

ble; for it is contrary to morality to anticipate such a contingency. 3. Again, if both parties to a sale know that the object sold is stolen, no obligation is created on either side: if the purchaser alone knows, the vendor will incur no obligation, though he can obtain nothing under the contract unless he voluntarily performs what he agreed to do; but if the vendor knows and the purchaser does not, both parties are bound by the contract. Pomponius also wrote to the same effect. 4. Purchase of one's own thing is valid if the object, from the outset, is to purchase the possession of it, which the vendor happens to have, to strengthen one's position in legal proceedings. 5. Tasting is measuring serves not to increase or diminish the amount sold but to determine how much is being sold. 6. Suppose a purchase on the terms, "I buy Stichus or Pamphilus"; the vendor has the choice of which he will give, as would be the case with stipulation; should one die, however, the other must be given, so that the risk of the first is on the vendor, of the second on the purchaser; but if both die together, the price is payable because one, at least, was at the purchaser's risk. The same would apply if the choice were given to the purchaser, the choice being, of course, which of the two he will have, not whether to buy at all. 7. A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another's affairs.

35 GAIVS, *Provincial Edict*, book 10: The common practice of giving earnest in respect of a purchase does not suggest that without the earnest there would be no contract but facilitates proof of the fact of agreement on the price. 1. It is settled that no contract is concluded when the vendor says to the purchaser: "You shall buy for what you choose to give, or what you think fair or at your own estimate of its value." 2. There are those who think that there is no purchase when poison is sold, since neither partnership nor mandate is valid if it has a nefarious object; that opinion would certainly be correct for poisons which cannot be put to a useful purpose by being compounded with other ingredients; but one can say otherwise of poisons which, when so compounded, lose their harmful qualities, so that antidotes and other beneficial medicaments are prepared from them. 3. If someone asks his friend, who is going abroad, to seek out his runaway slave and sell him, he does not himself contravene the *senatus consultum* because he personally makes no sale; nor does his friend because he sells a slave who is present; the purchaser, again, buying a slave who is present, is held to enter into a valid transaction. 4. If the thing sold is lost through theft, the first thing to consider is what the parties agreed concerning its safekeeping; if they appear to have made no arrangement, such care will be required of the vendor as a good head of household would display in his own affairs. If the vendor lives up to that standard and yet the thing is lost, he will incur no liability, though he will have to make available to the purchaser his *vindictio* and *condictio*. Against this background, we turn to the case of the man who sells a thing belonging to someone else; since he will have no *vindictio* or *condictio*, he is to be, on that account, condemned; for if he had sold his own thing, he would have been able to cede those actions to the purchaser. 5. In the case of those things which are determined by weight, number, or measure, such as corn, wine, oil, silver, we sometimes observe the same rule as for other things, that is, that once there is agreement on the price, the sale is perfect and sometimes the rule that though there is agreement on the price, the sale is perfect only upon the weighing, measuring, or counting of the things. If all the wine, the oil, the corn, or the silver, whatever the amount, be sold for a single overall price, the law is the same as for other things. But if wine be sold by the jar, oil by the gallon, corn by the peck, or silver by

3 emi posse: nec enim fas est eiusmodi casus expectare. Item si et emptor et venditor scit furtivum esse quod venit, a neutra parte obligatio contrahitur: si emptor solus scit, non obligabitur venditor nec tamen ex vendito quoquam consequitur, nisi ultra quod convenierit praestet: quod si venditor scit, emptor ignoravit, utriusque obligatio contrahitur, 4 et ita Pomponius quoque scribit. Rei suae emptio tunc valet, cum ab initio id agatur, ut possessionem emat, quam forte venditor habuit, et in iudicio possessionis potior esset. 5 Alia causa est degruandis, alia metiendi: gustus enim ad hoc proficit, ut improbare liceat, mensura vero non eo proficit, ut aut plus aut minus veniat, sed ut appareat, quantum ematur. Si emptio ita facta fuerit: 'est mihi emptus Stichus aut Pamphilus', in 6 potestate est venditoris, quem velit dare, sicut in stipulationibus, sed uno mortuo qui superest dandus est: est ideo prioris periculum ad venditorem, posterioris ad emptorem respicit. sed et si pariter decesserunt, pretium debebitur: unus enim utriusque periculo emptoris uixit. idem dicendum est etiam, si emptoris fuit arbitrium quem vellet habere, si modo hoc solum arbitrio eius commissum sit, ut quem voluisset emptum haberet, non 7 et illud, an emptum haberet. Tutor rem pupilli emere non potest: idemque por- (Pom.) 15 rigendum est ad similia, id est ad curatores procuratores et qui negotia aliena gerunt.

35 GAIVS libro decimo ad edictum provinciale. Quod saepe arrae nomine pro [E.19.1.35 S] emptione datur, non eo pertinet, quasi sine arra conventio nihil proficiat, sed ut evidenter probari possit convenisse de pretio. Illud constat imperfectum esse negotium, cum 1 emere nolentis sic venditor dicit: 'quanti velis, quanta aequum putaveris, quanti aestima- 2 ueris, habebis emptum'. Ueneni mali quidam putant non contrahi emptionem, quia nec societates aut mandatum flagitiosae rei ullas vires habet: quae sententia potest sane vera 3 uero quae mixta aliis materiis adeo nocendi naturam deponunt, ut ex his antidoti et alia quaedam salubria medicamenta conficiantur, aliud dicit potest. Si quis amico peregre eundi 4 mandauerit, ut fugitivum suum quaerat et si inuenerit uendat, nec ipse contra senatus consultum committit, quia non vendit, neque amicus eius, quia praesentem vendit: 5 emptor quoque, qui praesentem emit, recte negotium gerere intellegitur. Si res uendita per furtum perierit, prius animaduertendum erit, quid inter eos de custodia rei conueniat: si nihil appareat convenisse, talis custodia desideranda est a venditore, qualem bonus pater 6 familias suis rebus adhibet: quam si praestiterit et tamen rem perdidit, securus esse debet, ut tamen scilicet uindicationem rei et conditionem exhibeat emptori. unde uidebimus in personam eius, qui alienam rem uendiderit: cum is nullam uindicationem aut conditionem f. 238^r habere possit, ob id ipsum damnandus est, quia, si suam rem uendidisset, potuisset eas 5 actiones ad emptorem transferre. In his quae pondere numero mensurae constant, ueluti 35 frumentum uino oleo argento, modo ea seruantur quae in ceteris, ut simul atque de pretio conuenierit, uideatur perfecta uenditio, modo ut, etiamsi de pretio conuenierit, non tamen aliter uideatur perfecta uenditio, quam si ad mensa adpensa adnumeratae sint. nam si omne unum uel oleum uel frumentum uel argentum quantumcumque esset uno pretio uenierit, idem iuris est quod in ceteris rebus. quod si unum ita uenierit, ut in singulas 40 F [P(VU)]

1 habuit et] *firmant B.* habuit ita ut (*similiter Hal.*)? 2 quia? 3 casus] *causis P^a | si et 'et' emptor F, si bebis] habere P^a | putant] fPU, putat F, putat V | scit non sit non P^a 3 obligantur F1 tauerunt V 23 usus P^a, usui P^a | esse nobis P 24 natura' m. F2 | antidoti] FP^a, antidota P^a yU, inc. V^a 26 sum] serum P^a u aut P, ita ut U 9 emptio ita] fPU, emptioita, F | esto mihi P | stichum aut pamphilum P^a 13 emptoris s' F 14 non et illud an] non et illud P^a, non et an illud P^a, et non illud an U, non ut illud V 15 pro- rigendum F1 17 sepe F (*suppl. f*) 38 ad mensa] ad mensa F2 | et adpensa P^a uari F1 | conuenisset F | pr'a etio F2V | uenerit P^a V*