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## LAESIO ENORMIS

J. B. THAYER\*

The above phrase, coined by the medieval commentators on Justinian's legislation, describes the rule that a legal transaction may be avoided or rescinded on the ground of great disproportion in value of the reciprocal advantages which were the subject of the agreement.<sup>1</sup> In Anglo-American equity jurisprudence various expressions are used to justify this type of rescission; the contract is termed "unconscionable", "oppressive", obtained by "undue influence", or containing such grossly inadequate consideration as to evince fraud, treated, however, as "constructive".

### HISTORY OF THE DOCTRINES

#### A. Till Justinian

Of ancient laws other than the Roman, only two, the Chinese and Jewish, offer anything clearly relevant to the topic.<sup>2</sup> Anticipating the famous rescript of Diocletian as later construed in this article, the Chinese code penalized those who used a position of power to exact usurious interest or to compel a sale or purchase upon unfair terms.<sup>3</sup> The crime was assimilated to that of receiving bribes for a lawful purpose and the offender was compelled to restore what he received to its former owner, forfeiting to the state what he gave. The Jewish law is without example in its severity, permitting rescission if the disproportion is as slight as a sixth. This appears to be confined to movable property, the Roman requirement that the lesion be *ultra dimidiam* obtaining for transfers of land.<sup>4</sup> Further details may be

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<sup>1</sup> The assertion that the doctrine was never applied to gratuitous transactions is examined *infra* n. 29.

<sup>2</sup> A few vague references to the laws or customs of the Hindus, Egyptians, Mahometans, and Greeks have been collected by Bendelini, 255 ff. According to Cug. Et. dr. Bab. 388, the Babylonians allowed a co-owner to rescind a division upon discovering its inequality. The parallel passage of the Roman law (C. 3.38.3) is discussed *infra*.

<sup>3</sup> Ta Tsing Len Lee, Sec. 349, tr. Staunton; cf. for details Boulais, Code Chinois, 661 ff.

<sup>4</sup> Cf. Pineles, 77, Kadushin, Jewish Code of Jurisprudence 963 ff.

studied in Kadushin; here it is only necessary to add that the relief is refused if the seller knew the bargain to be unfavorable to him, but was forced to it by need of money. This system thus rejects what is universally conceived as the basis of our doctrine, i. e., the exploitation of weakness, and depends upon a presumption of fraud, most remarkable in view of the exiguity of the "overreaching". The idea that the relief is accorded merely for a mistake is refuted by the rubric, translated by Kadushin as "Law of Business Fraud". Of these two systems, neither of which had any known influence on others, it may be remarked that the first is thoroughly modern in its standpoint and the other *sui generis*.

As is well known, the origin of our doctrine in European law is a rescript attributed in Justinian's Code (4.44.2) to Diocletian and Maximian, A. D. 285, of which the following is a literal translation. "If you or your father sold a thing of a greater value for a lesser price, it is humane that either returning the price to the buyers you receive the farm sold, the authority of the judge intervening, or if the buyer so desires, that you receive what is lacking to the fair price. Moreover, it seeming to be a lesser price if half of the true value was not paid."<sup>5</sup> This laconic bit of legislation has caused such endless discussion that its careful consideration is excusable if not necessary. When the Corpus Juris was the reigning statute law it was necessary to determine whether the rule was the exception, to be restrictively interpreted, or the statement of a principle general in its application. This in turn depends on the previous state of the law as exemplified in the Digest. On the question the authorities were fairly equally divided, their solutions usually reflecting the same difference in conception of social policy which causes today such lively dispute as to the justice of our institution.<sup>6</sup> The recent tendency has been to regard the rescript as having been falsified by Justinian, to whom the genesis of the idea is attributed.<sup>7</sup>

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<sup>5</sup> As usual in Latin the same word (*pretium*) is used for price and value. It is hoped that the choice of nouns speaks for itself. On the phrases *verum* and *justum pretium* see de Senarclens, Mel, Fournier, 685.

<sup>6</sup> The references may be found in Vangcrow, 327 ff.

<sup>7</sup> Solazzi gives sufficient details as to this controversy, conducted at times with considerable acrimony.

As to whether the Romans before Diocletian were affected by extraordinary inequality of a bargain the burden of proof is admittedly on the proponents of the affirmative, for the Digest refuses relief on this ground as regards sales and leases.<sup>8</sup> Of the passages cited as favorable only those not adequately disposed of deserve treatment.<sup>9</sup> The rule that the price is reduced for a buyer who has the usufruct is unlike ours in requiring a mistake and depends on the principle that usufruct is a *pars domini*.<sup>10</sup> Moreover the buyer might be quite as impoverished if the usufruct were outstanding, but would then have to await eviction. The aid accorded husband or wife prejudiced by incorrect valuation of the *dos* is clearly irrelevant, since the wife was forbidden by law to make any agreement impairing her position.<sup>11</sup> The mutual desire to gain at the other's expense which is the essence of a sale or lease, would here not be countenanced if it existed. This same element may be held to explain another passage allowing correction of an inequitable decision by an arbiter chosen by partners to name their proper shares.<sup>12</sup> The contract of partnership implied a quasi "fraternal" relationship incompatible with the intention to overreach one another. The conclusion does not seem surprising that the parties were not bound by an agreement depending on a serious error in valuation of the assets contributed. Such indeed is the effect of the limitation to sale and lease of the transactions in which overreaching is "naturally permitted". No question of lesion arose in any other of the Roman nominate contracts.<sup>13</sup>

A more difficult problem is presented by the texts, all of Diocletian, allowing relief for lesion in a division accomplished by co-owners.<sup>14</sup> A division is an exchange (*permutatio*) of a

<sup>8</sup> 19.2.22.3. ff.

<sup>9</sup> On 18.1.54 see Lenel, Palingenisia, cf. also 21.1.1.8. The most superficial examination is enough to discard the sometimes cited 10.2.38 and 21.2.47. In spite of Solazzi, 57 n. 2, fraud is clearly presupposed in C. 2.50.5.1. In 45.1.36 the contract when reduced to the proper form failed to correspond as intended to the terms previously settled.

<sup>10</sup> 18.1.17; cf. Harv. Legal Essays, 495 n. 60.

<sup>11</sup> The texts are 23.3.6.2; *id.* 12.1; cf. Czyhlarz, R. Dotalrecht, 159 ff. for the limitations of the analogy to a sale.

<sup>12</sup> 17.2.79.

<sup>13</sup> Three were gratuitous; *mutuum* was covered by the usury laws; and pledge conveyed only a conditional and temporary right, cf. 13.7.1.2.

<sup>14</sup> C. 3.38.3; cf. Consult. 2.5.7.

part of one thing for part of another and exchanges are like sales typically bargaining transactions. That the result cannot reasonably be restricted to a case of actual fraud is sufficiently proved by the fact that a recent writer has been forced to hold interpolated the receipt as it appears in the Consultatio.<sup>15</sup> In Consult. 2.7 we are told that a division not made *bona fide* may be corrected without recourse to the restitution usually accorded even to majors, which extraordinary remedy is mentioned in C. 2.53.3 as a peculiarity of *bona fide* actions. Herewith a fresh problem is presented; for there appears to be no need for the restitution in view of the existence of the contract action.<sup>16</sup> Moreover the theory that any of this represents an innovation by Justinian or even Diocletian runs counter to the tenor of these passages, which treat the rules as a matter of course.<sup>17</sup> As regards the ground for the relief against the division it may be remarked that such a transaction usually differs from the ordinary exchange, instead of bargaining each for what he wishes the parties are attempting to divide on the basis of an equal valuation. The relief against any serious error in the appraisal is then an example of the general principle distinguishing mistakes in the performance from those in the formation of a contract.<sup>18</sup> The injured party who was never bound by the contract (innominate) has in theory a *condictio sine causa* of which the exact amount can be discovered only by the divisory action. In short the division is not complete since it has not settled the cross claims of the parties. It remains to consider the implication that the extraordinary restitution is necessary if the contract was binding. The case may be supposed of a sale for a price to be determined by an arbiter, whose decision is surprisingly high or low. If he reached the conclusion by malice the transaction is void, for the condition that he use his judgment was not fulfilled. If,

<sup>15</sup> Albertario, Arch. Giur, 100.238; cf. the vacillations of Accarias, *Precis*, 2.419 n. 2.884 n. 1. It may be noted that the plural *fraudes* is very far from definite in the Latin language.

<sup>16</sup> See Vangerow, 1.303. Few of those who attempt to deny the existence of the restitution have considered the rubric of C. 2.53 and none the express reference in Consult. 2.7, which refutes the idea that the former passage referred to a case of absence, so Duquesne, *Mel Fournier*, 199.

<sup>17</sup> Far from finding the principle anomalous *Cuq. cit. supra*, n. 2 reproaches the law for delaying until the time of Diocletian.

<sup>18</sup> Cf. the *condictio indebiti*; Foulke, 11 *Col. L. Rev.* 303; *Harv. Legal Essays*, 483 ff; see also C. 4.44.3 *cit. infra*.

however, he made an honest serious error, the parties are bound by the contract, for they assumed the risk of defects in his judgment. Here then is a case for restitution on the ground that the transaction was *bona fide*, provided that the decision is such that it would not have been reached by a reasonable man not affected by an extraordinary error. The fact that the injured seller may have either an action on the contract, if the buyer was fraudulent, or a condition if the sale was void for fraud of the arbiter, or a claim for restitution, is enough to explain the plural *actiones* in 16.3.2, the final passage cited for the existence of the lesion before Diocletian.<sup>19</sup>

All this only reinforces the conclusion, now generally espoused, that our main rescript introduced a new doctrine to the law, and the next question concerns the reason. As already noted the present tendency is to attribute the rule to an interpolation by Justinian, the objections to the form and substance of the rescript having been best developed by Brassloff.<sup>20</sup> These, however, relate only to the second half of the text, and the rule itself can be removed only by the excessively arbitrary expedient of Solazzi, who rearranges the passage to speak of fraud with a decision analogous to that in C. 4.44.10. No answer has been or apparently can be given to the question why Justinian's compilers should have selected this harmless and indeed banal pronouncement to receive the honor of such an epoch making innovation. It seems indeed incredible that instead of giving himself just credit for the idea Justinian should have taken the trouble falsely to attribute it to the pagan persecutor. The conclusion is obvious; Diocletian allowed the rescission but Justinian altered the conditions therefor required. The conjecture has been advanced that the original case was one in which the buyer was a magnate or *potentior*, a class who at this time in Rome were productive of much difficulty.<sup>21</sup> Many phenomena tend to confirm this hypothesis. All except the last sentence of C. 4.44.8 is devoted to refuting the idea that anything theretofore pro-

<sup>19</sup> It is thus unnecessary to recur to the allegation of interpolation, more plausible in this case than usual.

<sup>20</sup> The number of the buyer changes; the verb "receive" is unnecessarily repeated, and the mathematical test is suitable neither in a rescript nor in the law of Diocletian, whose enactments possess most of the pregnant good sense of the great lawyers.

<sup>21</sup> See Monnier, *Nouv. Rev. Hist.* 1900 *pass*, esp. 181.

vided (i. e., C. 2.53.3; 4.44.2) permits rescission for mere inadequacy of price. The reference in our rescript to "you or your father" becomes explicable if the ground of complaint lay in the personal relation of the parties, whence it might be deduced that the privilege of rescission died with the seller. Similarly the change of number as regards the buyer indicates that facts on that point (one or more being *potentiores*) have been omitted by the compiler. Sales of land compelled by *potentiores* are elsewhere mentioned and condemned.<sup>22</sup> If the rescript was so limited, the anomaly disappears that the succeeding Christian emperors refuse to recognize the general doctrine of *laesio enormis*, and it is quite natural to find them ordering rescission on the ground of *potentia*.<sup>23</sup> The theory was, then, one of duress (*metus*) and the remedy the usual restitution *in integrum*.<sup>24</sup> Hence it is that the signs of interpolation begin at the moment the buyer is accorded the option to make up the price, which would be unjustifiable if he had exercised compulsion. Justinian apparently wished to avoid the confession of weakness in his administration by ignoring any such theory and making the test mathematical and the buyer innocent.<sup>25</sup> There is less temerity in this suspicion as well as that of the end of C. 4.44.8 since the contrary passages in the Theodosian code have either been omitted from that of Justinian, or altered so as to accord with the present condition of the main rescript.

## B. After Justinian.

In 1851 Theodor Mommsen wrote, "as a reasonable man may well write the history of Prussia but not that of the Charlottenstrasse in Berlin so may one who feels competent trace and develop the idea of ownership through the various systems, but (our) *lex* has no history".<sup>26</sup> Notwithstanding this pronouncement immense effort has since been devoted to pursuing the minutiae of the doctrine throughout the ages. Thus even if it

<sup>22</sup> C. 10.34.1.1; cf. C. 4.47.2.

<sup>23</sup> C. Th. 3.1.1,4,7. The case of rescission from Chron. Pasc. may be found in Hanel, *Corpus Legum*, 223, *cit.* Solazzi, 69.

<sup>24</sup> This explains the reference to the intervention of judicial authority, whereon see Zachariae, 57 ff.; Brassloff 271 ff.

<sup>25</sup> The option has caused the interpreters to excuse the buyer if the thing is deteriorated or destroyed, cf. Vangerow, 331.

<sup>26</sup> *Jur. Schr.* 3.573 (a review of Chambon's *Beitrage*); herewith Kittelmann opens his thesis.

were desirable it would be scarcely possible to discover anything novel, and it remains only to mention the references, with the briefest summary of their content.

The fate of the rule in Byzantium is followed by Zachariae, whose citations show that the immediate successors of Justinian were no clearer as to its purpose and extent than later investigators. In spite of doubts the result seems to have been to restrict the relief to the seller of land, and the claim was barred after four years as if it were the extraordinary restitution *in integrum*. Following the rubric and according to the above conjecture, this latter deduction is incorrect, the intent having been to grant the ordinary contract action.<sup>27</sup> The tendency to restrict our remedy in time has always been sensible; by the Jewish law above mentioned the buyer must get the goods appraised as soon as possible, and Art. 1676 of the French code establishes an absolute term of two years, reduced to one by the Swiss. In the Western section of the empire the barbarian codes follow that of Theodosius in refusing to admit the relief for lesion.<sup>28</sup>

With the revival of learning at Bologna the doctrine comes into its own and was at once extended in every direction: as to the object transferred, which did not have to be land; as to the person of the plaintiff, who could be the buyer; and as to the nature of the transaction, which could be any "commutative contract", *bona fide*, or *stricti juris*. Meynial's assertion that even gifts were included seems, however, unwarranted, though some quite properly refused to take at its face value a statement in the contract that a gift of the balance was intended.<sup>29</sup> This question of the renunciation of the privilege caused much discussion and led to the distinction between the *laesio enormis* and *enormissima*, which latter was considered conclusively to evince fraud.<sup>30</sup> Another hotly debated problem was the amount by

<sup>27</sup> The many later doubts on this point are described by Gluck, 67 ff., who with the majority decides for the *actio venditi*.

<sup>28</sup> Hereon cf. Meynial, Mel. Girard, 2.201; Benedittini, 274 ff.

<sup>29</sup> The application to gifts is denied with citations by Pinellus, 2.3.4. Meynial's quotation (St. Scialoia, 2.350 n. 1) from Bartolus is, according to the copy here available, incorrect; with regard to the gift he wrote *non potest venire contra*. In giving an illustration of a transaction *stricti juris* Cynus was indeed betrayed into mentioning a gift. It is indeed exceedingly difficult to imagine a case of this type, cf. Pinellus, 2.3.10,11: one is a stipulation for payment of services too dignified to be the subject of *locatio*, whereon *infra*.

<sup>30</sup> This distinction is repeated in the Anglo-American formulation of the rule mentioned *infra*.



which the buyer had to be injured: if the seller of a thing worth 10 could rescind if he lost 6 it was argued that the buyer should have the same right if he paid 16.<sup>31</sup> The explanation of the exceedingly favorable reception of the principle is doubtless to be found in the attitude of the Church, which refused to recognize the obligation to pay interest upon a loan, and whose lawyers were hostile to commerce. The most refined dialectic was expended in the attempt to define a fair price, which should be absolutely invariable, and any departure from which should constitute the crime of usury.<sup>32</sup> The consequence of all which was that at the end of the 18th century our doctrine was generally recognized in theory and practice, except in France where it encountered stubborn resistance and a great willingness to accept the stereotyped clause waving the privilege of rescission.<sup>33</sup> At this period, that of the French revolution and of the English utilitarian and laissez faire philosophy, the rule begins to meet with hostility, the same which attached to the limitations of interest upon loans of money. All such restrictions were abolished in France by the revolutionists, and the lesion reappeared in the code, restricted to the seller of land, only by the personal intervention of Napoleon. In the Prussian code the remedy was, curiously enough, confined to the buyer. The Code Napoleon assigned no limit to the rate of interest which would be promised, but a usury law soon followed it in 1807. As the century progressed, however, the hostility became more pronounced and the Portuguese became the typical legislation, not mentioning the lesion even in case of a division and placing no limit on contractual interest.<sup>34</sup> The commercial code for Germany and Austria of 1862 took the same attitude, although these nations have ever been the most liberal in our sphere.<sup>35</sup> The reaction set in at the beginning of the present century with the passage of the German

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<sup>31</sup> The excellent Averanius, *Interp. Juris*, 3.7, who was also a mathematician, devoted himself with particular pleasure to the explosion of this heresy, cf. however, Mayn, *Cours de D. R.*, 5.2.236 n. 10.

<sup>32</sup> Hereon see Endemann, *St. in der Rom.-Kan. Wirths, u. Rechtslehre* 2.29-76; Kaula, *Zeits. f. d. ges. Staatswiss.*, 60.579.

<sup>33</sup> See Memin, *Th. Paris*, 1926, 87 ff., 125 ff.; and cf. Demontes, 24 ff. For the various Italian states see Benedittini, 278; and on the reception in Germany Stobbe *Handb. Deut. Privatr.*, 3.250.

<sup>34</sup> Lists of the unfavorable codes with their dates may be found in Pineles, 75 ff.; Morixe, 140.

<sup>35</sup> See also the references to the Saxon and Bavarian Codes in Kittelmann, 92.

Civil Code. Following a criminal statute of 1893 it introduced to the civil law the concept of "real" usury (*Sachfucher*) and declared void as contrary to good morals any transaction whereby one exploits the need, recklessness, (*Leichtsinn*) or inexperience of another to gain advantages which in the circumstances stand in surprising disproportion to what was rendered. This provision, applicable also to commercial transactions, was reproduced in the Swiss Code of Obligations, added to the Austrian Code by a Novel, adopted by the Project for a unified Franco-Italian Code, and by the recent Polish Code of 1934.<sup>36</sup> Moreover in France it has excited the keenest interest and several bills in the Legislature.<sup>37</sup> Even though the French have not yet decided to follow their neighbors across the Rhine to the full extent,<sup>38</sup> their authors never tire of noting the numerous ways in which the principle of lesion has been introduced by statute or judicial decision. Examples are the laws of 1907 on the sale of fertilizer in favor of the farmers, of 1915 against "sweat shops", of 1916 on contracts for marine salvage, the many war measures establishing maximum prices for necessities, the judicial legislation whereby the courts reduced fees for professional services. The same tendency may be observed in countries where the law is absolutely hostile to the principle; Spain passed a usury statute in 1908, Roumania in 1930, and in Argentina the same result has recently been achieved by the courts on the ground that the transaction is immoral.<sup>39</sup> Herefrom those who are opposed to legislation on the ground of its futility, could draw an argument in their favor: in times of prosperity the Germans and Swiss are said to have made little or no use of their privilege of rescission,<sup>40</sup> while the Argentinians obtain it in moments of stress against the known desire of the legislator.

<sup>36</sup> For the last two assertions see Bull. Soc. Leg. Comp (1933) 443, (1934) 332.

<sup>37</sup> See the discussion of the committee in Bull. Etudes Legis. (1922) 25.

<sup>38</sup> Signs of nationalistic prejudice are not infrequent, cf. the just cited Bull., 37, and on the other side Ennecerus "u". \* *i. j.*

<sup>39</sup> See Morixe 143 n. 10.225; Bull. S. L. C. (1931) 387; for Sweden cf. Bull. S. E. C. *cit.* 39 ff.

<sup>40</sup> This alleged fact is much dwelt on by the French authors, cf. e. g. Demontes, 70 ff. Whether or not it was once true in Germany it is certain that since the war the cases under Art. 138 (2) are legion, cf. B. G. B., Bersau, *et al.* (1934), 1.224 ff.

ENGLAND AND AMERICA<sup>41</sup>

Though not recognized by the law *stricto sensu* (the *ius civile*) the doctrine of rescission for lesion is extensively applied by the courts of chancery or equity who administer the *ius honorarium* corrective of the strict law; the broadest statement of the principle is that contracts which "shock the conscience"<sup>42</sup> will not only not be enforced in equity but will be annulled or rescinded. As there seems much reason to suppose that the earlier chancellors treated contracts according to the theories of the canon or ecclesiastical law, it need occasion no surprise that definite rules are almost impossible to deduce from the cases. All that can be said is that the courts of equity possess and employ wider discretion in the matter than those of any other system yet mentioned. Not only is gross inadequacy of consideration a ground for rescission if advantage has been taken of the necessity, weak-mindedness, ignorance, illiteracy, intoxication or senility of the other, but there exist certain classes of persons like sailors and expectant heirs whose position is or was hardly distinguishable from that of a minor. All of which has been summarized as a "principle applying to all the variety of relations in which dominion may be exercised by one party over the other".<sup>43</sup> As to the immediate question at issue; the effect of inadequacy of consideration by itself, it is usually said that it is of no importance unless so gross as to be presumptive evidence of fraud. This of course means nothing until the nature of the presumption is determined. If it is rebuttable, the definition adds nothing to what has already been said about exploitation of weakness, etc. Although the rule may be often stated as if the presumption were conclusive, e. g. by Pomeroy, Sec. 927, with citations, it is difficult if not impossible to find a case in which the injured party did not suffer from one or more of the above mentioned defects.<sup>44</sup> Indeed, as has been remarked, without any such element the transaction is nothing but a volun-

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<sup>41</sup>The main authority for the following is 2 Pomeroy, *Equity Jurisp.* 4 ed., secs. 924, 928, 937, 963; cf. also Bigelow, *Fraud* 351-384; Walsh, *Equity*, 22 ff.; 481 ff.

<sup>42</sup>For this expression see *Abbott v. Sworder*, 4 De G. & Sm. 448, 461 (1852).

<sup>43</sup>See *Dent v. Bennett*, 4 Myl. & C. 269, 277 (1839).

<sup>44</sup>Cf. the remarks of Walsh, *op. cit.* 482-3.

tary gift.<sup>45</sup> This possibility has induced a French court to ignore the article of the Code which allows rescission for lesion in spite of a waiver.<sup>46</sup> Moreover, if the plaintiff has any characteristics of a trader or merchant, courts of equity tend to treat him with the utmost severity.<sup>47</sup>

#### SOVIET RUSSIA

In articles 33 of their civil code the Russians adopt a principle analogous to that of the Germans, holding void a transaction "manifestly unfavorable" and contracted under "extreme necessity". The novelty of the provision lies in the fact that the complaint may be made not only by the injured person but also by the state or the proper social organizations. This peculiarity has been attributed to the desire to protect one too poor to institute a law suit,<sup>48</sup> but it may be observed that the state has a personal interest, for as in China it confiscates what was rendered by the exploiter.<sup>49</sup> Theoretically, if not practically, a host of difficulties is presented by unwillingness to sue on the part of the injured person. Descending from the general to the particular it is interesting to discover an attempt to revive the medieval canon law principle of an absolute "just price", any deviation from which renders the transaction void. The supreme court has had to confine this doctrine to necessities, and even then denies relief if the plaintiff is rich.<sup>50</sup> It is a piquant phenomenon that the logical extreme of our doctrine has been espoused by the Bolsheviks and the Roman Catholic Church and its absolute negation by the French Revolutionists and the Spencerian philosophers of the last century. In conclusion citations are unnecessary to prove the notorious fact that in recent years Germany, Italy, and the U. S. A. have adopted a policy of legislation the basis of which is by restricting freedom of con-

<sup>45</sup> Cf. *e. g.* *Harrison v. Town*, 17 Mo. 237, 244 (1852); *Davidson v. Little*, 22 Pa. St. 245, 252 (1853).

<sup>46</sup> D. 96.2.108; cf. *Planiol, Traite*, 2.532. The distinction was drawn by the Byzantine scholiast *Harmenopolous*, ed. *Heimbach*, 364 n.

<sup>47</sup> In *Schweitzer v. Gibson*, 321 Ill. 336, 151 N. E. 865 (1926), relief was refused to the seller of a farm worth \$8,000 in return for bank stock which was not only worthless but actually carried with it a liability, *i. e.*, the price was less than nothing.

<sup>48</sup> *Eliachevitch, Nolde, et al.*, *Traite Dr. Civ. et Comm. Sov.* 2.13.4.

<sup>49</sup> *Arts.* 149, 150, 402. The injured party has no relief if the exploiter is the state bank, see *Freund H., Zivilr. Sowietruss*, 155.

<sup>50</sup> See *Eliachevitch, op. cit.* 87 for details.

tract to avoid lesion or exploitation of entire masses of the population. The evil which probably evoked the rescript of Diocletian and certainly inspired Napoleon's defense of Art. 1674 of his code has been drastically met in modern Germany by an absolute prohibition upon the alienation of farm property.<sup>51</sup>

#### ANALYSIS OF THE DOCTRINE

Preceding any abstract discussion of the problem a few criticisms are in order of the various solutions which have stood the test of time to the extent that they still prevail. The codes which deny relief may be here excluded, for instead of attempting a solution they ignore the problem. The remainder may be divided into two categories: those like the French code which impose strict limitations, and those which follow the wide principle of the Germans. To show the inadequacy of the former little need be said. According to the French authors there is not a case on record where relief has been granted under Art. 1674. The nearest approach to it is the practice of the courts of rescinding sales of land in return for an annuity the amount of which does not seriously exceed the average annual rental value of the property. This remedy is held to be more fundamental than Art. 1674 being barred in 30 years instead of 2; moreover the lesion is not necessarily as great as 7/12. In short the doctrine is justified by nothing in the code or in logic, and is an example of the protection of the aged and infirm already met with in the Anglo-American law.<sup>52</sup> As for Art. 888, which permits rescission of a division for lesion of more than a quarter, even if the transaction was called a sale, etc., no reason is perceived or has been discovered for allowing a co-owner to revoke a voluntary act whereby he preferred for one reason or another property of less value in the market.<sup>53</sup> To the German definition of "real" usury the main objection is its extensiveness.<sup>54</sup> No exceptions are made for property the value of which is problematical, like curios and works of art,<sup>55</sup> or for commercial trans-

<sup>51</sup> See Lowenstein, 45 Yale L. J. 799 ff.

<sup>52</sup> See Planiol's note D. (1911), 1.353.

<sup>53</sup> A tendency to erect exceptions to this doctrine may be noted, cf. Demogue, 649.

<sup>54</sup> This is voiced by the reporter in the first citation made, *supra* n. 36.

<sup>55</sup> It was otherwise in the Prussian Code, Dernburg, Lehrb. Pr. Privatr., 2.356 n. 15.

actions. Cases may be imagined where the Code provision seems obviously to overshoot the mark. A dealer who ignores that an object is a genuine Titian or piece of Lowestoft should not be able to rescind the sale because the buyer happened to know or think that such was the case. If, in order to obtain the money to buy a family portrait, which he really desires, one sells what he knows to be a Titian which he dislikes, it seems inequitable to allow rescission on the ground that the owner ignored the present value of the Titian. On the same score of inexperience, relief would seem due to a tourist in a foreign country who pays for an object more than what would have been obtained from a native. The word *Leichtsinn* allows rescission of bargains on the ground of their improvidence regardless of their intrinsic justice. If articles de luxe are sold to one who cannot afford them he may rescind although the price would have been unobjectionable in the case of a richer buyer.<sup>56</sup> One who could not pay the price but agreed to do so in order to create inflated credit for himself has been allowed relief though he was engaged in the attempt to perpetrate a fraud.<sup>57</sup> There is indeed plausibility in the assertion of the other party that it is he who is injured by the acquisition of a bad debt. Strangely enough the German provision is from another standpoint too narrow; the fact that the defendant is a usurer has led to the exclusion of such cases as excessive charges by physicians, or contracts of marine salvage, on the ground that the necessity is not economic.<sup>58</sup> The difficulties of defining necessity are clear when the desire is to make a speculation with the proceeds of the transaction. Again a common criticism of the requirement is that it demands bad faith on the part of the defendant.<sup>59</sup> It is argued that one may equally deserve relief though his position was unknown to the other. This difficulty has, however, been met by the Germans, who annul the transaction not as usurious but as contrary to good morals.<sup>60</sup> The truly usurious transaction differs in that the usurer is liable though the thing has perished

<sup>56</sup> See *Jur. Wochenschr.* (1906), 366.

<sup>57</sup> *Seuff. Arch.*, 64 No. 2.

<sup>58</sup> See Brodmann in *Ehrenberg's Handb. ges. Handelsr.*, 4.2.208; *contra* *Ennecerus* n. 8.

<sup>59</sup> For the problem of putative necessity see Brodmann *cit.* 209.

<sup>60</sup> *Ennecerus*, 539 (*cf. infra* n. 73), who goes on to mention the "social" usury, whereby in the war and inflation period profiteering was repressed.

without his fault and that the transfer of ownership is "void". This latter point has occasioned tremendous dispute, e. g., as to whether the usurer can complain if the transaction turns out to his disadvantage. The Swiss Code thus accords only a unilateral right of avoidance within a year. *Bona fide* third parties are, nevertheless, protected in Germany, and not in France. With respect finally to the Anglo-American system it leaves such unfettered power in the hands of the judges as to lead to arbitrariness. In order to preserve family estates, sales by expectant heirs were so severely dealt with as to evoke a corrective statute, which in turn was denatured if not ignored by the judges.<sup>61</sup> If the recipient of the benefit is a mistress or religious adviser, the courts often annul the transaction more because of their own prejudices than of any defect in the will of the donor.<sup>62</sup>

Turning now to the true basis of a doctrine at present so popular, it will be found on examination to be most elusive. Mistake, fraud, duress, lack of *causa*, abuse of the right to contract, exploitation of the weak, public policy, temporary or accidental incapacity have all been suggested as the justifying factor, and the very number of these expedients is a sufficient indication of the logical weakness of the foundation. It is indeed far easier to prove why the doctrine should be denied any place in the law. The situation is further complicated by doubt as to the relative significance of the injury to the plaintiff and the reprehensible conduct of the defendant. Under these circumstances it seems advisable to consider some of the possible permutations of the typical hypotheses in which relief has been accorded. It may be observed at the outset that the definite mathematical limit which has been adopted following Diocletian's rescript is discarded for obvious reasons. We may begin with objects like land, the value of which is individual, not governed by a general custom of charges. If he is a seller or lessor the injured party may ignore the lesion, the case of mistake, or he may not, in which case he acts either by some kind of compulsion or desires to make a disguised gift. In the case of a buyer or lessee there is the further

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<sup>61</sup> Hereon see Pomeroy *op. cit.*, sec. 953.

<sup>62</sup> Cf. e. g. Norton v. Relly, 2 Eden 286; Lyon v. Home, 6 Eq. 655, 682; Shipman v. Furniss, 69 Ala. 555; Leighton v. Orr, 44 Ia. 679. In the absence of an anti-conventional bias it is hard to see how there could have arisen any doubt whatsoever of the validity of the gift in Allcard v. Skinner, 36 Ch. Div. 145.

possibility that he has a personal affection for the object, which of course excludes any claim for lesion. Similarly, the other party may or may not know the value of the object or realize the compulsion. The compulsion may be of various kinds besides economic necessity: the seller may desire money at once in order to make a speculation, e. g. to join the gold rush, or he may be forced to make the disguised gift by the influence of his family or friends. *A priori* it is not easy to see why an adult should be allowed to rescind an unfavorable bargain of his own making when the other party did no more than accept an offer, which was or might have been made to anybody else. It is submitted that the justification, if any, for such a rule must be sought in the analogy to prodigality; the injured party is, as it were, interdicted retroactively. In other words the transaction must concern almost all the estate of the plaintiff, who should have relatives or dependents to suffer thereby. Even here it may be doubted if relief should be granted if the defendant is perfectly innocent, e. g. he also ignored the fact that the property was worth more than he paid, or not desiring it paid the money he sorely needed at his friend's request. The situation is different if the initiative is taken by the gainer. If he knows that the price he names is more or less than others would offer and also that the offeree ignores this fact, he is engaged in the attempt falsely to represent the value. This representation is usually of no importance because the other is assumed to disregard it, but it ceases to be insignificant if the other is known to be weak, trusting, gullible, or disturbed by economic or other dangers. Thus is justified the ancient principle of the medieval commentators, who insisted on a *deceptio* in their interpretation of Diocletian's rescript. If on the other hand pressed by necessity the seller agrees to the inadequate offer without knowing whether it is fair or caring to inquire, the fraud has failed of its effect and rescission if any should be granted on the score of prodigality. Such a person prefers the slight sum of money to the object and the only injury is to his dependents. As to the case of mistake, here merely as to the value, its insignificance is generally admitted. An error as to value alone is conceivable only if the mistaken party is indifferent, or grossly negligent in the failure to make inquiries.



There is another class of case where the analogy is to duress rather than fraud, because the danger is physical and immediate, leaving little or no opportunity for reflection or inquiry. The typical case is that of marine salvage, wherein the courts of Admiralty have always exercised the power of reducing the agreed compensation as excessive.<sup>63</sup> Similar to this situation is that of one suffering from a disease who agrees with a physician or a surgeon for a cure. If, as is usual, the exorbitance of the reward is realized by the rescuer there seems in theory little objection to the reduction. The difficulty lies in determining the proper amount, for life is priceless and the services of the physician may be in fact or in general belief of unique excellence. Moreover, a very slight reward may be enormous to the promisor if he is poor, and conversely the services of the physician may in such a case be particularly complicated and exacting so that he can allege that but for the promise he would not have undertaken the case. In view of the pricelessness of life it may be argued that no reduction is possible if the doctor reasonably regarded the fee as moderate, but if he knowingly takes advantage of the danger he seems hardly distinguishable from a black-mailer or extortioner. Another case which might be here included is the converse one where the reward for the services is inadequate due to the desperate necessity of the worker. If having vainly sought employment and reduced to despair he accepts "starvation" wages, he may be said to have acted under fear of death. However, only the Germans have taken the logical step of treating labor as a commodity to the extent of permitting a claim for the regular or customary wage.<sup>64</sup> The objection is that in times of depression there may be no adequate regular wage and also that later payment of a large sum hardly compensates for the continual past privation. Moreover, the lesion is usually general and impersonal, and the enterprise may have been possible only at the rate of wages actually paid, so that the employer is quite incapable of making the necessary refund. A better if not an adequate remedy is the usual one of social legislation, establishing minimum wages, etc.

Analogous to the starving and unemployed worker is the poor debtor for whose benefit modern usury laws are established.

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<sup>63</sup> See *The Elfrida*, 172 U. S. 186 (1898), and cases *cit.*

<sup>64</sup> Cf. *Ehrenberg* (*supra* n. 58), 2.2.631.

The only distinction between the person injured by *laesio enormis* and the victim of usury lies in the fact that the former already has something to sell or with which to buy. Though it is a branch of our topic the subject of usury has a history and literature of its own and is so connected with economics that only the briefest remarks are in order.<sup>65</sup> Since Turgot and Bentham it has been agreed by economists that statutes generally limiting contractual rates of interest are more than futile, in that they increase the evil by driving underground what should be a legitimate enterprise. Instances are on record where debtors who have been saved by a reasonable loan have used the statute to escape a just liability.<sup>66</sup> It appears to be the consensus of opinion in America that protection is in order only for the poor who need temporary small loans, in which case a fair rate of interest may amount to as much as 50% per year. Such a debtor must pay for his fellows who default or must do without credit altogether. The evil of "moral usury", or lesion in our sense, is due to the ignorance or timidity of the embarrassed person, unable or unwilling to approach properly constituted channels of credit. Such cases present either the element of duress in so far as the borrower who has nothing must get the loan at any cost, or that of fraud in that he is led to suppose that the charges are not extortionate.<sup>67</sup> The American Ryan<sup>68</sup> asserts that "no one goes out to borrow \$1,000 or \$500 because of extremity or necessitous circumstances" while in England one of the main classes protected by the laws is the young man of fashion, heir to a large or aristocratic estate. This character, who presented a similar problem in ancient Rome (*S. C. Macedonianum*), has not figured in the commercial and bourgeois society of America.<sup>69</sup>

Here as before the popular type of statute invented by the Germans seems too extensive. If money is desired with which to bet on a horse race the lender might easily be justified in stipulating for the return of many times the sum lent. Where dis-

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<sup>65</sup> The following remarks are largely based on the excellent little book of an economist, *Usury and Usury Laws*, by F. W. Ryan (1924).

<sup>66</sup> The public indignation against the borrower is described by Ryan, 53.

<sup>67</sup> For the element of fraud see Bellot, *Bargains with Money-lenders*, 2 ed., 54.

<sup>68</sup> *Op. cit.*, 77.

<sup>69</sup> He may anyway be guarded by the "spendthrift" trust, more difficult of constitution with respect to land, the asset of the English gentry.

charges in bankruptcy are allowed, he risks losing all and the borrower obtains a chance to gain enormously. The question what is a disproportionate sum in view of the risk, can, it seems, be fairly answered only on the basis of commercial experience.<sup>70</sup> It is believed that the proper legislation should not only be confined to professional money lenders but also to particular types of loans or borrowers.<sup>71</sup>

Another case of lesion, mentioned by the French authors, is that of excessive fees charged by mandataries. This differs from those hitherto discussed in that the reduction is made regardless of the circumstances of the mandator, who may be well able to afford to pay the charge. It will be remembered that in Rome all services of such dignity as to be incapable of *locatio conductio* were subject if at all merely to remuneration *extra ordinem*, so that the mandator could bind himself to pay a definite sum only by the formal contract of stipulation. This would tend to put the promisor on guard, causing him to make inquiry and take advice before assuming the liability. The dignity of the agent's position, the technical nature of his profession, mysterious to the layman, and the confidence reposed in him by the client, are all elements tending to make him what is called in Anglo-American law a fiduciary, *i. e.* one who owes a duty of full disclosure of all relevant facts. As such relationships become commercialized (cf. our trust companies) the lesion will be less recognized.<sup>72</sup> If the service is of a stereotyped nature the law may well attempt to maintain the reputation of the profession by refusing to recognize charges the exorbitance of which is not appreciated by the client. The situation is analogous to that of prospective partners or spouses, where bargaining is contrary to "public policy".

Again there is the general type of lesion affecting the whole community or a class thereof, when necessities or widely marketed products are sold at excessive prices. By monopolies, legal or *de facto*, by extensive advertising, the public may be deprived

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<sup>70</sup> Under the money lender's act in England 85% has been held not excessive, see Hastings, Moneylenders, 63.

<sup>71</sup> Economists distinguish "productive" from "consumptive" loans. Borrowing to bet on a horse race is of the former type.

<sup>72</sup> According to the Restatements of American law the duty is owed by an attorney to a prospective client (Agency, Sec. 390e), but there seems to be doubt about the trustee (Trusts, Secs. 222d, 242h). The importance of the idea of commercialization is noted by Ripert, *Regle Morale*, 122.

of its chance to "shop around" and find better bargains. As the injury is here to rich and poor alike the problem is not one for private law but for politics, and relief will be accorded by the legislature in proportion to the power and organization of the group. The French farmers may complain of a lesion of a quarter in regard to chemical fertilizer while Americans continue to pay many times their actual value for cosmetics and patent medicines. Laws to repress profiteering in necessities are doubtless often rather attempts to placate consumers in time of scarcity than reflections on the greed of the retailer. If the enterprise is a purveyor of a necessity and also a monopoly, like a railroad, gas, or electricity company, its contracts are everywhere subject to control. In America this is usually done by public service commissions. In Germany the case is the main example of the non-usurious transaction contrary to good morals.<sup>73</sup> The practise by wholesalers of giving price discounts to favored retailers cannot be truly classified as a lesion to those not favored, it is a manifestation of the same type of commercial pressure as that of "price cutting" to consumers.<sup>74</sup>

In the effort to cover the various situations recently presented as examples of lesion we have been driven far afield. Every legal claim depends upon a lesion of some kind, and the further we have progressed the more has been neglected the requirement that the lesion be enormous. In truth our doctrine should be confined to transactions where the parties are trying and allowed to circumvent each other. In the absence of a bargaining intent any lesion however small may offer ground for rescission. Gifts are very freely annulled in Anglo-American law on the score of undue influence, and for the same reason they were void in Rome between husband and wife. The acquisitions of one continually able to play on another's emotions are jealously regarded by the courts.<sup>75</sup> The general interest in the security of transactions is at its minimum where the parties are not dealing at arm's length. Of the transactions included the Roman law spoke only of sales and leases (including those of particular kinds of services). Now that there are no longer any

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<sup>73</sup> See *supra* n. 60: on the French contrat d'adhesion cf. Ripert, *op. cit.*, 93 ff.

<sup>74</sup> In America the recent Robinson-Patman Act attempts to prohibit certain of these practices, cf. 50 Harv. Law Rev. 106.

<sup>75</sup> Cf. the facts in *Morley v. Loughnan* (1893), 1 Ch. 736.

innominate contracts, there may be added exchange or "permutation", compromise or "transaction",<sup>76</sup> and loan at interest, which is a kind of lease. Here the lesion may be only a manifestation of a particular kind of fraud or extortion, if the latter conception is extended to the threat not to rescue the endangered person. In other cases relief is defensible only on the principle of prodigality, and should never be available if the injured party is a merchant and the transaction made in the course of his business.<sup>77</sup> From what has been said it follows that the defendant should be treated as *mala fide* and so liable whether or not he still has the fruits of the bargain.<sup>78</sup> In this respect as in its rejection of any arithmetical requirement the provision of the German code represents an improvement from the doctrines derived from Diocletian's rescript. It may be added that most of the above considerations seem applicable to promises of a penalty, where it is believed that theory and practise are often too indulgent to the promisor.<sup>79</sup>

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<sup>76</sup> On this contract see the excellent remarks of Vangerow, 329 ff.

<sup>77</sup> This conclusion of Morixe, 198, is heartily endorsed though no such exception is made in the European systems, cf. for Austria, Altmann-Jacob, Komm. Oest. Strafr., 2.1587; for Italy though with some doubt Cuturi, Vendita, 615 ff. The transaction is aleatory and the loan productive, see also *supra* n. 47; Ripert, *op. cit.*, 120.

<sup>78</sup> The Peruvian Code makes an interesting distinction between defendants in good and bad faith, cf. Morixe, 88.

<sup>79</sup> See 9 Tulane L. Rev. 191.

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