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THE ANOMALOUS INSTITUTION OF LESION IN LOUISIANA LAW

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INTRODUCTION.

Forty-one years ago, the distinguished scholar, John P. Dawson made the following observations in his celebrated article, "Economic Duress and the Fair Exchange in French and German Law":

> The system of "free" contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality. As welcome fiction is slowly displaced by sober fact, the regime of "freedom" can be visualized as merely another system, more elaborate and more highly organized, for the exercise of economic pressure. With new vision has come a more conscious and sustained effort to select the forms of permissible pressure and to control the manner of its exercise. In law, as in politics, the control of economic power has emerged as the central problem of modern times.[2]

This bilateral conference on consumerism and codification attests to the vitality and prophetic vision of Professor Dawson's remarks. The interest in consumerism in both Canada and the United States suggests that the control of economic power remains a central problem of modern times. The awesome strength of many industries coupled with the technological advances of the last forty years make Professor Dawson's remarks even more poignant than they may have been when he wrote them. As we all know, even the most sophisticated engineer in search of a new appliance can be unnerved in the marketplace. Regardless of vocations, we have all come to expect good products at fair prices in the market. We are all consumers.

Professor Dawson wrote extensively about a constellation of legal controls upon excessive economic power. He treated at length such subjects as duress, abuse of rights, unconscionability, and the Roman doctrine of *laesio enormis*. This paper is limited to an examination of the contemporary operation of this last mentioned doctrine in Louisiana law. Specifically it sketches Louisiana's approach to lesion beyond moiety in sales of immovables, in exchanges, and in partitions of successions. It closes with remarks on simple lesion for minors' contracts, the

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* Association Henri-Capitant, Quebec City, Quebec, October 7-9, 1978.

[1] 11 *Tulane L. Rev.* 345 (1937).

[2] *Id.* at 345.

Louisiana doctrine of serious consideration, and some thoughts on modes of consumer protection in the context of the Civil Code.

LESION BEYOND MOIETY IN SALES OF IMMOVABLES.

The doctrine of lesion is an anomaly in modern Western legal systems. It is a unique example of a required term in two-sided nonstandardized contracts.[3] The doctrine appears even more anomalous because it does not regulate legal technicalities or subsidiary terms of the contract; instead, it regulates the price term, a matter of which both parties are keenly aware. Against the modern claim of economic liberalism that courts should not inquire into the parties' subjective evaluations of their respective prestations,[4] Louisiana civilians have argued that a "just price" is indeed discoverable, at least with regard to immovables. The garden variety lesion case involves the claim of lesion beyond moiety in the sale of land. This doctrine allows the vendor of an immovable who sells the property for less than half its value to demand a rescission of the sale, though he has declared that he has donated the purchaser the surplus of the thing's value.[5] A survey of Louisiana jurisprudence reveals a tendency to hedge the action with

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[3] A. VON MEHREN and J. GORDLEY, *The Civil Law System: An Introduction to the Comparative Study of Law 822* (2d ed. 1977).

> In certain of its applications, the French doctrine of *lésion* provides an example of an extremely rare phenomenon in western contract law; the requirement of a price term in a two-sided, individualized contract. Required terms of various kinds are, of course, commonplace in one-sided, standardized transactions. For example, in contracts with public utilities (*e.g.*, power, water, transportation, and communications), rates and conditions of service are largely determined by legislation and administrative regulation. Mandatory terms are becoming increasingly frequent in the field of retail sales. Both the circumstances that produce one-sided, standardized transactions and the considerations that justify their enforcement explain why various mandatory terms are required in contracts resulting from this type of transaction.
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> However, in the case of a two-sided, individualized transaction — the archetypic contract — requiring terms, particularly price terms, contradicts premises that are assumed to underlie contract law. The prices upon which individuals agree in the course of bargaining reflect their subjective perceptions of utility; accordingly, so long as the contracting process occurs under conditions requisite to reciprocal, individualized exercises of private autonomy, the resulting transactions are considered just and equitable. Through such doctrines as fraud, duress, and mistake and by providing formalities, the law ensures the integrity of the contracting process; where a truly two-sided, individualized transaction is involved, the resulting contract is not to be set aside except where subsequent developments, unforeseen or uncontrollable by the parties, provide a basis for intervention.
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> Accordingly, it is with a certain surprise that one reads article 1674 of the *Code civil*:
>
> If the seller has been harmed by more than seven-twelfths in the price of an immovable, he has a right to demand rescission of the sale, even if he expressly renounced in the contract the right to demand rescission, and stated that he wished to make a gift of the excess value."

VON MEHREN, *"The French Doctrine of Lésion in the Sale of Immovable Property"*, 49 *Tul. L. Rev.*, 321, 321 (1975).

[4] *See* M. HORWITZ, *"The Historical Foundations of Modern Contract Law,"* 87 *Harv. L. Rev.* 917, 946-48 (1974).

[5] La. Civ. Code art. 2589 provides:

> If the vendor has been aggrieved for more than half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave to the purchaser the surplus of the thing's value.

restrictions and to confine it within narrow limits. Some courts have openly expressed their disfavor of the doctrine.[6] But disputes based upon the doctrine continue to arise, and every notary public engaged in conveyancing knows that a title to property may be clouded for years by the recitation of the price as "one dollar and other valuable considerations," a traditional litany of the common law.

Although lesion is sometimes loosely called a kind of error, it does not fit neatly under any of the traditional vices of consent such as error, fraud, duress, or threats of violence. According to the Louisiana Civil Code, the action for lesion is "founded on its being the effect of implied error or imposition; for, in every commutative contract, equivalents are supposed to be given."[7] The action for lesion beyond moiety cannot be explained in terms of error alone because the vendor's right to rescind persists though he may have explicitly renounced it and declared the surplus value a gift.[8] Furthermore, if error clearly applied, then the action should be available to either party to rescind, a result expressly negated by the Civil Code.[9]

If lesion is considered a vice of consent — it appears in the Civil Code immediately after articles on error, fraud and violence — it is so because it suggests a lack of liberty, not error. Furthermore, inasmuch as the right does not arise because of fraud on the buyer's part, lesion may be considered as *dolus re ipsa*.[10] The imposition implied by lesion is technical, not related to fraud; it is an

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[6] See *Smith* v. *Huie-Hodge Lumber Co.*, 129 La. 28, 35, 55 So. 698, 700 (1911); *Bourgeois* v. *Martin*, 5 La. App. 321, 322 (1927).

[7] La. Civ. Code art. 1860 provides:

> Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for, in every commutative contract, equivalents are supposed to be given and received.

[8] This remedial onesidedness may be a product of historical accident. The supporters of article 1674 of the French Civil Code, such as Bigot-Préameneu, argued at the drafting stage the general proposition that "equity being the basis of all contract, the law had to assist him towards whom, by causing an enormous lesion, the contract became unjust." 12 J. LOCRÉ, *La Législation civile, commerciale et criminelle de la France*, 193 (Paris 1828) (author's trans.), but Napoléon made it clear that the protection of the lesion provisions was to extend only to a certain landed class:

> Is it not clear that the law of rescission is a law of morals that has for its object land? It is of little importance how a person disposes of some diamonds, of a few paintings, but the manner in which he disposes of his land is important to the society.
>
> ....
>
> Can it be within the principles of civil justice to sanction an act by which an individual sacrifices in a moment of folly the inheritance of his fathers and the patrimony of his children to the violence of his passions?

14 J. LOCRÉ, *La Législation civile, commerciale et criminelle de la France*, 89-91. (Paris 1828) (author's trans.) In a later discussion in the Conseil d'État, Napoléon gave various reasons why only the seller — not the buyer — should have the benefit of article 1674. His basic point was that the seller's position was likely to vary considerably so that the law could not handle the problem straightforwardly. *Id.* at 112-113.

[9] *See* note 5 *supra*, quoting La. Civ. Code, art. 2589. Also, La. Civ. Code art. 1877 provides:

> In actions, brought for relief against a sale or partition made between persons of full age, or in a like action, brought for lesion only, in a sale made by a minor or on his account, the purchaser may elect either to rescind the sale, or to have it confirmed on paying the full value. But this election must be made within a period to be designated in an interlocutory decree, determining the true value and the terms on which the payment is to be made.

[10] 1 J. DOMAT, *The Civil Law in Its Natural Order*, 229 & n.e (L. Cushing ed. W. Strahan trans. 1861).

imposition resulting from inadequacy of price. Thus the action based upon lesion beyond moiety differs from an action to resolve a contract for fraud because the resolution for fraud results in a judicial declaration of absolute nullity. By contrast, the buyer in an action to rescind for lesion has the option to rescind the sale or to confirm it by paying the rest of the purchase price. All of these explanations of lesion add up to one conclusion: they are variations of an objective theory of lesion, requiring only proof of the inadequacy of price.[11]

OBSTACLES TO ACTIONS BASED UPON LESION.

As already noted, the action for lesion beyond moiety is available to the transferor of an *immovable*. The rules do not cover movables. A further obstacle to the suit for rescission on grounds of lesion in a sale is prescription, which bars the action after four years.[12] Unlike prescriptive pleas in contract litigation generally, prescription in lesion need not be specially alleged: if a petition alleges that the contract was made and dated more than four years before the suit was filed, the defendant may simply file an exception of no cause of action.[13]

I have already noted that lesion is an anomaly in Western legal systems because it assumes the human capacity to determine a price objectively. This assumption runs counter to a tenet of classical liberal economics that all values are subjectively fixed by bargaining parties. The English author Samuel Butler formulated this viewpoint poetically in *Hudibras*: "The value of a thing is just exactly what 'twill bring." But it is dramatically opposed to the classical medieval view that "labor was.... rewarded.... according to the worker's position in the divinely ordained social hierarchy."[14] It is no wonder, then, that an obvious difficulty, and a principal reason for much adverse criticism of lesion, arises because of the civiliste's assumption that a just price can indeed be found.

Fixing the price requires a determination of the property's *intrinsic* value on the date of the sale.[15] Assuming, contrary to classical liberal economics, that

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[11] French jurisprudence also leans toward an objective theory of lesion. Since 1932, it has clearly taken the position that rescission for lesion is not based on a vice of consent but upon an objective imbalance between the value of the immovable and the price.

Consorts Gas v. *Dlle. de Queylar*, April 21, 1950, Cass. Civ., France [1950] Juris Classeur Périodique [J.C.P. 11] No. 5800.

[12] La. Civ. Code, art. 1876 provides: "Actions for lesion are limited to four years, to date from the time of the contract between the persons of full age, and from the age of majority in contracts of minors."

La Civ. Code, art. 2595 provides: "Actions for rescission of sales on account of lesion beyond moiety must be commenced within four years. These four years, with respect to minors, begin only from the day they become of age. With respect to persons of full age, they begin from the day of the sale."

[13] *Laenger* v. *Laenger*, 138 La. 532, 70 So. 501 (1915).

[14] See J. NOONAN, *The Scholastic Analysis of Usury*, 7 (1957).

[15] La. Civ. Code, article 1870 provides:

> When lesion is alleged to invalidate a partition or sale, the party alleging it must first prove the value of the property sold, in the state in which it was at the time of the contract, according to the usual terms of credit given on sales of property of that description. He must then show how much the price given was less than such value; but if the price given was paid at longer periods than those usually given on such sales, the interest for the time

something has an intrinsic value, the courts still generally reject the highest estimate.[16] It is insufficient to show merely the value of the land as a whole when a fractional interest has been sold since the value of a fractional interest is less than the corresponding fraction of the total value of the property.[17] Likewise, in the sale of timberland and of standing timber, the value and quantity of the logs must be practically certain.[18] The requirement of certainty of value, a paradox itself because it depends upon estimates of many witnesses, often precludes an action to rescind a sale of an oil-rich immovable.[19] Where negotiations for oil development of nearby lands were not made public until after sale of the land in question, the increase in the speculative value of the land could not be shown.[20]

Although the general rule requires a price to be fixed on the land's intrinsic value, the jurisprudence has admitted an exception which practically displaces the rule. In *Copley* v. *Flint and Cox*,[21] the court held that the defendant could show the real worth of the plaintiff's title and pretensions to the land, without being confined to the *mere intrinsic* value of the land. In a sense, the jurisprudence may have "subjectified" the objectively knowable price which the articles on lesion assume we can discover. Hence, the claim of classical economic liberalism that the "thing is worth exactly what 'twill bring" has inadvertently become a gloss on the Civil Code.

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exceeding such usual credit must be deducted from such price; or, if the price was paid in shorter periods than those of such usual credit, then the interest for the time such payment has fallen short of the usual credit, shall be added to the price actually paid; and from a comparison of the price after these additions or deductions with the estimated value, the court shall determine whether according to law applied to the circumstances of the case, there is a lesion sufficient to invalidate the contract.

La. Civ. Code, art. 1871 provides: "In all questions of lesion the value of that which was the subject of the contract at the time of making it, is the rule by which the lesion is to be ascertained. Even in the case of minors, changes, in value by subsequent events are not to affect the contract."

La. Civ. Code art, 2590 provides:

"To ascertain whether there is a lesion beyond moiety, the immovable must be estimated according to the state in which it was, and the value which it had at the time of the sale, or at the time the option was granted if the sale be made pursuant to a valid contract of option."

[16] *Hall* v. *Baker* 183 La. 714, 164 So. 777 (1935); *Girault* v. *Feucht*, 120 La. 1070, 46 So. 26 (1908). The estimators need not be experts, but may be neighboring landowners. Pothier argued that a proper distinction should be made between the highest, the lowest and the median price. Although he declares that the lesionary price would be less than one-half of the pretium infinum, he indicated that it was perhaps more exact to base it upon the *pretium medium*. POTHIER, *Treatise on the Contract of Sale*, no. 344, p. 216 (Cushing ed. 1839), Domat thought the just price was the highest price. 1 DOMAT, *Supra*, note 10, at 229. The French law provides for the appointment of three experts, who are to make a single report. Code Civil [C. Civ.] arts. 1678-1680 (Fr.). If lesion *outre moitié* is retained in a code revision, Louisiana might do well to adopt this expedient, and thereby eliminate waste of time and uncertainty caused by hordes of witnesses.

[17] *Beale* v. *Ricker*, 7 La. Ann. 667 (1852); *Fleming* v. *Irion*, 132 La. 163, 61 So. 151 (1913); *Hustmyre* v. *Waters*, 186 La. 218, 171 So. 855 (1937).

[18] *Smith* v. *Huie-Hodge Lumber Co.*, 129 La. 28, 55 So. 698 (1911); *Rogers* v. *Huie-Hodge Lumber Co.*, 129 La. 40, 55 So. 702 (1911).

[19] *Wilkins* v. *Nelson*, 99 So. 607 (La. 1924).

[20] *White* v. *Bergstedt*, 164 La. 993, 115 So. 59 (1927).

[21] 16 La. 380 (1840).

LESION IN EXHANGE.

There is apparent confusion in the articles of the Civil Code dealing with lesion in exchanges. For example, Article 2665[22] provides that when a movable is exchanged for an immovable worth more than twice the value of the movable, the transferor of the immovable may rescind for lesion. This remedy conforms with the theory previously outlined because it permits lesion only for the vendor of an immovable. The transferor of a movable worth more than twice the value of an immovable may not rescind for lesion. According to one writer, lesion should not be applied when the parties have each exchanged an immovable, though one estate is worth more than twice the other, in view of the Civil Code policy to protect the landed estate only when it is converted into money.[23] Because of inartfully drafted provisions, it is impossible to state with certainty the breadth of the remedy for lesion in exchanges of movables for immovables. Article 2666[24] should be interpreted to mean that where one party has exchanged two things (an immovable plus money or plus movables) for an immovable, and the value of the additional thing is twice the value of the immovable received, the party transferring the two things is considered the seller. Assuming this interpretation is correct, then the Civil Code is understandable.[25]

LESION IN PARTITION.

For the sake of completeness, it is noted that there is a special lesion rule regarding partitions. Although the rule seems never to have arisen in the jurisprudence, it provides that a party prejudiced in the amount of one-fourth in the value of a portion he receives may sue for rescission based upon lesion, although he is a person of full age and suffers from no incapacity.[26]

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[22] According to La. Civ. Code, art. 2665: "The rescission on account of lesion beyond moiety takes place, when one party gives immovable property to the other in exchange for movable property; in that case, the person having given the immovable estate may obtain a rescission, if the movables which he has received, are not worth more than one-half of the value of the real estate."

[23] Comment, "Lesion Beyond Moiety in the Law of Sale," 14 *Tul. L. Rev.* 249, 252 (1940).

[24] La. Civ. Code, art. 2666 provides: "The rescission on account of lesion beyond moiety, may take place on a contract of exchange, if a balance has been paid in money or immovable [in movable] property, and if the balance paid exceeds by more than one-half the total value of the immovable property given in exchange by the person to whom the balance has been paid; in that case it is only the person who has paid such balance who may demand the rescission of the contract on account of lesion."

[25] La. Civ. Code, art. 2666 is meaningless unless the word "immovable" is read as "in movable." Its source is article 2636 of the Louisiana Civil Code of 1825. In the source article, the phrase is "effets mobiliers," not "immeuble."

[26] La. Civ. Code art. 1861 provides:

> The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contracts, on account of such implied error or imposition, except in the two following cases:
> 1. In partition where there is a difference in the value of the portions to more than the amount of one-fourth to the prejudice of one or [of] the parties;
> 2. In sales of immovable property, the vendor may be relieved, if the price given is less than one-half of the value of the thing sold; but the sale can not be invalidated for lesion to the injury of the purchaser.

SIMPLE LESION.

The doctrine of simple lesion applies to the contracts of unemancipated minors. The pertinent articles of the Civil Code provide:

> L.C.C. art. 1865: As to such contracts as minors are, by virtue of their emancipation, authorized to make, they are entitled to no other relief against lesion than if they were of full age. As to all other contracts, which they can make only under certain formalities, they are in the same situation with other minors, and may have relief for simple lesion, or prosecute the action of nullity against the contract.
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> L.C.C. art. 1866: Lesion needs not be alleged to invalidate such contracts as are made by minors, either without the intervention of their tutors, or with such intervention, but unattended by the forms prescribed by law. Such contracts, being void by law, may be declared so, either in a suit for nullity or on exception, without any other proof than that of the minority of the party and the want of formality in the act.
>
> L.C.C. art. 1867: But in contracts made with minors, when duly authorized, and when all the forms of law have been pursued, on alleging and proving even simple lesion, they will be relieved with the exception of the cases provided for in the two next articles.

Although the principles of these articles rarely appear in the jurisprudence, perhaps a recent case[27] will suffice to show the judicial use of the articles. A minor contracted for a two year membership with a health club. According to the printed form she signed, she was of lawful age, and she charged the membership on her father's credit card. The minor's father, after paying his monthly credit card bill, sued to rescind his daughter's contract with the health club and to recover the price he inadvertently paid. On the basis of the articles on simple lesion, the court granted him relief, after finding that the daughter had not confirmed her contract after she attained majority, and that the fathor's payment to the credit card company resulted from error. Hence, the father was entitled to the "répétition de l'indu" based upon Civil Code article 2301.[28]

This kind of case is a rare occurrence; perhaps the court sensed that there had been imposition upon the minor and the lesion articles were convenient hooks on which to hang the opinion. Considering the multimillion dollar business conducted with minors, and the legitimate concern for security of transactions, courts are bound to move cautiously when minors seek rescission on grounds of simple lesion.

THE LOUISIANA DOCTRINE OF SERIOUS CONSIDERATION.

Civil Code article 2464, though technically not addressed to lesion, is thematically related to the fairness of exchanges. It provides:

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[27] *Farrar* v. *Swedish Health Spa*, 337 So. 2d 911 (La. App. 3d Cir. 1976).

[28] *Id.* La. Civ. Code art. 2301 provides: He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it.

> The price of the sale must be certain, that is to say, fixed ans determined by the parties.
>
> It ought to consist of a sum of money, otherwise it would be considered as an exchange.
>
> It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.
>
> It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

For Louisiana courts, this article, even more than the lesion articles, provides a convenient way of annulling unfair exchanges. This is so because the courts have been willing to extend the principle of Article 2464, technically applicable to land sales, to cases involving leases, service contracts, and movables. For example, the Louisiana Supreme Court has held one dollar insufficient to support a mineral lease, though the parties both knew how risky the venture was.[29] In another celebrated case, the Supreme Court held that a dentist had not received a sufficient price for his agreement not to compete with his former employer.[30] The article has been invoked to rescind a sale of jewelry where the seller was suspected of misrepresentation to an innocent buyer,[31] and to annul the sale of worthless seed because the seed was not considered an equivalent for the price.[32] A United States federal court in Louisiana annulled a sale of stock shares for $400 each when in fact each share was worth $2000. The federal judge held that the sale price was so trifling and disproportionate to the true value as not to be serious. Adopting the traditional stance of an English chancellor, the judge declared that such disproportion shocked the conscience.[33] Notably, judges in search of solutions to the fair exchange problem seem to prefer the broad, flexible standard of Article 2464 over the more confining lesion articles, though the latter were intended to combat directly abuses arising from grossly disproportionate bargaining positions. Taking account of the judiciary's predisposition to apply the flexible standard of Article 2464, the Reporter on Obligations Revision for the Louisiana Civil Code Revision will likely propose articles giving courts the discretion to rescind commutative contracts because of gross disparity in prestations. The classical model for such articles is BGB article 138 (2):

> A legal transaction is also void whereby a person exploiting the need, carelessness or inexperience of another, causes to be promised or granted to himself or to a third party in

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[29] *Murray* v. *Barnhart*, 117 La. 1023, 42 So. 489 (1906).

[30] *Blanchard* v. *Haber*, 163 La. 627, 112 So. 509 (1927).
The contract would be held valid in some jurisdictions, because at common law any lawful consideration for a contract is deemed sufficient. Under the civil law, although, as at common law, the question of adequacy of the consideration is a matter for the parties to determine before entering into the contract, nevertheless the consideration must be serious and not altogether out of proportion to the corresponding obligation. In that respect, article 2464 of the Civil Code refers specifically only to the contract of sale; but, in *Murray* v. *Barnhart*, 117 La. 1030, 42 So. 489, it was held that the principle was one of civil law, as old as the civil law itself, and applicable to all contracts; and the French commentators were cited as authority therefor.... The civil law requires that a contract must have a serious consideration. *Id.* at 637, 112 So. at 513.

[31] *Continental Jewelry Co.* v. *Augusta*, 129 So. 177 (La. App. art. 1930).

[32] *Rapides Grocery Co.* v. *Clopton*, 125 So. 325 (La. App. 1st Cir. 1929).

[33] *Johnson* v. *Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826 (1956).

> exchange for a performance, pecuniary advantages which exceed the value of the performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance.[34]

CONSUMER PROTECTION: THE MANY FACES OF LESION.

Because the revision of the Louisiana Civil Code has just gotten under way, I do not believe that we shall see a comprehensive consumer statute for some time. Nonetheless, developments regarding lesion are of interest. In 1977, the Council of the Louisiana State Law Institute instructed Professor Saül Litvinoff, Reporter on Obligations Revision, to consider a more flexible approach to lesion than the Louisiana Civil Code now contains. After careful research, Professor Litvinoff has suggested three alternatives: First, the present approach to lesion *outre moitié* might be retained, justifying the elimination of articles 1860-1880 from the general title on vices of consent and the retention of the special lesion articles in the code sections on sale, exchange, and partition. Professor Litvinoff's suggested second alternative is the elimination of an independent treatment of lesion from the Civil Code altogether. If this approach were taken, then special articles in the sections on error and duress might be inserted in the new draft. For example, a newly proposed article on error provides:

> Rescission on ground of error may be obtained also when a party has consented to a performance considerably larger, or to a counter-performance considerably smaller, than the one he intended to render or receive.

And a newly proposed article on duress provides:

> Rescission may be obtained on ground of duress when, because of need or inexpeience known to he other, a party has agreed to render a performance manifestly out of proportion to the performance of the other party.

Professor Litvinoff's recommended third alternative is to expand and to generalize the notion of lesion as the drafters of many modern civil codes have done. In accordance with the recommended third alternative, Professor Litvinoff has written several new articles that generalize the idea of lesion. For example, one proposed article, substantively similar to article 37 of the new draft Quebec Civil Code provides:

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[34] Bürgerliches Gesetzbuch, [BGB] art. 138 (W. Ger.) (Forrester, Goren & Ilgen trans. 1975). Swiss Code of Obligations article 21 is an analogous provision.

The new draft Quebec Civil Code has modern, streamlined texts on lesion between majors. Article 37 of Book Five provides: "Lesion vitiates consent when it results from one party's exploitation of the other and leads to a serious disproportion between the prestations of the contract. The serious disproportion raises a presumption of exploitation." According to Article 40 of the new draft Civil Code, "The court in case of lesion, may also enforce the contract whose nullity is demanded, provided the defendant offers a reduction of his claim or an equitable monetary supplement". *Id.* art. 40. These two articles imply that *the judge must be bold enough* to say that the disproportion is serious, that the defendant has not successfully rebutted the allegation of exploitation and that the dominant party in the transaction must not get the pound of flesh that he believes he has earned by hard bargaining. The judges may derive benefit from Professor Dawson's excellent commentary, "Unconscionable Coercion: The German Version," 89 *Harvard L. Rev.* 1041 (1976).

> Rescission may be obtained on grounds of lesion when, because of need or inexperience, a party has agreed to render a performance manifestly out of proportion to the performance of the other party. A party's need or inexperience is presumed when the value of the performance he has agreed to accept in return is less than one half the value of his own performance.

This proposed article, though it retains the *outre moitié* formulation, expands the courts' power to police contracts beyond the scope of the articles in force. A newly proposed article, substantively like article 40 of the draft Quebec Civil Code, provides:

> The party against whom rescission for lesion is sought may prevent it by offering to improve his performance to the satisfaction of the other party or of the court.

Because the Council of the Louisiana State Law Institute has not yet considered and debated the foregoing proposed articles, it would be premature to discuss their fate. The articles are symbolic of the expanded ideas of good faith and social responsibility in the market place.[35] They are antithetical to the maxim of *caveat emptor* as well as the attitude expressed in the phrase "The value of the thing is just exactly what 'twill bring." If the Council rejects all of the proposed articles, then drafting a consumer bill will be a hollow, useless gesture.

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[35] Professor Litvinoff has doctrinally elaborated the doctrines of good faith and abuse of right in his second treatise. 2 S. LITVINOFF, *Obligations*, §§ 4 & 5 (Louisiana Civil Law Treatise v. 7, 1975). His approach to these doctrines is analyzed in a book review, 23 *McGill L.J.* 549 (1977).