

***Laesio enormis* again**

Boudewijn SIRKS

(Université d'Oxford)

In his contribution in the Festschrift Mayer-Maly Pennitz has dealt with the two famous Diocletianic rescripts, C.4.44.2 and 8, *sedes materiae* of the rescission of a sale on account of a so called *laesio enormis*¹. As is well-known, in C.4.44.2 of 285 Diocletian replies that the petitioner may, through intermediation of the judge, recover his land, sold by him or his father for too low a price, while restituting the price, unless the buyer wants to supplement the price by making up the difference with the just price. And in a following phrase it is said that a price is considered too low, if less than half of the true price has been paid. In a later rescript, C.4.44.8 of 293, the emperors state that it is normal in a sale to haggle about the price until agreement has been reached and the sale become perfect. Again, in a last sentence, it is said: unless less than half of what the right price at time of the sale has been paid, while the option given to the buyer must be complied with.

Pennitz has given a very good survey of the literature on these rescripts published in the last decennia. It suffices to describe succinctly the two main views. One is, that the rescripts are diocletianic in their core, but that the last sentences have been added later on, either, as we have submitted, by editors in the period between Diocletian and Justinian to ascertain better the *grande damnum* of C.2.53.3 of 285², or, as other authors maintain, by the

¹M.PENNITZ, *Zur Anfechtung wegen laesio enormis im römischen Recht*, in: *Iurisprudentia Universalis*, Festschrift für Theo Mayer-Maly, hrsgg. M.J.Schermaier, J.M.Rainer und L.C.Winkel, Köln/Weimar/Wien 2002, p.575-589.

²Thus A.J.B.SIRKS, *La laesio enormis en droit romain et byzantin*, in: *Tijdschrift voor Rechtsgeschiedenis* 53 (1985) p.307; the same, Diocletian's option for the buyer in

justinianic compilers out of Christian motives. The rejections in the fourth and fifth centuries, by emperors and in *leges barbarorum*, of the possibility to rescind a sale simply for too low a price are arguments in favour of this view. Further, the byzantine interpretation was not that merely a price under half of the value entitled to rescind a sale, but that it indicated *dolus* and by that the possibility to rescind a sale on that ground; which also is an argument in favour of this³. The other view is, that the last sentences are diocletianic too and consequently the entire rescripts and rules. Since such a measure would be a rather abrupt break with the principles of Roman law which Diocletian strongly upheld, some reason for his introducing this has to be submitted. Also the rejection in later times has to be explained. As to the introduction, economic changes and the emperor's interference with prices in his Price Edict have been adduced. Even the later rejection has been adduced as proof that such a rule existed⁴. The inclusion of the texts in Justinian's Code is explained by Christian motives of the compilers.

Pennitz unambiguously takes the latter position, i.e. that the texts and their contents are authentic diocletianic, be it that the last phrase of C.4.44.8 is a reference by Hermogenian made when he drafted as imperial secretary the rescript. It is certainly possible for him to have done so, since C.4.44.2 was included in the Gregorian Code, which has been issued between 290 and 292. C.4.44.8 dates from 293 and thus he might have had the code in front of him⁵. Another argument that this could be the case is that the Gregorian Code, although a 'private' collection, would have been an instrument in Diocletian's policy to foot the private law on secure sources; this evidently means that references to it were now easy to make⁶. Yet this is but one

case of rescission of a sale. A reply to KLAMI, in: Tijdschrift voor Rechtsgeschiedenis 60 (1992) p.44: not supporting a justinianic interpolation as Pennitz writes.

³See SIRKS 1985 (note 2), p.305 for Thalelaios' interpretation. It resembles to some extent the position the Italian Civil Code takes in § 1448, be it that a disproportion in performances is merely an indication of the hardship of the damaged party and does not suffice in itself. Also the German private law jurisprudence interprets *laesio enormis* only as indication of a case of § 138 II BGB (abuse of circumstances etc.).

⁴See PENNITZ (note 1), p.576.

⁵PENNITZ (note 1), p.581, assuming that he meant C.4.44.8 and 290/292 in stead of C.4.44.2 and 190/192.

⁶PENNITZ (note 1), p.581. Although we have to be careful with statements about a legal policy of Diocletian, it is indeed not impossible that the two Codes, though

possibility: if it was Hermogenian who drafted the last phrase of C.4.44.8, he may as well have referred to the text in the imperial archive, to which he had access. If both last phrases are indeed diocletianic, then it is true that they reached a wide public by their inclusion in the two Codes and thus gained a wider application.

As to the counterargument that later laws rejected the cancellation of a sale merely on ground of a too low price, Pennitz accepts Mayer-Maly's argument that these rejections precisely prove that the rule existed⁷. Yet that argument cannot be accepted: rejection of a malpractice proves the malpractice, but does not convert the malpractice into law nor proves that it was law. What is possible, however, is that later emperors opposed a misinterpretation of the rescripts, namely that merely a price too low anyway sufficed for dissolving a sale: there had to be *grande damnum*, i.e. the price had to be very low in relation to the value of the land sold, and it had to be adduced within the context of the *in integrum restitutio*. It is precisely such an interpretation which argues for the two rescripts being included in the respective Codes *without* the last phrases: otherwise it could not have been put forward. And the addition of the phrase would have been done to clarify *both* their application *and*, possibly, the posterior rejections⁸.

Pennitz does not elaborate the possibility of *in integrum restitutio*⁹ since his position is slightly different. He accepts an intervention by a judge who establishes the right price and places the rescripts within the context of the *in integrum restitutio*. He addresses a new question: did C.4.44.2 merely contain as innovation the choice for the buyer, either to reconstitute the land or to supply the price paid? But, so Pennitz, first it has to be determined whether the Romans thought a *iustum pretium* could be ascertained¹⁰; apparently, but he says so only later on, he considers the novelty of the texts not lying in that choice but in the introduction of a *iustum pretium* doctrine. Citing first Seneca as argument against this and then some texts on fiscal sales and the *tributum* in favour of this, he concludes that it indeed was possible:

private collections, served a policy of better access to law and greater clarity about general rules: see our *The Theodosian Code. A Study*, Friedrichsdorf 2007, Nr.4.

⁷PENNITZ (note 1), p.582.

⁸So SIRKS 1985 (note 2), p.302.

⁹He mentions it on p.587.

¹⁰PENNITZ (note 1), p.578-579.

officials could establish a 'true value'. So why not for private sales? He sees in C.4.44.8 an affirmation of this for private transactions, then *vel post pretii quantitatis disceptationem* would refer to such an official fixing¹¹. Pennitz understands *disceptatio* as 'judicial decision', which meaning the word certainly can have; but it can also mean 'discussion', 'debate'. The latter meaning is the right one in view of the context. The text says that a sale may not be rescinded for whatever reason after the contract has been concluded by consent, 'be it at once or after a debate about the amount of the price'. If a judicial decision had been meant, the reference to the consent would be senseless: there would have been no consent. Further, in that case also the last phrase (*electione iam emptori praestata*) falls outside of the context: it cannot fit a judicial decision on the right price (it rather fits a judicial decision to retribute). Apart from this, it is true that in fiscal sales a just price in the sense of true value is desired, but that was in the interest of the fisc. If the emperors had really been so concerned about the interests of private persons, why would we only find C.4.44.2 and 8 as doubtful testimonies for that? In short, there is insufficient evidence for this assumption¹².

On the other hand, Pennitz accepts the idea that both texts are to be considered as applications of the *in integrum restitutio*, although to

¹¹PENNITZ (note 1), p.580-581.

¹²Pennitz too easily takes this step, in view of the fact that he himself first cites Sen. *benef.* 6.15.3-5 as evidence that in the first century AD a just price was what the parties agreed upon and not an objective value. He does not mention D.35.2.63.2 in which price variations are considered a function of time and place (see A.J.B.SIRKS, *Quelques remarques sur la possibilité d'une règle dioclétienne sur la rescision d'une vente à cause de lésion énorme* (laesio enormis), in: *Atti dell'Accademia Romanistica Costantiniana* 5, 1981 [1983], p.47, n.31). He refers to D.49.1.14.35, in which fiscal auctions, in which the price of land as determined on basis of its revenues, should be considered [PENNITZ (note 1), p.579, n.24]. This was meant to detect collusion which could (and usually would) result in too low a price. Yet the just price was what the auction resulted into: not necessarily the intrinsic price, since it was established by a free auction, which had not been interfered with. We do not hear of an auction which was voided merely because of (too) low a price. Here only the *collusio*/interfering was condemned, not the fact that the price in itself was too low. Otherwise an *in diem addictio* was added to the sale [see on this legal construction A.J.B.SIRKS, *Laesio enormis und die Auflösung fiskalischer Verkäufe*, in: *ZRG Rom. Abt.* 112 (1995) p.11-422].

state that since Kaser this classification is accepted¹³ goes too far. Kaser merely says in a footnote that the two texts are authentic diocletian and because of that belong to the group of texts, considered by Brutti as manifestations of a wider application of the *in integrum restitutio* on account of *dolus* in the cognitional procedure under Diocletian. That, however, is not exactly what Brutti writes. Brutti proposes to see the two texts as authentic *ad hoc* interventions in Diocletian's time by officials who wanted to re-establish contracts which were evidently inequitable (for the reason for this he then looks for economic causes). It were the justinianic compilers who incorporated them into the sphere of *in integrum restitutio*, apparently as cases of *dolus*, thereby changing their *ad hoc* character into norms ('i rescritti nella prospettiva giustiniana perdono il proprio carattere episodico, trasformandosi da decisioni in norme'¹⁴). What Kaser therefore did was to assign the two texts a place within the *in integrum restitutio* on account of *dolus*, yet now already under Diocletian. However, it is clear that there is no question of *dolus* here, be it in diocletianic or, if interpolated, in justinianic times¹⁵. If the two texts had been cases of *dolus*, the problem to rescind the sale on basis of too low a price would never have been posed itself and we would also have found references to this in the later rejections. Brutti's proposition is sound in as far as it does not submit this for Diocletian's time. Yet an incidental intervention would not have been included in the Gregorian or Hermogenian Code: inclusion means the texts concern general rules. We submitted they were applications of C.2.53.3, therefore cases of an extraordinary *in integrum restitutio*, viz. in case of a *grande damnum*. The rescripts in themselves did not constitute this but concerned applications of an existing rule, not problematical at all since this was a valid criterium. New was, thus we

¹³PENNITZ (note 1), p.587 n.55, referring to M.KASER, *Zur in integrum restitutio, besonders wegen metus und dolus*, in: ZSS Rom. Abt. 94 (1977), p.135 and p.155, n.208. But Kaser does not mention at all C.4.44.2 and 8 or the *electio* on p.135ff. As to p.155, n.208, see hereafter.

¹⁴M.BRUTTI, *La problematica del dolo processuale nell'esperienza romana*, Milano 1973, p.595-596, n.386. Brutti also considers C.2.53.3 (on *in integrum restitutio* for majors) a not generally applicable rule. He cites further also SCHEUER, *Die 'laesio enormis' im römischen und im modernen Recht. I. Die 'l.e.' im römischen Recht*, Zeitschrift für vergleichende Rechtswissenschaft 47 (1933), p.77ff., for the interpretation of an application of *in integrum restitutio* on grounds of *dolus*.

¹⁵I leave aside Thalelaios' opinion (above, note 3) since that is an explanation.

submitted, that in C.4.44.2 within this context a new general rule was formulated, viz. of the choice for the buyer¹⁶.

As to the choice granted to the buyer, Pennitz explains this as an aspect of the change towards the cognitional procedure. In this procedure it was possible to soften the consequences of the cancellation of a contract, in itself valid, by granting the buyer this choice¹⁷. Apparently he is of the opinion that the two texts contain two innovations, not one. Yet if he accepts the texts as applications of the *in integrum restitutio*, the ground for the judicial decision seems for him to be only the large discrepancy between price and value which is considered inequitable and nothing else. He does not try to relate such an application to known applications of the *in integrum restitutio* such as granted to women and minors after the limitation of action in case of *grande damnum*. But what argues against this, apart from the argument against such an interpretation of C.4.44.8 (see above), are his own remarks on the usefulness of such a remedy. He cites Mayer-Maly and Hackl, according to whom farmers left the land, or were pressed by powerful persons to sell their land for a ridiculous low price. As motive for its introduction inflation cannot be adduced, so Pennitz, since this was insufficient in that period to call for such a measure, viz. to grant a general right to rescission if the agreed price was 50% under the real price. That would be a quit blunt instrument anyway to assist small farmers against disadvantageous sales: in case of a contract just over 50% they had no recourse, whereas the *potentiores* would acquire a legal title at the cheap price of just over 50% of the real value. Diocletian's measure rather confirmed disadvantageous sales for prices just over half of the true value than that it helped small landowners to acquire the true value for their land¹⁸. We can only agree with this. But, so Pennitz, in any case the emperor set a standard of at least 50% which now also applied to other cases of *in integrum restitutio*. Although the limit of half the true value is quite a blunt instrument, it still assists persons who would not have been assisted before: who sold out through

¹⁶See SIRKS 1985 (note 2), p.294, 299. Since we never considered the two texts within the context of *dolus* - they do not give any reason to do so, and Thalelaios' argument (above, note 3) is but a presumption of evidence - we did not consider these works for our article of 1985 (cited in note 2).

¹⁷PENNITZ (note 1), p.587-588.

¹⁸PENNITZ (note 1), p.583.

inexperience or misunderstandings about the value¹⁹. Yet such assistance was already offered to the groups mentioned in C.4.44.2 and 8: minors and women²⁰, and, in C.2.53.3, to majors in case of *bona fide* contracts. Pennitz does not draw conclusions from this, but if we are right, this would have deteriorated the position of these groups, since originally they would have been assisted at any price until they received the full price, if they applied for *in integrum restitutio* within the legal term, and after that year still in case of *damnum enorme*²¹. This *damnum enorme* would now have been fixed at just above 50% of the real price. The two texts would actually have curbed their possibilities. This is not likely. Pennitz also thinks the two rescripts would fit well an economic reform policy of Diocletian, to assist small farmers and to protect them from squandering away their farm and with that their economic existence²². However, Pennitz' own acute remark, that the set limit of 50% enabled the *potentiores* to acquire legally land at half the real value, argues precisely against this. Without the last sentence C.4.44.2 would, on the other hand, indeed provide ill-treated sellers with a relief and, if Diocletian indeed had such a policy, support this.

In accepting the two texts in their entirety as authentic diocletianic, Pennitz has to surmount one more problem: the fixation of the loss at more than half of the true value. Why did the emperor take this limit? It is in any case an interesting question. We assume that it stands for a general idea of half or double as limits of justice and injustice. Pennitz first seems to follow this line too, citing Cicero according to whom the middle of the value as measure is right between a valid sale for a fair price and a sale, invalid for lack of a price. Pennitz cites D.18.1.57, in which text the case is put of the sale of a house, of which both seller and buyer are unaware that it has burned down. There is no contract due to the lack of an object. In case it was partly burned down, Neratius suggests that there is no contract unless half of the house or less has burned down. In that case the sale is valid and an arbiter has to adjust the price to the present value of the house. Pennitz is cautious in extending this case to C.4.44.2, but nevertheless

¹⁹PENNITZ (note 1), p.583-584.

²⁰See SIRKS 1985 (note 2), p.299-301.

²¹See SIRKS 1985 (note 2), p.300.

²²PENNITZ (note 1), p.584.

thinks it not impossible that the author of C.4.44.2 transposed this idea from the object of the sale to the price and then applied it²³. Yet, as Pennitz himself says, the case is basically about an agreement with an uncertain or missing object. Neratius wanted to save as much as possible of the contract, but his opinion was apparently not followed, and rightly so: how do we know that the buyer would be interested in a half burned down house? What gives us the right to assume this? The same would go for the case under consideration: how do we know that a seller is interested in a price just above half of the true value if he knew of the true value? Because that is how the case would be transposed.

Pennitz sees in another rescript, C.4.44.6 of 293, an application of the principle of C.4.44.2 (and even the spread of Gregorian's Code), be it reversely: Gaius wanted to have the sale rescinded and offered twice the price paid to him. Since Gaius did not have to be protected in his existence, there was no reason to lift the *firmitas* of a concluded sale. Pennitz thinks that the same was valid for all cases in which a buyer had paid more than double the value of the sold land²⁴. How are we to see this as the application of the principle of C.4.44.2? There a price, lower than the real value had been agreed upon²⁵, and the real value was, so Pennitz, to be established according to revenue of the land. But has, since the seller offers more than double the sale price for the repurchase, the real value suddenly doubled? The argument in the rescript is that the buyer cannot be forced against his will to rescind the sale: apparently since he is satisfied with the price he paid, as was the seller or else he would have invoked the principle behind C.4.44.2. We have to assume that the price paid represented the real value of the thing sold (it is, by the way, not clear whether it concerns movables or immovables). The real reverse case of C.4.44.2 would be, however, that the buyer paid more than, eventually twice as much as the thing was worth. That case is not dealt with in the Code.

Pennitz introduces interesting and ingenious arguments to the debate on the two *laesio enormis* texts. There are points on which we

²³PENNITZ (note 1), p.585-586. He refers to Apathy and Schermaier who consider this text interpolated.

²⁴PENNITZ (note 1), p.584.

²⁵Since both C.4.44.2 and 8 mention prices *paid*, perhaps this aspect should be examined. Yet all authors part from the assumption, that the price agreed upon was too low.

both agree (the inadmissibility of the inflation theory to explain the issuing of the texts; the texts being applications of *in integrum restitutio*), but as regards the origin of the famous last phrases and the innovation of C.4.44.2, we see no reason, as we hope to have argued sufficiently, to part from our view as expressed before: that the novelty of C.4.44.2 is merely the choice granted to a purchaser to avoid restitution by supplementing the price (also indicated by CTh.3.1.4 of 383 in which indeed a supplement is requested but denied²⁶) and that both last phrases are later, postdiocletianic, prejustinianic additions, be it directly or (rather more likely) by way of marginal gloss, to give an indication of the *grande damnum*, necessary to apply extraordinarily the remedy of *in integrum restitutio*; and that the rejections in the fourth and fifth century regarded the unfounded interpretation that a mere discrepancy gave the seller a right to cancellation; which said additions were included by the justinianic compilers²⁷.

²⁶See SIRKS, *Laesio* (note 2), p.297.

²⁷That Thalelaios (see note 3) considered it as a case of alleviation of the proof of *dolus* only argues in favour of this.