, the fisc or other legatee shall have no permission to have anything to do with the dispute, and shall not undertake a suit (in connection therewith), but an appraisal shall be made of the value of the suit which shall be paid to the parties to whom the right of action or property has been left. 1. The heirs (however) may carry the suit (already begun) to conclusion, claiming the property in litigation in actions carried on at their risk. 2. This shall apply to duebills, so that the heirs shall pay the present value thereof to the fisc or other legatees, and they may pursue those whom they consider liable.

Given at Thessalonica June 17 (380).

Note.

The danger pointed out in note to the preceding law, of transferring property to persons of power, is indicated to some extent in the present law, and it specifically prohibits even a legatee from carrying on a suit - the proceeds of which had been bequeathed to him. It simply gives the legatee the appraised value of the suit. The action then pending must be carried on by the heirs, and they obtained or lost the proceeds thereof. This law was changed by c. 1 of Novel 112, providing that the action should be carried on by the heirs and not by the legatee, but that the latter should get the proceeds, if the suit was won and to get nothing if the suit was lost.

8.36.4. Written in 501 - (lost).

8.36.5. Emperor Justinian to Johannes, Praetorian Prefect.

We resolve that if a man has transferred to anyone else, during the pendency of a suit, any rights of action or any property which he possesses whether with or without the knowledge of the transferee (that the suit is pending), it is subjected to the vice of things in litigation. A distinction as to the contracting parties must be observed, so that if anyone has knowingly received such property by sale, gift or other contract, he may know that he will be compelled not only to return the property received, but will also lose the purchase-price thereof, not that it shall accrue to the benefit of the party who alienated it, but that a sum equal to it shall be paid to the fisc (by the alienator). 1. But if he purchased the property in litigation, the alienation shall be void, but he shall receive the purchase price back, together with one-third thereof in addition.[2] For it is just that the seller who has not informed the purchaser that the property has been drawn into litigation should be punished by a third part of the price as we have already ordered for his fraudulent intention and underhanded trickery. 2. And such punishment shall apply not only to other contracts, but also as to gifts, so that the transferor will, when no price is paid, be punished with its true, estimated value, and all documents made in connection

[2] [Blume] The fisc receiving from the seller two-thirds of such purchase price as an additional penalty. 9 Cujacius 1175.

therewith shall be void. 3. Excepting, however, from the provisions of this law persons who gave or received such rights of action or property either on account of dowry pre-nuptial gift, compromise, division of an inheritance, legacy or trust.
Given at Constantinople October 18 (532).

Note.

The instant law was followed and confirmed by Nov. 112, c. 1. By that Novel, a defendant in a real action was forbidden to sell the property after service of summons. See Vangerow, Pand. § 160; Winscheid, Pand. § 125. See also C. 3. 37. 1.