ARTICOLE

THE LONG LIFE OF *LAESIO* ENORMIS

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Abstract: *Although it is often said that the price in a contract of purchase and sale must be* iustum *(fair or just), it was not a requirement for the validity of the contract in Roman law. In classical Roman law of sale no account was taken of unequal bargaining power in the parties and they were entire free to fix the price, there being no requirement that the price must be adequate or fair. In late Roman law, however, there was an attempt to require a "just" price in a contract of purchase and sale. The doctrine upon which this was built, was known as* laesio enormis*. This Roman-law doctrine was later received in the Netherlands and although it extended to contracts generally, it was specifically applicable to contracts of sale. In Roman-Dutch law contracts could therefore be rescinded on the basis of* laesio enormis *in cases in which a person was prejudiced to more than half the price. Dutch acceptance of this doctrine shows how strongly the Dutch were bound to the classical tradition. As a successful commercial nation, trading with the greater part of the known world, they still retained this doctrine which was prejudicial to free commercial intercourse. When the Dutch came to the Cape of Good Hope in 1652, they brought their legal system, Roman-Dutch law, along with them and this ensured the continued existence of* laesio enormis *in South Africa.*

Keywords: contract of purchase and sale; *iustum pretium*; *laesio enormis*; reception; transplantation; substantive unfairness.

1. Introduction

The law has strange ways, and Roman law probably stranger than most. The most amazing thing is that Roman law has survived in spite of the fact that the Roman Empire came to an end almost two thousand years ago. The *de facto* division of the Roman Empire in A.D. 395 resulted in an Eastern and a Western Empire. At the end of the fifth century the West was in the hands of Germanic warrior kings. In general the Germanic peoples lived according to their own tribal

law and the Romans according to Roman law. In the Eastern Roman Empire the law culminated in a classical revival and the codification of Justinian. The Emperor wanted to transform the masses of Roman law into a system that could be used for the academic teaching of law and for legal practice. This codification was of extreme importance since, at the very moment when the ancient world was breaking apart, it succeeded in collecting together the literature of the Roman law. Justinian's collection survived, mainly because of the reception of Roman law in Western Europe (in countries such as the Netherlands, Germany and France). This reception will be discussed in more detail *infra*.

Against this background, another remarkable survival will briefly be discussed, namely the doctrine of *laesio enormis*. This doctrine was only ever mentioned twice in Justinian's *Code.* There is no certainty about its origin or the reason for it, but somehow it survived, came to be received in Dutch law, was received in the Cape of Good Hope and in all the colonies of South Africa. At present, although it has since officially been abolished, there is mention of a possible revival of this doctrine.

2. The reception of Roman law

2.1 Introduction

Ideas have wings. No legal system of significance has been able to claim freedom from foreign inspiration.[1]

It may be regarded as normal that "foreign" legal ideas, doctrines and even whole codes be adopted. However, the process known as "the reception of Roman law" may be distinguished from other receptions in view of its scope and impact.[2] "The reception of Roman law" may be interpreted in two ways. In the wider sense it coincided with the history of Roman law in Europe after the fall of the Western Roman Empire in A.D. 476, and in the narrower sense it points to the adoption of Roman law as a system in Western Europe during the fifteenth and sixteenth centuries.[3]

The reception of Roman law was an important event in the civilization of the modern world. Thus Haskins stated: "Thrice, says Jhering, did Rome conquer the world: by her arms, by her church and by her law" and "the ultimate conquest of her law was a spiritual conquest, after her empire was dead and her armies turned to dust".[4] Although Roman law obviously had its greatest impact in those areas where the Germanic law was less developed, the scientific reception of Roman law (the adoption of Roman doctrines, concepts, principles and methods) eventually probably had a more important and extensive effect.

The reception can, in the broadest sense, be divided into various phases. The first phase was the pre-reception or infiltration phase prior to the twelfth century.[5] This was a period during which Roman law was randomly included or received into the Germanic customary laws. Roman law survived despite the fact that it was no longer supported by the Roman Empire in the West. This was due to the fact that it was still applied by the Romans and that some Roman-law rules infiltrated the local customary rules. In the East, Justinian codified the Roman law and, in addition, there was a revival of jurisprudence in Lombardy during the eleventh century which spread to the south of France. The intellectual "rediscovery" of Justinianic Roman law in the twelfth century by the law school of Bologna and its subsequent clarification by the universities of the Middle Ages constituted the second phase.[6] The revival took the form of a scientific study of Justinian's codification of the law. The glossators and their pupils spread far and wide over Europe and played an important role in the reception of Roman law. The third phase was that of the early reception (thirteenth to the middle of the fifteenth century).[7] During this period, there was an increase in the influence of the scientific study of Roman law. There were two important groups of jurists, the ultramontani (thirteenth century, France) and the commentators (fourteenth and fifteenth century, Italy) who actively contributed to the reception process. It was the commentators who facilitated the importation of Roman law into the practical administration of justice. The reception proper (second half of the fifteenth to the sixteenth century) constituted the fourth phase.[8] It was characterized by a large-scale reception when Roman law, as a system, was incorporated into the legal systems of some countries to form part of their common law. During this period the extent and tempo of the reception varied from country to country.

2.2 Holland

Germany, France and the Netherlands had therefore, prior to the twelfth century, experienced an infiltration of Roman law. The reception that followed was signified by the infiltration of the learned Roman law ("*geschreven of beschreven recht*") into the customary law.

The local customary laws were crude, to a large extent *ius incertum*, and did not comply with the commercial demands of the time, while the jurisprudence of Rome presented a comprehensive legal system, consisting of rules and principles that could immediately be applied in practice.[9] Dutch writers differ as to the manner in which and the time when the reception of Roman law took place in the Netherlands, and likewise as to the questions whence this introduction came and

to what extent the authority of the Roman law prevailed in the Dutch courts.[10] On the one hand, several Roman-Dutch authors, such as Merula, Grotius and Sande, assert that the Roman law was introduced through usage on account of its wisdom and equity.[11] On the other hand, Vinnius and Van Leeuwen are of the opinion that the introduction took place *ex lege*,[12] whilst Voet[13] is rather vague regarding the matter. The first legislative recognition of Roman law *in foro* came with section 42 of an *Instructie* of 1462, stating that the proceedings in court shall be "according to the tenor and form of the written laws" ("*soo sal men voorts procederen na den inhoude en forme van beschreven rechten*").[14]

This is also the first official proof of the adoption of the *Corpus iuris civilis* in the Court of Holland. The establishment of a number of courts in the Netherlands largely contributed to the knowledge and use of Roman law. Jurists and judges were usually not all that familiar with the local customs, but they were educated in the principles of the *Corpus iuris civilis*. According to Grotius the jurisdiction of the Hof van Holland specifically had an important influence on Roman law. This court was constituted of lawyers who were, in 1531, instructed to judge according to written sources, most of which were probably Roman law and considered to be filled with wisdom and equity.[15]

One may also ask to what extent and in what manner the Roman law was observed in the Netherlands after its reception. Grotius and Van Leeuwen say that wherever indigenous statutes or custom is silent there shall be immediate recourse to Roman civil law that was regarded as the *ius commune*.[16] This would be done in such a way that even in the interpretation of statutes, ordinances and customs not clearly indicating the contrary, the Roman law principles will be applied and in doubtful cases the local law and customs will be restricted in interpretation. As to specifically the extent and authority of Roman law in Dutch practice, Van Leeuwen states, in the *Censura Forensis*,[17] that since Roman law is considered to be subsidiary law, it must be adopted only when general or particular statutes and ordinances and customs fail.

According to Van der Keessel there is sufficient proof that Roman law was received *in subsidium* in Holland. For example, many principles of the civil law were tacitly adopted in the law of Holland; technical terms were adopted from Roman law and applied in such a way that it is clear that the doctrines comprehended under these terms were also adopted in Dutch courts; Dutch legislators often expressly adopted or confirmed certain Roman-law principles; and many Dutch maxims, rules and precepts acknowledge that the civil law was adopted to its full extent and direct judges to determine disputes according to the civil law.[18]

It follows that although Grotius, Van Leeuwen and Van der Keessel expressly state that Roman law was acknowledged to be filled with "wisdom and fairness", this was not the main reason why it was adopted.[19] It was, in fact, regarded as valid law since, in Holland, Roman law was applied as subsidiary common law.[20] Officially recognized as "subsidiary common law", Roman law played a far greater role because local law or custom had to be proved and also because a lot of Roman law was adopted, expressly or tacitly, by the legislature.[21]

It is interesting to note that the term "Roman-Dutch law" was used for the first time in the seventeenth century by Simon van Leeuwen when he published a book entitled *Paratitula juris novissimi, dat is, Een kort begrip van het Rooms-Hollands Regt* (*Paratitula juris novissimi, that is, a Breviarium of Roman-Dutch Law*) in 1652.[22] This is an explicit acknowledgement of the reception of Roman law in the Netherlands, and especially in Holland.

2.3 South Africa

Countries originally affected by the reception passed on Roman law. Thus, when Jan van Riebeeck occupied the Cape on behalf of the Dutch Republic in 1652, Roman-Dutch law was brought to South Africa.[23] The Dutch East India Company was created in 1602 in terms of a charter granted by the State General, a body representing the seven provinces of the United Netherlands.[24] In a letter dated 4 March 1621 the Here XVII instructed their representatives in Batavia that in future the laws to be implemented would be those of the province Holland, and if there was anything the laws of Holland did not say Roman law was to be applied.[25] This instruction did not have force of law in India. The State General did, as far as can be determined, not grant legislative authority to the Dutch East India Company or any other organ of the Company. However, despite a lack of knowledge and the fact that no legal instruction regarding the law to be applied in East India was ever given, the law of the province Holland became the law of the East Indian areas, including that of the Cape.

Why was the law of Holland specifically adopted in preference to the other Dutch provinces? Probably because as the wealthiest and most powerful of the provinces Holland exercised the prevailing authority in the affairs of the Dutch East India Company, also providing most of its directors, officers and servants.[26] While the Dutch East India Company ruled the Cape, the law of Holland was its law. A Cape resolution of 21 February 1657 provided that free burghers should be governed by such civil laws as are common according to Dutch and Indian customs

("*onder soodanige burgerlycke wetten ende rechten, als na de Vaderlandse ende Indische manieren gebruyckelyck is*").[27]

On arrival at the Cape the Dutch came into contact with the indigenous peoples. They took no notice of their laws and imposed the civilian legal tradition on the indigenous legal systems existing in the Cape although the people had no desire to receive the Dutch legal system.[28] It can consequently not be said that Roman-Dutch law was "received" in the strict sense of the word since "reception" implies a willing acceptance of a foreign legal system. Technically, it should therefore rather be said that Roman-Dutch law was "transplanted" from Holland to Southern Africa.

However, if the concept of reception is used in the broad sense of the word, it may be said that modern South African law is the product of a double reception process.[29] The first was that through which, over many centuries, the Germanic customary law systems of the various Western European countries adopted or received Roman law. Thus Roman law was received into Holland, one of the seven provinces of the Netherlands. This Roman law, as amended by local Dutch legislation and customary law, became known as Roman-Dutch law and was transplanted to the Cape in the seventeenth century. The second reception process was the one through which English law was adopted into the prevailing Roman-Dutch law from the eighteenth century onwards.

3. The origin and development of *laesio enormis*

3.1 Introduction

In Roman, Roman-Dutch and South African law discussions of the requirements of the purchase price all start with more or less the same words: "There must be a price, which must be in money (*pecunia numerata*), and in addition it must be certain (*certum*) and real (*verum*)."[30] There was no requirement that the price had to be adequate or just. Later, however, it was accepted as a "requirement" in certain circumstances. This "requirement" in Roman, Roman-Dutch and South African law will now be discussed briefly.

3.2 Roman law

A just or fair price was not a requirement for the validity of a Roman contract of purchase and sale.[31] It may rather be said that it was an ideal to be striven for in accordance with the principle of *bona fides.* According to Zimmermann this resulted from the liberalistic spirit of Roman law, as well as the important position

and authority of the Roman *paterfamilias*.[32] Schulz holds that the Roman principle of liberty led to extreme individualism in the domain of private law.[33] This, however, did not mean that within the limits of private law everyone could do as he pleased. Abuse of the law was not approved of and the restrictions imposed by *pietas*, *fides* and *humanitas* were real and powerful.[34] A free Roman citizen was expected not only to take care of his own interests, but also to protect the weaker members of the community.

The parties to a contract had to fix the price, and judicial reconsideration and interference would have been an improper infringement of their freedom to conclude the contract.[35] According to the Romans bargaining and profits were legitimate.[36] Roman law did not encroach upon the autonomy of the subject in regard to transactions that were not tainted with bad faith.[37] There was very little in the Roman law of contract to limit economic liberalism and it merely provided the framework within which individuals may operate.[38] The purpose of the law was not to protect the parties to a contract of sale and no attempts were made to interfere with their freedom to determine the price. Throughout the ages merchants wished to make a profit and it is part of business life to bargain for the best price.[39] Average business decency is all that could be expected from the parties: their actions had to be in accordance with the nature of trade (*natura contractus*) and could therefore not be evaluated according to abstract ethical standards. Although Roman lawyers realized that the usages of trade and commerce did not always agree with the highest standards of honesty,[40] they apparently resigned themselves to the realities of life and business practices.

It follows that classical Roman law of sale took no account of the parties' unequal bargaining power. They were free to determine a "right" price for themselves and the reciprocal taking of advantage (*ius invicem se circumscribendi*) was accepted.[41] Although harsh bargains may have resulted, there was no legal principle under which the law may intervene in cases where there was neither fraud nor duress and the party suffering had no special claim to protection.[42]

Towards the end of the third century, various factors – such as economic decline, poor agricultural practices, exhaustion of soil, shortage of agricultural labor, and small tenants experiencing great difficulties to survive – introduced far-reaching changes in the agricultural world.[43] Furthermore, during this period inflation complicated the free determination of the price.[44] Owners of *latifundia* consequently put heavy pressure on small-holders to sell their plots of land for exceptionally low prices.

Some of these sellers ostensibly petitioned the emperors Diocletian and Maximian for relief from their contracts and judges were authorized by imperial rescript to rescind such sales if the price was unreasonably or unconscionably low

unless the buyer was prepared to supplement it. This was the result of an attempt to require a "just" price in a contract of sale, a principle which was quite unknown to the earlier law where the parties were left to make their own bargain and in the absence of fraud could not undo an engagement which had been voluntarily entered into. Since it encouraged a party to divest himself of obligations which he had freely and solemnly undertaken, it was not in harmony either with reason or public policy.

The rescission of sales on the ground of *laesio enormis* (literally "abnormal injury") thus had its origin in two rescripts purported to emanate from Diocletian and Maximian and dating from A.D. 285 and 293.[45] In terms of these texts if land was sold at less than half its value, the seller could have the sale rescinded unless the buyer would make up the price to the full value.[46] It does not appear to have applied to anything but land and the buyer had no comparable right in the opposite case. It is, however, possible that this was a Justinianic interpolation.[47] The two rescripts show signs of interpolations, and the argument of the second is actually against the doctrine. In the Code the principle is expressed in strong language that where a person of full capacity sells a farm he cannot (apart from relief granted on, for example, the ground of fraud and duress) be heard to say that he has made a bad bargain because he did not know the true value of his land and therefore wishes to rescind the sale. It is therefore possible that either the emperors never issued the decrees attributed to them or that the rescripts became obsolete or were cancelled between the reigns of Diocletian and Theodosius.

During the post-classical period there were many examples of emperors preventing the application of classical rules by actively trying to protect the weak against exploitation.[48] The doctrine of *laesio enormis* may have been part of the protection of the poor against the *potentiores* which was a prominent feature of late classical law.[49] Diocletian's two rescripts may have constituted the first trace of such benevolence. They do not seem to have laid down a general rule of law, but rather to have given extraordinary relief in cases of great hardship. Judges were instructed to apply the law or interpret transactions "equitably" or "benevolently". This was, however, not done very scientifically since the level of legal science at that stage had deteriorated quite significantly.[50] The last title of Justinian's *Digest* contains an anthology of maxims lifted from various legal contexts. It has several legal maxims, such as "In doubtful cases, the more generous view (*benigniora*) is always to be preferred".[51] It is not clear to which party the benevolence is to be extended.

The application of the *laesio enormis* doctrine presented serious difficulties. This is probably why classical law had refused to consider the adequacy of the price unless bad faith or incapacity was shown.[52] Risks were an inherent part of

commercial life, which is structured by the law of contract, and in the field of contract it is generally accepted that it was more important that the law should in every case be certain than that it should be just.[53]

3.3 Roman-Dutch law

Roman-Dutch law never required the price to be just. Voet briefly discusses "an agreement to sell for a just price", but concludes that it did not constitute a sale.[54] There was a difference between a contract of sale and such an agreement. Parties agreeing to sell at a just price have not yet determined a certain price, and since this essential requirement for a contract of sale had therefore not yet been complied with, no contract had been concluded. It should rather be regarded as mere preparation for the conclusion of a contract of sale. A "just agreement" is therefore not the same as a "just price". He further states that the payment in a contract of purchase and sale must be just and suitable to the merchandise, "even though the contracting parties have a natural freedom to get the better of each other in a moderate degree as to the price by a certain shrewdness".[55] So, despite declaring that the price should be just, he is fully aware that in practice this did not always happen.

Grotius states that if a seller or purchaser was prejudiced in the price to the extent of more than half the value (if there was no fraud on either side), that is, when the price had become "enormously unfair", a sale could be rescinded unless the other party was willing to increase or reduce the price to the true value.[56] He regards the *laesio enormis* as a remedy by means of which an obligation can be rendered invalid not wholly, but in part, since the opposite party has the choice to abandon the contract or to make good the deficiency.[57] In terms of this remedy the party who was been defrauded above half (the value) of the thing, could by civil request to the Supreme Court be relieved and regressed against it. The transaction was therefore not necessarily declared void since the party who defrauded or misled the other party could adhere to the bargain if he so chose, provided he returned the excess above the true value of the thing sold. Or, if it was the purchaser, he would have to pay in what the thing was worth above what he actually gave for it.

This doctrine was received from Roman law where it was specifically applicable to the sale of land.[58] However, since the remedy was regarded as fair it was first extended to purchasers and then to reciprocal *bona fide* contracts, such as letting and hiring and partnership, but not to unilateral contracts.[59] Voet, for example, tells us that in Holland, at any rate, the practice prevailed of allowing the remedy to be extended first to house property and then to the more valuable

kinds of movables.[60] Most Roman-Dutch authors further seem to agree that the *querela laesionis enormis* may be invoked by the purchaser as well as the seller and may be relied upon to rescind all reciprocal contracts in which a person was prejudiced to more than half the price.[61] However, not everyone agreed with this. Schorer,[62] with reference also to Voet,[63] avers that the purchaser and the seller ought to be treated the same although only the seller is mentioned in *C*. 4.44.2. He further mentions Zoesius, who says that only the seller is referred to because he may sometimes be forced to sell at a very low price, but nevertheless allows the remedy to the purchaser too since the reason for the remedy is *laesio enormis* (extraordinary lesion), something that may happen to both the seller and the purchaser.[64] Huber further refers to Sande[65] who states that the application of this remedy is limited to purchase and sale since it was a new means of achieving something that had been introduced. Since it conflicted with the principles of the ancient law it should not be extended any further.

The only condition which Grotius imposes for this remedy is that there had to be a "verkorting over de helfte" (a party had to have been "damnified to the extent of more than half").[66] The lesion is also called "*bedrog* over de helft" (*fraud* to the extent of more than half"). The expressions *laesio*, *verkorting* (damnified), *bedrog* (fraud) and *exceptio doli generalis* all imply wrongdoing or dishonest conduct in the part of the person who had made the bargain. If a person had bought something for a price constituting less than half the true value, there was consequently a *praesumptio iuris* that he must have deceived the other contracting party. Thus Van Leeuwen states that the remedy is granted "in order that the one party should not by too much covetousness enrich himself to the loss or detriment of the other, and by doing so introduce *too much fraud* into the bargain.[67] Van der Linden, too, says that a contract is invalid when a person was induced to conclude a contract by the *fraud* of the other party.[68] He points out that only something that was obviously a violation of good faith would be regarded as fraud, in which case the presiding judge could declare it invalid.

Laesio enormis was therefore one of the special causes that could lead to the rescission of a contract.[69] With regard to the reason why this remedy had been introduced, Grotius holds that when the origin of all contracts are considered, it appears that they had originated in reciprocal abundance and need, and consequently reason demands that parity should be regarded in them.[70] According to Huber, although initially a property could be sold at as high a price as the seller could manage to negotiate, apart from fraud or defect in the property sold, it was later considered to be only fair that the price should not become unreasonably high.[71] Restrictions were therefore introduced and it was determined that a price that

was more than half the true value ought not to be allowed. It was then decided that a seller who had stipulated for less than half the true value of a thing at the date of sale, might demand either that the thing be returned or that the payment be made more. Van der Linden states that although contracts derive their validity from the mutual and free consent of the contracting parties, contracts are often imperfect and invalid. Being prejudiced to an *enormous extent* in respect of the price that had been agreed upon in the contract, is just one example of such contracts.[72] The basic ground for this remedy is therefore the huge disparity between price and property.[73]

If the price was very high or very low, but the difference less than half the value, the parties had to accept it.[74] Someone who was – without fraud – prejudiced to the extent of less than half, could consequently not rescind the sale for if sales were to be annulled for every kind of inequality it would undermine trade and the public interest.[75]

On perusing Roman-Dutch cases, it is interesting to note that not one single case in which a contract between persons of full capacity was set aside on this ground alone could be found: that is, when it could not have been rescinded on some additional ground such as, for example, minority and fraud.[76]

Dutch acceptance of this doctrine shows how strongly the Dutch were bound to their ancient customs and the classical tradition. Even after they had become a successful commercial nation, trading with the greater part of the known world, they still retained this doctrine that was so prejudicial to free commercial intercourse. They certainly realized that it constituted a burden to their trade for they tried to limit its injurious effects. *Laesio enormis* did not apply in sales, for example, where the value of the thing was essentially uncertain and the sale was of a speculative nature: such as where the next year's crop was bought or land was bought with the hope that it would contain minerals.[77] Nor did it apply where the party who was damnified knew at the time of the sale of the disparity between the price and value of the thing in which case he was then stopped from claiming the remedy of *laesio enormis.*[78] Furthermore, by the time the Dutch came to the Cape, it was seldom applied since humanism and the law of nature spoke against it.

3.4 South African law

Laesio enormis constituted part of South African common law but was soon abrogated in the Cape Colony by the General Law Amendment Act of 1879 and thereafter in the Free State by the General Law Amendment Ordinance of 1902. In the Union of South Africa this doctrine was abolished by statute in 1952.[79]

In recent times, however, there has been mention of the "revival" of *laesio enormis* in South African law. This flows forth from the enactment of the Consumer Protection Act 68 of 2008 and especially article 48.[80] The Act provides for both judicial and administrative control of unfair contract terms across a broad range of consumer contracts.

Until the important decision in *Sasfin v Beukes*[81] (in which case the Appellate Division accepted that substantive unfairness may in exceptional cases render a contract or contractual provision void for illegality) the courts remained faithful to the philosophy that freedom and sanctity of contract preclude a court from invalidating contracts or contractual terms on the ground of substantial unfairness.[82] Now, one of the stated purposes of the Consumer Protection Act is to "promote and advance the social and economic welfare of consumers in South Africa"[83] by providing them with an "accessible, ... effective and efficient system of redress for consumers".[84] The provisions of the Consumer Protection Act do not prevent the consumer from challenging unfair contract provisions on the basis of common-law principles. The prohibition in article 48(1) relates to unfair, unreasonable or unjust terms generally, and article 48(2) sets out guidelines for determining what is unfair. According to article 48(2)(a) a transaction, agreement, term or condition is unfair, unreasonable or unjust if "it is excessively one-sided in any favor of any person other than the consumer", whilst article 48(2)(b) states that it is unfair if "the terms of the transaction or agreement are so adverse to the consumer as to be inequitable". If it will appear from the application of this act that a purchaser, who is a person of full capacity, whose free exercise of volition was in no way impaired or restricted, can seek relief not against a wrong, but against his own judgment, ineptitude or folly, it will indeed seem like a phoenix that has once again arisen from the ashes.

4. Conclusion

The doctrine of *laesio enormis* was known to all three legal systems discussed above, namely Roman, Roman-Dutch and South African law. In Roman law it was introduced in contracts of sale in extremely difficult economic times. It radically offended against Roman contractual practice which was strongly in favour of the independence of the parties and did not approve of any interventions. Roman-Dutch law received this doctrine as part of the reception process. It is a sign of their strong adherence to Roman law that the Dutch accepted it at all. They did, however, introduce many exceptions in which it was not applicable.

Finally, it was also received (transplanted) in South Africa when the Dutch brought their law to the Cape of Good Hope in 1652. It has, however, since been abrogated. One may, indeed, be impressed by the fact that a legal doctrine of uncertain origin managed to survive for almost two thousand years. It was surprising that far more sophisticated legal systems accepted this doctrine which ran counter to the basic principle of freedom of the contracting parties. They were probably motivated by the high esteem afforded to the Roman legal system that was received in the Netherlands.

In South Africa there are now signs that the phoenix may have arisen in the form of the Consumer Protection Act. The Preamble of the Consumer Protection Act states that one of the reasons for the promulgation of this Act is the fact that "apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality". This may lead to the conclusion that legislative protection is especially required in difficult times. Circumstances resulting in hardship and poverty in the Roman Empire led to the doctrine of *laesio enormis*, and in South Africa it seems as though the fact that the majority of the population is poverty-stricken and illiterate has likewise led to the promulgation of this Act which purports to protect the interests of the consumer. It should, however, also be noted that similar Acts which have been promulgated in industrialized countries abroad where these circumstances do not prevail.[85] Consumers all over the world today, for various other reasons but that advanced for South Africa, are protected by consumer protection acts and regulations.

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[1] H.R. Hahlo & E. Kahn *The South African Legal System and Its Background* (Juta & Co, Cape Town, 1973) at p. 484.

[2] *Ibid*.

[3] *Idem* p. 485.

[4] C.H. Haskins *The Renaissance of the Twelfth Century* (Harvard University Press, Cambridge, Massachusetts, 1976) at p. 193. See, also, G. Highet *The Classical Tradition. Greek and Roman Influences on Western Literature* (Oxford University Press, New York, 1976) at p. 9.

[5] See Hahlo & Kahn (n. 1) at pp. 485-489; G.J. van Niekerk "History of the South African law" at *http://myfundi.co.za/e/History_of_the_South_African_Law* (accessed on 13 July 2012) at p. 1-3.

[6] See Hahlo & Kahn (n. 1) at pp. 489-499.

[7] *Idem* at p. 499.

[8] *Idem* at p. 499ff.

[9] W. Schorer in H. de Groot (Grotius) *The Introduction to Dutch Jurisprudence of Hugo Grotius* A.F.S. Maasdorp (trl.) (Juta, Cape Town, 1903) Appendix to vol. 1, Book 1, Chapter 1, par. 2, Note 1.1.

[10] *Idem* 1.2.

[11] See, for example, Grotius (n. 9) 1.2.22: "(Since) the Roman laws, especially in the form in which they were codified in the time of the Emperor Justinian, are regarded by the learned as replete with *wisdom and equity*, they were first adopted as examples of *wisdom and equity*, and in course of time, through custom, as laws." (my emphasis)

[12] See, for example, S. van Leeuwen *Censura Forensis* W.P. Schreiner (trl.) (Juta, Cape Town, 1883) 1.1.12: "For indeed in our practice and in that of others a rule had been introduced by express enactment that wherever indigenous statutes or customs are silent there shall be had immediate recourse to the Roman law." He does, however, add that "the Roman positive law remains the *basis and foundation of Equity and Justice*". (my emphasis) He further adds that Roman law was by reason of its "excellence, equity and utility" adopted by all other nations. See, further, D.G. van der Keessel *Select Theses on the Laws of Holland and Zeeland* C.A Lorenz (trl.) (Juta, Cape Town, 1884) 1.1.22.

[13] *The Selective Voet, Being the Commentary on the Pandects* vol. 1 P. Gane (trl.) (Butterworth, Durban, 1955) 1.1.2.

[14] See *Groot Placaet-boek* vol. 3 (1683) at p. 635. By "written laws" is meant the Roman law. Further *Groot Placaet-boek* vol. 7 De Resolusie van de Staaten-Generaal (The Resolution of the States-General) of 17 February 1741 at p. 964.

[15] H. de Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, vol. 2, Notes by S.J. Fockema Andreae & L.J. van Apeldoorn (S. Gouda Quint., Arnhem, 1926) to 1.2.22 at p. 11.

[16] *Cf*. Grotius (n. 9) 1.2.22: "In the absence of any written law, charter, privilege, or custom, on any particular subject, the judges have from times of old been enjoined on oath to follow reason to the best of their knowledge and discretion." Since Roman laws, and especially the codification of Justinian, were considered to be full of wisdom and equity, they were first adopted as examples of wisdom and equity, and as time went by, through custom, as laws. See, further, Van Leeuwen *Censura Forensis* (n. 12) 1.1.12; S. van Leeuwen *Simon van Leeuwen's Commentaries on Roman-Dutch Law* 2ed. vol. 1 J.G. Kotzé (trl.) & C.W. Decker (rev. and ed.) (Sweet & Maxwell, London, 1921) 1.1.11.

[17] (n. 12) 1.1.12.

[18] *Select Theses* (n. 12) 1.2.22.6. See further 1.2.22.7-10.

[19] Grotius (n. 9) 1.1.22; Van Leeuwen *Censura Forensis* (n. 12) 1.1.12; D.G. van der Keessel *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad iurisprudentiam Hollandicam* P. van Warmelo *et al.* (A.A. Balkema, Amsterdam, 1961) 1.2.22 quotes Grotius as saying that Roman law, especially as codified by Justinian, was regarded as being filled with wisdom and equity by learned men. These laws were initially accepted as examples of wisdom and equity and eventually it was accepted as law.

[20] Van der Keessel *Select Theses* (n. 12) 1.2.22.6-25; Van Leeuwen *Censura Forensis* (n. 12) 1.1.12. See further Grotius (n. 9) 1.2.22; Voet (n. 13) 1.1.2ff.

[21] See Van der Keessel *Select Theses* (n. 12) 1.2.22.6.

[22] It contains a brief compendium of the Roman as well as the Dutch law (*Neerlands Regt*) of the time.

[23] Hahlo & Kahn (n. 1) at p. 571.

[24] J.C. de Wet "Die resepsie van die Romeins-Hollandse reg in Suid-Afrika" (1958) 21 *Journal of Contemporary Roman-Dutch Law* p. 84-97 at 85.

[25] *Idem* at p. 88.

[26] Hahlo & Kahn (n. 1) at p. 572.

[27] *Idem* at p. 572 n. 32.

[28] G.J. van Niekerk "The endurance of the Roman civil tradition in South African law" (2011) 4 *Studia Iurisprudentia Universitatis Babeş-Bolyai* 1-9 at p. 1.

[29] *Ibid.*

[30] See, for Roman law, W.W. Buckland & P. Stein *A Text-Book of Roman Law from Augustus to Justinian* (University Press, Cambridge, 1963) at pp. 485-486; W.W Buckland *A Manual of Roman Private Law* (University Press, Cambridge, 1939) at p. 280; F. de Zulueta *The Roman Law of Sale* (Clarendon Press, Oxford, 1966) at pp. 16-19; J.B Moyle *The Contract of Sale in the Civil Law* (Clarendon Press, Oxford, 1892) at 66-74. For Roman-Dutch law, see, for example, Grotius (n. 9) 3.14.1 and 3.14.23; Van Leeuwen *Commentaries* (n. 16) 4.17.1; Van Leeuwen *Censura Forensis* (n. 12) 1.4.19.1-2; U. Huber *The Jurisprudence of My Time (Heedensdaegse Rechtsgeleertheyt)* P. Gane (trl.) vol. 1 (Butterworth, Durban, 1939) 3.4.1 and 3.4.5; Van der Keessel *Praelectiones* vol. 4 (n. 19) at p. 311 ("monetam currentem") and pp. 352-353; J. van der Linden *Van der Linden's Institutes of the Laws of Holland* 2ed. G.T. Morice (trl.) (T. Maskew Miller, Cape Town, 1922) at 1.15.8. For South African law, see A.J. Kerr *The Law of Sale and Lease* (LexisNexis Butterworths, Durban, 2004) at p. 30; G.R.J. O'Donovan *Mackeurtan's Sale of Goods in South Africa* (Juta, Cape Town, 1984) at p. 14; R.H. Zulman & G. Kairinos *Norman's Law of Purchase and Sale in South Africa* (LexisNexis Butterworths, Durban, 2005) at p. 41; R. Sharrock *Business Transactions Law* (Juta, Cape Town, 2011) at p. 272.

[31] See Buckland & Stein (n. 30) at p. 486; Buckland (n. 30) at p. 280; M. Kaser & R. Knütel *Römisches Recht. Ein Studienbuch* 19ed. (Verlag C.H. Beck, München, 2008) at p. 226; De Zulueta (n. 30) at p. 19.

[32] R. Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (University Press, Oxford, 1996) at pp. 255-256. See further F. Schulz *Principles of Roman Law* (Clarendon Press, Oxford, 1936) at pp. 140ff.

[33] See Schulz (n. 32) at p. 146.

[34] *Idem* at p. 158.

[35] Zimmermann (n. 32) at p. 256.

[36] *D.* 4 4.16.4, *Ulpianus libro undecimo ad edictum*: "Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire" ("Pomponius also says that as regards the price in purchase and sale, the contracting parties are in the course of nature allowed to overreach each other"); *D.* 19 2 22 3, *Paulus libro tregesimo quarto ad edictum*: "Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita inuicem se circumscribere, ita in locationibus quoque et conductionibus iuris est" ("The nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less, the reciprocal taking of advantage"). English translations of the *Digest* from T. Mommsen, P. Krueger & A. Watson *The Digest of Justinian* (University of Pennsylvania Press, Philadelphia, 1985).

[37] *Cf. D*. 17.2.76-79.

[38] See Frier *The Rise of the Roman Jurists* (Princeton University Press, Princeton, N.J., 1985) at p. 192: "The formal equality of Romans before the law became a shield behind which the mercantile economy of Rome could operate with greater confidence."

[39] For the bargaining process see *C*. 4.44.8 (Diocletianus et Maximianus, 293). *Cf*. also Wacke "Circumscribere, gerechter Preis und die Arten der List" (1977) 94 *Zeitschrift der Savigny Stiftung* Rom. Abt. 184-246 at pp. 202ff. Wacke states that some haggling took place and was accepted as commercial practice before a contract was concluded. The parties usually took their time before they reached an agreement. The initial offer of the vendor could therefore not have created a reasonable expectation that the object was really worth this price.

[40] See Cicero *De Officiis* 3, 17-68; and *D.* 50.17.144, *Paulus libro sexagensimo secundo ad edictum*: "Non omne quod licet honestum est" ("Not everything which is lawful is honourable").

[41] Paul *D.* 19.2.22.3, *libro trigesimo quarto ad edictum. Cf*. also *C*. 4.44.8 (293). See P. Stein *The Character and Influence of the Roman Civil Law. Historical Essays* (The Hambledon Press, London, 1988) at p. 35; H.F Jolowicz "The origin of *laesio enormis*" (1937) 49 *Juridical Review* 50-72 at p. 50.

[42] De Zulueta (n. 30) at p. 19.

[43] See K. Visky "Die Proportionalität von Wert und Preis in den romischen Rechtsquellen de III Jahrhunderts" (1969) 16 *Revue Internationale des Droits de l'Antiquité* 355-388 at pp. 380-381; K. Hackl "Zu den Wurzeln der Anfechtung wegen laesio enormis" (1981) 98 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* Rom. Abt. 147-161 at pp. 156-157; R. van den Bergh "Ownership of *agri deserti* during the later Roman empire" 2004 (1) *Journal of Contemporary Roman-Dutch Law* 60-66 at pp. 60-61; P. van Warmelo *An Introduction to the Principles of Roman Civil Law* (Juta, Cape Town, 1976) at pp. 171-172. See, however, A.J.B. Sirks "Diocletian's option for the buyer in case of rescission of a sale. A reply to Klami" (1992) 60 *Tijdschrift voor Rechtsgeschiedenis* 39-47 at pp. 42-43 for a dissenting opinion.

[44] Kaser & Knütel (n. 31) at p. 226.

[45] *C.* 4 44 2 (Diocletianus and Maximianus, A.D. 285): "A price is considered too little if one half of the true value is not paid", and *Codex* 4 44 8 (Diocletianus and Maximianus, A.D. 293): "For if you consider the nature of purchase and sale, that when the parties are intending to enter into such a 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 to what he had offered, that they finally consent to a definite price, you surely must see that neither good faith that protects the contract of purchase and sale, nor any other reason, permits that the contract, completed by consent, either immediately or after the 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)."

[46] See De Zulueta (n. 30) at pp. 19-20: In terms of *laesio enormis* the seller could rescind the sale on the ground that the price agreed was less than half the real value of the land ("less than half the just price"); B. Nicholas *An Introduction to Roman Law* (Clarendon Press, Oxford, 1965) at p. 175.

[47] It is significant that the *Digest* and the *Institutes* are silent on this remedy. What were the reasons for the introduction of this rule as it appears in the Code? Did Justinian actually disregard the basic rule that the price in a contract is to be settled by the agreement of the parties or was there already a change of attitude before his time? See, for the possible origin of *laesio enormis*, Jolowicz (n. 41) 50-72; Visky (n. 43) 355-388; Hackl (n. 43) 147-161; E. Stanković "Protection of the poor during Diocletian's reign" in 2010 (16-1) *Fundamina* 423-427; A.J.B. Sirks "La 'laesio enormis' en droit romain et byzantine" (1985) 53 *Tijdschrift voor Rechtsgeschiedenis* 291-307; H.T. Klami "'*Laesio enormis*' in Roman law" 1987 (33) *Labeo* 48-63; Sirks (n. 43) 39-47; A.J.B. Sirks "*Laesio* enormis again" 2007 (54) *Revue Internationale des Droits de l'Antiquité* 461-469; R. Westbrook "The origin of *laesio enormis*" (2008) 55 *Revue Internationale des Droits de l'Antiquité* 39-52.

[48] Stein (n. 41) at pp. 35-36. See also Moyle (n. 30) at p. 181; Stanković (n. 47) at 423.

[49] Buckland (n. 30) at p. 281.

[50] Stein (n. 41) at p. 36.

[51] *D.* 50.17.56, *Gaius libro tertio de legatis ad edictum urbicum*. Although references like these to equity in post-classical texts, they have little to do with the equitable principles which gave form and structure to the classical law. They were merely appeals to equity, trying to ensure that classical legal rules should not be applied if the results would be unpleasant, despite the cost of uncertainty thereby generated. See, also, P. Stein *Regulae Iuris: From Juristic Rules to Legal Maxims* (University Press, Edinburgh, 1966) at pp. 109-123.

[52] Nicholas (n. 46) at p. 175.

[53] *Ibid*.

[54] J. Voet *The Selective Voet, Being the Commentary on the Pandects* vol. 3 P. Gane (trl.) (Butterworth, Durban, 1956) 18.1 2.

[55] Voet (n. 54) 18.1.22(i) with reference to *D.* 4.4.16.4 and *C*. 4.44.8.

[56] See Grotius (n. 9) 3.17.5; Van der Linden (n. 30) 1.15.10.3. Huber (n. 30) at 3.6.2-3, with reference to *C* 4.44.2, points out that in such a case the seller can demand that the sale be annulled if he can prove that the property is worth the half more as it was sold for. At 3.4.7 Huber confirms that it is only when a price becomes "enormously unfair" that rescission of a contract was allowed if the party benefitting from this price was not willing to make up the price. A person was considered to be *enormously* prejudiced if the price was more than double the just value the thing (*laesio enormis*).

[57] Grotius (n. 9) 3.52.1.

[58] See Grotius (n. 9) 3.52.2.

[59] *Ibid*. See also Huber (n. 30) 3.6.10.

[60] See Voet (n. 54) 18.5.12. See, further, J.W. Wessels *History of the Roman-Dutch Law* (African Book Company, Grahamstown, 1908) at pp. 609-610.

[61] Voet (n. 54) 18.5.5.

[62] Schorer's Notes in Grotius (n. 9) 3.52.1.536.

[63] (n. 54) 18.5.5.

[64] See Schorer (n. 9) 3.52.1.536.

[65] Huber (n. 30) 3.6.12.

[66] Grotius (n. 9) 3.52.1.

[67] (n. 16) 4.20.5. (my emphasis)

[68] See Van der Linden (n. 30) at 1.14.2(c). (my emphasis)

[69] Huber (n. 30) 3.6.2-3 with reference to *C.* 4.44.2.

[70] Grotius (n. 9) 3.52.2.

[71] Huber (n. 30) 3.6.4.

[72] (n. 30) 1.14.2(d).

[73] Huber (n. 30) 3.6.15.

[74] Huber (n. 30) 3.4.6 and 3.4.7.

[75] Huber (n. 30) 3.4.7. This was ruled by the Court in regard to a sale of land on 7 May 1720.

[76] *Cf.* E.M Meijers *et al. Nederlandsch Compendium van de Observationes Tumultuariae van Cornelis van Bijnkershoek* (Tjeenk Willink en Zoon, Haarlem, 1935): see, for example, vol. 1 Cas. 62 (fraud); vol. 2 Cas. 1378 (fraud); Cas. 1523 (minority); Cas. 1886 (fraud).

[77] Voet (n. 54) 18.5.15.

[78] *Idem* 18.5.17.

[79] Section 25 Act 32 of 1952. Morice (n. 30) at p. 198 states that at the time the remedy was out of harmony with modern legal views. Although they were in favour of increasing the protection of the law against acts in bad faith, they were not in favour of interference with contracts entered into voluntarily and with eyes open.

[80] Act 68 of 2008 which became fully operational on 31 March 2011. See R.D. Sharrock "Judicial control of unfair contract terms: The implications of the Consumer Protection Act" 2010 (22) *SA Mercantile Law Journal* 295-325 at pp. 295ff. *Cf.*, too, in general, W. Jacobs, P. Stoop and R. van Niekerk "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 (13) *Potchefstroom Electronic Review* 301-406 at pp. 302ff. for an overview of the Act.

[81] *Sasfin (Pty.) Ltd. v. Beukes* 1989 (1) SA 1 (A).

[82] See, for example, *Grinaker Construction (Tvl.) (Pty.) Ltd. v. Transvaal Provincial Administration* 1982 (1) SA 78 (A) at pp. 96-97; *Magna Alloys and Research (SA) (Pty.) Ltd. v. Ellis* 1984 (4) SA 874 (A) at pp. 893-894.

[83] Article 3(1).

[84] Article 3(1)(h).

[85] For example, in the United Kingdom the Unfair Contract Terms Act 1977 (c. 50) and the Unfair Contract Terms in Consumer Contracts Regulations 1999; in Germany the Civil Code, sections 307-310; and in the Netherlands the Civil Code, articles 6:231-6:237.